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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

FELIPE MARTINEZ,

Defendant and Appellant.

D064590

(Super. Ct. No. JCF30778)

APPEAL from a judgment of the Superior Court of Imperial County, William D. Lehman and Raymond A. Cota, Judge. Affirmed with directions to correct the abstract of judgment.

Robert Booher, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Andrew Mestman and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Felipe Martinez guilty of first degree burglary with a person present (Pen. Code, § 459)<sup>1</sup> and receiving stolen property (§ 496, subd. (a)). The trial court sentenced Martinez to four years for the burglary conviction and a concurrent two-year term for the receiving stolen property conviction.

Martinez contends (1) the trial court erred in denying his motion to suppress evidence obtained after he was detained by the police; (2) his constitutional right to due process was violated because the jury was instructed with CALCRIM No. 376; (3) insufficient evidence supports his conviction for receiving stolen property; (4) his constitutional right to equal protection was violated because he was prosecuted for receiving stolen property instead of for petty theft; and (5) the rule set forth in *In re Williamson* (1954) 43 Cal.2d 651 (*Williamson*) required that he be prosecuted for petty theft rather than for receiving stolen property. We conclude that Martinez's arguments are without merit, and we accordingly affirm the judgment. During our review of the record, we noted a typographical error in the abstract of judgment, and we therefore direct that the trial court correct the error.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

Around 10:15 p.m., on the evening of April 10, 2013, Martinez cut a screen door and entered the home of Phyllis Mulligan, a retired widow, who was asleep in her bed.

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Penal Code.

Martinez pointed a flashlight toward Mulligan from the bedroom doorway, and Mulligan woke up. Mulligan asked, "Who is there?" Martinez told her, "Don't be alarmed ma'am, I am here to help you." When Mulligan asked how Martinez could help her, he stated, "I am here. I am looking for the police." Mulligan told him that the police were not in the house, but Martinez went from room to room, ostensibly looking for the police. At one point, Martinez asked for Mulligan's name. She gave him a false name and then asked for Martinez's name, to which Martinez responded truthfully, telling her his name was Felipe Martinez.

Mulligan unsuccessfully tried to lead Martinez outside the house by stepping outside herself. Mulligan eventually returned inside and managed to lock herself in the bathroom and call 911 on her cell phone. The police arrived a short time later, and Mulligan gave them a description of Martinez. Nothing was missing from Mulligan's home. Mulligan later determined that someone had gone through items in the interior of her vehicle that was parked in her driveway.

Responding to the 911 call, Officer Cory Gustafson saw Martinez standing in the driveway of a house a couple of blocks away from Mulligan's home. Martinez was wearing a white T-shirt with a design on it. Officer Gustafson radioed the police officer who was with Mulligan to determine if Mulligan had given a more detailed description of the suspect, and he was told that the suspect was a Hispanic male wearing a white T-shirt with a design on the front. When Officer Gustafson looked back to the driveway, Martinez was no longer there.

Another officer reported seeing the suspect walking in a nearby alley, and Officer Gustafson drove to that area in his patrol car. Officer Gustafson located Martinez in the alley, activated his overhead lights, and saw Martinez running away, discarding small paper items as he ran. Martinez started walking as Officer Gustafson caught up to him, and Officer Gustafson then blocked Martinez's path with the patrol car.

Officer Gustafson ordered Martinez to the ground and placed handcuffs on him. In response to Officer Gustafson's inquiry, Martinez stated that he was not armed. Nevertheless, noting several large bulges in Martinez's pockets, Officer Gustafson asked if he could conduct a search of Martinez's pockets, saying, "Do you mind if I go in there?" Officer Gustafson thought there was good reason to believe that Martinez might be armed as he might have just committed a burglary. Martinez consented to the search.<sup>2</sup>

In Martinez's pockets was a flashlight, two cell phones and several pieces of broken Sheetrock. Officer Gustafson also located several documents tucked into Martinez's waistband: (1) a vehicle registration for Moises Perez; (2) an insurance policy for Moises Perez; (3) a letter written by Guadalupe Perez, who is Moises Perez's sister; (4) a handwritten note with Guadalupe Perez's social security number and birth date; and (5) parking citations. Some of the documents identified an address for Moises Perez as the house next door to where Officer Gustafson had originally seen Martinez standing in the driveway a few minutes earlier.

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<sup>2</sup> Although he was not certain, Officer Gustafson believed he likely had his weapon drawn during the encounter with Martinez.

