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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. FELIX BROWN III, Defendant and Appellant.	B278131 (Los Angeles County Super. Ct. No. SA024364)

APPEAL from an order of the Superior Court of Los Angeles County. David V. Herriford, Judge. Affirmed.

Nancy L. Tetreault, 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, Noah P. Hill and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Felix Brown III (Brown) appeals the denial of his petition for recall and resentencing under Penal Code section 1170.126.[1] He contends the trial erred when it found he posed an unreasonable risk of danger to public safety.

We find no error and affirm.

FACTS[2]

Criminal Background

In 1983, when he was 17 years old, Brown was made a ward of the juvenile court for possessing PCP for sale. In 1984, he was placed on probation for grand theft person. Also, he was convicted of assault with a firearm and exhibiting a deadly weapon and ultimately served 90 days in jail on a grant of summary probation.

Two years later, in 1985, he was arrested for attempted burglary and pleaded guilty to the crime of attempted residential burglary. He was placed on probation for five years. In addition, he was involved in a residential burglary and robbery during which he helped a cohort tie up the 66-year-old female victim. Brown was present while the victim was sexually assaulted by the cohort. She later required medical treatment for the lacerations to her vagina as well as wrist burns caused by being tied up. The investigating officer indicated the victim was left tied up in a closet until her daughter returned home eight hours later. The temperature in the closet was approximately 105 degrees. Brown was eventually convicted of residential burglary,

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

[2] Some of the facts are taken from *People v. Brown* (Oct. 16, 1998, B108429) (*Brown I*) a nonpublished opinion.

residential robbery, and false imprisonment by violence and sentenced to state prison.

Brown was paroled in 1991. In 1993, he returned to state prison due to a parole violation. Later in that year, he was arrested and convicted of possession of cocaine base for sale and received a four-year prison sentence. He was released on parole on December 24, 1995.

On January 12, 1996, he was arrested for sexual battery. During the booking process, officers found 8.2 grams of cocaine base in rock form in a plastic bag in Brown's shorts. He was convicted of possession for sale of cocaine base in violation of Health and Safety Code section 11351.5 and sentenced to state prison for 30 years to life.[3] He pleaded guilty to sexual battery. As to that offense, he was sentenced to a concurrent term of six months in county jail.

Regarding the sexual battery, the probation report indicated that Brown "was arrested after being observed by vice officers to commit sexual battery on several females at the oceanfront walk at Venice Beach. He would work his way through the crowd and place himself behind particular females who were a part of the crowd watching a show along the oceanfront walk. [Brown] would stick his hand inside the front of his spandex biker-type shorts and manipulate his penis, inching

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[3] The trial court found true allegations that Brown had suffered three prior serious or violent felony convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). His sentence was composed of 25 years to life under the Three Strikes law, plus two years for prior prison term enhancements (§ 667.5, subd. (b)), and three years for a prior drug conviction enhancement (Health & Saf. Code, § 11370.2). (*Brown I*, *supra,* B108429, at p. 2)

closer to the female in front, thrusting his pelvic area forward and touching his genital area against the female's buttocks. He was observed to engage in this conduct for approximately 30 minutes with at least seven females."

Disciplinary History During Incarcerations

During Brown's various incarcerations, he had multiple disciplinary problems.

In 1987, he was warned about refusing an order to return to his cell. Subsequently, a Rules Violation Report (RVR) was issued after he again refused an order to go to his cell and then addressed the correctional officer by saying, "Shut up bitch, f**k you." A month later, he refused an order to return to his unit and called the correctional officer a tramp. After the correctional officer performed a body search and informed him she would issue an RVR, he said, "I don't give a f**k, you're still a tramp." On multiple occasions the following year, he received a warning for masturbating or exposing his erect penis. In 1989, he was found guilty of threatening a member of the prison staff with force and violence. In 1990, Brown received an RVR for extending his erect penis through his cell bars. Also, he received an RVR for standing outside his cell masturbating and saying to a correctional officer, "[C]an you help get me off?"

