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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ADOLPH J. ARISTA,

Defendant and Appellant.

F061906

(Super. Ct. No. 10CM8611)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Donna Tarter, Judge.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Rachelle A. Newcomb, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Cornell, J., and Detjen, J.

On January 5, 2011, a jury convicted appellant, Adolph J. Arista, of unauthorized possession of a syringe in prison (Pen. Code, § 4573.6).¹ In a separate proceeding that same day, appellant admitted allegations he had suffered three “strikes.”² On February 8, 2011, the court denied appellant’s request that the court dismiss his strikes pursuant to section 1385³ and imposed a sentence of 25 years to life under the three strikes law, to be served consecutively to the sentence appellant was serving at the time of the commission of the instant offense.

On appeal, appellant contends the court erred in denying his *Romero* motion, and that the sentence imposed was unconstitutionally cruel and/or unusual. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Facts

On the afternoon of November 25, 2009, Correctional Officer Larry Lerma was conducting security checks in a housing unit at Avenal State Prison, when he noticed appellant, an inmate at the prison who lived in the unit, kneeling by his bunk.⁴ The unit is a “dorm setting” where inmates “could go in and out freely into their bunk areas.” Appellant had a job in the unit; he “help[ed] clean up”

Officer Lerma noticed items he recognized as “tattoo paraphernalia”—tattoo needles and a guitar string—lying on appellant’s bunk, “right there in front of him.” The

¹ Except as otherwise indicated, all statutory references are to the Penal Code.

² We use the term “strike,” in its noun form, and “strike conviction” as synonyms for “prior felony conviction” within the meaning of the “three strikes” law (§§ 667, subds. (b)-(i); 1170.12), i.e., a prior felony conviction or juvenile adjudication that subjects a defendant to the increased punishment specified in the three strikes law.

³ A criminal defendant’s request that a court dismiss one or more strike convictions pursuant to section 1385 is commonly called a *Romero* motion. (See *People v. Superior Court (Romero)* (1996) 13 Cal.3d 497 (*Romero*).)

⁴ Our factual summary is taken from Officer Lerma’s testimony.

officer told appellant to step away and appellant complied, at which point Officer Lerma noticed an inmate-manufactured syringe lying on appellant's bunk, a few inches away from where he had been kneeling.

Appellant was taken into custody, after which officers searched appellant's bunk and locker areas, as well as his person, but found no other drug paraphernalia.

The syringe found on appellant's bunk could not be used for tattooing. Its intended use was for "some type of liquid drug to be [injected] into the body." There was a liquid substance in the syringe when Officer Lerma found it, but the substance was not tested.

Additional Factual Background

Appellant was 47 years old at the time of sentencing. His first contact with the criminal justice system occurred in 1985, when he was convicted of obstructing or resisting a peace officer (§ 148), a misdemeanor, and placed on 36 months' probation. He also served 30 days in jail. Over the course of the next four years, he suffered three more misdemeanor convictions, for vandalism (§ 594) in 1987, being under the influence of a controlled substance (Health & Saf. Code, § 11550) in 1988, and second degree burglary in 1989. He was placed on probation following each of these convictions, and he served jail terms of 90 days and 60 days following his 1988 and 1989 convictions, respectively.

In 1990 he was convicted of first degree burglary, a felony, and sentenced to two years in prison. He was subsequently released on parole three times, and each time he was returned to custody for violating parole. He was discharged in 1996.

In 1995, while on parole, appellant was convicted of misdemeanor hit and run driving resulting in injury (Veh. Code, § 20001), and placed on three years' probation. In 2000, he was convicted of two felonies: second degree robbery (§§ 211, 212.5, subd. (c)), in the commission of which he personally used a firearm (§ 12022.5,

subd. (a)), for which he was sentenced to 12 years in prison,⁵ and second degree robbery (§§ 211, 212.5, subd. (c)), for which he was sentenced to a consecutive two-year term.

