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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. VINCENT M. HARMON, Defendant and Appellant.	B269971 (Los Angeles County Super. Ct. No. BA093310)

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

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

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Vincent M. Harmon (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

One early morning in March 1994, a homeowner was shot outside his home. The homeowner identified defendant as the shooter, and police found defendant in a nearby alley with the homeowner's jewelry case in his pocket. The People charged defendant with (1) attempted premeditated murder (§§ 187, subd. (a) & 664), (2) first degree residential burglary (§ 459), and (3) receiving stolen property (§ 496, subd. (a)). The People further alleged, with respect to the burglary count, that defendant personally used a firearm (§ 12022.5, subd. (a)) and that he personally inflicted great bodily injury (§ 12022.7, subd. (a)).

A jury convicted defendant of second degree burglary and receiving stolen property, but acquitted him of attempted murder and found "not true" the additional allegations with respect to the burglary count.

The trial court sentenced defendant to prison for 27 years to life. On the burglary count, the court imposed 27 years to life, comprised of (1) a third strike base sentence of 25 years to life because defendant's 1984 and 1987 robbery convictions constituted strikes within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(j) & 1170.12, subds. (a)-(d)); and (2) two

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

additional one-year enhancements because those two prior convictions also constituted prior prison terms (§ 667.5., subd. (b)). The court stayed the receiving stolen property sentence under section 654.

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, which was enacted by the voters as Proposition 36. The trial court ordered a response from the People, entertained full briefing, and in September 2015, held an evidentiary hearing at which the court heard testimony from a defense expert and admitted dozens of exhibits.

In November 2015, the trial court issued a 14-page written ruling denying defendant's petition. The court concluded that defendant was *eligible* for resentencing under Proposition 36, but found him unsuitable for resentencing because he "pos[ed] an unreasonable risk of danger to public safety."

In assessing defendant's suitability, the court applied the three factors Proposition 36 specifies are to inform the trial court's discretion in determining whether to resentence an eligible defendant—namely, (1) the petitioner'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 court recounted defendant's extensive criminal history. As a juvenile, defendant committed the crimes of burglary (§ 459) and receiving stolen property (§ 496) in April 1980; was sent to the California Youth Authority in January 1981, after he violated his probation; escaped from the California Youth Authority in September 1981; and thereafter committed the crimes of burglary

(§ 459) and receiving stolen property (§ 496) in November 1981, doing so while carrying a loaded .38-caliber revolver. Defendant was convicted of several more crimes as an adult. In January 1984, while on parole from the California Youth Authority, defendant committed a strong-arm robbery (§ 211) using a baseball bat. After release from the ensuing three-year prison sentence and while still on parole, defendant in September 1986, committed another strong-arm robbery (§ 211), this time holding a gun to the victim's head. After release from the resulting two-year prison sentence and while still on parole, defendant in August 1990, possessed a gun stolen from a police officer (§ 496). While on probation for the stolen gun conviction and under pain of a five-year suspended prison sentence, defendant in December 1991, fired 10 shots at a person and was subsequently convicted of assault with a firearm (§ 245, subd. (a)(2)) and unlawfully possessing a firearm (§ 12022, subd. (a)). Defendant was on probation for the assault conviction under pain of a 16-year prison sentence when he committed the crimes that are the subject of this appeal. During the trial in this matter, moreover, defendant pantomimed firing a gun by putting his finger to his head while one of the victims was on the stand.

The court also reviewed defendant's disciplinary history in prison, as well as his rehabilitative efforts. In addition to a number of minor infractions, defendant committed the following violations: (1) he was disrespectful to prison staff in June 2001; (2) he did not report to work in November 2002; (3) he circumvented the jailhouse telephone procedures in October 2003; (4) he was late to work in November 2004; and (5) he engaged in mutual combat in January 2007, when he bear hugged (but did not punch) a fellow inmate. While in prison,

defendant worked as a dining hall worker and a building porter. Defendant also participated in a few courses soon after his admission to prison—namely, an orientation course and a shop and site safety course in April 1998, and a parenting class in March 2001. After filing his Proposition 36 petition, defendant completed a three-day basic workshop on alternatives to violence in October 2013; a three-day advanced course on alternatives to violence in February 2014; a one-hour course on hypertension in January 2015; a course on life skills/anger management in February 2015; and a course on life skills/stress management in February 2015.