In June 1994, in an RVR, the reporting correctional officer wrote that during "institutional count . . . I observed [Brown] laying naked on his bunk, mast[u]rbating. I immediately ordered [Brown] to stop, get dressed, turn on the light and come to the cell door. [Brown] laughed at me and remained on his bunk mast[u]rbating. I repeatedly yelled out orders to [Brown] to stop mast[ur]bating. [Brown] got up and stood in front of me at the cell door mast [u]rbating." Brown would not stop until another

inmate said something. Brown put on boxer shorts, smiled at the correctional officer and said, "I was just relieving myself, that's all, I got the right."

In February 2001, Brown received an RVR for writing a letter to a female correctional officer that encouraged illegal sex acts.

About a year and a half later, in July 2002, he received an RVR for possessing dangerous contraband after four altered razor blades were found in the ceiling light of his cell. This was a violation of California Code of Regulations, title 15, section 3006, subdivision (a). A hearing was held, and Brown was found guilty of the offense.

In 2008, Brown received an Inmate Progress Report[4] from a female correctional officer. It stated: he repeatedly stared at the correctional officer in a sexual manner; he followed her in the exercise yard; he leered at a female nurse; after being instructed to stop leering at females, he stopped for only a few days; and he purposely placed himself near the correctional officer, and would use any reason to talk to her. On one occasion, the correctional officer believed Brown was masturbating in front of her and a nurse, but she was not certain because she could not see his lower body. In the report, she stated, "I fear that he has a mental disorder that might make him a danger to the health and safety of others in that it is likely that he will engage in [] sexually criminal behavior."

Vocational and Rehabilitative Programming in Prison

Brown enrolled in vocational training for plumbing from July 2000 to January 2001, and for office services from 2001 to

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[4] The trial court ruling explained that Inmate Progress Reports are commonly called chronos.

2003. Variously, he received satisfactory and unsatisfactory ratings from instructors. From 2011 to 2013, he participated in classes for General Education Development. He was employed as a porter from August 2014 to June 2015.

Classification Score; Risk Assessment

In 1999, Brown's classification score was 157. In 2013, it was down to 89.[5] In 2015, his custody designation was "Medium (A)."

Brown's 2015 California State Risk Assessment (CSRA) score was 1. The CSRA is an actuarial test used by the CDCR to measure risk factors that are most predictive of recidivism. The risk factors used to produce the numeric value include age, gender, criminal misdemeanor and felony convictions, and sentence/supervision violations. The lowest risk has a numeric value of 1. A moderate risk has a value of 2. A high risk of reoffending by committing a drug offense has a value of 3. A high

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[5] In the trial court's memorandum of decision, it explained: "Every [California Department of Corrections and Rehabilitation (CDCR)] inmate is given an initial classification score, and re-classified at least annually. The score is used to determine inmate placement within the CDCR, including the security level of the facility where the inmate will be housed. The lower the inmate's score, the better in terms of housing and access to programs and work. The minimum score a life inmate can receive is 19. Inmates enjoy a score reduction of two points when they have a six-month period of no discipline and two additional points if they have satisfactory or better performance in work, school or vocational training. Conversely, they suffer additional points added to their score for serious rules violations. The details of how a classification score is computed and recomputed periodically are set forth in the CDCR Departmental Operations Manual[.]"

risk of reoffending with a property offense is 4. A high risk of reoffending by committing a violent crime is 5. Thus, based on his score, the CDCR considers Brown a low risk of committing a felony offense within three years of his release on parole. (Cal. Code Regs., tit. 15, § 3768.1.)

Petition for Recall and Resentencing

On November 6, 2012, the voters approved Proposition 36, the Three Strikes Reform Act of 2012. (*People v. Valencia* (2017) 3 Cal.5th 347, 354 (*Valencia*); *People v. Yearwood* (2013) 213 Cal.App.4th 161, 167.) Proposition 36 created a procedure "whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be resentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. [Citation.]" (*Id*. at p. 168.)

