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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

WARREN CHRIS JAMES,

Defendant and Appellant.

B286804

(Los Angeles County
Super. Ct. No. TA041533)

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

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

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Nicholas J. Webster and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Warren Chris James (defendant) appeals from an order denying his petition for resentencing on the ground that he was ineligible for relief under Proposition 36 (Pen. Code, § 1170.126).¹ We affirm the trial court's order.

BACKGROUND

Factual background

In the early morning hours of February 6, 1995, Maria Villa saw defendant exiting from her detached garage. She screamed. Defendant told Maria to “shut up” and began walking toward her, with his hand extended out, pointing directly at her. Maria was not able to see whether or not defendant held anything in his hand, but she retreated back into the house and warned her adult son, Jaime, not to go outside because defendant had a gun. Jaime heard his mother's screams, retrieved a gun from his room, and went outside to confront defendant.

Jaime testified at trial that defendant turned towards him and was holding a black handgun. Jaime shot at defendant, firing a total of five rounds. Defendant ran away and climbed over a fence to the street outside.

Gary Crosby, who was staying with a neighbor five blocks from the Villa residence, testified that he heard gunshots, walked to the sidewalk outside, and saw defendant, who was injured. Crosby drove defendant to a nearby hospital, where defendant was treated for gunshot wounds. At the hospital, Jaime identified defendant as the person he saw outside his garage.

In 1996, a jury convicted defendant of second degree burglary (§ 459) and found true the allegations that he had suffered two prior convictions under the Three Strikes law (§§ 667, subd. (b)-(i), 1170.12, subd. (a)-(d)), and that he had served five prior prison terms (§ 667.5, subd. (b)). The jury

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

acquitted defendant of two counts of assault with a firearm. (§ 245, subd. (a)(2).) Defendant was sentenced to 25 years to life in prison. This court affirmed defendant's conviction. (*People v. James* (Dec. 3, 1997, B103631)[nonpub. opn.])

In November 2012, defendant filed a petition to recall his sentence pursuant to Proposition 36. The trial court found that defendant had made a prima facie showing that he was eligible for recall of his sentence and issued an order to show cause. In response to the order to show cause, the prosecutor filed an opposition to the petition, arguing that defendant was ineligible for resentencing because he was armed with a firearm at the time of his commitment offense. Defendant argued in reply that the prosecutor could not rely on the underlying facts of the assault with a firearm charges because defendant had been acquitted of those charges. In a supplemental opposition brief, the prosecutor argued that the jury's acquittal of the assault with a firearm charges was not a finding that defendant was unarmed, and that the trial court could review the record of conviction and conclude that defendant was armed with a firearm at the time of the offense.

At the hearing on the petition, defendant sought leave to testify that he was not armed at the time of the burglary offense. The trial refused to allow the testimony, on the ground that such testimony would be outside the record of conviction. Applying a preponderance of the evidence standard, the trial court concluded that defendant was armed during commission of the current offense, and that his prior conviction was for a serious or violent felony. The court then denied the petition with prejudice. This appeal followed.

DEFENDANT'S CONTENTIONS

Defendant contends the trial court erred by denying him the opportunity to testify that he was not armed during

commission of the current offense, by not precluding the prosecutor from arguing that defendant was armed during commission of the offense, and by applying the wrong standard of proof to determining his eligibility for resentencing.

DISCUSSION

Overview of section 1170.126

In November 2012, voters in California approved Proposition 36, which enacted section 1170.126. That statute establishes a procedure under which a defendant serving an indeterminate life sentence as a third strike offender for a non-serious or non-violent felony can file a petition for recall of sentence and request resentencing as a second strike offender for that offense. (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 596-597.)

An inmate serving an indeterminate third-strike term for a crime that is not a serious or violent felony may petition for resentencing under section 1170.126, unless his third-strike offense comes within one of the statutory exceptions to eligibility. (§ 1170.126, subd. (e).) One such exception applies when “[d]uring the commission of the current offense . . . [the defendant] was armed with a firearm.” (§§ 1170.12, subd. (c)(2)(C)(iii), 667, subd. (e)(2)(C)(iii), 1170.126, subd. (e)(2).)

