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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MARCOS SANTISTEVAN, Defendant and Appellant.	B295055 (Los Angeles County Super. Ct. No. KA072435)

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.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Petitioner Marcos Santistevan assaulted a female friend, and then resisted arrest for that assault—including kicking the arresting police officer. In 2006, a jury convicted Santistevan of resisting an executive officer (Pen. Code, § 69)[1] and misdemeanor battery (§ 243, subd. (e)(1)). Because Santistevan had two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12), the court sentenced Santistevan to 25 years to life for the count of resisting an executive officer. The court also imposed a concurrent term of one year in jail for the misdemeanor battery.

Santistevan subsequently filed a petition under Proposition 36, the Three Strikes Reform Act of 2012 (§ 1170.126), to recall his third strike sentence for resisting an officer. The trial court denied the petition, finding that Santistevan was ineligible for relief because he acted with the intent to cause great bodily harm during the commission of the offense for which he was convicted (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2)).

On appeal, Santistevan contends there was not substantial evidence that he intended to cause great bodily harm to the arresting officer, the trial court mistakenly placed the burden of proof on Santistevan, and the trial court erroneously prevented Santistevan from presenting new evidence outside the record of conviction. We reject these claims, and affirm.

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

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Underlying Conviction

On September 22, 2005, Santistevan and his friend Jessica M got into an argument.[2] Santistevan punched Jessica M in the face and head-butted her in the forehead. Santistevan then followed Jessica M to a bus stop, where he hit her in the legs with his bicycle and held her with his arm across her neck. A witness called the police.

Baldwin Park Police Officer Juan Serrato arrived to investigate. Santistevan was angry and upset. Officer Serrato tried to get Santistevan to calm down, but Santistevan continued to rant and rave. When Officer Serrato began to conduct a pat down search, Santistevan moved away in a violent manner. A struggle ensued, during which Santistevan attempted to kick Officer Serrato. The officer instructed Santistevan to stop resisting and to comply with his directives. Eventually, Santistevan was handcuffed.

Santistevan continued to yell and complained of a sharp pain to his hip. Santistevan relaxed somewhat after Officer Serrato promised to raise him to a sitting position if he calmed down. When the officer released downward pressure, Santistevan swung backward and kicked the officer twice, ripping his uniform. With assistance from others, Officer Serrato subdued Santistevan and placed him in the patrol car.

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[2] We summarize the facts based on the opinion in Santistevan's direct appeal, which affirmed his conviction. (*People v. Santistevan* (Sept. 27, 2007, B190994) [nonpub. opn.].) We refer to the victim by her first name and initial to protect her personal privacy. (Cal. Rules of Court, rule 8.90(b)(4).)

Officer Serrato attempted to speak to Jessica M. Santistevan screamed, kicked his feet against the window of the patrol car, and also butted his head against the window. When he refused to stop, Officer Serrato clipped Santistevan's ankles to the back of his handcuffs and placed him in an upright seated position, after which he was transported to the police station.

In his defense, Santistevan denied kicking Officer Serrato, claiming the officer was behind him the entire time. Santistevan also denied trying to move away from Officer Serrato. Santistevan admitted being uncooperative in the verbal sense only, and said he never threatened Officer Serrato.

B. The Proposition 36 Petition and Prior Appeal

In 2013, Santistevan petitioned under Proposition 36 to recall his third strike sentence for resisting an officer. The trial court held an eligibility hearing. The court found by a preponderance of the evidence that Santistevan was ineligible for relief, because while resisting the officer he " 'intended to cause great bodily injury to another person.' " (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii); see 1170.126, subd. (e)(2).)

Santistevan appealed. We reversed on the ground the trial court applied the wrong standard of proof. *People v. Frierson* (2017) 4 Cal.5th 225, 230, which was decided after the initial eligibility hearing, requires the People to establish ineligibility for resentencing by proof beyond a reasonable doubt. We remanded for the trial court to reconsider the petition under the beyond a reasonable doubt standard. (*People v. Santistevan* (Feb. 15, 2018, B281265) [nonpub. opn.].)