On November 30, 2012, Brown filed a petition for resentencing under section 1170.126. The trial court issued an Order to Show Cause. The People opposed on the ground that Brown posed an unreasonable risk of danger to public safety.

At the hearing, the trial court received various exhibits from both sides into evidence. Brown called various witnesses. The People called no witnesses.

Evidence

Beyond Brown's criminal history, prison disciplinary history, vocational and rehabilitative programming, classification score, and CSRA score, the evidence and testimony was as follows:

Amity Foundation accepted Brown into a transitional program. According to Brown's sister, her husband was semi-retired from his floor waxing and carpet cleaning business. If Brown was released, her husband would hire Brown for jobs too big for her husband to handle alone. Also, she stated that she could assist Brown financially. Brown's father testified that Brown had changed during his incarceration and seemed to be giving thought to the consequences of his actions. According to Brown's father, he was willing to give Brown whatever he needed, including transportation and financial assistance, upon his release from prison. Brown's uncle testified that he would provide Brown with housing and transportation, and wrote a letter stating he would provide Brown with "housing, food, healthcare, transportation, and monetary support . . . until he is able to function on his own."

Richard Subia (Subia), who held various positions in the CDCR, provided an expert opinion on risk assessment. He concluded that Brown did not pose "an unreasonable risk of dangerousness to public safety." Dr. Hy Malinek, a clinical forensic psychologist, concluded that Brown's risk of violence was "no[t] more than low to moderate" based on his age (49 at the time of the report), his history of only one violent offense, his current attitude (identified as prosocial), and the fact that he had "some transitional plans."

Brown submitted three letters addressed to the trial court and one addressed to a third party. The letters expressed his remorse and responsibility for his crimes, and they referred to a transition plan.

The Trial Court's Ruling

In a 22-page memorandum of decision, the trial court found that Brown currently posed an unreasonable risk of danger to public safety and denied his petition for recall and resentencing petition.

In reaching this decision, the trial court detailed appellant's criminal history, disciplinary history, vocational and rehabilitative programming, classification score and age, and postrelease plans. The trial court also summarized the opinions provided by Subia and Dr. Malinek regarding Brown's risk assessment. Then the trial court made various findings. For example, Brown minimized his criminal and disciplinary past, he had not sought self-help programming for his issues with exhibitionism, women, and authority, and he did not have adequate postrelease plans. Summing up its decision, the trial court stated that the totality of the evidence in the record demonstrated "that resentencing [appellant] would pose an unreasonable risk of danger to public safety at this time due to his criminal history, prison misconduct, failure to accept responsibility, insufficient rehabilitative programming, and inadequate post-release plans."

This appeal followed.

DISCUSSION

Brown contends the trial court abused its discretion in concluding that he poses an unreasonable risk of danger to public

safety. As we discuss below, the trial court ruled within the bounds of reason.

I. *Proposition 36*.

If a prisoner is eligible for resentencing, he or she "shall be resentenced pursuant to paragraph (1) of subdivision (e) of Section 667 and paragraph (1) of subdivision (c) of Section 1170.12 unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) In exercising its discretion, a trial court may consider: (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety. (§ 1170.126, subd. (g).)

When opposing a petition for recall and resentencing, the prosecution bears the burden of proving dangerousness by a preponderance of the evidence. (*People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1301–1305.)

Brown contends that the definition of "unreasonable risk of danger to public safety" in Proposition 36 is the same as the definition of that phrase in Proposition 47, The Safe Neighborhoods and Schools Act. (*Valencia*, *supra*, 3 Cal.5th at p. 355.) If it is not the same, Brown contends that Proposition 36 is unconstitutionally vague.

We disagree with both contentions.