Mulligan was transported to the scene, and she positively identified Martinez as the intruder who had been in her house. Martinez was arrested and taken to the police station.

Officer Gustafson went to Moises Perez's address and spoke with Perez. Perez stated that the documents found in Martinez's waistband belonged to him, as did one of the cell phones found in Martinez's pockets. The items had been in an unlocked vehicle parked in Perez's driveway. Perez did not know Martinez and had not given him permission to take items from the vehicle. The interior of Perez's vehicle had been ransacked.

At the police station, Martinez spoke to the police and admitted to having entered a home on Mulligan's street and waking up an older woman. Martinez lied and said the home belonged to a friend and he inadvertently woke up his friend's grandmother. Martinez also told a series of inconsistent lies about the documents found in his waistband. First, he told the police that the documents belonged to a friend. Next, he claimed the documents belonged to Moises Perez, and that Perez was his cousin. Finally, Martinez changed his mind about Perez being his cousin and explained he had taken items from Perez's vehicle because the items belonged to a different friend.

Martinez was charged with (1) first degree burglary with a person present (§ 459) based on his intrusion into Mulligan's home and (2) receiving stolen property (§ 496, subd. (a)) based on the items taken from Perez's vehicle. Martinez's main defense at trial was that he was extremely drunk on the evening of April 10, 2013, and accordingly lacked capacity to form the intent to steal when he entered Mulligan's home. However,

several witnesses testified that Martinez did not appear to be inebriated during the relevant timeframe. The jury found Martinez guilty on both counts. The trial court sentenced Martinez to a prison term of four years for the burglary and a concurrent two-year term for receiving stolen property.

## II

### DISCUSSION

#### A. *The Trial Court Did Not Err in Denying Martinez's Motion to Suppress*

We first examine Martinez's contention that the trial court erred in denying his motion to suppress evidence.

Prior to trial, Martinez filed a motion to suppress evidence found on his person when Officer Gustafson searched him, including the documents and the cell phones, as well as statements that he made to the police after his arrest. Among other things, Martinez argued that (1) he did not give valid consent to the search because he was intoxicated, and (2) he was arrested without probable cause at the point that Officer Gustafson handcuffed him on the ground, and the evidence resulting from the illegal arrest should therefore be excluded. The trial court conducted a suppression hearing and heard testimony from Officer Gustafson, as well as from Martinez and other defense witnesses who claimed Martinez was drunk on the evening of April 10, 2013. The trial court also viewed a videotape that Officer Gustafson recorded of his interaction with Martinez during the detention and search, noting that Martinez appeared to be lucid.

The trial court denied the motion to suppress, ruling that Martinez gave legally operative consent for the search. In the alternative, the trial court ruled that the inevitable

discovery rule applied because Mulligan arrived shortly after the search and identified Martinez as the perpetrator, leading to his arrest, during which the police officer would have conducted a valid search.

" ' "An appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] . . . [Citations.] [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review." ' " (*People v. Ayala* (2000) 23 Cal.4th 225, 254-255.) Regardless of the subsequent evidence presented at trial, "[w]hen reviewing the trial court's denial of a motion to suppress, we consider only the evidence presented to the trial court in connection with that motion." (*People v. Tolliver* (2008) 160 Cal.App.4th 1231, 1237.)

Martinez contends that he was subject to an unlawful de facto arrest without probable cause when Officer Gustafson ordered him to the ground at gunpoint and placed handcuffs on him. Martinez contends that the consent to the search he gave under those circumstances was ineffective. (See *Stern v. Superior Court* (1971) 18 Cal.App.3d 26, 30 ["Consent secured at gunpoint following an illegal arrest cannot be relied upon to render

the evidence obtained by a search and seizure pursuant thereto admissible."]; *People v. Haven* (1963) 59 Cal.2d 713, 719 ["A search or seizure made pursuant to consent secured immediately following an illegal entry or arrest, however, is inextricably bound up with the illegal conduct and cannot be segregated therefrom."].) To address this argument, we focus on whether there is any merit to Martinez's claim that he was under de facto arrest — rather than temporarily detained — at the point he was ordered to the ground and placed in handcuffs.<sup>3</sup>

"When a police officer has an objective, reasonable, articulable suspicion a person has committed a crime or is about to commit a crime, the officer may briefly detain the person to investigate. The detention must be temporary, last no longer than necessary for the officer to confirm or dispel the officer's suspicion, and be accomplished using the least intrusive means available under the circumstances. [Citations.] A detention that does not comply with these requirements is a de facto arrest requiring probable cause." (*People v. Stier* (2008) 168 Cal.App.4th 21, 26-27 (*Stier*).)

