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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIK RENE ANDERSSON,

Defendant and Appellant.

G050903

(Super. Ct. No. 02NF2176)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

Erik Rene Andersson appeals from the trial court's order denying his petition to recall his sentence arising from a 2003 conviction. Andersson argues the court erred by concluding he was ineligible for resentencing because during the 2003 offense he intended to cause great bodily injury to another person and, alternatively, that he poses an unreasonable risk of danger to public safety. Because we conclude the court did not err by concluding he was ineligible for resentencing, we need not determine whether he poses an unreasonable risk of danger to public safety. We affirm the order.

FACTS

In 2003, a jury convicted Andersson of violating Penal Code section 245, subdivision (a)(1),¹ assault by means of force likely to produce great bodily injury. However, the jury did *not* find true Andersson personally inflicted great bodily injury on the victim (§§ 12022.7, 1192.7, subd. (c)(8)). After the trial court found Andersson suffered two prior strike convictions, the court sentenced him to prison for 25 years to life. Judge Gregg L. Prickett presided. In 2005, this court affirmed the judgment. (*People v. Andersson* (Apr. 28, 2005, G032548) [nonpub. opn.] (*Andersson*).

In January 2013, Andersson filed a petition for recall of sentence pursuant to section 1170.126 and a couple of months later, he filed a supplemental petition. The Orange County District Attorney (the DA) opposed the petition. Andersson filed a response to the DA's opposition. Andersson filed another supplemental petition, which was supported by numerous exhibits, including declarations from corrections officers who knew Andersson and a report from a psychologist who examined Andersson.

Judge Prickett heard live testimony at a multi-day hearing during several months. At the hearing, Andersson offered the testimony of corrections officers, the psychologist, and family members. Andersson also testified. Near the end of the

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

hearing, the DA filed written closing argument opposing the petition. Andersson filed a response to the DA's closing argument.

The trial court denied Andersson's petition to recall his sentence. Relying on *People v. Guilford* (2014) 228 Cal.App.4th 651 (*Guilford*), the trial court concluded Andersson was not eligible to recall his sentence. The court read into the record the following facts from our opinion in *Andersson, supra*, G032548.

“In June of 2002, two Marines, Christopher Rybicki and Karen Jaramillo were enjoying themselves at the Cowboy Boogie Club, departing at 2:00 a.m. Rybicki had been drinking throughout the evening, but Jaramillo had not. Wandering into the nearby 7-Eleven, they stood in line by two unruly men, each “cut” in front of them to try to pay for alcoholic beverages before the cashier terminated such sales.

“Rybicki only complained after the second man made his attempt. Nonetheless, neither man was able to make a purchase, as the cashier informed them the time had expired.

“Suddenly, the two men turned on Rybicki, complaining it was his fault for impeding their progress.

“In emphasis, one of the men threw his beer, smashing it on the door.

“The clerk promptly called the police and both men cleared out.

“Rybicki and Jaramillo remained near the clerk for awhile, hoping the men had left the area.

“Rybicki was not to be that fortunate. As he and Jaramillo walked towards his car, he heard a voice from behind, yelling, “you in the gray shirt!” Fearing trouble, he continued walking but could hear footsteps approaching.

“Turning slightly, he was elbowed in the eye and lost consciousness. When he awoke, he was 20 feet from the location of the hit. His nose was bloody, his tooth chipped, [and] his face was swollen [with] multiple injuries.

“Jaramillo corroborated Rybicki’s description of the offense, adding it was Andersson who struck Rybicki, causing him to fall to the ground. While Rybicki was helpless on the ground, Andersson then kicked him three times, only stopping after Jaramillo, assisted by two students, finally pulled him off of Rybicki.

“However, Andersson slipped their grasp, returned to Rybicki, kicking him and punching him again.”

Based on these facts, the trial court reached the “clear conclusion” Andersson intended to cause great bodily injury to Rybicki. Alternatively, the court concluded by a preponderance of the evidence Andersson posed an unreasonable risk of danger to public safety. In making its alternative ruling, the court found Andersson not to be credible.