In Proposition 47, the phrase means a risk that a defendant will commit a super strike offense, one of the eight serious or violent felonies identified in section 667, subdivision (e)(2)(C)(iv). (*Valencia*, *supra*, 3 Cal.5th at pp. 350–351, 355.) In *Valencia*, the court considered and rejected the suggestion that "unreasonable risk of danger to public safety" means the same thing in Proposition 36 and Proposition 47. (*Valencia*, *supra*, 3 Cal.5th at pp. 351, 356–375.) Also, the court noted: "Following the enactment of Proposition 36, Courts of Appeal have rejected arguments that the phrase 'unreasonable risk of danger to public safety,' as used in section 1170.126, subdivision (f), is unconstitutionally vague. [Citations.]" (*Valencia*, *supra*, 3 Cal.5th at pp. 351, 355–356, citing *People v. Garcia* (2014) 230 Cal.App.4th 763, 768–770 [the term "'unreasonable risk of danger to public safety'" not void for vagueness"] and *People v. Flores* (2014) 227 Cal.App.4th 1070, 1074–1075 [same].)

II. *Standard of Review*.

"Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the [trial] court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125.) The facts upon which a trial court finds an unreasonable risk of danger are reviewed for substantial evidence. "If a factor . . . is not established by a preponderance of the evidence, it cannot form the basis for a finding of unreasonable risk [of danger]. [Citations.]" (*People v. Buford* (2016) 4 Cal.App.5th 886, 901.)

III. *No Due Process Liberty Interest at Stake*.

Brown argues that he has a due process liberty interest in resentencing, and that his interest requires that there be a rational nexus between a prisoner's record and a trial court's finding of dangerousness.

There is no case law supporting Brown's position. He asks us to analogize to the rule that a prisoner has a due process liberty interest in his or her release from prison on parole if a state creates an expectation of parole, i.e., the relevant scheme mandates a prisoner's release if the parole board determines that the necessary prerequisites exist. (*Greenholtz v. Inmates of Nebraska Penal & Correctional complex* (1979) 442 U.S. 1, 11; *Board of Pardons v. Allen* (1987) 482 U.S. 369, 373.)

Also, Brown contends he has a liberty interest under our state's broader guarantees of due process. (Cal. Const., art. 1, §§ 7, subd. (a), 15.) In particular, he notes that, with respect to California law, "when an individual is subjected to deprivatory governmental action, he always has a due process liberty interest both in fair and unprejudiced decision-making and in being treated with respect and dignity." (*People v. Ramirez* (1979) 25 Cal.3d 260, 268 (*Ramirez*).)

Section Proposition 36 did not create an expectation of resentencing analogous to the expectation of parole.

For life sentences, there is a mandatory minimum amount of prison time that must be served before an inmate can be considered for parole. (§ 3046.) Thus, if a life prisoner is suitable for parole, he or she has a particular time frame in which parole

can be expected. In contrast, section 1170.126 provides no such time frame on sentence reduction.[6]

Moreover, "'parole applicants in this state have an expectation that they will be granted parole unless the [Parole] Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation.' [Citations.]" (*In re Lawrence* (2008) 44 Cal.4th 1181, 1204.) The parole provisions are mandatory. (*In re Prather* (2010) 50 Cal.4th 238, 251 (italics added) [when exercising their discretion, the Parole Board and governor "*must* consider the statutory factors concerning parole suitability set forth in section 3041 as well as the [Parole] Board regulations"].) Section 1170.126, subdivision (g), on the other hand, provides that a trial court exercising its discretion "may" consider certain delineated factors. Because the discretion in connection with resentencing is less circumscribed than the discretion in connection with granting parole, a life prisoner cannot expect a sentence reduction.

Beyond the foregoing, we conclude that the denial of a petition for resentencing and recall is not deprivatory governmental action. It is a refusal to exercise lenity and, as such, does not trigger *Ramirez*.