Martinez contends that because he was ordered to the ground and handcuffed, he was under de facto arrest rather than temporarily detained. However, "because a police officer may take reasonable precautions to ensure safe completion of the officer's investigation, handcuffing a suspect during a detention does not necessarily transform the detention into a de facto arrest. . . . The issue is whether the handcuffing was reasonably

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<sup>3</sup> On appeal, Martinez does not challenge the trial court's finding that he was lucid during the interaction with Officer Gustafson and therefore could give knowing and voluntary consent assuming he was not under an illegal de facto arrest.

necessary for the detention. . . . [¶] In deciding this question, courts consider the duration and scope of the detention. . . . Courts also consider the facts known to the police officer at the time of the detention to determine whether the officer's actions went beyond what was necessary to confirm or dispel the officer's suspicion of criminal activity. . . . [¶] Generally, handcuffing a suspect during a detention has only been sanctioned in cases where the police officer has a reasonable basis for believing the suspect poses a present physical threat or might flee. . . . The more specific the information an officer has about a suspect's identity, dangerousness, and flight risk, the more reasonable a decision to detain the suspect in handcuffs will be." (*Stier, supra*, 168 Cal.App.4th at pp. 27-28, citations omitted.)

Thus, for example, our Supreme Court concluded in *People v. Celis* (2004) 33 Cal.4th 667, 675 (*Celis*) that "[w]ith regard to the scope of the police intrusion, stopping a suspect at gunpoint, handcuffing him, and making him sit on the ground for a short period, as occurred here, do not convert a detention into an arrest." In that case, the police officer was faced with two suspects, either of which might flee with evidence of a drug crime if not immediately stopped at gun point and restrained with handcuffs while the officers conducted a search of the area. (*Id.* at p. 676.) As our Supreme Court observed, "[a]lthough a routine traffic stop would rarely justify a police officer in drawing a gun or using handcuffs, such actions may be appropriate when the stop is of someone suspected of committing a felony." (*Ibid.*)

Under the circumstances here, Officer Gustafson was justified in detaining Martinez by ordering him to the ground at gunpoint and handcuffing him rather than

using a less intrusive form of restraint. First, Officer Gustafson could reasonably have believed that handcuffs were necessary because Martinez had been fleeing from him by running down the alley when Officer Gustafson approached him. Restraining Martinez on the ground with handcuffs greatly reduced the risk that Martinez would continue to flee. (See *Stier, supra*, 168 Cal.App.4th at p. 28 [handcuffing has been determined to be reasonably necessary for detention when "the suspect acts in a manner raising a reasonable possibility of danger or flight"].) Second, because Officer Gustafson had observed Martinez in the vicinity of Mulligan's home, Martinez fit the description of the intruder given by Mulligan, and Martinez was fleeing, Officer Gustafson could reasonably suspect that Martinez may have recently committed a felony. As we have noted, suspicion that a suspect has recently committed a felony justifies a more intrusive detention. (*Celis, supra*, 33 Cal.4th at p. 675.) Further, in light of the bulges in Martinez's pockets and the fact that he may have recently committed a home intrusion, Officer Gustafson testified that he reasonably believed that there was a good possibility that Martinez was armed and thus posed a danger if not restrained. (See *People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1230 ["a reasonably prudent person would fear a possible burglar and burglary suspects frequently carry weapons"].) Finally, Officer Gustafson was alone with Martinez at the time of the detention and the act of handcuffing Martinez reasonably provided an additional level of officer safety to the lone police officer. (See, e.g., *Stier*, at p. 28 [noting ratio of police officers to suspects when determining whether handcuffing during detention is reasonable].) Based on all of these factors, ordering Martinez to the ground and handcuffing him was a reasonable level of

restraint to impose on Martinez while Officer Gustafson briefly detained him to investigate both whether he posed a danger to officer safety or was involved in the intrusion at Mulligan's home.