Appellant filed a statement in mitigation, in which he asserted the following: The instant offense was “a product of his addiction to illegal narcotics” Appellant’s addiction has “repeatedly put him in prison,” but “he has never received adequate treatment.” However, appellant’s addiction is “treatable,” and his “goal [is] to end his addiction.” At the hearing on appellant’s *Romero* motion, his counsel stated that appellant has a “trucking license,” he is a handyman, he does construction work, and thus, if he were released from prison, he would be “productive in society.”

The prosecution proposed a plea agreement under which appellant would have received a six-year sentence, and another under which appellant’s sentence would have been seven years. Appellant rejected both offers.

Denial of *Romero* Motion

In denying appellant’s *Romero* motion, the court stated: “Although there is an argument that [the instant offense] is a misdemeanor and a relatively minor crime if he was out of custody, that circumstance really has little value in this case. Drug possession, paraphernalia, possession these types of offense are extremely dangerous in the confines of the prison. Drug use and trafficking leads to various other offenses which involve great violence including murder in the prison, so this is not a minor crime, this is a very serious crime. [¶] Although the present offense is not a violent offense, Mr. Arista does have a criminal history of violent behavior and parole violations. At the time of this offense Mr. Arista was serving a prison sentence His assertion that he wishes to return to society with a goal to end his addiction to narcotics with the plan for counseling

⁵ The sentence included five years for a prior serious felony enhancement (§ 667, subd. (a)).

and treatment appears disingenuous. He has not demonstrated any in-custody attempts to address his in-custody issues concerning his addiction. The Court will deny the Romero motion.”

DISCUSSION

Romero Motion

Section 1385 provides, in relevant part, “The judge or magistrate may, ... in furtherance of justice, order an action to be dismissed.” (§ 1385, subd. (a).) In *Romero*, *supra*, 13 Cal.4th at pp. 529-530, the California Supreme Court concluded that section 1385, subdivision (a) “permit[s] a court acting on its own motion to strike prior felony conviction allegations in cases brought under the Three Strikes law.” But although “[a] defendant has no right to make a motion, and the trial court has no obligation to make a ruling, under section 1385,” a defendant “does have the right to ‘invite the court to exercise its power by an application to strike a count or allegation of an accusatory pleading, and the court must consider evidence offered by the defendant in support of his assertion that the dismissal would be in furtherance of justice.’” (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony I*).

In *People v. Williams* (1998) 17 Cal.4th 148 (*Williams*), the California Supreme Court set forth the factors relevant to a court’s determination of whether to strike a strike: “[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, ‘in furtherance of justice’ pursuant to [section 1385, subdivision (a)], or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*Id.* at p. 161.)

A superior court's determination not to strike a strike is reviewable for abuse of discretion. (*Carmony I, supra*, 33 Cal.4th at p. 376.) "In [conducting this review], we are guided by two fundamental precepts. First, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" [Citation.] Second, a "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'" [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377.)

Thus, "[i]t is not enough to show that reasonable people might disagree about whether to strike one or more' prior conviction allegations.... Because the circumstances must be 'extraordinary ... by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary. Of course, in such an extraordinary case—where the relevant factors described in *Williams, supra*, 17 Cal.4th [at p. 161], manifestly support the striking of a prior conviction and no reasonable minds could differ—the failure to strike would constitute an abuse of discretion." (*Carmony I, supra*, 33 Cal.4th at p. 378.)

Appellant argues that the court abused its discretion in denying his *Romero* motion for the following reasons: the instant offense is a misdemeanor if committed by a non-prisoner and is "passive, non-violent, victimless and[,] ... as was apparently the case

here, a product of addiction”; the court’s characterization of the instant offense as “extremely dangerous” and one that leads to “various other offenses which involve great violence” was “unfounded”; the instant offense “reveals no tendency to commit additional offenses that pose a threat to public safety”; appellant’s strike convictions “are remote from and bear no relation to the current offense”; with the exception of the instant offense and appellant’s strikes, his criminal record consists entirely of misdemeanor convictions; because he was employed in prison and, according to defense counsel, he has job skills, his “prospects” if released and his “background” militate in favor of dismissing his strikes; given his age, appellant’s sentence is “virtually life without parole”; and the prosecutor proposed two agreements, one calling for a six-year term and the other for a sentence of seven years, thereby indicating the “The State itself apparently did not consider appellant to be a significant danger to society.”