The trial court further considered evidence that (1) defendant's prison "classification score," which evaluates the level of security under which he should be incarcerated, started at 59 (on a 100-point scale) and steadily dropped to 19 (which is the lowest possible level for a prisoner with his sentence); (2) defendant had been accepted into a post-release program to assist with his transition from prison and had received an offer to enroll in another post-release program; (3) defendant had non-validated association with the Crip-Hoover 74th Street gang and, in November 2009, possessed paraphernalia associated with the Black Guerrilla Family prison gang, about which he stated, "I am a Silver Back Gorilla," and "I am a leader"; (4) defendant's relatives and others attested to his good character; and (5) an expert employed by the defense submitted a written report and testified to his opinion that defendant "does not possess an unreasonable risk of dangerousness to public safety."

The court acknowledged that defendant's age (50, at the time of the evidentiary hearing) put him in "a population that presents a statistically lower risk of re-offending," and that

defendant's criminal history was "remote in time." However, the court observed that defendant's "crimes have escalated significantly over time, becoming more violent and often involving the use or possession of a weapon." What is more, the court noted that most of these crimes were committed while defendant was on probation or parole, and that even a 16-year suspended prison sentence did not deter defendant from committing the underlying crimes. The court recognized that this "history of recidivism alone [was] insufficient to support a finding that he currently poses an unreasonable risk of danger to public safety," but found that other evidence "provide[d] a nexus between [defendant's] criminal past and his current dangerousness"—namely, (1) a lack of rehabilitative programming, (2) inadequate post-release plans, and (3) his gang associations. The court noted that nearly all of defendant's rehabilitative programming occurred *after* defendant filed his Proposition 36 petition, leaving the court with "little confidence" that defendant would continue to "voluntarily participate in re-entry programs once" he was released. The court further observed that defendant had not obtained "any trade or vocational skills" while in prison and that his acceptance into two post-release programs could not overcome his lack of any skills that "would permit him to earn an honest living" and "avoid re-offending." Based on the "totality of [this] evidence," the court concluded that defendant "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, subd. (e)(2)(A) & 1170.12, subd. (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 an 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's conclusion that he is not suitable is not supported by substantial evidence. The first issue turns on questions of statutory interpretation, which we review de novo. (*People v. Prunty* (2015) 62 Cal.4th 59, 71.) The standard of review we are to employ in evaluating a trial court's finding that a defendant is not suitable for resentencing under Proposition 36 is unsettled: Review could be for an abuse of discretion because Proposition 36 entrusts the suitability determination to the trial

court's "discretion" (§ 1170.126, subd. (f)); review could be for substantial evidence because the suitability determination rests on factual findings; or review could be for "'some evidence'" because the prognostication of risk required by Proposition 36 is "somewhat akin" to the denial of parole (*People v. Superior Court (Kaulick*) (2013) 215 Cal.App.4th 1279, 1306, fn. 29 (*Kaulick*)). We need not select a standard because, as discussed below, defendant's second claim lacks merit even if we employ the more rigorous substantial evidence and abuse of discretion standards, which call upon us to assess whether the evidence is sufficient for a rational trier of fact to come to the same conclusion and whether the trial court's ruling was arbitrary and capricious. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712; *People v. Zamudio* (2008) 43 Cal.4th 327, 357; cf. *In re Shaputis* (2011) 53 Cal.4th 192, 210 [under "some evidence" standard, "'the court's review is limited to ascertaining whether there is some evidence in the record that supports the . . . decision'"].)

I. The 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

Two years after Proposition 36 was enacted, the voters in November 2014, enacted Proposition 47. (§ 1170.18.) Proposition 47 redesignates as misdemeanors "certain drug- and theft-related offenses" that were charged as felonies or charged as "wobblers" (that is, offenses that are punishable as a felony until a court reduces them to a misdemeanor) and ultimately sentenced as felonies. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.) Like Proposition 36, Proposition 47 has a retrospective component that entitles persons sentenced to these low-level felonies to petition for resentencing. (§ 1170.18, subds. (f) & (g).) Also, like Proposition 36, Proposition 47 tasks a court with determining whether the defendant seeking resentencing would "pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) Of critical importance here, Proposition 47 provides: "As used throughout *this Code*, 'unreasonable risk of danger to public safety' means an unreasonable risk that the [defendant] will commit" one of a small list of so-called "super strike" felonies.[2] (§ 1170.18, subd. (c), italics added.)