Despite concluding that Brown does not have a due process liberty interest at stake, we do not dispute that there must be a rational nexus between his record and a trial court's finding of

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[6] Section 1170.126, subdivision (b) requires life prisoners to file a petition for recall and resentencing within two years after the effective date of Proposition 36. This is a procedural limit on when petitions can be filed. It is not a limit that impacts eligibility considerations.

dangerousness. Requiring a rational nexus is just another way of saying that a trial court's decision cannot be arbitrary, capricious or patently absurd. In other words, state case law provides the protection Brown seeks.

IV. *No Abuse of Discretion*.

Brown contends the trial court abused its discretion by denying his resentencing petition because the evidence was insufficient to support its factual findings. Even if the evidence was sufficient, he contends the trial court's factual findings did not support its legal conclusion that he currently posed an unreasonable risk of danger to public safety. (*People v. Esparza* (2015) 242 Cal.App.4th 726, 746.)

A. Criminal History; Brown's Minimization.

The trial court found that Brown had an extensive and severe criminal history that he minimized. The evidence supported these findings.

From 1983 to the time he was incarcerated for the commitment offense, Brown was involved in multiple drug and theft related offenses. Also, he was involved in a burglary and false imprisonment in which he and his cohort entered the home of a 66-year-old woman to rob her, and the cohort sexually assaulted the woman. The trial court noted that Brown told Subia "he heard noises coming from upstairs when they were robbing the home, he saw that his cohort was sexually assaulting the victim and insisted that they leave." At the preliminary hearing in that case, the victim testified that the "first man" (Brown) held a knife to her throat while the "second man" tied her up. Then Brown began taking things. After the assault, the victim was left tied up in a closet that was 105 degrees inside. Even though Brown was not convicted of sexual assault, there

was sufficient evidence he was involved in false imprisonment and knew about a sexual offense and then callously left the elderly victim in a hot closet where she could have died. Years later, at the time of his commitment offense, he committed sexual battery.[7] The preceding evidence establishes a pattern of pervasive criminal conduct over an approximate 10 to 11 year period.

On appeal, Brown attempts to minimize this history because it contained few acts of violence, and because his crimes were primarily motivated by theft. But since he was 17 years old, he has either been incarcerated, on parole or on probation. Further, he has shown a callous disregard for the safety and dignity of others, as evidenced by his involvement in the residential burglary/residential robbery/false imprisonment by violence and the sexual battery. He has never shown he can function as a law abiding adult.

Next, Brown suggests that the trial court improperly made a finding that he was involved in the rape during the residential burglary. The trial court made no such finding. Rather, it merely stated it was "concerned that he continues to minimize his involvement in the offense" because he told Subia "he heard

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[7] Brown suggests the trial court erred when, in its memorandum of decision, it wrote, "[Brown's] commitment offense also had a sexual component." This is a dispute over form, not substance. While true Brown's commitment offense was for possession of cocaine base for sale and did not have a sexual component, it is also true that he was initially arrested for sexual battery. It was the search incident to arrest that resulted in the drug charge. We take the trial court's statement to be a reference to the sexual battery. Its statement was therefore not unsupported by the evidence as Brown otherwise suggests.

noises coming from upstairs when they were robbing the home, he saw that his cohort was sexually assaulting the victim[,] and insisted that they leave." In other words, the trial court was concerned that Brown attempted to exonerate himself by impliedly suggesting he stopped the sexual assault by insisting that he and his cohort leave. Also, it was concerned that Brown did not disclose to Subia that he participated in tying up the victim prior to the sexual assault.[8]

Brown assigns error to the trial court's finding that his account of the rape and residential burglary was inconsistent with the victim's testimony at the preliminary hearing, and was an attempt to minimize his involvement. But broadly speaking, his statements were inconsistent because he omitted a material fact, i.e., his involvement in tying up the victim. Also, that omission was a minimization.

The trial court found that Brown's minimization continued, noting that "[w]hile [Brown] wrote several letters to the court accepting responsibility for his crimes, when given the opportunity to accept responsibility to [Subia], he minimized and mitigated his involvement in the violent crime committed against a 66 year old woman in her home, which resulted in her being sexually assaulted, receiving 22 stitches to her vagina, and being locked in a closet[.]" This finding is based on a reasonable inference. (*People v. Ledbetter* (2014) 222 Cal.App.4th 896, 900

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[8] Brown focuses on whether he was legally involved in the sexual assault as opposed to whether, more broadly, he was practically, knowingly and morally involved. The trial court was not circumscribed to questioning Brown's legal involvement versus his more general involvement.

[the trier of fact may draw reasonable inferences from the record].)

The trial court concluded that Brown was minimizing his sexual battery offense based on the following evidence. He told Subia he was arrested for the commitment offense because he looked like a pickpocket in the area. He denied any sexual misconduct and told Subia he entered a plea to sexual assault because his attorney told him to "clear the misdemeanor." When Dr. Malinek was asked about the commitment crime, Brown claimed that the drug and the sexual assault charges were untrue. Once again, the finding is based on a reasonable inference.

Regarding Brown's efforts to minimize with Subia, Brown adverts to testimony from Subia that he did not place "excessive weight" on Brown's attempts to deny or minimize his crimes and disciplinary history because that behavior is common from inmates during forensic interviews. Tacitly, Brown suggests the trial court was required to follow Subia's lead and discount Brown's denials and attempts at minimization. The trial court, however, was the trier of fact, and was free to determine the weight of Subia's testimony. (*In re Ernesto H.* (2004) 125 Cal.App.4th 298, 311, fn. 4 [the weight of the evidence is determined by the trier of fact in arriving at a decision].) Also, because the trial court was able to evaluate the same historical facts as Subia, it was not arbitrary for the trial court to disregard Subia's expert testimony. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890 (*Foreman*).)

B. *Disciplinary History; Brown's Minimization.*

Based on the 2001 sexually explicit letter to a female correctional officer and 2008 chrono in prison, substantial

evidence supported the trial court's finding that Brown had two serious rules violations. This was evidence that Brown was willing to engage "in serious rule breaking behavior despite having received a substantial criminal sanction." (*In re Rozzo* (2009) 172 Cal.App.4th 40, 60.)

In addition, the evidence supported the trial court's finding that Brown attempted to minimize his violations. He told Subia that he wrote the sexually explicit letter because he thought the officer liked him because she was always talking to him. According to Brown, the officer "flipped out" when she read the letter. To Dr. Malinek, Brown explained writing the letter this way: "Because I want to have sex with a wom[a]n. She's a woman. That is what men do." These statements by Brown are in the record. The only question is whether the trial court drew reasonable inferences. The answer is yes. Each of Brown's statements, if believed, had the effect of either placing him in a better light or normalizing his conduct. In other words, they were attempts at minimizing.

Brown urges us to conclude the trial court placed too much emphasis on the 2008 chrono accusing him of leering at women and possibly masturbating. Subia, Brown tells us, found the chrono's veracity dubious at best. Even if that was Subia's opinion, the trial court was entitled to decide what weight to give to the 2008 chrono.

C. Self-Help Programming.

Brown contends: "The [trial court] faulted [Brown] for failing to address his 'exhibitionism,' 'issues with women,' and 'issues with authority.' [Citation.] This finding violated due process and is not supported by the record." Restated, he argues

there is no nexus between the evidence and the trial court's findings and legal conclusions.

We disagree.

The only indication of self-help programming was a chrono that was reported by Subia and which indicated that Brown participated in Self Help Lifers Group for nine months from 2004 to 2005. The trial court found: "Outside of this nine month period, [Brown] has participated in no self-help programming to address his issues with exhibitionism, his issues with women, and his issues with authority. Indeed, his attitude toward his criminal behavior and his misconduct in prison demonstrates that he has engaged in no self-reflection to address aspects of his personality that have contributed to his illegal and inappropriate behavior." These findings are sufficiently supported by the record.