We note first that appellant understates the seriousness of the instant offense. In enacting section 4573.6, “the ultimate evil with which the Legislature was concerned was drug use by prisoners.” (*People v. Gutierrez* (1997) 52 Cal.App.4th 380, 386.) Even assuming appellant did not intend to use the syringe to inject drugs, “its mere presence” in the prison “posed the threat that some prisoner would use it for this purpose.” (*Id.* at p. 387, italics omitted.) And drug use in prison increases the likelihood for violence, thus posing a serious danger to both inmates and prison staff. In addition, appellant’s apparent drug addiction, cited by appellant as a mitigating factor, is, according to appellant’s trial counsel, a problem of longstanding, and although counsel stated that appellant has never received adequate treatment, there is, as the court indicated, nothing to indicate appellant has pursued treatment in prison. Therefore, appellant’s problems with drugs, rather than helping his cause, lend support to the conclusion that his prospects for refraining from committing other offenses are not particularly good. (Cf. *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511 [“drug addiction is not necessarily regarded as a mitigating

factor when a criminal defendant has a long-term problem and seems unwilling to pursue treatment”].)

We acknowledge that appellant suffered the most recent of his three strike convictions more than 10 years prior to his commission of the instant offense, and that the instant offense did not involve violence. But these factors and the others cited by appellant do not establish that the instant case is the extraordinary one in which departure from the three strikes law sentencing scheme is compelled. (See *People v. Ingram* (1995) 40 Cal.App.4th 1397, 1415 (*Ingram*), disapproved on another point in *People v. Dotson* (1997) 16 Cal.4th 547, 559-560 (*Dotson*) [“Society’s interest in deterring criminal conduct or punishing criminals is not always determined by the presence or absence of violence”].) Since reaching adulthood, appellant has suffered, in addition to five misdemeanor convictions, three felony convictions; two for robbery, a statutorily designated violent felony (§ 667.5, subd. (c)(9)), in one of which he personally used a firearm, and one for residential burglary, a serious crime, rife with the potential for violence (See *People v. Sparks* (2002) 28 Cal.4th 71, 82 [“entry into a home carries with it a certain degree of danger”]; *People v. Hines* (1989) 210 Cal.App.3d 945, 950-951 overruled on other grounds in *People v. Allen* (1999) 21 Cal.4th 846, 864 [risk of violence inherent in residential burglary]). Moreover, all three of appellant’s felony convictions resulted in prison sentences, he has received multiple jail sentences and grants of probation, and while on parole he committed multiple parole violations. Thus, appellant has demonstrated an inability to refrain from committing crimes despite past sanctions and attempts to rehabilitate through probation and parole.

Although the record may indicate that this matter is within the range of cases as to which the trial court had discretion under section 1385 to strike one or more of appellant’s strikes, nothing in the record compels an exercise of that discretion, and it was not irrational for the court to refuse to treat appellant as if he had not previously suffered

three strikes. Accordingly, the court did not abuse its discretion in denying appellant's *Romero* motion.

Cruel and/or Unusual Punishment

Appellant contends the 25-years-to-life sentence imposed constitutes cruel or unusual punishment in violation of article I, section 17 of the California Constitution, and cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution.⁶

California Constitution, Article I, Section 17

In *In re Lynch* (1972) 8 Cal.3d 410 (*Lynch*), our Supreme Court held a punishment may violate the California Constitution “if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*Lynch*, at p. 424, fn. omitted.) To administer the general rule, the court distilled three techniques from federal and sister-state cases: (1) “examin[ing] the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society” (*id.* at p. 425); (2) comparing “the challenged penalty with the punishments prescribed in the same jurisdiction for different offenses which, by the same test, must be deemed more serious” (*id.* at p. 426, emphasis omitted); (3) comparing the “challenged penalty with the punishments prescribed for the same offense in other jurisdictions having an identical or similar constitutional provision” (*id.* at p. 427, emphasis omitted).