Defendant’s request to testify

The trial court properly denied defendant’s request to testify at the resentencing hearing. A trial court’s eligibility determination under Proposition 36 is limited to the record of conviction underlying the defendant’s commitment offense. (*People v. Cruz* (2017) 15 Cal.App.5th 1105, 1110; *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 7.) That record 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 does not include testimony at the resentencing hearing.

People v. Estrada (2017) 3 Cal.5th 661 (*Estrada*) does not support defendant's position that a court may consider evidence outside the record of conviction when determining eligibility for resentencing under Proposition 36. Neither the prosecutor nor the petitioner in that case sought to introduce evidence that was not part of the prior record of conviction, and the Supreme Court did not authorize a resentencing court to consider evidence outside the record of conviction. *Estrada* is accordingly inapposite.

Estoppel

The prosecutor was not estopped from arguing that defendant was armed during commission of the current offense. Collateral estoppel bars relitigation of an issue decided at a previous trial only if the following conditions are satisfied: (1) the issue necessarily decided at the previous trial is identical to one sought to be relitigated; (2) the previous trial resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior trial. (*People v. Vogel* (2007) 148 Cal.App.4th 131, 136.) Collateral estoppel does not apply here because the identical issue was not litigated at defendant's trial.

Assault with a firearm requires proof of the following elements: (1) the defendant committed an act with a firearm that by its nature would directly and probably result in the application of force to a person; (2) the defendant did that act willfully; (3) at the time of the act, the defendant was aware of facts that would lead a reasonable person to realize that the act would directly and probably result in the application of force to a

person; and (4) at the time of the act, the defendant had the present ability to apply force with a firearm to a person; and (5) the defendant did not act in self-defense. (§ 245, subd. (a)(2); CALCRIM No. 875.) That the jury acquitted defendant of the assault with a firearm counts does not establish that they found defendant to be unarmed. The acquittal is simply the jury's determination that the evidence was insufficient to establish one or more of the requisite elements of that crime. (See *People v. Dove* (2004) 124 Cal.App.4th 1, 11.) Collateral estoppel accordingly does not apply.

Burden and standard of proof

Under Proposition 36, “the petitioning defendant has the *initial* burden of establishing eligibility, and if that burden is met, then the prosecution has the opportunity to establish ineligibility on other grounds.” (*People v. Johnson* (2016) 1 Cal.App.5th 953, 963 (*Johnson*).) Once the defendant makes that initial showing, the burden shifts to the prosecution to prove, beyond a reasonable doubt, that the defendant is ineligible for resentencing. (*People v. Frierson* (2017) 4 Cal.5th 225, 234. (*Frierson*).)

The trial court here erred by placing on defendant the burden proving that he was unarmed during commission of the underlying offense and by applying a preponderance of evidence standard in determining that defendant's prior conviction was for a serious or violent felony. (*Frierson, supra*, 4 Cal.5th at p. 234.) We conclude, however, that those errors were harmless. The trial court's error in applying a preponderance of the evidence standard requires reversal only when there is a reasonable probability of a more favorable result had the court applied the correct standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *Johnson, supra*, 1 Cal.App.5th at p. 968 [applying harmless error standard to error in determining eligibility for resentencing

under Proposition 47].) We review the trial court’s factual findings supporting its determination of Proposition 36 eligibility for substantial evidence. (*People v. Perez* (2018) 4 Cal.5th 1055, 1066.) Here, the record shows that Maria Villa saw defendant extend his arm and hand in her direction when he became aware of her presence. Although she did not see if defendant was in fact pointing a gun at her, his gesture and demeanor prompted her to warn her son Jaime that defendant was armed. Jaime Villa testified that defendant was holding a black handgun and that defendant pointed the gun at him. Substantial evidence supports the trial court’s finding that defendant was armed during commission of the underlying offense and was thus ineligible for the relief sought.

DISPOSITION

The order denying the petition for recall of sentence and resentencing is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT