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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. NORMAN HIRSCHER, Defendant and Appellant.	B280628 (Los Angeles County Super. Ct. No. KA032781)

APPEAL from an order of the Superior Court of Los Angeles County. Rand S. Rubin, Judge. Affirmed.

Michael S. Romano, 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, Tita Nguyen and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

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Norman Hirscher (defendant) appeals the trial court's denial of his motion to be resentenced under the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126).[1] We conclude there was no error, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Underlying Conviction and Sentence

In February 1996, police went to the house where defendant was living, and in the house's garage, found a methamphetamine lab complete with a how-to book entitled "The Secrets of Methamphetamine Manufacturing, 3rd Edition." Defendant's fingerprints were on the lab equipment. When police arrested defendant, he was carrying $2,750 in cash and the key to a motel room that contained 2.7 grams of methamphetamine, a pricing list for methamphetamine, various pay/owe sheets, and a gram-to-ounce conversion chart. Police found a loaded gun in defendant's car.

The People charged defendant with manufacturing a controlled substance other than PCP (Health & Saf. Code, § 11379.6, subd. (a)). A jury convicted defendant.

The trial court sentenced defendant to prison for 25 years to life, as a "third strike" sentence under our Three Strikes law (§§ 667, subds. (b)-(j), 1170.12, subds. (a)-(d)). Defendant's 1988 first degree burglary conviction and his 1994 assault with a deadly weapon conviction constituted his first and second strikes, respectively.

II. Petition for Resentencing

In September 2013, defendant filed a petition for recall of this sentence pursuant to the Three Strikes Reform Act of 2012,

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

which was enacted by the voters as Proposition 36. The trial court ordered a response from the People, and entertained robust briefing that included several supplemental rounds of briefing. The court also held an evidentiary hearing, at which two defense experts—Dr. Steven Barron and Dr. Richard Subia—testified. Each expert ultimately opined that defendant did not pose an "unreasonable risk of danger to public safety." However, one or both of the experts also acknowledged that defendant had and continues to have a "significant" substance abuse problem; that his substance abuse underlies his criminal history; and that it would be "problematic," or that defendant would pose an "unreasonable risk of danger," if defendant were released without a "structured" and "secure" substance abuse program.

The trial court issued a 15-page order. The court concluded that defendant was eligible for resentencing under Proposition 36, but found him unsuitable for resentencing because he "'continues to pose an unreasonable risk to public safety.'"

In assessing defendant's suitability, the court applied the three factors Proposition 36 specifies are to inform a court's discretion in deciding whether to resentence an eligible defendant—namely, (1) the defendant's "criminal conviction history," (2) his "disciplinary record and record of rehabilitation while incarcerated," and (3) "[a]ny other evidence the court . . . determines to be relevant." (§ 1170.126, subd. (g).)

The trial court recounted defendant's "extensive criminal history," which started when he was 17 and persisted "throughout his adulthood." Between 1985 and 1991, defendant was convicted of driving under the influence four times; the last time, he hit a motorcyclist. In 1988, defendant was convicted of first degree burglary for breaking into a residence, stealing

jewelry and a handgun, and engaging in fistfight with the homeowner. In 1994, defendant was convicted of second degree burglary and assault with a deadly weapon for using a crowbar to pry his way into two businesses, stealing cash, electronics and computer equipment, and swinging the crowbar at a concerned neighbor who came to investigate the noise defendant was making; defendant smelled of alcohol at the time and had a loaded gun in his car. Defendant also sustained convictions for burglary (in 1986), for being under the influence of a controlled substance (in 1990), and for driving on a suspended license (twice in 1988).

The trial court also reviewed defendant's disciplinary history in prison, as well as his rehabilitative efforts. The court found that defendant had engaged in "extensive institutional misconduct," including (1) possessing a homemade 9.75-inch toothbrush sharpened to a point (in 2006); (2) engaging in mutual combat with his cellmate (in 2007); (3) possessing or manufacturing alcohol (in 1997, 2003, 2004, and 2005); (4) possessing or using a controlled substance or drug paraphernalia (in 2012, three times in 2014, and twice in 2015); and (5) refusing to drug test (twice in 2006, twice in 2014, twice in 2015, and in 2016). Nine of these violations occurred while his Proposition 36 petition was pending. The court noted defendant's many years of satisfactory or above-satisfactory vocational work in prison, his participation in several rehabilitative programs (such as anger management, "Hope for Strikers," "Balanced Reentry Activity Group," and "Lifer Group"), his participation in various educational and charitable programs, and his sporadic attendance at Alcohols Anonymous and Narcotics Anonymous meetings in 2009, 2012, 2013, and 2015. The court found all of

this "rehabilitative programming" to be "encouraging," but tempered by defendant's termination from vocational programming in 2015 and insufficient in any event to "overcome his current dangerousness based on his criminal history and serious institutional misconduct."

The court went on to consider other evidence, including defendant's advancing age (of 51), the opinions of Dr. Barron and Dr. Subia, and defendant's admission into a two-year rehabilitative program at Delancey Street should he be released. The court acknowledged that defendant's age "statistically reduced his probability of recidivism," but noted that it had not stopped him from his institutional misconduct. The court also acknowledged the experts' opinions that defendant would not pose an unreasonable risk of danger to public safety, but observed that those opinions "hinge[d] upon [defendant's] commitment to an in-patient drug program." Because it was undisputed that Delancey Street was not a "secure" facility and that defendant could leave whenever he wanted, the court was concerned that defendant would "simply walk away from any such program and give up his sobriety," which—as defendant himself admitted—"factored into a majority of his criminal history." In the court's view, defendant's "inability to stay sober, [to] comply with institutional rules, and [to] follow the law" meant he is "simply not committed to rehabilitation," that he is likely to relapse, and that his relapse will lead to further criminality that would pose an "unreasonable risk of danger to public safety."

Defendant filed a timely notice of appeal.

DISCUSSION

Until 2012, California's Three Strikes law required a trial court to impose a minimum sentence of 25 years to life in prison for a defendant convicted of a felony—no matter what the felony—if he or she had previously been convicted of two serious or violent felonies (so-called strikes). (Former §§ 667, subds. (d), (e)(2)(A), 1170.12, subds. (b), (c)(2)(A).) Proposition 36 changed this law. Prospectively, the Proposition modifies the Three Strikes law so that the minimum 25-years-to-life sentence may in most cases only be imposed for a third or subsequent felony conviction if that conviction is also a serious or violent felony. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).) Retrospectively, the Proposition entitles defendants *previously* sentenced on a nonserious and nonviolent felony to a 25-years-to-life sentence under the Three Strikes law to petition for resentencing on that offense. (§ 1170.126, subd. (b).) Whether a defendant is entitled to that resentencing (and thus to earlier release) turns on (1) whether he is eligible for relief and, if so, (2) whether he is suitable for relief—that is, whether "resentencing the [defendant] would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

It is undisputed that defendant is eligible for Proposition 36 relief. Defendant argues that the trial court erred in denying his Proposition 36 petition for resentencing because (1) the court applied the incorrect legal standard for assessing his suitability for relief, and (2) the court erred in concluding that he is not suitable for relief. The first issue turns on questions of statutory interpretation, which we review de novo. (*People v. Prunty* (2015) 62 Cal.4th 59, 71.) The second issue potentially involves two inquiries: To the extent we review the court's factual findings,

we review for substantial evidence (*People v. Frierson* (2017) 4 Cal.5th 225, 239 (*Frierson*); to the extent we review the court's ultimate finding as to suitability, we review for an abuse of discretion (*People v. Zamudio* (2008) 43 Cal.4th 327, 357).

I. Standard for Assessing Suitability

Proposition 36 explicitly sets forth the factors that a trial court is to consider "[i]n exercising its discretion" to "determine[] [whether] resentencing the [defendant] would pose an unreasonable risk of danger to public safety": (1) the defendant'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 defendant's "disciplinary record and record of rehabilitation while incarcerated"; and (3) "[a]ny 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, subds. (f) & (g).)

Defendant asserts that the trial court erred in applying these factors because, in his view, the court should have applied three different standards. We examine each in turn.

A. *The Proposition 47 Standard*

Defendant argues that we must apply the definition of unreasonable risk of danger to public safety set forth in section 1170.18, which was enacted by the voters as Proposition 47. (§ 1170.18, subd. (c).) That definition limits "unreasonable risk" to "an unreasonable risk that the [defendant] will commit a new violent felony," and for these purposes limits the definition of "violent felony" to one of the "super strike" felonies listed in

section 667, subdivision (e)(2)(C)(iv).[2] (§ 1170.18, subd. (c).) Our Supreme Court rejected defendant's argument in *People v. Valencia* (2017) 3 Cal.5th 347, 352, 374-375 (*Valencia*).

B. *Harm to Persons, Not Property*

Defendant contends that unreasonable risk of danger to public safety is limited to unreasonable risk that the defendant will commit a *violent* crime; the risk that a defendant might commit crimes against property, he reasons, is not enough. For support, he notes that Proposition 36 prospectively allows for the imposition of a "third strike" sentence of 25 years to life only if the crime at issue is a "serious" or "violent" felony, and argues that a similar standard should be implied for retrospective resentencing under Proposition 36. He also draws upon two cases that focus on the defendant's likelihood of committing violent offenses upon release on parole. (*In re Hunter* (2012) 205 Cal.App.4th 1529, 1543 [looking to whether defendant "will engage in future violence if released from prison"]; *In re Jackson* (2011) 193 Cal.App.4th 1376, 1388 [same].)

