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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CLEO WESTERFIELD, Defendant and Appellant.	B269019 (Los Angeles County Super. Ct. No. KA043390)

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

Jonathan B. Steiner, Executive Director, California Appellate Project, Cheryl Lutz, Staff Attorney, 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, Assistant Attorney General, Noah Hill and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Cleo Westerfield appeals from the postjudgment order denying his petition to recall his sentence and for resentencing pursuant to Penal Code section 1170.126,[1] added by Proposition 36 (or Act).[2] He contends the Proposition 36 court erred in finding he was armed with a deadly weapon, because: (1) the court improperly made factual findings beyond those that establish the nature or basis of his current conviction in violation of *People v. Guerrero* (1988) 44 Cal.3d 343 (*Guerrero*); (2) the court improperly considered evidence outside the record of conviction, i.e., the preliminary hearing transcript, and relied on the prosecutor's mistaken assertion he had been convicted of firearm possession; (3) the court applied the incorrect preponderance of the evidence rather than the correct beyond a reasonable doubt standard of proof; and (4) the evidence was insufficient to establish he was armed with a firearm during the commission of the current crime, because the evidence did not establish he had control over or ready access to the firearm found in his car or the existence of a facilitative nexus between the firearm and the felony evading offense.

In his supplemental brief, defendant contends he was denied his constitutional right to effective assistance of counsel (U.S. Const., 6th Amend.) if his counsel's failure to object to the Proposition 36 court's admission of the preliminary hearing transcript and application of the

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

[2] "On November 6, 2012, the electorate passed Proposition 36, the Three Strikes Reform Act of 2012 . . . . Proposition 36 reduced the punishment to be imposed with respect to some third strike offenses that are neither serious nor violent, and provided for discretionary resentencing in some cases in which third strike sentences were imposed with respect to felonies that are neither serious nor violent." (*People v. Johnson* (2015) 61 Cal.4th 674, 679.) Proposition 36 was effective on November 7, 2012. (*Johnson*, at p. 680.)

preponderance of the evidence standard of proof results in forfeiture of these claims of error.

We affirm the order. The Proposition 36 court found "[d]uring the commission of the current offense, the defendant . . . was armed with a firearm," which is an expressly enumerated factor for disqualifying, or rendering ineligible, a defendant for resentencing under Proposition 36 (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)). This finding is legally sound and supported by substantial evidence. Defendant's reliance on *Guerrero* is misplaced, as *Guerrero* is factually inapplicable. Further, contrary to his claim, the record of conviction includes the preliminary hearing transcript, which the trial court therefore was entitled to consider. The court also correctly applied the preponderance of the evidence standard, a lesser standard of proof, rather than the greatest standard of proof, beyond a reasonable doubt. Accordingly, no prejudice resulted from the failure of defendant's counsel to object to admission of the preliminary hearing transcript and to the application of the preponderance of the evidence standard of proof.

BACKGROUND

In the early morning hours of January 26, 1999, after Pomona Police Officer Paul Western activated the lights and siren on his marked patrol car to make a lawful stop of a 1997 Mitsubishi Mirage driven by defendant, defendant attempted to evade the officer by increasing his speed, driving past two stop signs without stopping, and entering the 10 Freeway. Other officers joined the chase, including Officer Robert McCrary, who took over the lead.

At times, defendant drove at speeds over 90 miles per hour and on occasion over 110 miles per hour. He transitioned to the 57 Freeway and then onto the 60 Freeway. Thirty minutes later, defendant exited the 60

Freeway at a high rate of speed. Upon hitting a parked car and the curb, his car became airborne, rolled over, crashed through a fence, and landed upright. Defendant, who was in the driver's seat, exited and ran. He stopped and lay on the ground when ordered by McCrary.

A woman was in the front passenger seat, and a man identified as Willie Barnes was in the back seat. During the chase, McCrary saw the man in the back seat duck down and conceal himself. A loaded handgun was found on the front passenger seat. During booking, defendant laughed and told Western, "I almost slipped your ass."

At trial, defendant admitted making that statement. He also admitted he was the driver during the chase. He identified the front passenger as his girlfriend and stated Barnes was in the rear seat. Defendant denied his criminal record prompted his failure to stop. He explained the real reason was Barnes was holding a hand gun and told him to keep driving. When asked if Barnes had threatened him, defendant responded, "The gun alone threatened me by itself. I was—I felt—I don't know what he [*sic*] going to do. I'm scared. I'm in the car, he got [*sic*] a gun." He acknowledged, however, Barnes did not say, "Drive the car or I will kill you."