DISCUSSION

Under the “Three Strikes” law as it existed before November 2012, when California voters passed Proposition 36, the Three Strikes Reform Act of 2012 (the Act), a defendant convicted of two prior serious or violent felonies was subject to a sentence of 25 years to life upon conviction of any third felony. In amending sections 667 and 1170.12 and adding section 1170.126, the Act did two things. (*Guilford, supra*, 228 Cal.App.4th at p. 654.) First, it changed the Three Strikes law by reserving indeterminate life sentences for cases where the new offense is also a serious or violent felony, unless the prosecution pleads and proves an enumerated disqualifying factor. (*Id.* at p. 655.) Second, as relevant here, it allows defendants serving a life term for a third strike to petition for resentencing. (*Ibid.*, § 1170.126, subd. (b).) “That part of the Act creates a two-step process. First, the trial court determines whether a defendant is qualified or disqualified from seeking a recall of sentence. Second, if and only if a defendant is found to be qualified, the trial court conducts a hearing, and then applies certain standards to determine whether the defendant’s sentence should be lessened. [Citations.]” (*Guilford, supra*, 228 Cal.App.4th at p. 654.)

As to the first step, section 1170.126, subdivision (e)(2), states a petitioner is not eligible for resentencing under the Act if his or her current sentence was imposed for “any of the offenses appearing in” section 667, subdivision (e)(2)(C)(i)-(iii), or section 1170.12, subdivision (c)(2)(C)(i)-(iii). Section 667, subdivision (e)(2)(C)(iii), and section 1170.12, subdivision (c)(2)(C)(iii), both provide the following: “During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or *intended to cause great bodily injury to another person.*” (Italics added.) There is a split of authority as to the appropriate standard of proof on eligibility determinations.

In *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040 (*Osuna*), the court was presented with the same issue here and after discussing *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1303-1305, where the court concluded the Sixth Amendment was not implicated under the second step, dangerousness, the *Osuna* court found the *Kaulick* court’s reasoning persuasive and held a trial court must find a disqualifying factor based on a preponderance of the evidence. (*Osuna, supra*, 225 Cal.App.4th at p. 1040; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1061-1062 [same].)

In *People v. Arevalo* (2016) 244 Cal.App.4th 836 (*Arevalo*), the court discussed *Osuna*, and *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1343 (*Bradford*), where the court was confronted with the issue but ultimately concluded it was not dispositive. The *Arevalo* court discussed at length a concurrence in *Bradford*, where Presiding Justice Raye suggested a heightened standard of review, such as *clear and convincing evidence*, may be appropriate in making the eligibility determination. (*Bradford, supra*, 227 Cal.App.4th at p. 1350 (conc. opn. of Raye, P.J.)) The *Arevalo* court agreed with Presiding Justice Raye’s concurrence and concluded the beyond a reasonable doubt standard of proof was applicable in eligibility determinations. (*Arevalo, supra*, 244 Cal.App.4th at p. 852.)

If the trial court determines a petitioner is eligible, the court proceeds to the second step. Section 1170.126 states the court must resentence the petitioner “pursuant to paragraph (1) of subdivision (e) of [s]ection 667 and paragraph (1) of subdivision (c) of [s]ection 1170.12 unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” The two courts that have written on the issue have both concluded dangerousness is determined based on a preponderance of the evidence standard of proof. (*People v. Esparza* (2015) 242 Cal.App.4th 726, 741; *Kaulick, supra*, 215 Cal.App.4th at p. 1305.)

Here, the trial court found Andersson ineligible for resentencing and that he posed an unreasonable risk of danger to public safety. Because we conclude the court did not err by finding Andersson ineligible for resentencing, we need not address the second step. *Guilford, supra*, 228 Cal.App.4th 651, is instructive.