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2 Those offenses include (1) a "sexually violent offense" (as defined in Welf. & Inst. Code, § 6600), (2) sodomy, oral copulation, or sexual penetration with 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)),

Defendant argues that Proposition 47's narrower definition of "unreasonable risk of danger to public safety," which focuses on the danger that the defendant would commit specific offenses rather than his danger generally, applies to Proposition 36 because Proposition 47 says its definition applies "throughout this Code" and Propositions 36 and 47 are both part of the Penal Code. This plain language of Proposition 47 is certainly on defendant's side. However, every court to consider this argument—save one—has rejected it and concluded that Proposition 47's use of the word "Code" (rather than "Act") was a drafting error. In reaching this conclusion, these courts reasoned that applying Proposition 47's narrower definition to Proposition 36 (1) is inconsistent with Proposition 47's mandate not to "diminish or abrogate the finality of judgments in any case not falling within the purview of this act" (§ 1170.18, subd. (n)); (2) goes far beyond Proposition 47's stated intent to give lower-level criminals who have committed a "nonserious and nonviolent property" offense a reduced sentence (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis. Analyst, p. 35) because it allows for the reduction of sentences for hardened criminals with at least two prior serious or violent felonies; and (3) makes little sense because Proposition 47 was enacted just two days before Proposition 36's two-year window for seeking relief closed. (*People v. Buford* (2016) 4 Cal.App.5th 886,

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(7 possessing a weapon of mass destruction (in violation of § 11418, subd. (a)(1)), and (8) any other serious or violent felony punishable by life imprisonment or death. (§ 667, subd. (e)(2)(C)(iv).)

903-913, review granted Jan. 11, 2017, S238790 (*Buford*).)[3] Our Supreme Court has agreed to review this question. (See *Chaney*, *supra*, 231 Cal.App.4th 1391, review granted; *Valencia*, *supra*, 232 Cal.App.4th 514, review granted.) In the meantime, we are persuaded by the majority position, and we will not revisit the identical arguments defendant raises here and that have been rejected by these decisions.

However, defendant raises one additional argument not addressed above. He contends that *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) mandates the retroactive application of Proposition 47's definition to Proposition 36. In our view, *Estrada* is doubly irrelevant. To begin, *Estrada* erects a "reasonable presumption that a legislative act mitigating the

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3 Our Supreme Court, as explained below, has granted review on this issue, and this grant of review has resulted in the complete or partial depublication of every other published decision on the issue. (Compare *People v. Florez* (2016) 245 Cal.App.4th 1176, 1190-1196 (2016), review granted June 8, 2016, S234168 [declining to apply Proposition 47's definition to Proposition 36]; *People v. Myers* (2016) 245 Cal.App.4th 794, 801-804, review granted May 25, 2016, S233937 [same]; *People v. Sledge* (2015) 235 Cal.App.4th 1191, 1212, review granted July 8, 2015, S226449 [same]; *People v. Guzman* (2015) 235 Cal.App.4th 847, 853-857, review granted June 17, 2015, S226410 [same]; *People v. Davis* (2015) 234 Cal.App.4th 1001, 1006, review granted June 10, 2015, S225603 [same]; *People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted Feb. 18, 2015, S223676 (*Chaney*) [same]; *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted Feb. 18, 2015, S223825 (*Valencia*) [same] with *People v. Cordova* (2016) 248 Cal.App.4th 543, 547-548, review granted Aug. 31, 2016, S236179 [applying Proposition 47's definition to Proposition 36].)

punishment for a particular criminal offense is intended to apply to all nonfinal judgments." (*People v. Brown* (2012) 54 Cal.4th 314, 324; *Estrada*, at p. 744.) Although the resentencing defendant seeks under Proposition 36 ostensibly "mitigat[es] . . . punishment," *Estrada* applies only to "nonfinal" judgments, and defendant's 1995 third strike conviction and sentence became final a long time ago when his ability for direct review of that conviction and sentence expired. (*People v. Smith* (2015) 234 Cal.App.4th 1460, 1464-1465 [conviction becomes final when time to appeal and file a petition for writ of certiorari expires].) Further, *Estrada* speaks to whether a newly enacted provision that applies to a conviction or sentence is to be applied retroactively; it does not speak to the precursor question whether the newly enacted provision applies in the first place. We have before us that precursor question: Does Proposition 47's definition apply to Proposition 36 in the first place? *Estrada* says nothing on that question.

B. The "Unreasonable Risk" Standard

The suitability inquiry under Proposition 36 looks to whether the defendant "pose[s] an *unreasonable* risk of danger to public safety." (§ 1170.126, subd. (f), italics added.) Defendant seems to suggest that this requires something more than just a "risk of danger to public safety," and points us to several out-of-state cases defining "*unreasonable* risk." We reject this argument. As an initial matter, the distinction defendant appears to be drawing between "unreasonable risk" required by Proposition 36 and "risk" required in parole cases is not as stark as defendant portrays. (E.g., *In re Moses* (2010) 182 Cal.App.4th 1279, 1303-1304 (*Moses*) [treating "risk" and "unreasonable risk" interchangeably in a parole case].) Moreover, the out-of-state

cases defendant cites all define "unreasonable risk" for purposes of tort law. (E.g., *Wagoner v. Waterslide, Inc.* (Utah Ct.App. 1987) 744 P.2d 1012, 1013; *Dick's Sporting Goods, Inc. v. Webb* (Ky. 2013) 413 S.W.3d 891, 899 & fn. 26.) We decline to displace the standards for assessing "unreasonable risk" included in Proposition 36 with a standard used by other states' courts in tort actions.