A jury convicted defendant of evading an officer with willful or wanton disregard for the safety of persons or property (Veh. Code, § 12800.2, subd. (a)) and having a concealed firearm in a vehicle (§ 12025, subd. (a)(1)). The court found he had sustained three prior serious felony convictions under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and that he had served three prior prison terms (§ 667.5, subd. (b)). He was sentenced to prison to 25 years to life on his evading conviction and to three concurrent one-year terms for the prior prison term enhancements, plus a concurrent six-month term for the firearm conviction.

In his earlier appeal from the judgment, defendant challenged his conviction for having a concealed firearm in a vehicle (count 2) for lack of evidence the firearm was concealed. We found his claim to be well taken. As to that count, we reversed the judgment, vacated the sentence, and ordered the information dismissed. We otherwise affirmed the judgment.[3]

On April 9, 2013, defendant filed a Proposition 36 petition to recall his sentence and for resentencing.

On April 19, 2013, the Proposition 36 court issued an order to show cause. The People filed opposition to the petition.

On June 5, 2014, defendant filed a document entitled "Amended Petition and Reply to People's Opposition."

On February 4, 2015, the People filed a second revised opposition to the petition.

On November 16, 2015, following a hearing, the Proposition 36 court denied the petition, finding defendant "was armed with a firearm in the commission of the current offense."

DISCUSSION

1. *Jury's Verdict Does Not Preclude Armed Finding by Proposition 36 Court*

Defendant contends the Proposition 36 court's "own factual finding" that defendant was armed with a firearm is unsupported by the record of conviction, i.e., the jury's verdict, and that the court's "'relitigation' of the circumstances of the crime" is prohibited under *Guerrero*, *supra*, 44 Cal.3d 343, 355. We find his contention to be without merit.

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[3] The above background is taken from the earlier unpublished opinion (B134599), of which we take judicial notice. (Evid. Code, §§ 452, subd. (d)(1), 459.)

The fatal fallacy lies in his misguided focus on "the 'nature or basis' of the verdict," i.e., the jury merely found defendant had a concealed firearm rather than defendant was "armed" with a firearm. That the jury did not find specifically defendant was "armed" with a firearm is of no consequence. In *People v. Newman* (2016) 2 Cal.App.5th 718 (*Newman*),[4] this court explained that a disqualifying factor, such as the one here, is "not a subject for a jury to determine, because [such factors] do not cause an *increase* in punishment beyond the statutory punishment for the current offense." Rather, "the existence of a disqualifying factor that would render a defendant ineligible for resentencing under Proposition 36, which would lessen his punishment if he were eligible, is a determination solely within the province of the Proposition 36 court to make." (*Newman*, at p. 724.) Further, we explained that *Guerrero* is factually inapplicable. "*Guerrero*, which was decided long before enactment of Proposition 36, concerns what evidence a trial court may consider in determining the truth of a *prior conviction* allegation." (*Newman*, at. p. 726.)

2. *No Improper Reliance on Preliminary Hearing Transcript or Prosecutor Argument*

Defendant contends the Proposition 36 court erroneously found he was "armed" with a firearm based on evidence the bullet found in defendant's pocket matched the bullets in the gun's magazine, which evidence was only in the preliminary hearing transcript, not in the record of conviction, and on the prosecutor's mistaken assertion defendant had been convicted of firearm possession. These contentions lack merit.

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[4] On September 28, 2016, a petition for review was filed in *Newman* (S237491).

a. *Proposition 36 Hearing*

At the hearing, the prosecutor argued defendant was driving the vehicle; of the three occupants of the vehicle only defendant ran away when the car stopped after having rolled over during the chase; a loaded gun was found on the front passenger seat; the bullets found in defendant's pocket matched the bullets in the gun; at the preliminary hearing, he was held to answer to possessing a concealed weapon; and the jury found him guilty of possession of a concealed weapon.

Defendant's counsel argued defendant testified the rear passenger was the one who possessed and showed the gun. When the court asked how the bullets got into defendant's pocket, counsel admitted he did not know. He added the police admitted the gun was not tested for fingerprints. The court responded, "And yet the jury found him guilty as a man with a gun." Counsel pointed out the Court of Appeal reversed.

The prosecutor clarified "[w]hat happened was, at [the] preliminary hearing, the deputy D.A. who was doing the prelim did not have a 969(b) packet, and so therefore the ex-felon with a gun charge wasn't held to answer, and, instead, the People asked for the lesser charge of a concealed weapon. At trial, he was found guilty of the concealed weapon [charge.]" Referring to footnote 10 in the appellate court opinion, the prosecutor argued, "The court of appeals [*sic*] reversed that charge solely based on the fact that the weapon was not concealed, not on the fact of the possession."[5]

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[5] Footnote 10 appears on pages 16 and 17 of our earlier opinion and reads: "We note that the magistrate found sufficient evidence to show that [defendant] possessed a concealed firearm in a public place. At the conclusion of the preliminary hearing, after acknowledging that he lacked evidence to establish the ex-felon element of the offense then alleged, the prosecutor asked the magistrate to add 'the lesser charge of possession of a . . . loaded firearm' under . . . section 12021, subdivision (a.) The magistrate

Counsel argued the appellate "court never reached the issue of possession. The magistrate found sufficient cause to hold him over for possession. That's quite a different thing." He pointed out that when the police arrived at the end of the chase, defendant was already out of the car and Barnes was in the back seat. The court again asked how the bullets got into defendant's pocket. Counsel responded, "A man can have bullets in his pocket."

