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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. PESAMINO PRINCE LETELE, Defendant and Appellant.	B275996 (Los Angeles County Super. Ct. No. MA047880)

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

Jonathan B. Steiner and Larry Pizarro, 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, Senior Assistant Attorney General, Noah P. Hill and Viet H.

Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Pesamino Prince Letele was sentenced to an indeterminate life term under the three strikes law (Pen. Code, §§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d))[1] in 2010, after a jury convicted him of two counts of sodomy in a correctional facility in violation of section 286, subdivision (e). After Proposition 36 was enacted in 2012, defendant petitioned for resentencing under section 1170.126, but was found ineligible for relief. He appeals the resentencing court's denial of the petition.

We conclude that the resentencing court did not err in making factual findings beyond those made by the jury at trial, and that substantial evidence supports the court's finding that defendant intended to inflict great bodily harm in the commission of the sodomies. We affirm the order denying defendant's petition for recall of sentence.

FACTS AND PROCEDURAL HISTORY

Prosecution

Defendant and H.L. were cellmates at California State Prison, Los Angeles County in Lancaster. On February 27,

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

2008, H.L. was reading when defendant suddenly hit him in the face, knocking him unconscious. When H.L. regained consciousness he was naked and blindfolded. His hands were tied behind his back with bed sheets.

H.L. felt a lubricated metal object penetrating his anus. He thought the object was a metal inhaler.[2] H.L. then "felt [something] like skin" penetrating him, and "moving in and out" for five minutes. Afterwards, defendant took off H.L.'s blindfold and forced him onto the top bunk of the bed. Defendant warned H.L. that he would hurt him if he said anything.

About two hours later, defendant ordered H.L. to orally copulate him and threatened to hurt him "again" if he did not comply. Defendant pulled H.L. down from the top bunk. H.L. refused, and defendant slapped and hit him. Defendant stuck his penis into H.L.'s mouth and ejaculated.

The next day defendant ordered H.L. to pull his pants down. He threatened to hurt H.L. if he did not have sex with him. Defendant pulled off H.L.'s clothes, blindfolded him with a sheet, and tied his hands. He bent H.L. over and penetrated his anus for five or ten minutes. Defendant then turned H.L. to face him, and again ordered H.L. to orally copulate him. He put his penis in H.L.'s mouth for five or ten minutes and ejaculated. Defendant forced H.L. to swallow his semen. Afterwards, defendant lifted H.L. onto the top bunk bed. He threatened to beat him if he said anything.

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[2] Defendant used an inhaler.

The next day, H.L. reported what had happened to correctional officers when he left the cell for a psychiatry appointment. On cross-examination, H.L. testified that he requested to be housed with defendant because they were of the same race. H.L. admitted that he pretended to be suicidal so that he could have his own cell.

Forensic nurse examiner Helen Withers examined H.L. at Antelope Valley Hospital on February 29, 2008. H.L. reported that he had been sexually assaulted by his cellmate on February 27th and 28th. H.L. said his cellmate hit him in the face, tied his hands behind his back, choked him with a towel, forced H.L. to orally copulate him, ejaculated in H.L.'s mouth, and anally penetrated H.L. with multiple objects including fingers, an inhaler, and a penis. H.L. had injuries consistent with sexual assault. H.L. had bruising, swelling, and discoloration on several areas of his body including his face and outer thigh, he had a laceration to his anus, and had ruptured vessels "from something hitting the back of the roof of the mouth repeatedly." Withers took a sample of H.L.'s blood, completed a sexual assault evidence kit, and collected H.L.'s shirt and boxer shorts.

Jamie Daughete, a senior criminalist at the Los Angeles County Sheriff's Department Crime Lab, received a sexual assault kit collected from defendant. Daughete analyzed semen taken from H.L.'s shirt and boxer shorts. One of the semen stains from the boxer shorts contained a mixture of DNA. The major contributor matched defendant's

DNA profile. Three other semen stains from the boxer shorts contained DNA matching defendant's genetic profile.