In *People v. Dillon* (1983) 34 Cal. 3d 441, our Supreme Court, in holding the punishment for first degree murder was cruel or unusual punishment under the facts (*id.* at p. 450), refined the offense/offender technique. “[T]he courts are to consider not only

⁶ Respondent argues that appellant has forfeited his constitutional challenge to his sentence by failing to raise such a challenge below. We assume without deciding that appellant's claim is properly before us.

the offense in the abstract—i.e., as defined by the Legislature—but also ‘the facts of the crime in question’ [citation]—i.e., the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant’s involvement, and the consequences of his acts.” (*Id.* at p. 479.) “[T]he courts must also view ‘the nature of the offender’ in the concrete rather than the abstract: although the Legislature can define the offense in general terms, each offender is necessarily an individual.... This branch of the inquiry therefore focuses on the particular person before the court, and asks whether the punishment is grossly disproportionate to the defendant’s individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.” (*Ibid.*) Determinations of whether a punishment is cruel or unusual may be made utilizing offense/offender technique alone. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 399 (*Ayon*), disapproved on another point in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10 (*Deloza*).

“Findings of disproportionality have occurred with exquisite rarity in the case law.” (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.) Our Supreme Court has emphasized “the considerable burden a defendant must overcome in challenging a penalty as cruel or unusual. The doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are uniquely in the domain of the Legislature. Perhaps foremost among these are the definition of crime and the determination of punishment. [Citations.] While these intrinsically legislative functions are circumscribed by the constitutional limits of article I, section 17, the validity of enactments will not be questioned ‘unless their unconstitutionality clearly, positively, and unmistakably appears.’” (*People v. Wingo* (1975) 14 Cal.3d 169, 174.)

Applying the first of the *Lynch* techniques, appellant contends the sentence imposed was disproportionate as applied to both the offense and the offender. With respect to the “offense” prong of this inquiry, appellant argues that he received an overly harsh penalty for a minor, “passive, non-violent and victimless” offense which “posed no direct or immediate danger to society.” With respect to the “offender” prong of the first *Lynch* technique, he asserts that his criminal history is “not exceptional” and that the prosecution did not view him as a danger to society, as evidenced by the prosecution’s offers of plea agreements under which appellant would serve, at most, seven years.

Although appellant’s offense was not violent, his challenge to his sentence under the California Constitution, as with his challenge to the denial of his *Romero* motion, understates the seriousness of the instant offense, for the reasons stated in the previous section. In addition, appellant’s cruel-or-unusual-punishment analysis does not adequately take into account the danger posed by someone with his criminal record. Recidivism in the commission of multiple felonies poses a manifest danger to society justifying the imposition of longer sentences for subsequent offense. (E.g. *People v. Karsai* (1982) 131 Cal.App.3d 224, 242 [recidivist statute for violent sex offender did not impose cruel or unusual punishment], overruled on other grounds in *People v. Jones* (1988) 46 Cal.3d 585, 600, fn. 8.) In discussing recidivist statutes, the Supreme Court of the United States has stated: “The purpose of a recidivist statute ... [is] to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person’s most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the

amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.” (*Rummel v. Estelle* (1980) 445 U.S. 263, 284-285.) For this reason, “[H]abitual offender statutes have long withstood the constitutional claim of cruel or unusual punishment. [Citations.]” (*Ingram, supra*, 40 Cal.App.4th at p. 1413.) As this court said of the defendant in *People v. Cooper* (1996) 43 Cal.App.4th 815, 825 (*Cooper*), “The imposition of a 25-year-to-life term for a recidivist offender, like appellant, convicted of a nonviolent, nonserious felony but with at least 2 prior convictions for violent or serious felonies is not grossly disproportionate to the crime.”