C. The Current Finding of Ineligibility

The trial court issued an order to show cause why Santistevan should not be found eligible for recall of sentence and resentencing under Proposition 36, and appointed counsel. Counsel for Santistevan filed a supplemental pleading regarding Santistevan's eligibility for relief under Proposition 36. At the hearing, the trial court noted it had read defense counsel's supplemental eligibility argument. It turned to defense counsel and stated: "Okay . . . , you have the burden." Counsel stated that she would submit on her moving papers.

The court indicated its "inclination would be to make the same ruling, [Santistevan's] ineligible because he intended to inflict great bodily injury. There really was no contrary evidence." Defense counsel asked, "because I'm not sure whether I can do it or not. Can I put it over and bring some witnesses in as to this situation?" The court responded: "No, you're limited to the record of conviction." Counsel could not "relitigate the facts."

Defense counsel then argued Santistevan was under the influence of drugs at the time of the offense. "He was complaining that his hip hurt because they had pushed him down. He was kicking and flailing. Nobody was injured. I know it's intent, but this was just a guy acting up, it really was." She added that Santistevan should not be found ineligible for recall of sentence "for acting like a jerk."

The court responded that "it's hard to find anything but that he intended to inflict great bodily injury." The court added that case law "tells you that people are presumed to intend the results of their actions." The court then found Santistevan statutorily ineligible for recall of sentence and resentencing under Proposition 36.

Santistevan timely appealed.

II. DISCUSSION

A. Standard of Review

Under Proposition 36, "[n]ot every inmate who is currently serving a third strike sentence for a nonserious, nonviolent felony is eligible for resentencing . . . ." (*People v. Thomas* (2019) 39 Cal.App.5th 930, 934 (*Thomas*).) Proposition 36 "makes ineligible for resentencing those persons who, inter alia, '[d]uring the commission of the current offense . . . intended to cause great bodily injury to another person.' (§§ 667, subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii); see § 1170.126, subd. (e).)" (*People v. Guilford* (2014) 228 Cal.App.4th 651, 654; accord, *Thomas*, *supra*, at pp. 934-935.) "The petitioning defendant has the *initial* burden of establishing a prima facie case for eligibility for recall of the third strike sentence. [Citations.]" (*Thomas*, *supra*, at p. 935.) That is, a petitioning defendant like Santistevan must make a prima facie showing that he meets the eligibility criteria in section 1170.126, subdivision (e). "Once that requirement is satisfied, however, the burden shifts to the prosecution to prove beyond a reasonable doubt that one of the disqualifying factors applies. [Citations.]" (*Thomas*, *supra*, at p. 935.)

The trial court's determination as to eligibility for recall of sentence and resentencing under Proposition 36 "is a factual determination reviewed on appeal for substantial evidence. [Citation.] That is, the reviewing court must determine if there was sufficient evidence for the trial court to conclude that the prosecutor . . . prove[d] that the petitioner is ineligible for resentencing beyond a reasonable doubt. Under this standard, the burden remains on the prosecutor to demonstrate the petitioner's ineligibility [citation]; the burden never shifts to the

petitioner, either in the trial court or on appeal, to provide any evidence once he or she has made an initial showing of eligibility. Further, the reviewing court does not reweigh the evidence; appellate review is limited to considering whether the trial court's finding of [ineligibility] is supportable in light of the evidence." (*People v. Perez* (2018) 4 Cal.5th 1055, 1066; accord, *Thomas*, *supra*, 39 Cal.App.5th at pp. 935-936.)