Brown's sexual battery, various RVRs, warnings and chronos, and attempts to minimize his conduct support the finding that he has issues with women and authority that need addressing through self-help programming to enable him to avoid recidivist behavior. The trial court's finding that Brown has an issue with exhibitionism was supported by evidence that Brown had exhibited himself in a sexual way on multiple occasions. Regardless of what Brown suggests, it does not matter that he was not diagnosed with an exhibitionism disorder. Even if he was exhibiting himself based on anger or protest rather than a diagnosed mental disorder, it was troubling behavior nonetheless because it was offensive and showed a lack of both judgment and impulse control.

Using Dr. Malinek's testimony as a springboard, Brown attacks the trial court's finding that he has issues with

exhibitionism and authority. Dr. Malinek opined that Brown did not have "a sexual disorder or that he has a pervasive sexual deviation which predisposes him to commit criminal sex acts. He exposed himself in prison and had episodes of boundary violating that are sexually inappropriate behavior." As Dr. Malinek understood it, Brown was being "defiant," which was related to a "criminal generic attitude." Masturbation in prison, Dr. Malinek testified, is not uncommon. To him, Brown's behavior was "more a part of an antisocial personality disorder, which has been confirmed in him at the time and not a marker of an enduring sexual disturbance." If Brown was really an exhibitionist, Dr. Malinek believed there would be "some evidence of it" and concluded there was no such evidence. Dr. Malinek suggested that Brown's defiant behavior was a thing of the past.

Tacitly, Brown suggests the trial court was required to accept Dr. Malinek's testimony. But that is not the law. As long as the trial court did not act arbitrarily, it was free to reject Dr. Malinek's testimony, even if that testimony was uncontradicted. (*Foreman*, *supra*, 3 Cal.3d at p. 890.) To the degree the trial court rejected Dr. Malinek's testimony in whole or part, it was not arbitrary because the trial court was able to evaluate the same historical facts as Dr. Malinek.

Brown indicates that according to Subia, life inmates have restricted access to education and work programs until they have achieved a custody level of medium or better. We are informed by Brown that he achieved this designation a few years ago. He contends it is "unfair to place a condition" on resentencing that he cannot meet. Because this is just one of many factors, we see nothing Kafkaesque here. Moreover, because Proposition 36 does not limit what a trial court can consider when deciding to deny a

petition, it is not an abuse of discretion for a trial court to consider an inmate's lack of self-help programming, even if it was unavailable, if that contributed to a risk of dangerousness.[9]

D. Postrelease Plans and Expectations.

The trial court found that Brown's "work history and vocational training is limited." It noted that in Brown's reply brief he stated he "is limited in work assignments due to physical limitations from a hernia." The trial court commented that in "20 years of incarceration[, Brown] has failed to pursue a skill or vocation, or even work in a marketable vocation. While [Brown] claims he wants to work if released, and this is a key component

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[9] The trial court stated Brown had not engaged in mental health programming "to assist him in addressing the mental health diagnoses that Dr. Malinek identified." It relied on Dr. Malinek's report, which stated that Brown "was design[at]ed as eligible for mental health treatment in prison approximately ten years ago. He was apparently placed on an antidepressant and mood stabilizing medications . . . , but has not been seen as needing psychiatric care for many years. The diagnostic impressions in the medical records referenced Intermittent Exposure, Mood Disorder Not Otherwise Specified, Cocaine Dependence, Bipolar Disorder, Antisocial Personality Disorder and Personality Disorder Not Otherwise Specified. Most recent entries indicate that he has denied any pschiatric issues and was not seen as meeting diagnostic criteria for any psychiatric diagnosis."

Brown complains that he should not be faulted for not engaging in a mental health program when he has not been diagnosed with a mental illness. Even if he is correct, and even if the trial court misunderstood the evidence on this one issue, there was ample evidence supporting the trial court's decision to deny Brown's petition, and for it to consider Brown's lack of self-help programming.

of his transition plan, he also claims to be physically unable to work."