As we have concluded that Martinez was validly detained at the time he consented to the search by Officer Gustafson rather than under de facto arrest, we find no merit to Martinez's contention that the evidence obtained after he was handcuffed by Officer Gustafson should have been excluded from evidence as the product of an unlawful arrest.<sup>4</sup>

B. *The Trial Court Did Not Err by Instructing with CALCRIM No. 376*

The trial court instructed the jury with CALCRIM No. 376 as follows:

"If you conclude that the defendant knew he possessed property and you conclude that the property had in fact been recently stolen, you may not convict the defendant of First Degree Residential Burglary (Person Present) based on those facts alone. However, if you also find that supporting evidence tends to prove his guilt, then you may conclude that the evidence is sufficient to prove he committed First Degree Residential Burglary (Person Present).

"The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove his guilt of First Degree Residential Burglary (Person Present).

"Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."

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<sup>4</sup> We need not, and do not, reach the Attorney General's alternative argument that the inevitable discovery doctrine (*People v. Robles* (2000) 23 Cal.4th 789, 800) justifies the admission of the evidence obtained after Martinez was handcuffed.

Martinez contends that the trial court violated his due process rights by giving CALCRIM No. 376 because Martinez did not possess any stolen property *from the burglary of Mulligan's home*, and the only stolen items he had were *from Perez's vehicle*. Martinez contends that CALCRIM No. 376 may only be given if the defendant possesses stolen property *from the burglary with which he is charged*. Otherwise, according to Martinez, the portion of CALCRIM No. 376 instructing that a finding of guilt may be based on the fact of possessing stolen property plus "slight" supporting evidence would impermissibly allow the jury to find a defendant guilty of burglary even when the People have not proved each element of the crime beyond a reasonable doubt. As we will explain, Martinez's due process argument lacks merit.

We begin our analysis with the well-established principle that CALCRIM No. 376, and its predecessor CALJIC No. 2.15, set forth a *permissive inference*, rather than a mandatory inference. (*People v. Solorzano* (2007) 153 Cal.App.4th 1026, 1035 ["the inference that possession of stolen property creates is permissive, not mandatory"].) "The instruction does not create a mandatory presumption that operates to shift the People's burden of proof to the defense, for the instruction merely permits, but clearly does not require, the jury to draw the inference described therein." (*People v. Parson* (2008) 44 Cal.4th 332, 356 (*Parson*).) The inference is permissive, not mandatory, because the jury is instructed in CALCRIM No. 376 that it *may* infer the defendant's guilt of a particular crime based on the fact that the defendant knowingly possessed stolen

property along with other supporting evidence of the crime, but the jury is not *required* to do so.

Our Supreme Court has explained that because the instruction sets forth a *permissive* inference, it does not relieve the People of proving the crime beyond a reasonable doubt and therefore does not violate the defendant's due process rights *unless* " 'the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury.' " (*People v. Yeoman* (2003) 31 Cal.4th 93, 131.)

Put another way, "[u]se of this permissive inference comports with due process unless there is *no rational way for the jury to make the logical connection* which the presumption permits." (*People v. Snyder* (2003) 112 Cal.App.4th 1200, 1228; see *County Court of Ulster County, N. Y. v. Allen* (1979) 442 U.S. 140, 157 [an instruction on a permissive inference violates due process only when "there is no rational way the trier could make the connection permitted by the inference".]) " 'As long as the corroborating evidence together with the conscious possession could naturally and reasonably support an inference of guilt, and that inference is sufficient to sustain a verdict beyond a reasonable doubt, . . . [there is] nothing [in CALCRIM No. 376] that lessens the prosecution's burden of proof or implicates a defendant's right to due process.' " (*People v. Lopez* (2011) 198 Cal.App.4th 698, 710 (*Lopez*).

Applying this principle, case law holds that the instruction should *not* be used in nontheft-related cases because there is generally not a strong logical connection between the knowing possession of stolen property and guilt for nontheft crimes such as murder and rape. " '[P]roof a defendant was in conscious possession of recently stolen property

simply does not lead naturally and logically to the conclusion the defendant committed' a rape or murder[,]" and therefore "inclusion of nontheft offenses like rape and murder in CALJIC No. 2.15 [is] erroneous." (*People v. Prieto* (2003) 30 Cal.4th 226, 249; see *People v. Gamache* (2010) 48 Cal.4th 347, 375 [as the instruction is "inappropriate" for nontheft-related crimes, it was error to use the instruction in the context of a murder charge]; *People v. Moore* (2011) 51 Cal.4th 1104, 1130 [error to instruct with CALJIC No. 2.15 for a murder charge].) "[T]he connection between a defendant's guilt of *nontheft* offenses and his or her possession of property stolen in the crime is not sufficiently strong to warrant application of the slight corroboration rule" set forth in the instruction. (*Id.* at p. 1132, italics added.) Thus, CALCRIM No. 376 "generally is appropriate for theft prosecutions, as well as for robbery and burglary prosecutions" (*Parson, supra*, 44 Cal.4th at p. 357), but not for other types of crimes. Further, as relevant here, in theft-related cases, the instruction "is properly given in cases in which the defendant's *intent to steal* is contested." (*Parson*, at p. 356, italics added.)