B. Sufficiency of the Evidence

1. *Intent To Cause Great Bodily Injury*

Santistevan first challenges whether substantial evidence supports the trial court's finding that he intended to cause great bodily injury to Officer Serrato. Great bodily injury is " 'significant or substantial physical injury.' However, 'the injury need not be so grave as to cause the victim "permanent," "prolonged," or "protracted" bodily damage.' [Citation.]" (*People v. Woods* (2015) 241 Cal.App.4th 461, 486.) "An examination of California case law reveals that some physical pain or damage, such as lacerations, bruises, or abrasions is sufficient for a finding of 'great bodily injury.' [Citations.]" (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1047-1048.) The intent to cause great bodily injury may be inferred from the defendant's application of force to another in a manner reasonably certain to cause great bodily injury—it is not necessary that the defendant actually cause great bodily injury. (*Thomas*, *supra*, 39 Cal.App.5th at pp. 936-937; see *People v. Phillips* (1989) 208 Cal.App.3d 1120, 1124.)

The intent to cause great bodily injury " 'may be shown by, and inferred from, the circumstances surrounding the doing of the act itself.' " (*Thomas*, *supra*, 39 Cal.App.5th at p. 936, quoting *People v. Phillips*, *supra*, 208 Cal.App.3d at p. 1124.) It

may also be shown by the defendant's actions leading up to the offense, as well as any other relevant circumstances. (*Thomas*, *supra*, at p. 936; *Phillips*, *supra*, at p. 1124.) "[A]lthough ' "[e]vidence of a defendant's state of mind is almost inevitably circumstantial," ' such evidence may nevertheless be sufficient by itself to support a court's factual finding of intent. [Citation.] Indeed, the same deferential standard of review applies when a court's finding is based on circumstantial evidence and requires that we 'accept logical inferences that the [trial court] might have drawn from the circumstantial evidence.' [Citations.]" (*Thomas*, *supra*, at p. 936.)

2. *Substantial Evidence Supports the Court's Finding of Intent*

Leading up to the offense at issue, Santistevan punched Jessica M in the face, head-butted her in the forehead, and hit her in the legs with his bicycle. Santistevan was still angry and upset when Officer Serrato arrived. Santistevan attempted to kick Serrato with Santistevan's shod feet. After promising he would calm down, Santistevan swung backward and again kicked Officer Serrato twice. This time he connected, hard enough to rip the officer's uniform but not so accurately as to hit Officer Serrato's body. Accepting all logical inferences that the trial court might have drawn from this sequence of events, there was substantial evidence that Santistevan intended to hit Officer Serrato hard enough to inflict lacerations, bruises, and/or abrasions, and thereby intended to inflict great bodily injury.

Santistevan argues that the court did not credit contrary inferences in assessing his intent, such as his purported intoxication and the fact that Officer Serrato was not in fact injured. Contrary inferences that Santistevan lacked the

requisite intent to cause great bodily injury certainly can be drawn from the facts here. Our role, however, is not to reweigh the evidence. Instead, we must "view the evidence in the light most favorable to the trial court's findings without reassessing the credibility of witnesses or resolving evidentiary conflicts. [Citations.] 'A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support' " ' the court's findings. [Citation.]" (*Thomas*, *supra*, 39 Cal.App.5th at pp. 935-936.)

Santistevan further argues that the facts in the record of conviction were not reasonable, credible, and of solid value because he had neither the motive nor opportunity to challenge at trial the issue of intent to inflict great bodily injury. Santistevan's reliance on cases discussing the adversarial testing of evidence during trial is misplaced, as the law distinguishes factual findings that increase a petitioner's sentence from those at issue here which result in leaving the original sentence intact. (See *People v. Perez*, *supra*, 4 Cal.5th at p. 1064.) Courts have uniformly "held that the resentencing eligibility factors need not have been pled and proven to a trier of fact." (*People v. Arevalo* (2016) 244 Cal.App.4th 836, 847.) Nor does a petitioner have a right to a jury finding on facts pertinent to potential resentencing. (*Perez*, *supra*, at pp. 1063-1064.) Santistevan was given an opportunity to submit briefing on his eligibility, and the court held a hearing at which Santistevan's counsel was heard before the court ruled. Further procedural protections were not required before the court relied on facts that were part of the record of conviction to make its findings. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331.)