C. The Risk of Violent Crimes Standard

Relatedly, defendant seems to argue that Proposition 36's requirement that the defendant not "pose an unreasonable risk of danger to *public safety*" mandates a showing that the defendant is likely to commit violent crimes. (§ 1170.126, subd. (f), italics added.) He cites no authority for the broad proposition that only those persons who commit violent crimes present a risk of danger to public safety.

II. Substantiality of Evidence Supporting Suitability Finding

The People bear the burden of proving that a defendant poses an "unreasonable risk of danger to public safety" by a preponderance of the evidence. (*Kaulick*, *supra*, 215 Cal.App.4th at p. 1305; *Buford*, *supra*, 4 Cal.App.5th at pp. 895-898, review granted.)[4] The trial court concluded that the People carried this

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4 At least one court has held that the People must prove a defendant's lack of suitability beyond a reasonable doubt. (*People v. Arevalo* (2016) 244 Cal.App.4th 836, 842.) Every subsequent decision has disagreed with *Arevalo*. (*People v. Frierson* (2016) 1 Cal.App.5th 788, 793-794, review granted Oct. 19, 2016, S236728; *People v. Newman* (2016) 2 Cal.App.5th 718, 730-732, review granted Nov. 22, 2016, S237491; *Buford*, *supra*, 4 Cal.App.5th at pp. 895-898, review granted.) The issue is now before our Supreme Court in *Frierson* and *Newman*. The issue is

burden after considering the evidence and testimony submitted, filtering them through the three factors set forth in Proposition 36, and ultimately concluding that the totality of that evidence indicated that defendant currently posed an unreasonable risk of danger to public safety.

Defendant raises a number of challenges to the trial court's analysis. First, he argues that the court erred in rejecting his expert's opinion that he did not pose an unreasonable risk of danger to public safety, particularly when there was no contrary expert opinion. There was no error because the court, as the trier of fact, was free to disregard that opinion in light of the other evidence presented. (*People v. Brown* (2014) 59 Cal.4th 86, 101.)

Second, defendant asserts that the trial court erred by making a "rote recitation" of his prior criminal history and in failing to connect his prior criminal history to his *current* risk of danger. (*Moses*, *supra*, 182 Cal.App.4th at pp. 1303-1304 [prohibiting the same in making parole decisions].) However, the court did no such thing: The court recognized that the proper focus was on whether defendant "*currently* poses an unreasonable risk" and noted that defendant's "history of recidivism alone" was not enough to prove risk, but concluded that other evidence provided the requisite "nexus" linking his prior crimes to his current risk—namely, (1) a lack of rehabilitative programming, (2) inadequate post-release plans, and (3) his gang associations.

Third, defendant asserts that the trial court erred when it stated that he had made no plans for reintegration into the community if he were released. Again, the court did no such thing. The court recognized that defendant had signed up with

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not relevant to this case because defendant does not dispute the applicability of the preponderance of the evidence standard.

two post-release programs, but found this insufficient to ensure he would not revert to a life of crime because he had developed no useful "trade or vocational skills" while incarcerated.

Fourth, defendant contends that the trial court erred in placing weight on the fact that he undertook nearly all of his rehabilitative efforts *after* filing his Proposition 36 petition; such efforts, he contends, are relevant no matter when they occur. However, the court did not ignore defendant's efforts. It elected to accord them less weight because their timing indicated that defendant's sole motivation for rehabilitation was to obtain release, a motivation he would no longer have if released into the community. A defendant's lack of motivation to pursue re-entry efforts once back in the community is a relevant consideration.

Lastly, defendant asserts that the trial court should have discounted his entire criminal history due to its age. The court properly recognized that defendant's crimes were "remote in time," but went on to note that defendant had reverted to committing crimes whenever he was released, and that being on parole or probation had not deterred that criminal behavior. The court was also undoubtedly aware that the gap in defendant's commission of any crime after 1995 was due in part to his incarceration during that entire period.

At bottom, defendant seems to contend that the trial court did not properly weigh the evidence presented. But it is not our place to reweigh the evidence. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.) The evidence presented was sufficient; the trial court's analysis was reasoned and thorough; and we accordingly have no basis to disturb its ruling.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, 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.