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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICKY DARWELL HAMMONDS, Defendant and Appellant.	B268411 Los Angeles County Super. Ct. No. BA115920-01

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Cheryl Lutz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill and Abtin Amir, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant appeals from the trial court's order denying his petition for resentencing of his three-strikes sentence under Penal Code[1] section 1170.126, enacted as part of the Three Strikes Reform Act (Proposition 36). Defendant raises two contentions on appeal: (1) the court erred in making factual findings beyond the facts and circumstances that establish the nature and basis of defendant's conviction; and (2) the court applied the incorrect standard of proof in making its eligibility determination. We reject defendant's first contention but agree with his second. Nevertheless, we conclude the court's application of the incorrect standard of proof was harmless and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The underlying offense

In May 1995, defendant assaulted his wife. After defendant told his wife to leave his apartment, he struck her right ear with his hand. Defendant struck his wife's ear with so much force that that he removed portions of the skin from the outside of the ear, exposing the ear's cartilage and causing the ear to bleed.

Defendant's wife called the police and reported that defendant had "struck her several times on the right side of her face with a closed fist." When police responded to the scene, they found fresh drops of blood in defendant's apartment. Two officers observed that the wife's ear was badly swollen, bruised, and bleeding. According to the officer who booked defendant into

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[1] All undesignated statutory references are to the Penal Code.

custody, defendant asked the officer to tell his wife that "he was sorry that he hurt her." Defendant blamed his conduct on the fact that he had used cocaine before he attacked his wife.

Four days after the incident, defendant's wife was examined by a doctor. Defendant's wife was still in significant pain, and her ear was swollen and lacerated. According to the doctor, the ear was "very tender" and the skin on the ear "was all gone and . . . kind of curled up on the edges." The doctor referred defendant's wife to a plastic surgeon.

The People charged Defendant with one count of inflicting corporal injury on his spouse (§ 273.5, subd. (a)) and one count of assault with a deadly weapon or by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). The People also alleged defendant had suffered four prior serious or violent felony convictions under the Three-Strikes law (strike allegations) (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)) and served four prior prison terms (§ 667.5, subd. (b)).

A jury convicted defendant of assault by means of force likely to produce great bodily injury and of inflicting corporal injury on his spouse. The jury also found true three of the strike allegations. The court sentenced defendant to a term of 25 years to life in prison for his conviction for infliction of corporal injury on his spouse, and it stayed defendant's sentence as to his conviction for assault by means likely to produce great bodily injury. Defendant's convictions and sentence were later affirmed on appeal.

2. Proposition 36 proceedings

On April 29, 2013, defendant filed a petition for resentencing under Proposition 36.[2] The People filed an opposition to the petition on August 29, 2013, and defendant filed his reply on November 12, 2014. On March 9, 2015, the People filed a supplemental brief addressing the impact of Proposition 47 on Proposition 36 and a supplemental opposition to defendant's petition. In their supplemental opposition, the People argued defendant was ineligible for resentencing because the facts of his underlying offense established that he intended to cause great bodily injury to his wife when he attacked her. On July 23, 2015, defendant filed a reply to the People's supplemental opposition. Among other things, defendant argued the court was required to make its eligibility finding applying the "beyond a reasonable doubt" standard of proof.

In September 2015, the court conducted a two-day eligibility hearing on defendant's petition for resentencing. On September 25, 2015, the court issued a written ruling denying defendant's petition. The court concluded that by "hitting [the victim] several times in the ear, [defendant] intended to inflict great bodily injury upon [the victim] and in fact accomplished this intent." Accordingly, based on a preponderance of the evidence, defendant was ineligible for relief under Proposition 36.

Defendant timely appealed.

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[2] Defendant had first filed a petition for resentencing in January 2013, which the court denied without prejudice because defendant failed to serve the People.

DISCUSSION

1. To determine eligibility for resentencing under Proposition 36, a trial court may make factual findings beyond the facts and circumstances necessarily decided in the underlying conviction.