In *Guilford*, a jury convicted petitioner of spousal abuse, the trial court imposed a three strikes sentence, and the court denied resentencing because it concluded petitioner intended to cause great bodily injury. (*Guilford, supra*, 228 Cal.App.4th at pp. 654-655.) Petitioner objected to the court’s use of the prior appellate opinion from his direct appeal to determine his intent because there was no finding that was pleaded and proved that supported the court’s determination. (*Id.* at p. 655.) The *Guilford* court stated the Act did not require pleading and proof of disqualifying factors. (*Id.* at p. 657.) The court also said a trial court may look to the entire record of a prior conviction, which included the prior appellate opinion. (*Id.* at p. 660.) The court explained petitioner made no claim the opinion misstated the facts, and he did not file a petition for rehearing. (*Id.* at pp. 660-661.) The court therefore concluded it could be assumed the facts as stated in the opinion were faithful to the appellate record. (*Id.* at p. 661.) The *Guilford* court summarized the injuries suffered by the victim and cited trial testimony regarding a prior incident when petitioner had struck the victim several times and concluded there was substantial evidence to support the trial court’s finding petitioner intended to inflict great

bodily injury on the victim. (*Id.* at pp. 661-662.) The *Guilford* court thus affirmed the trial court's order denying the petition. (*Id.* at p. 663.)

Here, the trial court did not err by relying on *Guilford, supra*, 228 Cal.App.4th at page 660, to look to this court's opinion in *Andersson, supra*, G032548, to determine whether Andersson intended to inflict great bodily injury on Rybicki during the aggravated assault (§ 245, subd. (a)(1); *People v. Valdez* (2002) 27 Cal.4th 778, 787 [assault general intent crime].) Contrary to Andersson's claim otherwise, this case is not one of first impression because the *Guilford* court held a trial court may rely on the record of conviction to determine whether a petitioner intended to inflict great bodily injury during commission of a general intent crime, in that case spousal abuse (§ 273.5; *People v. Thurston* (1999) 71 Cal.App.4th 1050, 1055 [§ 273.5 is a general intent crime].)

Relying on *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), and the fact the jury convicted him of a general intent crime, Andersson argues it was the jurors who had to decide whether he intended to cause great bodily injury to Rybicki. *Osuna, supra*, 225 Cal.App.4th 1020, is instructive.

In *Osuna*, the trial court denied petitioner's resentencing petition, concluding he was ineligible for resentencing, the first prong, because he was armed with a firearm during the commission of his offense. (*Osuna, supra*, 225 Cal.App.4th at p. 1028.) After the *Osuna* court concluded there was no pleading and proof requirement and clarified what it meant to be "armed" (*id.* at pp. 1026-1027, 1028-1040), the court addressed petitioner's constitutional claims (*id.* at p. 1038). Pursuant to *Dillon v. United States* (2010) 560 U.S. 817, the *Osuna* court explained the Act did not increase petitioner's sentence but instead disqualified him from an act of lenity and thus did not implicate the Sixth Amendment. (*Osuna, supra*, 225 Cal.App.4th at pp. 1039-1040.) The *Osuna* court thus affirmed the trial court's order denying the petition. (*Id.* at

p. 1040.) We find the *Osuna* court’s reasoning persuasive and adopt it here. Thus, it was not for the jury to determine whether Andersson intended to cause great bodily injury to Rybicki.

Relying on the fact the jury found not true the section 12022.7 enhancement, Andersson contends principles of collateral estoppel prevent the trial court from relitigating the issue. It was not the same issue.

Section 12022.7, subdivision (a), authorizes an additional prison term of three years whenever any person who commits a felony “personally inflicts great bodily injury on any person.” Section 12022.7, subdivision (f), defines “great bodily injury” as “a significant or substantial physical injury.” Section 12022.7, subdivision (a), punishes the *actual* infliction of great bodily injury. (*People v. Smith* (1981) 122 Cal.App.3d 581, 587.)

As relevant here, the Act states a petitioner is not eligible for resentencing if “[d]uring the commission of the current offense, the defendant . . . *intended* to cause great bodily injury to another person.” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), italics added.) The first element of collateral estoppel is “the issue sought to be precluded from relitigation must be *identical* to that decided in a former proceeding.” (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, italics added.)