Martinez argues that because he did not obtain the stolen property while burglarizing Mulligan's home, giving CALCRIM No. 376 for the burglary count is analogous to giving the instruction in a nontheft case, such as murder or rape. According to Martinez, his due process rights were violated by giving CALCRIM No. 376 for the burglary count as "there is no . . . natural and logical connection between burglary and possessing items stolen from somewhere other than the house into which a defendant entered." We disagree.

In the specific context of this case, in which Martinez walked around a single neighborhood at night entering cars and a home during a short time period, there is a *strong* logical connection between Martinez's possession of stolen property from Perez's car and the issue of whether he committed burglary in entering Mulligan's home. Specifically, the main disputed factual issue presented to the jury for the burglary count was whether Martinez entered Mulligan's home with an intent to steal. Martinez's defense was that he entered Mulligan's home because he was extremely intoxicated and confused, and that he therefore lacked an intent to steal. Evidence that Martinez stole property from a car in the same neighborhood on the same evening was strong circumstantial evidence that he was consciously engaged in the activity of committing thefts that night, and that he therefore entered Mulligan's home because he was looking for additional items to steal, and *not* because he was disoriented.<sup>5</sup> Under the

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<sup>5</sup> Although his argument is not clear, it appears that Martinez may also be suggesting that because the crime of burglary includes proof beyond a reasonable doubt of elements *in addition to* the intent to steal, it was improper to instruct the jury that Martinez's knowing possession of stolen property from Perez's vehicle, together with *slight* supporting evidence, was sufficient for a finding that Martinez burglarized Mulligan's home. Case law rejects this type of argument, pointing out that ". . . CALCRIM No. 376 makes it quite apparent that the 'slight' supporting evidence is not to be considered in isolation, but together with all of the other evidence for purposes of determining whether there is proof beyond a reasonable doubt that the defendant committed [the charged crime] . . . . The instruction expressly requires the jury to be 'convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt.' " (*Lopez, supra*, 198 Cal.App.4th at p. 711, citation omitted; see *People v. Letner* (2010) 50 Cal.4th 99, 189 ["The instruction did not invite the irrational inference that the jury could find defendants had robbed [the victim] without finding that they used force or fear to obtain her property, because the jury separately was instructed regarding the elements of both robbery and theft, and there was no suggestion in the challenged instruction that the jury need not find that all of the

circumstances, " 'the corroborating evidence together with the conscious possession [of property stolen from Perez's vehicle] could naturally and reasonably support an inference of guilt . . . beyond a reasonable doubt' " (*Lopez, supra*, 198 Cal.App.4th at p. 710), and therefore the trial court did not violate Martinez's due process rights by instructing with CALCRIM No. 376 for the burglary count.

C. *Substantial Evidence Supported the Conviction for Receiving Stolen Property*

We next examine Martinez's claim that insufficient evidence supports his conviction for receiving stolen property in connection with the documents and cell phone taken from Perez's vehicle. Specifically, Martinez contends that although he may have committed a *theft* of items from Perez's vehicle, he was not charged with that crime, and the facts of this case do not satisfy the elements required for a receiving stolen property conviction.

In considering a challenge to the sufficiency of the evidence, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. . . . We presume every fact in support of the judgment the trier of fact could have

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elements of robbery (or theft) had been proved beyond a reasonable doubt."]; *People v. Holt* (1997) 15 Cal.4th 619, 677 [the jury was instructed on all of the required elements of burglary and robbery and was expressly told that in order to prove those crimes, each of the elements must be proved, so there was "no possibility that giving the jury the additional admonition that it could not rely solely on evidence that defendant possessed recently stolen property would be understood by the jury as suggesting that it need not find all of the statutory elements of burglary and robbery had been proven beyond a reasonable doubt"].)

reasonably deduced from the evidence. . . . If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. . . . 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' "

(*People v. Albillar* (2010) 51 Cal.4th 47, 60, citations omitted.)