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2 These offenses include (1) a "[s]exually violent offense" (as defined in Welf. & Inst. Code, § 6600, subd. (b)); (2) oral copulation or sodomy, or sexual penetration of a child under the age of 14 when the defendant is age 24 or older (in violation of §§ 286, 288a, or 289); (3) a lewd or lascivious act involving a child under the age of 14 (in violation of § 288); (4) homicides and attempted homicides (in violation of §§ 187-191.5); (5) soliciting murder (in violation of § 653f); (6) assault with a machine gun on a peace officer or firefighter (in violation of § 245, subd. (d)(3)); (7) possessing a weapon of mass destruction (in violation of § 11418, subd. (a)(1)); or (8) any other serious and/or violent felony punishable in California by life imprisonment or death. (§ 667, subd. (e)(2)(C)(iv).)

We reject this contention for three reasons.

First, the language of Proposition 36 does not expressly limit danger to public safety to danger to public safety *due to violence*. We typically defer to the plain text of a statute and may not add to it. (*In re Cervera* (2001) 24 Cal.4th 1073, 1079-1080 [the plain text of a statute "must prevail"]; *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 301 ["the court may not add to the statute"].) Further, we must honor the voters' intention to erect different standards for retrospective and prospective relief.

Second, public safety is elsewhere defined to reach beyond crimes involving violence. Some courts have recognized that crimes against property are themselves an affront to public safety. (*People v. Nasalga* (1996) 12 Cal.4th 784, 790 [""public safety"" is enhanced by greater penalties for ""vehicle theft""]; *People v. Allesch* (1984) 152 Cal.App.3d 365, 372 [in context of release after finding of sanity, "safety . . . is not limited to safety from physical harm" and reaches "freedom from damage to one's property"].)

At a minimum, crimes involving a *risk* of violence pose a risk to public safety. When our Legislature defined the violent and serious felonies egregious enough to count as strikes, it included crimes such as assault, extortion, burglary, grand theft involving a firearm, arson, and threatening witnesses. (§§ 667.5, subd. (c)(15), (19), (20) & (21), 1192.7, subd. (c)(12), (13), (14), (18), (26) & (27).) Each is a crime that entails a *risk* of violence or bodily harm but does not necessarily *result* in violence or bodily harm. Indeed, the crimes underlying several of defendant's prior convictions—burglary, driving under the influence, and manufacturing methamphetamine—are each crimes that entail a

high risk of violence or bodily injury. (See *People v. Hughes* (2002) 27 Cal.4th 287, 355 [burglary entails "'"the danger that the occupants will . . . react violently to the invasion, thereby inviting more violence"'"]; *People v. Thompson* (2006) 38 Cal.4th 811, 821 ["'driving while under the influence of alcohol or drugs continues to pose a substantial danger to public health and safety'"]; *People v. Duncan* (1986) 42 Cal.3d 91, 105 [the "volatile nature of chemicals . . . involved in the production of drugs such as . . . methamphetamine creates a dangerous environment"].) And we need look no further than this case to see how that risk can translate into actual violence or bodily harm—defendant got into a fistfight during his 1988 burglary, swung a crowbar at someone during his 1994 burglary, and struck a motorcyclist while driving under the influence in 1991.

Lastly, the cases defendant cites do not call for a different result. Although at least one court has remarked that the Proposition 36 suitability inquiry is "akin to a decision [regarding] . . . inmate parole" (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1306, fn. 29), it did so in the context of establishing the standard of review—not the substantive meaning of Proposition 36. (Accord, *People v. Buford* (2016) 4 Cal.App.5th 886, 913-914 [declining "to decide how and to what extent parole cases inform the decision whether to resentence" under Proposition 36].) However, even if we assume that parole cases are *generally* helpful as an analogy, they are not helpful on the question of what Proposition 36 means by public safety because the regulations governing parole specifically look to violence (*In re Jackson*, *supra*, 193 Cal.App.4th at pp. 1384-1385); Proposition 36, as we explain above, does not.

C. *Average Recidivism Rate*

Defendant asserts an *unreasonable* risk of danger to public safety exists only when it is shown that a defendant's likely recidivism rate exceeds the average recidivism rate of other prisoners (1) convicted of the same crime, or (2) serving a sentence of the same length. Because judicially noticeable documents from the California Department of Corrections and Rehabilitation show that prisoners convicted of manufacturing a controlled substance have a three-year return-to-prison rate of 23.9 percent, and because the People never proved that defendant's recidivism rate was higher, defendant concludes that he is entitled to release.