Brown argues that the trial court's suggestion that he is physically unable to work is unsupported by the record because he had a hernia in 1999 but was cleared for full work duty in 2011 after hernia surgery. But it was neither arbitrary, capricious nor patently absurd for the trial court to rely on a statement in Brown's brief. (See *Franklin v. Appel* (1992) 8 Cal.App.4th 875, 893, fn. 11 ["While briefs and argument are outside the record, they are reliable indications of a party's position on the facts as well as the law, and a reviewing court may make use of statements therein as admissions against the party"].)

According to the trial court, Brown lacked adequate transition plans. The trial court cited Subia and Dr. Malinek as testifying "as to the importance of [Brown's] involvement in a transitional program, and placed great weight on his acceptance to Amity Foundation." Even though Brown's own witness, Dr. Malinek, testified it was important for Brown to be the subject of tight monitoring and rehabilitative efforts to decrease his risk of future violence, the trial court perceived that Brown and his family "underestimate the importance of such a transition program and monitoring." The trial court stated: "[Brown] fails to acknowledge Amity Foundation as his transition plan in his letters to the court. Indeed, even his family, who offered to give [him] a place to live and help support him did not indicate [he] would be involved with Amity." In his reply brief below, Brown asked the trial court "not [t]o place him on Post Release Community Supervision[.]" This prompted the trial court to comment that Brown's "assertion that he is not in need of

supervision or transitional services demonstrates that he has failed to address the causative factors of his criminal behavior and misconduct. [His] unrealistic views of his transition into free society should he be released further demonstrate that he currently poses an unreasonable risk of danger to public safety, specifically in light of his lack of self-help programming, claimed disability preventing him from working, and inadequate transition plan."

Brown claims the trial court erred in its interpretation of the foregoing evidence. The trial court's inferences, however, are reasonable. The fact that Brown and his family members omitted references to Amity Foundation support an inference that they did not understand its importance, which supported the subordinate inference that they failed to appreciate what it would take for Brown to be a law abiding citizen. This inference was also supported by Brown's assertion in court papers that he should not be placed on Post Release Community Supervision. That assertion contradicted Dr. Malinek's prescription for tight monitoring and indicated Brown was not being realistic about his needs and responsibilities upon release.

E. The Trial Court's Synthesis.

Criminal and disciplinary history do not, by themselves, establish dangerousness. The trial court recognized as much, correctly explaining that they must be examined in light of other facts in the record. (*In re Lawrence, supra,* 44 Cal.4th at p. 1221 [discussing the determination of dangerousness in the context of parole decisions]; *People v. Esparza, supra,* 242 Cal.App.4th at p. 746.) For this reason, the trial court placed Brown's criminal and disciplinary history in context.

The trial court determined that based on Brown's "insufficient rehabilitative programming and lack of an adequate post-release plan, his criminal history, while remote, remains predictive of his current dangerousness." It also determined that Brown's "current attitude toward his prison misconduct, his failure to accept responsibility for his actions, and his continued minimization of his inappropriate sexual conduct all cause the [trial court] concern. [Brown's] continued lack of insight into his misconduct, paired with his failure to engage in meaningful programming and develop an adequate transition plan, does demonstrate that [he] continues to pose an unreasonable risk of danger to public safety." The trial court acknowledged that Brown's age, CSRA score, and lowering classification score tend to demonstrate that he does not currently pose an unreasonable risk of dangerousness. But the trial court concluded that these factors did not "outweigh those [factors] that demonstrate" otherwise. The way the trial court perceived the record, Brown "has taken no proactive steps to address the factors that contributed to his criminal lifestyle, his commitment offense, or his misconduct in prison. The factors in [his] favor are greatly outweighed by other factors which demonstrate he is an unreasonable risk of danger to public safety[.]"

We must concur. The trial court carefully and methodically reviewed the evidence. Cumulatively, the evidence permitted the trial court's findings.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

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