Correctional Sergeant Kenneth Thomas interviewed defendant and H.L. on February 29, 2008. Defendant stated, "I never sexually assaulted that dude. He was taking a shit. And when I pulled the curtain back, he had his hand by his butt and his hand by his front. I grabbed him and then threw him on the floor."

Nurse Jessica Buendia spoke to defendant about the assault. Defendant told Buendia "that he did not rape him. He just beat his ass."

Defense

Defendant testified on his own behalf. Defendant belonged to a gang called "Sons of Samoa." H.L. belonged to the "Tiny Rascal Gang" which was a rival of the Sons of Samoa "on the street." In prison, the gangs put their rivalry aside.

Defendant was bisexual. He and H.L. had a consensual sexual relationship. H.L. initiated their first sexual encounter. The two men had intercourse three to four times a day while they shared a cell.

H.L. told defendant he faked suicide to get into a better prison program. Defendant warned H.L. not to attempt suicide while they were celled together. In the event of an attempted suicide, guards would spray the entire cell with mace, which would hurt defendant's eyes and ruin his

belongings. Two days later, a correctional officer told defendant H.L. had tried to kill himself. The correctional officer did not spray down the cell because he wanted to give defendant the opportunity to talk to H.L. first. Defendant confronted H.L. and told him that if he planned to continue the attempts he needed to move to another cell. H.L. said he did not plan to stop, so defendant asked to have H.L. removed. H.L. was taken to another cell.

Four days later, a correctional officer told defendant that H.L. wanted to return. Defendant agreed after H.L. promised to stop the suicide attempts. H.L. was returned to defendant's cell on February 25, 2008. They resumed their sexual relationship.

Two days after H.L. returned, a correctional officer told defendant, "your celly's no good." He gave defendant H.L.'s rap sheet, which showed that H.L. was in prison for child molestation. As a Sons of Samoa gang member, defendant had a duty to kill H.L. when he learned he was a child molester. If defendant did not try to kill H.L., he could be killed by fellow gang members for failing to take action. When defendant confronted H.L., he said he had committed a drug offense. Defendant hit him with a "slap hook" and knocked him to the ground. H.L. stood up. Defendant then hit him "really hard" in the leg, and H.L. fell again.

Defendant testified that he contemplated many ways of killing H.L. He wanted "the quickest elimination . . . . So I was already plotting that in my head." He was concerned about the consequences he would face, but knew that he had

to seriously injure H.L.: "I was trying to figure out a way to hurt him where I wouldn't have to kill him but hurt him enough to where my people would hear that I did enough damage to him. But at the same time, if I do catch a case that I wouldn't get life, you know, cuz [*sic*] I was looking right around the corner of going home." He eventually decided to stab H.L., but H.L. left the cell the next morning before defendant had time to get a weapon. H.L. was taken to a medical appointment, where he claimed defendant had raped him.

Defendant admitted that when prison authorities questioned him about H.L.'s allegations, he denied they had any sexual contact.

Procedural History

Defendant was charged with two counts of forcible sodomy (§ 286, subd. (c)(2) [counts 1 and 3]); two counts of forcible oral copulation (§ 288a, subd. (c)(2) [counts 2 and 4]); one count of forcible penetration by foreign object (§ 289, subd. (a)(1) [count 5]); and two counts of sodomy in a correctional facility (§ 286, subd. (e) [counts 6 and 7]). The jury found defendant guilty in counts 6 and 7, but was unable to reach verdict on the other counts. The prosecution opted not to retry the remaining counts, which were subsequently dismissed.

After the voters approved the enactment of Proposition 36, defendant petitioned for recall of sentence. The

resentencing court denied the petition in a written memorandum of decision. The court found defendant was disqualified from relief because (1) he intended to cause great bodily injury during the commission of the sodomies (§1170.126, subd. (e)(2)); and (2) the sodomy convictions were prior convictions for sexually violent offenses (§1170.126, subd. (e)(3)). Defendant appeals, challenging both bases for ineligibility.