The prosecutor countered that the evidence reflected after the car rolled, the gun was found on the front passenger seat, not the back seat; the bullets in the gun's magazine matched those in defendant's pocket; and defendant was the only one to flee the car. She argued the preliminary hearing judge held defendant to answer that he had the gun; the jury found he had the gun, and reversal was solely on the concealment issue.

The court then received into evidence the exhibits filed by both parties and the pleadings. Based on "the submissions and argument of counsel," the court found defendant ineligible for relief, "because he was armed with a firearm in the commission of the current offense" and denied the Proposition 36 petition.

b. *Record of Conviction Includes Preliminary Hearing Tran*script

Initially, we note the preliminary hearing transcript reflects that an officer found one .22-caliber bullet on defendant and this bullet was the same as those removed from the magazine of the.22-caliber gun retrieved from the front passenger seat.

Defendant's contention the Proposition 36 court erred in relying on the preliminary hearing transcript is unsuccessful. In *People v. Reed* (1996) 13

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found that [defendant] had committed 'a violation of 12021(a), possession of a firearm in a public place, a concealed firearm in a public place . . . .'"

Cal.4th 217 (*Reed*), our Supreme Court expressly held that the preliminary hearing transcript is part of the record of conviction which may be considered by a court. (*Id*. at p. 223.) Defendant attempts to narrow this holding to the situation where the defendant enters a plea of guilty, or its equivalent, and construes the *Reed* holding to be inapplicable in the situation where the defendant is convicted of the current offense by a jury. As authority, he relies on *People v. Houck* (1998) 66 Cal.App.4th 350 (*Houck*).)

We find such a dichotomy to be legally unsupportable. In *Reed*, the court did not carve out such an exception, and nothing in *Reed* can be construed reasonably to support such a distinction. Moreover, as conceded by the court in *Houck*, "[t]he exact parameters of 'record of conviction' are yet to be defined." (*Houck*, *supra*, 66 Cal.App.4th at p. 355.) Our Supreme Court has not yet carved out an exception for preliminary hearing transcripts in the context of a jury trial. Further, we are not persuaded by the explanation in *Houck* for such an exception, namely, that the trial transcript trumps the preliminary hearing transcript as the "reliable reflection" of what transpired test pursuant to *Reed*. (*Houck*, at pp. 355-357.) This explanation does not address why the testimony in the preliminary hearing transcript should not be considered reliable to clarify or amplify the testimony presented during trial.

Additionally, in the context of a Proposition 36 petition, the court in *People v. Frierson* (2016) 1 Cal.App.5th 788 (*Frierson*),[6] concluded the "record of conviction" is a term that "include[s] material which is part of the record, such as *excerpts from preliminary hearing transcripts*," citing to *Reed*, *supra*, 13 Cal.4th 217, at page 223. (*Frierson*, at p. 792, italics added.) In *Reed*, the

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[6] A petition for review was granted in *Frierson* on October 19, 2016 (S236728).

court concluded "the procedural protections afforded the defendant during a preliminary hearing tend to ensure the reliability of such evidence." (13 Cal.4th at p. 223.) We find the analysis in *Frierson* to be persuasive and decline to follow *Houck*.

c. *Proposition 36 Court Was Not Misled by the Prosecutor*

Defendant contends that during the hearing, the prosecutor mischaracterized his firearm-related conviction by asserting "[a]t trial, [he] was found guilty of possession of a concealed weapon," which the trial court misrelied on in finding defendant was armed during the commission of the current crime. We disagree that the Proposition 36 court was misled by the prosecutor's characterization of defendant's conviction.

In our earlier opinion resolving the appeal from the judgment, we clearly pointed out the jury convicted defendant of having a concealed firearm in a vehicle in violation of section 12025, subdivision. (a)(1).) The People offered this opinion as an exhibit, which the Proposition 36 court admitted into evidence. The Proposition 36 court therefore is presumed to have adhered to our description of defendant's conviction rather than what the prosecutor argued at the hearing. (See *People v. Chamberlin* (1966) 242 Cal.App.2d 594, 597 [presumed court read the hearing transcript].)