Section 496, subdivision (a) provides in relevant part:

"(a) Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished . . . .

"A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property."

As Martinez interprets the statutory language, to support a conviction for receiving stolen property "there must be some evidence that the property was stolen by some person other than the defendant or appellant did something more than simply steal the property." Martinez argues that the evidence was insufficient to support a conviction because he did nothing more than steal property from Perez's vehicle.

Martinez relies on outdated case law in support of his argument, citing decisions from 1925 to 1948. (*People v. Jacobs* (1925) 73 Cal.App. 334; *People v. Bausell* (1936) 18 Cal.App.2d 15; *People v. Foogert* (1948) 85 Cal.App.2d 290.) Those cases adhered to the theory that it was "logically impossible for a thief who has stolen an item of property

to buy or receive that property from himself." (*People v. Allen* (1999) 21 Cal.4th 846, 854 (*Allen*).)

However, the second paragraph of section 496, subdivision (a) was added to the statute in 1992 (Stats. 1992, ch. 1146, § 1, p. 5374), significantly changing existing law. " 'After the 1992 amendment, 'the fact that the defendant stole the property no longer bars a conviction for receiving, concealing or withholding the same property.' " (*Allen, supra*, 21 Cal.4th at p. 857.) "[O]ne who is a principal in the theft of property may be convicted either for the theft of the property or, under section 496, for *receipt* of the property." (*People v. Hinks* (1997) 58 Cal.App.4th 1157, 1165, italics added.) Thus, for example, in *Hinks*, the defendant was properly convicted of receiving stolen property when he was found with auto parts that he had stolen only moments before. (*Id.* at pp. 1159-1160.)<sup>6</sup>

As the law currently stands, even when the defendant is the thief, to obtain a conviction under the theory that the defendant *received* stolen property, only the traditional elements of receiving stolen property must be proved, which is "the property was stolen, the defendant was in actual or constructive possession of it, and the defendant

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<sup>6</sup> To support his interpretation of the statute, Martinez cites the legislative history of the 1992 amendment, which referred to an intent to provide for the prosecution of principals in the theft of property who continue to possess the property after the statute of limitations for theft has expired. Our Supreme Court has long since rejected the identical argument made by Martinez, holding that "the plain meaning of the first sentence of the 1992 amendment is that the actual thief may be convicted of violating section 496 whether or not the statute of limitations on theft has run" (*Allen, supra*, 21 Cal.4th at p. 861) and that "nothing in [the 1992 amendment's] text or its legislative history suggests an intent that the 1992 amendment be construed *not* to apply to the far more common case of the thief who is caught with the stolen goods *before* the statute of limitations on theft has run." (*Ibid.*)

knew it was stolen." (*Allen, supra*, 21 Cal.4th at p. 857, fn. 10; see *People v. Price* (1991) 1 Cal.4th 324, 464 ["A conviction for receiving stolen property may be based on evidence 'that the property in question was stolen, that the defendant was in possession of it, and that the defendant knew the property to be stolen' [citation], even though the evidence also strongly suggests that it was the defendant who stole the property."].) Here, a jury could reasonably find, based on the evidence, that (1) the items from Perez's vehicle were stolen; (2) Martinez had possession of the items; and (3) Martinez knew the items were stolen. Therefore, the evidence was sufficient to support the conviction for receiving stolen property even though Martinez received the property by stealing it himself.

D. *Martinez's Equal Protection Argument Lacks Merit*

Martinez contends that his constitutional equal protection rights were violated because he was prosecuted for receiving stolen property rather than petty theft for taking items from Perez's vehicle. Specifically, Martinez argues that because a petty theft charge would have been only a misdemeanor, and the charge of receiving stolen property was a felony, he was unlawfully treated in a disparate manner from other defendants who might only be charged with petty theft in the same circumstance. As we will explain, Martinez's equal protection argument lacks merit.

The United States Supreme Court "has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." (*United States v. Batchelder* (1979) 442 U.S. 114, 123-124 (*Batchelder*).) "Selectivity in the enforcement of criminal

laws is, of course, subject to constitutional constraints" but "[t]he Equal Protection Clause prohibits selective enforcement 'based upon an unjustifiable standard such as race, religion, or other arbitrary classification.' " (*Id.* at p. 125 & fn. 9.) Martinez's equal protection claim fails because he does not identify any improper consideration motivating the decision to prosecute him under the statute criminalizing receiving stolen property rather than petty theft.