As relevant here,[3] the resentencing court made the following findings in ruling defendant intended to cause H.L. great bodily injury during the commission of the sodomies: "Petitioner was convicted of committing two acts of sodomy on February 27, 2008, and February 28, 2008. During this two-day period, Petitioner struck [H.L.] in the face several times, rendering him unconscious. Petitioner sodomized [H.L.] against his will and forced [H.L.] to orally copulate him, causing [H.L.] pain in the process. Petitioner threatened [H.L.] into complying, stating 'you better suck my dick or else I'm going to hurt you again,' and 'I'm going to hurt you if you don't let me have sex with you.' During the medical examination, Nurse Withers observed injuries that were consistent with [H.L.]'s testimony. [H.L.] had swelling on his left cheek, gray discoloration and tenderness on his

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[3] Because we affirm on the basis that defendant intended to cause H.L. great bodily injury during commission of the crimes, we recount the only the portion of the resentencing court's decision relevant to that basis for ineligibility.

left shoulder, yellow-gray discoloration on his right shoulder, lateral redness in the middle of his back, bruising on the back part of his right arm above the elbow, bruising on his left arm, and bruising on the outer thigh of his right leg. [H.L.] also had a laceration in front of his sphincter, and petechiae in the back of his throat. Even though [H.L.]'s injuries did not require immediate medical attention, [H.L.]'s pain and injuries are enough to show that Petitioner intended to and did inflict great bodily injury."

The court continued, "Petitioner's knowledge that [H.L.] was a child molester was contemporaneous with the two acts of sodomy that occurred on February 27, 2008, and February 28, 2008. After learning [H.L.] was a child molester on February 27, 2008, Petitioner admitted he contemplated stabbing [H.L.] to death, beating [H.L.] to death, or snapping [H.L.]'s neck. He indicated, 'I wanted the quickest elimination where I can eliminate him, you know the fastest way. I was already plotting that in my head.' During their confrontation, Petitioner admitted he struck [H.L.] hard enough to make [H.L.] fall to the ground, and then punched [H.L.] in the leg when [H.L.] attempted to get back up. Petitioner explained he felt obligated to murder or kill child molesters while in prison. He explained, 'I was trying to figure out a way to hurt him where I wouldn't have to kill him but hurt him enough to where my people would hear that I did enough damage to him. But at the same time, if I do catch a case that I wouldn't get life, you know, cuz [*sic*] I was looking right around the corner of going

home.' He eventually decided to stab [H.L.] with a weapon, but [H.L.] was removed from the cell before he could do so. Petitioner's argument that he had consensual sex with [H.L.] during this two-day period, when Petitioner (1) knew [H.L.] was a child molester; (2) felt obligated to harm or kill child molesters; and (3) intended to stab [H.L.] for being a child molester, is simply not credible."

DISCUSSION

Relevant Law

Prior to Proposition 36, "the Three Strikes law required that a defendant who had two or more prior convictions of violent or serious felonies receive a third strike sentence of a minimum of 25 years to life for any current felony conviction, even if the current offense was neither serious nor violent." (*People v. Johnson* (2015) 61 Cal.4th 674, 680 (*Johnson*).) Proposition 36 "prospectively 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. In all other cases, a recidivist defendant will be sentenced as a second strike offender, rather than a third strike offender." (*People v. Chubbuck* (2014) 231 Cal.App.4th 737, 740–741.) Proposition 36 also created a post-conviction procedure under which a prison inmate who is serving a third strike sentence for a crime that is not a serious or

violent felony may petition to recall his or her sentence and be resentenced as a second strike offender. (§ 1170.126, subds. (a)–(f); *Johnson*, *supra*, 61 Cal.4th at p. 682.) To obtain relief, the inmate must satisfy certain statutory eligibility requirements. (See § 1170.126, subd. (e).) Among these is the requirement that the inmate must not have intended to cause great bodily injury "[d]uring the commission of the current offense." (§§ 667, subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii); 1170.126, subd. (e)(2).)