Defendant contends the trial court exceeded the permissible scope of review of the record of conviction when it made its eligibility finding. According to defendant, because the jury did not, and was not required to, make a finding of **intent** to inflict great bodily injury to convict him of the assault and corporal injury charges, the court exceeded its authority by making a finding of fact that was not necessary to determine whether defendant committed those offenses. We disagree.

Under Proposition 36, an inmate is ineligible to have his or her third-strike sentence reduced if the sentence was imposed for an offense listed in, among other statutory provisions, section 667, subdivision (e)(2)(C)(iii). (§ 1170.26, subd. (e)(2).) Thus, if a defendant "used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person" during the underlying offense, he or she is ineligible for resentencing under Proposition 36. (§§ 1170.26, subd. (e)(2), 667, subd. (e)(2)(C)(iii).)

A trial court's factual determination of whether the circumstances of the underlying offense disqualify a defendant from resentencing under Proposition 36 is similar to the determination of whether a prior conviction constitutes a serious or violent felony. (*People v. Hicks* (2014) 231 Cal.App.4th 275, 286.) Both determinations must be based on the record of conviction. (See *ibid.*; *People v. Guerrero* (1988) 44 Cal.3d 343, 355 (*Guerrero*).) The record of conviction includes the appellate opinion (*People v. Woodell* (1998) 17 Cal.4th 448, 456); transcripts of testimony from the underlying trial (*People v. Bartow* (1996)

46 Cal.App.4th 1573, 1580–1582); admissions (*People v. Goodner* (1990) 226 Cal.App.3d 609, 616); and preliminary hearing transcripts (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1531). It also includes facts established within the record, such as a defendant's personal admissions on *Tahl*[3] waiver forms, even if those facts are not essential to the judgment. (*People v. Smith* (1988) 206 Cal.App.3d 340, 344–345 (*Smith*).)

Defendant relies on *Guerrero* and *People v. Trujillo* (2006) 40 Cal.4th 165 (*Trujillo*) to contend the court erred in finding he was ineligible for resentencing because whether he intended to cause great bodily injury to his wife was not an element of assault or infliction of corporal injury, and such a finding could not be inferred from the jury's verdict. Defendant argues the court "relitigated" the facts of his underlying offenses to make its finding, which violates the holdings of *Guerrero* and *Trujillo*.

Defendant reads *Guerrero* and *Trujillo* too narrowly, especially as they apply to an eligibility finding under Proposition 36. Under *Guerrero* and *Trujillo*, a sentencing court may not make factual findings based on facts that were never established in the prior proceeding's record of conviction. (See *Trujillo*, *supra*, 40 Cal.4th at pp. 179–181.) Those cases do not, however, preclude a trial court from making factual findings that can be established by competent evidence that is included in the record of conviction. (See *Smith*, *supra*, 206 Cal.App.3d at pp. 343–345.) Indeed, the overwhelming majority of courts that have addressed the same issue raised by defendant have agreed that at the eligibility stage of a Proposition 36 proceeding, a trial court may make a factual determination based on its review of the record of conviction, even if that finding is not confined to the

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[3] *In re Tahl* (1969) 1 Cal.3d 122.

facts and circumstances that establish the nature and basis of the underlying conviction. (See, e.g., *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1033–1038; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332–1334; *People v. White* (2014) 223 Cal.App.4th 512, 525–528; *People v. Arevalo* (2016) 244 Cal.App.4th 836, 847 (*Arevalo*); *People v. Frierson* (2016) 1 Cal.App.5th 788, 791–793, review granted October 19, 2016; *People v. Newman* (2016) 2 Cal.App.5th 718, 723–727, review granted November 22, 2016; but see *People v. Berry* (2015) 235 Cal.App.4th 1417, 1425–1428 [in determining whether a defendant who pled guilty to the underlying offense is eligible for resentencing under Proposition 36, the trial court cannot look to evidence relating to any dismissed charges if that evidence does not also pertain to the charges to which the defendant pled guilty].) We too agree that the trial court's eligibility determination is not limited to the facts or circumstances necessarily decided in the underlying proceeding.