Martinez's main complaint is that he is being treated unfairly because the People chose to prosecute him for the crime with the greater penalty. This argument fails because the United States Supreme Court has explained that although "[t]he prosecutor may be influenced by the penalties available upon conviction, . . . this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause." (*Batchelder, supra*, 442 U.S. at p. 125.) "Just as a defendant has no constitutional right to elect which of two applicable . . . statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced." (*Ibid.*)

In sum, because Martinez has not identified discrimination based on any impermissible classification, and the People were entitled to make charging decisions based on the associated criminal penalty, Martinez has not established any violation of his equal protection rights.

E. *The Williamson Rule Does Not Apply Here*

Martinez contends that he should have been prosecuted for petty theft rather than receiving stolen property based on the rule set forth in *Williamson, supra*, 43 Cal.2d 651.

"Under the *Williamson* rule, if a general statute includes the same conduct as a special statute, the court infers that the Legislature intended that conduct to be prosecuted exclusively under the special statute. In effect, the special statute is interpreted as creating an exception to the general statute for conduct that otherwise could be prosecuted under either statute. . . . 'The rule is not one of constitutional or statutory mandate, but serves as an aid to judicial interpretation when two statutes conflict.' . . . 'The doctrine that a specific statute precludes any prosecution under a general statute is a rule designed to ascertain and carry out legislative intent.' " (*People v. Murphy* (2011) 52 Cal.4th 81, 86, citations omitted (*Murphy*).

"Absent some indication of legislative intent to the contrary, the *Williamson* rule applies when (1) 'each element of the general statute corresponds to an element on the face of the special statute' or (2) when 'it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute.' . . . In its clearest application, the rule is triggered when a violation of a provision of the special statute would inevitably constitute a violation of the general statute." (*Murphy, supra*, 52 Cal.4th at p. 86, citation omitted.)

Martinez argues that the statute criminalizing petty theft is the *special statute* and the statute criminalizing receiving stolen property is the *general statute*. Further, he contends that a violation of the more specific statute (i.e., receiving stolen property) will inevitably constitute a violation of the petty theft statute, so that under the *Williamson* rule, the Legislature must have intended that a defendant in his position should be prosecuted for petty theft rather than receiving stolen property.

Without even considering whether the premises of Martinez's argument are sound, we reject the argument for the fundamental reason that the Legislature has already expressly indicated its intent on the issue of whether a defendant may be prosecuted for receiving stolen property when he could also be prosecuted for petty theft. In the statute making it a crime to receive stolen property, the Legislature specifically stated that "[a] principal in the actual theft of the property may be convicted pursuant to this section." (§ 496, subd. (a).) With these words, the Legislature plainly indicated that it did not intend that the theft statutes should take precedence over the statute criminalizing receiving stolen property. Indeed, our Supreme Court has interpreted the statutory language in precisely that way, stating that "section 496[, subdivision (a)] permits a 'thief in fact' to be convicted of receiving the stolen property." (*People v. Ceja* (2010) 49 Cal.4th 1, 6.)

F. *Correction of a Clerical Error in the Abstract of Judgment*

During our review of the appellate record, we noted that due to a clerical error the abstract of judgment does not correctly reflect the sentence that the trial court pronounced on the record and that is reflected in the corresponding minute order. Specifically, the abstract of judgment incorrectly states that the court imposed a four-year sentence for *receiving stolen property* and the two-year concurrent sentence for *burglary*. However, the trial court stated at the sentencing hearing that it was sentencing Martinez to prison for a four-year term for the *burglary* conviction, and that it was imposing a concurrent two-year term for *receiving stolen property*.

The appellate court has the authority to order a correction of clerical error in the abstract of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) We accordingly order that the abstract of judgment be modified to correctly reflect a four-year sentence on the burglary conviction and a two-year concurrent sentence on the conviction for receiving stolen property.<sup>7</sup>

#### DISPOSITION

The trial court is directed to amend the abstract of judgment to reflect a four-year sentence on the burglary conviction and a two-year concurrent sentence on the conviction for receiving stolen property. The trial court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.

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<sup>7</sup> We brought the error to the attention of the parties, and they expressed no objection to correcting the error.