3. *Preponderance of the Evidence Is the Applicable Standard of Review*

Defendant contends the Proposition 36 court applied the incorrect standard of proof in making its factual findings, because the appropriate standard is beyond a reasonable doubt, as enunciated by the court in *People v. Arevalo* (2016) 244 Cal.App.4th 836, not preponderance of the evidence. We are not persuaded.

In *Frierson*, the court disagreed with *Arevalo* and concluded the correct standard of proof is preponderance of the evidence. (*Frierson*, *supra*, 1 Cal.App.5th at pp. 793, 794, rev.gr.) In *Newman*, this court concurred with that conclusion. We noted "beyond a reasonable doubt, the highest standard of proof, implicates issues regarding guilt or innocence of a charged crime but not sentencing," as a general matter, unless the issue involves a factual finding that might subject a defendant to a potential sentence greater than that authorized by the verdict of the trier of fact itself. (*Newman*, *supra*, 2 Cal.App.5th at p. 731.) We held the preponderance of the evidence standard applies, because "Proposition 36 operates to decrease a defendant's punishment, not to increase the 'penalty for a crime beyond the prescribed statutory maximum'" (*id.* at p. 732), the scenario in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490). Defendant offers nothing new or different that would warrant revisiting our conclusions in *Newman*.

4. *Armed with a Firearm Finding Is Supported by Substantial Evidence*

Defendant contends the trial court erred in finding he was armed with a firearm during the commission of the current offense, because the evidence is insufficient to establish he possessed the firearm in his car, i.e., he had control over or ready access to the firearm, or the requisite nexus between the firearm and the felony evading offense. We find substantial evidence supports the court's challenged finding.

The factual findings of the Proposition 36 court are reviewed for substantial evidence. (*People v. Dove* (2004) 124 Cal.App.4th 1, 10; *People v. Johnson* (2003) 114 Cal.App.4th 284, 290.) Under the applicable review standard, we examine the evidence, both direct and circumstantial, in light of the entire record and must indulge in favor of the order all presumptions, as

well as every logical inference, that the court could have drawn from the evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396; *People v. Carter* (2005) 36 Cal.4th 1114, 1156; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The reviewing court "uphold[s] any express or implied factual findings of the . . . court that are supported by substantial evidence." (*People v. Robinson* (2010) 47 Cal.4th 1104, 1126.)

Based on our review of the record, we conclude substantial evidence supports the Proposition 36 court's factual finding that defendant was armed with a firearm during the commission of the current offense. This evidence established defendant was the driver during the reckless and dangerous police chase. He was the only one who fled from the car after it had flipped and stopped. The loaded firearm was found on the front passenger seat within easy reach of defendant. The unexplained presence of a bullet on defendant's person that matched those in the gun tied defendant to the gun. The Proposition 36 court was entitled to disbelieve, as self-serving, defendant's testimony that Barnes, the rear passenger, was the one with the gun and defendant only continued to drive in the face of the gun threat, especially in light of Officer McCrary's testimony that during the chase, the rear passenger was ducking down and concealing himself.

We disagree that the finding defendant was armed during the commission of the current offense is defective, because there was no evidence of a "facilitative nexus" between his crime and his possession of the weapon, i.e., intent to use the gun to commit the crime. As defendant concedes, the appellate courts have rejected the requirement of a "facilitative nexus" where the evidence in the record of conviction of a possession offense reveals the defendant had ready access to the weapon, which is the case here. (See, e.g., *People v. White* (2016) 243 Cal.App.4th 1354, 1360-1364; *People v. Brimmer*

(2014) 230 CalApp.4th 782, 797-799; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1051-1052; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1030-1038*; People v. White* (2014) 223 Cal.App.4th 512, 518-519.)

5. *No Ineffective Assistance of Counsel Shown*

In its opening brief, respondent contends the absence of an objection forfeits defendant's claims of error regarding the preliminary hearing transcript and the preponderance of the evidence standard. Defendant contends his counsel was ineffective (U.S. Const., 6th Amend.) should this court decide counsel's failure to object to the Proposition 36 court's admission of the preliminary hearing transcript and its application of the preponderance of the evidence standard of proof amounts to forfeiture of his claims of error. He fails to show his counsel was ineffective.

As discussed above, we have addressed defendant's claims of error on the merits and found them to be without merit. The omission of objections on the part of his counsel therefore was nonprejudicial, and no further discussion of the adequacy of counsel's performance in this regard is warranted. (See, e.g., *People v. Ledesma* (2006) 39 Cal.4th 641, 748, *People v, Mendoza* (2000) 24 Cal.4th 130, 170.)

DISPOSITION

The order appealed from is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

ASHMANN-GERST, J. HOFFSTADT, J.