The Nature of the Resentencing Court's Inquiry

Defendant does not dispute that the resentencing court properly limited its review to the record of conviction in relying on the transcript of defendant's trial to find him ineligible for resentencing. He contends the court exceeded its authority by making new factual findings that went beyond the nature or basis of his current convictions. Defendant argues the resentencing court was prohibited from finding that he intended to cause great bodily injury because the underlying facts were disputed and the jury had not made findings with respect to his mental state. He asserts "[t]he court should [have] look[ed] for what can be said to have already been pleaded and proved." We disagree.

Defendant's argument essentially restricts the resentencing court's ability to find an ineligibility circumstance to cases in which intent to cause great bodily

injury was an element of the crime, an allegation the jury found true, or based on undisputed facts. This would impose a pleading and proof requirement on section 1170.126, subdivision (e)(2) eligibility determinations, an interpretation that appellate courts have repeatedly rejected. (See, e.g., *People v. Arevalo* (2016) 244 Cal.App.4th 836, 847 (*Arevalo*) ["courts addressing this issue have all held that the resentencing eligibility factors need not have been pled and proven to a trier of fact"]; *People v. Guilford* (2014) 228 Cal.App.4th 651, 656 (*Guilford*) [pleading and proof requirement applicable to prospective portion of the Act does not apply to the retrospective part]; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 802 (*Brimmer*) [same].) "Instead, *section 1170.126, subdivision (f)* provides that, 'Upon receiving a petition for recall of sentence under this section, *the court* shall determine whether the petitioner satisfies the criteria in subdivision (e).'" (*Guilford*, *supra*, at p. 657.) "By referring to those facts attendant to commission of the actual offense, the express statutory language [of section 1170.126, subd. (e)(2)] requires the trial court to make a factual determination that is not limited by a review of the particular statutory offenses and enhancements of which petitioner was convicted." (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332; *Arevalo*, *supra*, 244 Cal.App.4th at p. 848.) The law does not support defendant's position.

Defendant's reliance on *People v. Guerrero* (1988) 44 Cal.3d 343 (*Guerrero*); *People v. Trujillo* (2006) 40 Cal.4th 165 (*Trujillo*), and *People v. Wilson* (2013) 219 Cal.App.4th

500 (*Wilson*), is misplaced. In *Guerrero*, our Supreme Court considered whether, when determining if a prior conviction qualified as a serious felony for purposes of a section 667 enhancement, a court was limited to matters necessarily established by the prior judgment of conviction. (*Guerrero*, *supra*, 44 Cal.3d at p. 345.) The *Guerrero* court concluded that "in determining the truth of a prior-conviction allegation, the trier of fact may look to the entire record of the conviction," but "no further." (*Id.* at pp. 345, 355.) The court reasoned its holding was fair and reasonable because it "effectively bars the prosecution from relitigating the circumstances of a crime committed years ago" which would "threaten[] the defendant with harm akin to double jeopardy and denial of speedy trial." (*Id.* at p. 355.)

As defendant concedes, here the court only considered evidence contained in the record of conviction. The court made factual findings based on trial testimony—it did not "relitigate" the case, a procedural posture unlike that in *Guerrero*. In *Guerrero*, the trial court considered whether the defendant's prior conviction qualified him for a significant sentence *enhancement*. Under Proposition 36, the issue is a third strike inmates eligibility for a sentence *reduction*, as "'an act of lenity on the part of the electorate.'" (*Brimmer*, *supra*, 230 Cal.App.4th at p. 804.) The constitutional concerns in *Guerrero* when a defendant's punishment is increased are not implicated in determining eligibility for Proposition 36 relief.

In *Trujillo*, the Supreme Court held that the defendant's post-plea probation interview was not part of the record of conviction that the trial court could consider to determine whether the defendant used a weapon in committing the crime because the weapon use allegation had been dismissed as part of the defendant's plea agreement. (*Trujillo*, *supra*, 40 Cal.4th at pp. 178–180.) The *Trujillo* court explained that "[o]nce the [trial] court accepted his plea, defendant could admit to the probation officer having stabbed the victim without fear of prosecution, because he was clothed with the protection of the double jeopardy clause from successive prosecution for the same offense. [Citation.] Defendant's admission recounted in the probation officer's report, therefore, does not describe the nature of the crime of which he was convicted and cannot be used to prove that the prior conviction was for a serious felony." (*Id.* at p. 179.)