Focusing next on the second of the *Lynch* techniques, appellant argues that the penalty imposed in the instant case is unconstitutionally disproportionate because it is more severe than the penalty in California for any number of offenses more severe than the instant offense, including second degree murder, punishable by 15 years to life (§ 190, subd. (a), 2d par.), and voluntary manslaughter, punishable by up to 11 years (§ 193, subd. (a)). This argument has been repeatedly rejected, including by this court in *Cooper, supra*, 43 Cal.App.4th 815: “[P]roportionality assumes a basis for comparison. When the fundamental nature of the offense and offender differ, comparison for proportionality is not possible. The seriousness of the threat a particular offense poses to society is not solely dependent on whether it involves physical injury. Consequently, the commission of a single act of murder, while heinous and severely punished, cannot be compared with the commission of multiple felonies.” (*Id.* at p. 826; accord, *People v. Gray* (1998) 66 Cal.App.4th 973, 993; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1137; *Ayon, supra*, 46 Cal.App.4th at p. 400 [“[A] comparison of Ayon’s punishment for his current crimes with the punishment for other crimes in California is inapposite since it is his recidivism in combination with his current crimes that places him under the three

strikes law”].) The sentence imposed in the instant case was neither cruel nor unusual under the California Constitution.

United States Constitution, Eighth Amendment

In *Lockyer v. Andrade* (2003) 538 U.S. 63 (*Andrade*) and *Ewing v. California* (2003) 538 U.S. 11 (*Ewing*), the United States Supreme Court reexamined its opinions on the question of the proportionality of a term-of-years sentence under the Eighth Amendment. In *Ewing*, the high court stated that the Eighth Amendment does not require strict proportionality, but only forbids extreme sentences that are grossly disproportionate to the crime. (*Ewing*, at pp. 23-24.) The court affirmed California’s power to make “a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime,” concluding “[n]othing in the Eighth Amendment prohibits California from making that choice.” (*Id.* at p. 25.) The court further noted that “[i]n weighing the gravity of [a defendant’s] offense, we must place on the scales not only his current felony, but also his long history of felony recidivism.” (*Id.* at p. 29.)

In *Ewing*, the defendant was convicted of felony grand theft for stealing three golf clubs and was sentenced to 25 years to life in state prison under the three strikes law. (*Ewing, supra*, 538 U.S. at pp. 18-20.) The defendant had four prior strike convictions for burglary and robbery as well as numerous other convictions, and committed the current offense while on parole. Justice O’Connor’s lead opinion, in which two justices joined and two others concurred, states the defendant’s sentence was “justified by the State’s public-safety interest in incapacitating and deterring recidivist felons, and amply supported by [the defendant’s] own long, serious criminal record.” (*Id.* at pp. 29-30.) The sentence reflected “a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated. The State of California ‘was entitled to place upon [the

defendant] the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State.’ [Citation.] Ewing’s is not ‘the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.’” (*Id.* at p. 30.)

In *Andrade*, the defendant was sentenced to two consecutive 25-years-to-life terms under the three strikes law based on two convictions for petty theft with a prior (§ 666), an offense which may be charged either as a felony or a misdemeanor, but which the prosecutor elected to charge as a felony, for stealing videocassettes valued at less than \$200. (*Andrade, supra*, 538 U.S. at pp. 66-68.) The defendant had suffered three strike convictions, each for first degree burglary. A five-Justice majority upheld the sentence, concluding that “[t]he gross disproportionality principle reserves a constitutional violation for only the extraordinary case.” (*Id.* at p. 77.)

Appellant contends the sentence imposed was grossly disproportionate to the instant offense, which in this portion of his argument he characterizes as “minimal,” victimless, devoid of violence or “even the threat of violence,” and “one of the most passive crimes a person can commit.” He argues that “essentially,” the court here “use[d] a minor triggering offense simply to increase the punishment for prior offenses retroactively,” in violation of constitutional double jeopardy principles. He likens the instant case to *People v. Carmony* (2005) 127 Cal.App.4th 1066 (*Carmony II*).