C. The Trial Court Utilized the Correct Burden of Proof

Santistevan next argues we should reverse the trial court's denial of his petition because the trial court erroneously placed the burden of proof on him. The trial court began the hearing by stating that Santistevan had the burden of proof, without further explanation of what the court meant by that statement. Santistevan did have the initial burden to establish a prima facie case for eligibility for recall of his third strike sentence. (*Thomas*, *supra*, 39 Cal.App.5th at p. 935.) Once that requirement was satisfied, however, the burden shifted to the prosecution. (*Ibid*.) Thus, to the extent the court was referring to Santistevan's initial burden, its statement was correct. To the extent the court was referring to anything else, it was incorrect.

Reviewing the record as a whole, we conclude the court was referring to Santistevan's initial burden. Santistevan filed a pleading before the hearing arguing his eligibility, and the court made the statement at the beginning of the hearing when it logically would first consider the prima facie question. The court then proceeded to note that "the whole point of [the appellate court remanding the case], among other things, is to consider whether I can make [a] finding beyond a reasonable doubt." After hearing further argument from counsel and receiving into evidence the pleading and exhibits, the court stated "I find beyond a reasonable doubt that [Santistevan] is statutorily ineligible for recall[ ] . . . because during the commission of the current offense, [Santistevan] intended to inflict—cause great bodily injury to another person."

Given the trial court's acknowledgement of the correct standard set forth in our prior opinion, and the court's express application of the reasonable doubt standard when making its

findings, the record shows the court did not misunderstand or misapply the correct burden of proof. We disagree with Santistevan that the court's statement that "[t]here's no other evidence here that really conflicts" with the conclusion that Santistevan intended to cause great bodily injury shows the court misapplied the burden of proof. (Cf. *People v. Bradford* (1997) 15 Cal.4th 1229, 1340 ["A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence"].) Read in context, the court was not commenting on the burden of proof but rather expressing its belief that it did not find credible any other explanation for Santistevan kicking at Officer Serrato other than attempting to inflict great bodily injury.

D. The Trial Court Did Not Err in Denying Santistevan the Opportunity To Present New Evidence

Santistevan lastly argues he should have been permitted to call witnesses or present other new evidence at the hearing. The People argue this claim was forfeited, because Santistevan made no offer of proof below. (E.g., *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1176-1177.) The trial court, however, indicated it would not permit any evidence outside the record of conviction. We agree with Santistevan that when a trial judge " 'indicates that he will not receive evidence on a certain subject, an offer of proof relating to the excluded issues would be futile and is excused.' [Citation.] Accordingly, [Santistevan's] failure to make a formal offer of proof does not preclude him from raising the point in this court." (*People v. Whitsett* (1983) 149 Cal.App.3d 213, 219, fn. 1.)

Santistevan acknowledges that numerous authorities have held no new evidence is permitted in a Proposition 36 hearing to recall a three strikes sentence. (E.g., *People v. Cruz* (2017) 15 Cal.App.5th 1105, 1110; *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 6-8.) Identifying no contrary precedent, he argues instead that *People v. Estrada* (2017) 3 Cal.5th 661 cast these decisions in doubt when it reserved decision on the question of "what sources a court may consider when making an eligibility determination." (*Id.* at p. 676, fn. 7.)

Estrada expressly did not consider the issue of whether a court can look beyond the record of conviction—indeed, the dispositive facts in *Estrada* were contained in the record of conviction. (*People v. Estrada*, *supra*, 3 Cal.5th at pp. 669, 674-676.) Our Supreme Court's decision to reserve deciding a question not presented does not cast doubt on lower court precedent that squarely addresses that same question. Cases are not authorities for propositions not considered. (*Los Angeles County Metropolitan Transportation Authority v. Yum Yum Donut Shops, Inc.* (2019) 32 Cal.App.5th 662, 673.) *Estrada* accordingly provides no basis to depart from existing authority prohibiting parties from introducing new evidence outside the record of conviction in a Proposition 36 recall proceeding.

III. DISPOSITION

The order denying Santistevan's petition to recall sentence is affirmed.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

ROTHSCHILD, P. J.

JOHNSON, 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.