The circumstances are quite different in this case. The *Trujillo* court considered statements the defendant made *after* his plea was taken. Here, the resentencing court properly considered the transcript of defendant's trial, which clearly reflected the facts underlying his convictions, and no counts were dismissed as part of a plea agreement. In contrast to the defendant in *Trujillo*, defendant was not "clothed with the protection of the double jeopardy clause from successive prosecution for the same offense." (*Trujillo*, *supra*, 40 Cal.4th at p. 179.) Finally, in *Trujillo*, the dismissed allegation encompassed the very fact that the trial court was charged with determining. Here, defendant's

specific intent to cause great bodily injury was not an element of any of the charged offenses, dismissed or otherwise.

In *Wilson*, the defendant had previously pleaded no contest to offenses related to driving under the influence of alcohol. Based on its examination of the preliminary hearing transcript in the prior case, the trial court found the defendant had personally inflicted great bodily injury on the victims, making the offenses strikes under the three strikes law. (*Wilson*, *supra*, 219 Cal.App.4th at pp. 503–504.) The Court of Appeal held the trial court erred because "[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." (*Id.* at p. 516, fn. omitted.) Under the circumstances in *Wilson*, the Court of Appeal concluded that the trial court "could not have found the offense to be a strike without resolving [a] factual dispute." (*Id.* at p. 504.)

Here, there is no plea agreement delineating the circumstances underlying defendant's conviction. And, as we have previously stated, the court's finding is not being used to increase defendant's sentence, but to determine if defendant is eligible to have his sentence reduced. *Wilson* is inapplicable.

Sufficiency of the Evidence

We also reject defendant's contention that even if the resentencing court was permitted to make factual findings, the evidence was insufficient to support its finding that defendant intended to cause H.L. great bodily injury.

We review the factual basis of the resentencing court's finding based on the record of conviction under the familiar sufficiency of the evidence standard. (*People v. Hicks* (2014) 231 Cal.App.4th 275, 286; *Guilford*, *supra*, 228 Cal.App.4th at p. 661; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1317.) There is conflicting authority regarding the standard of proof applicable to resentencing eligibility determinations under Proposition 36. (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040 [preponderance of the evidence]; *Arevalo*, *supra*, 244 Cal.App.4th at p. 848 [beyond a reasonable doubt].) Although the result in this case would be the same under either standard, we believe *Osuna* was correctly decided.

Substantial evidence supports the resentencing court's finding that defendant intended to cause great bodily injury. The jury found beyond a reasonable doubt that the sodomies were committed on February 27 and February 28, 2008. H.L. testified that defendant tied him up, struck him, knocked him unconscious, forced him to be subjected to and perform numerous sexual acts that caused H.L. pain, and threatened to hurt him "again" if he did not comply. Nurse Withers testified that H.L. had injuries that were consistent

with his version of events. Defendant testified that he learned H.L. had been convicted for child molestation two days after H.L. moved back into the cell on February 25, 2008. His decision to "eliminate" H.L. or at least "hurt him enough to where my people would hear that I did enough damage to him" was contemporaneous with the sodomies. Defendant admitted to knocking H.L. to the ground, and then punching him hard in the leg when H.L. tried to get up. This is more than ample evidence to support the resentencing court's finding that he intended to cause great bodily injury.[4]

[4] Defendant also challenges the resentencing court's finding that he is ineligible for relief under section 1170.126, subdivision (e)(3). Because we affirm the court's ineligibility finding under section 1170.126, subdivision (e)(2), we do not reach this contention.

DISPOSITION

The order denying defendant's petition for recall of sentence is affirmed.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

LANDIN, 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.