Here, the issues were not identical. When the jury found the section 12022.7, subdivision (a), not true, it concluded Andersson did not *actually* inflict great bodily injury on Rybicki. We presume that was because the jury concluded a bloody nose, a chipped tooth, and a swollen face were insufficient to establish great bodily injury. When ruling on Andersson’s petition, the trial court had to determine whether Andersson *intended* to cause great bodily injury on Rybicki. Andersson could have intended to inflict great bodily injury on Rybicki without actually doing so. The issue before the trial court on the petition was not identical to the issue before the jury in the 2003 trial, and therefore collateral estoppel does not apply. (But see *People v. Berry*

(2015) 235 Cal.App.4th 1417, 1428 [trial court may not consider counts where defendant/petitioner acquitted].)

Citing to section 667.5, subdivision (c)(8), which defines a violent felony as one where “the defendant inflicts great bodily injury,” Andersson claims our holding will “emasculate” the Act because every aggravated assault will be considered a serious or violent felony based on the record of conviction. Contrary to Andersson’s claim otherwise, only those petitioners who used a firearm, were armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person are ineligible for resentencing. And as we explain above, *Guilford, supra*, 228 Cal.App.4th 651, authorizes the court to make this finding based on the record of conviction. We decline Andersson’s invitation to rewrite section 667, subdivision (e)(2)(C)(iii), and section 1170.12, subdivision (c)(2)(C)(iii), to delete “intent” and substitute “actually” or “personally.” (*People v. Cook* (2015) 60 Cal.4th 922, 934 [courts may not sit as super-Legislature and rewrite statutes].)

Finally, we conclude substantial evidence supported the trial court’s conclusion Andersson intended to cause great bodily injury on Rybicki. The evidence at trial established Andersson kicked Rybicki three times while he lay on the ground unconscious and helpless. Although the jury concluded the evidence of Rybicki’s injuries did not support the conclusion beyond a reasonable doubt Andersson *actually* inflicted great bodily injury, substantial evidence supported the trial court’s conclusion Andersson *intended* to do so. Kicking an unconscious person three times demonstrates an intent to inflict great bodily injury.

Based on the court’s language, that Andersson’s actions could not be explained or understood and it was “clear” to the court he intended to cause great bodily injury on Rybicki, we are convinced the court would have found Andersson ineligible for resentencing under any standard of proof. Because we conclude substantial evidence supported the court’s finding Andersson intended to cause great bodily injury to Rybicki

(*Guilford, supra*, 228 Cal.App.4th at p. 661 [sufficiency of evidence standard of review applies]), we need not address whether the court erred by finding Andersson posed an unreasonable risk of danger to public safety.

DISPOSITION

The order is affirmed.

O'LEARY, P. J.

I CONCUR:

MOORE, J.

ARONSON, J., Concurring.

I concur in the decision to affirm the judgment, but approach the issues differently.

The trial court rejected Erik Rene Andersson's petition to recall his sentence under the Three Strikes Reform Act of 2012. The court based its decision on two grounds: (1) Andersson was ineligible for resentencing because the evidence at his trial for assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4); all citations are to the Penal Code) showed he intended to inflict great bodily injury; and (2) even if eligible, the court declined to resentence him because it found he posed "an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) The majority affirms on the first ground, but I think that approach ill-advised.

Andersson raises a due process objection to the trial court's determination that Andersson intended to inflict great bodily injury when the issue was not presented to the jury. (See *People v. Arevalo* (2016) 244 Cal.App.4th 836, 851 ["review of the record of the prior conviction is potentially problematic since the parties had no incentive to fully litigate unpleaded factual allegations at the time of the original trial court proceedings that relate to the petitioner's conduct and intent at the time of the crimes"] (*Arevalo*.) Nor is it clear which standard of proof the trial court employed, an issue upon which there is a split of authority. (Compare *People v. Osuna* (2014) 225 Cal.App.4th 1020 with *Arevalo*.)

There is no need to reach these important issues in this appeal. Although Andersson presented numerous witnesses showing he was remorseful and rehabilitated, I cannot say based on the evidence in the record that the trial court abused its discretion in finding Andersson posed an unreasonable risk of danger to the public. Consequently, I would defer discussion of the issues concerning eligibility for another day.

ARONSON, J.