Defendant's reliance on *People v. Wilson* (2013) 219 Cal.App.4th 500 is misplaced. In *Wilson*, the Sixth District held a sentencing court's factual finding that rendered the defendant's prior conviction a strike under the Three-Strikes law violated the defendant's Sixth Amendment rights because that finding was not encompassed within the elements of the prior offense. (*Id*. at p. 516 ["A court may not impose a sentence above the statutory maximum based on disputed facts about prior conduct not admitted by the defendant or implied by the elements of the offense"].) Unlike this case, *Wilson* involved the imposition of a second-strike sentence in the first instance; it did not involve a request to retroactively reduce a lawfully imposed third-strike sentence. (See *id*. at pp. 503–504.) The determination of whether a defendant is eligible to have his or her lawful sentence reduced does not implicate the defendant's

Sixth Amendment rights. (*Dillon v. United States* (2010) 560 U.S. 817, 828–829, [130 S.Ct. 2683, 177 L.Ed.2d 271]; see *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1304.)

Here, the court properly limited its eligibility determination to only evidence that was included in the record of conviction for defendant's prior conviction. Because the court was permitted to find from its review of that evidence that defendant intended to inflict great bodily when he committed his underlying assault and infliction of corporal injury offenses, we turn to defendant's claim that the court applied the wrong standard of proof when it made that finding.

2. The trial court's application of the wrong standard of proof to its eligibility determination was harmless.

Defendant contends the trial court applied the incorrect standard of proof when it found he intended to cause great bodily injury during his infliction of corporal injury and assault offenses.[4] Specifically, he argues the court should have applied the "beyond a reasonable doubt" standard as opposed to the "preponderance of the evidence" standard. In light of our opinion in *Arevalo, supra,* 244 Cal.App.4th at pp. 847–853, we agree with defendant's contention that the court applied the incorrect standard of proof to its eligibility determination. In light of the People's evidence and the trial court's findings, however, the error was plainly harmless, whether viewed through the prism of federal constitutional law (*Chapman v. California* (1967)

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[4] We reject the People's contention that defendant forfeited this argument by not raising it below. Defendant explicitly argued he was entitled to have the eligibility finding made using a beyond a reasonable doubt standard of proof.

386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]) or state law (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Here, overwhelming evidence in the record supports a finding of intent to cause great bodily injury based on defendant's conduct and his wife's injuries. For example, defendant's wife reported that defendant struck her multiple times in the ear. Defendant also used so much force that he not only cut the skin of his wife's ear, he also caused the cartilage of the ear to be exposed.

The severe nature of defendant's wife's injury was consistently described by several witnesses at defendant's trial. One of the officers who observed defendant's wife shortly after the attack testified that the skin around her ear was "badly swollen and bruised" and blood was coming from the inside of the ear. Another officer who examined defendant's wife shortly after the incident testified that blood was "coming from the right side of [the wife's] ear." The doctor who examined the wife a few days after the attack testified that the wife was in "significant" pain, and that her ear was swollen and lacerated. According to the doctor, defendant had hit his wife so hard that the skin on the edges of the wife's ear had curled up, causing the ear's cartilage to be exposed. Due to the severity of the injury, the doctor had recommended the wife consult a plastic surgeon.

To be sure, there is also evidence in the record that defendant had used cocaine before the attack and asked one of the officers who responded to the scene of the attack to tell his wife he was sorry that he had hurt her. We disagree, however, that this evidence would cause the court to reach a different finding under a beyond a reasonable doubt standard of proof. In short, based on the severity of the injury defendant inflicted on his wife, the amount of force that defendant would have had to use to inflict such an injury, and the court's finding that the

severity of that injury showed that defendant intended to inflict great bodily injury, the error was harmless.

DISPOSITION

The trial court's order denying defendant's resentencing petition is affirmed.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

GOSWAMI, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.