In *Carmony II*, the court concluded that the three-strikes-law sentence of 25 years to life was so grossly disproportionate to the violation of the sex offender registration statute at issue in that case that it “shock[ed] the conscience of the court and offend[ed] notions of human dignity” and thus constituted cruel and/or unusual punishment under both the federal and state Constitutions. (*Carmony II, supra*, 127 Cal.App.4th at p. 1073.) The “defendant had registered his correct address as a sex offender with the police one month before his birthday, as required by law ... [but] failed to ‘update’ his

registration with the same information within five working days of his birthday as also required by law.” (*Id.* at p. 1071, fn. omitted.) The defendant’s information had not changed in the interim, “and in fact [his parole agent] arrested [the] defendant at the address where he was registered.” (*Ibid.*) Nevertheless, the defendant was charged with the registration violation, a felony to which he pled guilty, and three prior strike convictions, which he admitted, and the trial court sentenced him to the mandatory three-strikes term of 25 years to life in prison. (*Id.* at pp. 1072–1074.)

The appellate court characterized the crime as the “willful failure to file a duplicate registration as a sex offender . . .” (*Carmony II, supra*, 127 Cal.App.4th at p. 1086.) It was a crime of omission—“a passive, nonviolent, regulatory offense, which causes no harm and poses no danger to the public.” (*Ibid.*) The court explained: “It is a rare case that violates the prohibition against cruel and/or unusual punishment. However, there must be a bottom to that well. If the constitutional prohibition is to have a meaningful application it must prohibit the imposition of a recidivist penalty based on an offense that is no more than a harmless technical violation of a regulatory law.” (*Id.* at p. 1072.)

The court also suggested that the sentence violated double jeopardy principles: “Given the minimal and completely harmless nature of defendant’s offense and the relatively light penalty prescribed for a simple violation of the registration requirements,^[7] defendant’s prior serious and violent felonies almost wholly account for the extreme penalty imposed on defendant. . . .^[8] [¶] When the purpose of a penalty is to

⁷ “The penalty is the lowest triad of terms prescribed for felonies, a prison term of 16 months, or two or three years.” (*Carmony II, supra*, 127 Cal.App.4th at p. 1078.)

⁸ The defendant had suffered three strike convictions: for forced oral copulation (§ 288, subd. (c)), in which he sexually assaulted a nine-year-old girl; aggravated assault (§ 245, subd. (a)(1)), in which he punched and kicked his girlfriend, causing a miscarriage; and a second aggravated assault, in which he pushed and punched another

punish recidivism and *not the current offense*, the penalty is for past crimes and ... is proscribed.” (*Carmony II, supra*, 127 Cal.App.4th at p. 1080, italics added.)

Carmony II, however, is inapposite. Appellant’s current offense is not a passive act of omission, it carries a greater maximum term—four years (§ 4573.6, subd. (a))—than Carmony’s offense, and, most significantly, it is far from a harmless technical violation. As demonstrated above, possession of a syringe in prison creates the potential of physical harm to both inmates and prison staff. Given the serious nature of the offense, it cannot reasonably be inferred that the purpose of the sentence was to punish appellant for his past crimes and not for the instant offense. Therefore, the instant offense is fundamentally different than Carmony’s offense.

In our view, the instant case is more akin to *Ewing* and *Andrade*, cases in which a person committed a relatively minor felony, but received a three-strikes sentence based on a criminal history that included multiple prior serious and/or violent felony convictions. Indeed, because of the potential for physical harm posed by appellant’s offense, that offense was more serious than the thefts at issue in *Ewing* and *Andrade*. When we “place on the scales not only [appellant’s] current felony, but also his long history of felony recidivism” (*Ewing, supra*, 538 U.S. at p. 29), we conclude appellant’s sentence is not an “extreme” sentence that is ““grossly disproportionate to the crime,”” (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 (conc. opn. of Kennedy, J.), nor does it “shock[] the conscience and offend[] fundamental notions of human dignity” (*Lynch, supra*, 8 Cal.3d at p. 424). The sentence therefore does not run afoul of either the California Constitution or the Eighth Amendment.

girlfriend, and then cut her hand with a knife. (*Carmony II, supra*, 127 Cal.App.4th at pp. 1073, fn. 4, 1080, fn. 9.)

DISPOSITION

The judgment is affirmed.