We reject this argument for several reasons.

To begin, defendant never presented this argument—or requested judicial notice of the documents he now cites in his appellate briefs—to the trial court. The trial court can hardly abuse its discretion in not considering, and the People can hardly be faulted for not disproving, evidence and argument never presented to them. (E.g., *People v. Lee* (2008) 161 Cal.App.4th 124, 130 [defendant on appeal "may not now complain that the trial court abused its discretion because it did not consider evidence that was never presented"].)

This argument also lacks merit. Defendant would have us make a comparison of recidivism rates be the determinative factor in whether a defendant poses an unreasonable risk of danger to public safety. Such a reading of Proposition 36's suitability inquiry would render irrelevant (and thereby implicitly repeal) the specific factors set forth in section 1170.126, subdivision (g) that courts are to consider when evaluating suitability. (*California Cannabis Coalition v. City of Upland*

(2017) 3 Cal.5th 924, 945 [implied repeals not favored].) It would also all but eliminate the discretion that our Supreme Court has repeatedly stated that trial courts are to exercise when evaluating suitability under Proposition 36. (*Frierson*, *supra*, 4 Cal.5th at pp. 239-240; *Valencia*, *supra*, 3 Cal.5th at p. 354.)

II. Substantiality of Evidence Supporting Suitability Finding

After considering the factors set forth in section 1170.126, subdivision (g), a trial court ruling on a Proposition 36 petition must ultimately determine whether the People have proved, by a preponderance of the evidence, that the defendant "currently poses an unreasonable risk of danger to public safety." (*People v. Esparza* (2015) 242 Cal.App.4th 726, 746, italics omitted; *Frierson*, *supra*, 4 Cal.5th at p. 239.)

The trial court did not abuse its discretion in concluding that the People met their burden in this case. Defendant and his experts admitted that defendant has a significant and long-standing substance abuse problem. Dr. Subia admitted, and the facts underlying defendant's prior convictions establish, that defendant's criminal behavior—and the risk of violence and bodily harm attendant to it—are linked to his substance abuse problem. And both of defendant's experts agreed that defendant would relapse into addiction if not placed in a secure treatment program. Because it is undisputed that the treatment program into which defendant would be placed is *not* secure, the trial court had ample basis upon which to conclude that defendant was likely to continue his drug use, and thus to commit more crimes posing a risk of violence or bodily injury.

Defendant urges that the trial court nevertheless abused its discretion in finding him unsuitable for release, and offers two arguments.

First, he asserts that the trial court found him unsuitable for release on the ground that he might relapse in his substance abuse. This finding, defendant continues, runs afoul of the mandate of *In re Morganti* (2012) 204 Cal.App.4th 904, 921, which provides that "[t]he risk an inmate may fall back into alcohol or drug abuse can justify denial of parole *only* where [that risk] is greater than that to which a former drug or alcohol abuser is normally exposed." Defendant says that the proof required by *In re Morganti*—namely, that he faces a greater risk of relapse than an "average incarcerated addict"—is lacking.

In re Morganti is inapplicable in this case for several reasons. To begin, it is a parole case and, for the reasons noted above, it is far from clear that the substantive standards for parole apply to Proposition 36. Even if they did, the mandate *In re Morganti* purports to erect arose in a far different factual context. There, the parole board denied parole on the basis of a possibility of relapse even though the defendant in that case had lived a "sober and drug free life" for nearly two decades prior to the parole hearing. (*In re Morganti*, *supra*, 204 Cal.App.4th at p. 914.) Here, by contrast, defendant has had substance abuse problems since he was 17 and, critically, continues to struggle with them today. More to the point, the trial court's finding of dangerousness in this case was not based on an abstract concern about the possibility of relapse wholly divorced from any potential criminality; instead, it was based upon a solid link between defendant's ongoing substance abuse problem and his commission of crimes while addicted.

Second, defendant contends that the trial court "ignored" several pieces of evidence that favored a finding that he did not pose an unreasonable risk of danger to public safety—namely, (1) that he had a number of "clean" drug tests while incarcerated, (2) that his more recent addiction to morphine (from 2011 through the present) was started by prison doctors prescribing him morphine in response to his shoulder injury despite his history of addiction, and (3) that defendant's risk level under the California prison system's risk classification system was at the lowest rung, as Dr. Subia testified. This evidence was all before the trial court, and the court nevertheless concluded that the totality of the evidence weighed in favor of a finding that defendant posed an unreasonable risk of danger to public safety. For the reasons described above, this conclusion was supported by substantial evidence and was not an abuse of discretion. At bottom, defendant is asking us to reweigh the evidence ourselves and to come to a different conclusion; this is something we are not allowed to do. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.)

DISPOSITION

The order is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST