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

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN LAGOD,

Defendant and Appellant.

F062741

(Super. Ct. No. BF134605A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. Charles R. Brehmer, Judge.

Eric Russell Cioffi, 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, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Wiseman, Acting P.J., Detjen, J. and Franson, J.

A jury convicted appellant, Jonathan Lagod, of the offense commonly known as petty theft with a prior (Pen. Code, § 666, subd. (a)), and in a separate proceeding, the court found true enhancement allegations that appellant had served four separate prison terms for prior felony convictions (Pen. Code, § 667.5, subd. (b)). The court struck all four prior prison term enhancements pursuant to Penal Code section 1385 and imposed a prison term of two years.

On appeal, appellant's sole contention is that the court erred in excluding evidence offered to impeach a prosecution witness, viz., evidence that the witness had suffered a prior misdemeanor conviction. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### ***Facts***

At approximately 8:45 p.m., on November 9, 2010, Juan Martinez, a “[l]oss prevention associate” at a Home Depot store (the store), saw appellant enter the “tool aisle” of the store, pick up a propane bottle and a wrench set, and continue walking down the aisle, looking at other merchandise.<sup>1</sup> At that point, Martinez made a call on his cell phone to his partner, Joseph Hughes, who was in an office in the store, monitoring the store's video surveillance system, and asked Hughes to record appellant's movements with the store video surveillance camera while he (Martinez) ““trail[ed] behind.”” Hughes told Martinez that he (Hughes) had a clear view of appellant, and Martinez “backed off” so appellant could not see him. At that point, Martinez was approximately 100 feet away from, and could not see, appellant.

Hughes testified he saw appellant pick up two packages, each containing 10 sanding disks, and then remove the disks from one package and place them in the other package. Hughes further testified he informed Martinez by cell phone of this.

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<sup>1</sup> Except as otherwise indicated, our factual statement is taken from Martinez's testimony.

Martinez testified the sanding disks were packaged in a cardboard box. The disks were “loose.” They “[were] not covered by any type of material[.]” If one opened the box, one “could just pull them out[.]”

After Hughes informed Martinez of appellant’s manipulation of the sanding disk packages, Martinez saw appellant walk into the “plumbing aisle,” pick up a “grate”—an item designed to be placed in the bottom of a rain gutter to keep debris out of the gutter—peel the bar code sticker off the grate, and affix the sticker to the wrench set, so as to cover the bar code on the wrench set.

Appellant went to the cashier, made payment and walked out of the store with the items he had purportedly purchased, including the wrench set and the one package containing 20 sanding disks. Martinez followed appellant outside the store, identified himself as an “asset protection specialist” employed by the store, and directed appellant to accompany him back inside.

Appellant went with Martinez to an office in the store. There, appellant said “he was sorry,” and stated, “I made stupid decisions.”

Appellant had in his possession the wrench set and the package of sanding disks containing the extra 10 disks. He also had a sales receipt that showed he paid \$12.57 for the wrench set, and that he paid for one 10-item package of sanding disks. The actual price of the wrench set was approximately \$54.00.

City of Bakersfield Police Officer Clint Blackburn testified to the following: On November 9, 2010, in response to a call, he went to the store, where he made contact with appellant. Subsequently, after appellant had been placed in a patrol car and Blackburn had “*Mirandize[d]*”<sup>2</sup> him, appellant, in response to questioning, “said he had retagged [the wrench set] to a lower price” because “[h]e wanted to pay a low price for that item,” and stated that “he was sorry” that he had removed sanding disks from one package and placed them in another. Blackburn prepared a report approximately three and one-half

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<sup>2</sup> See *Miranda v. Arizona* (1966) 384 U.S. 436.

hours after speaking with appellant, and “[t]he only direct quote [he] put in [his] report was when [appellant] stated, ‘I’m sorry,’ unquote.”

The store closes at 9:00 p.m. Warnings go out over the public address system at 8:45 p.m. and 8:50 p.m. that the store is about to close. The sales receipt indicated that the time of the transaction was 9:01 p.m.

During the time Martinez observed appellant, appellant did not appear to be “in a hurry.” He was not running, nor was he “walking fast.”

The video recorded by Hughes was played for the jury and introduced into evidence. Hughes testified the camera he was using did not “look into the plumbing area” where, according to Martinez’s testimony, appellant removed the bar code sticker from the grate and placed it on the wrench set.<sup>3</sup>

The defense presented no evidence.

### ***Evidentiary Ruling***

Prior to Martinez testifying, the defense informed the court that it wished to introduce, for impeachment purposes, evidence that on July 7, 2006, Martinez suffered a conviction of violating Vehicle Code section 20002 (misdemeanor hit-and-run driving), “based on the argument that [that offense] is a crime of moral turpitude[.]”

The defense relied chiefly on *People v. Bautista* (1990) 217 Cal.App.3d 1, which held that felony hit-and-run driving (Veh. Code, § 20001) involves moral turpitude, and that therefore evidence of a conviction of that offense could be introduced to impeach a witness who had suffered such a conviction. The trial court here ruled the proffered evidence inadmissible, finding *Bautista* distinguishable because Martinez had been convicted of *misdemeanor* hit-and-run driving. In addition, the court ruled the evidence inadmissible under Evidence Code section 352.

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<sup>3</sup> The video was not available for viewing by this court.

### ***Defense Closing Argument***

Defense counsel, in closing argument to the jury, argued, inter alia, as follows: There were warnings at 8:45 p.m. and 8:50 p.m. that the store was about to close, “so it’s reasonable to suggest that [appellant] was probably in a hurry.” Appellant “wasn’t running around,” but “the circumstances showed it was reasonable he could have been rushed for time.” The video showed appellant “fumbling with the merchandise.” “It’s not unreasonable to suggest that he was looking through the boxes to see if these were the particular types of sanding paper that he needed. [¶] ... It’s reasonable to suggest that it’s not unusual for someone to open up the box and look at what’s inside. [¶] Mr. Martinez testified that the items were easily removed from the box. There is no plastic wrap inside the cardboard. Simply open the cardboard box, pull out the sanding disks. It’s very easy to pull them out. [¶] It’s certainly reasonable under the evidence that [appellant] could have made a mistake. This was not proved. Just because 20 pads ended up in one box does not prove that he intended to steal. It is not proof beyond a reasonable doubt that he had an intent to commit theft.”

Defense counsel also argued that there was no video evidence appellant removed the bar code sticker from the grate and placed it on the wrench set, and that Martinez’s testimony on this point was not credible for various reasons, including that Martinez’s “sole job is loss prevention ....”

### **DISCUSSION**

In *People v. Wheeler* (1992) 4 Cal.4th 284 (*Wheeler*), our Supreme Court held that a person can be impeached in a criminal case by evidence of prior misdemeanor conduct that involves moral turpitude, provided such evidence is not excluded under Evidence Code section 352. (*Wheeler, supra*, 4 Cal.4th at pp. 295–297 & fn. 7.) “Misconduct involving moral turpitude may suggest a willingness to lie ....” (*Id.* at p. 295.) The *Wheeler* court also stated that evidence of a misdemeanor conviction remains “inadmissible hearsay when offered to impeach a witness’s credibility.” (*Id.* at p. 300, fn.

omitted.) However, Evidence Code section 452.5, enacted four years after *Wheeler* was decided, creates an exception to this application of the hearsay rule, “allowing admission of qualifying court records to prove not only the fact of conviction, but also that the offense reflected in the record occurred.” (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1460.)

Appellant argues the court erred in ruling evidence of Martinez’s 2006 conviction of misdemeanor hit-and-run driving inadmissible. The People disagree. We need not resolve this dispute, however, because any error in the exclusion of the proffered evidence was harmless.

We review errors in the application of the “ordinary rules of evidence” under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Marks* (2003) 31 Cal.4th 197, 226-227.) Under the *Watson* standard, if a trial court erroneously excludes evidence, the defendant must show on appeal that it is reasonably probable he or she would have received a more favorable result had that evidence been admitted. (*Watson*, at p. 836; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1125.)

Noting that Martinez was the only witness to testify that appellant, while in the plumbing aisle, removed the bar code price sticker from the grate and placed it on the wrench set, appellant argues, “If Martinez was shown to be untruthful, the jury would have been left with one incident—the removal of the sandpaper.”<sup>4</sup> Evidence of that incident, appellant argues, was “innocuous” because (1) “[a]ppellant did not shop lift, he went to the cashier to pay,” and (2) that evidence supported his defense that although he removed all 10 sanding disks from one package, placed them in another, presented the single package containing 20 disks to the cashier for purchase, and paid for only one 10-disk package, he did so inadvertently, because “he was in a hurry and made a mistake.” Therefore, appellant suggests, absent the purported error—the exclusion of the proffered

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<sup>4</sup> We note that the video evidence apparently did not show appellant’s movements in the plumbing aisle.

impeachment evidence—“it is reasonably probable the jury would have accepted appellant’s version of events.” We disagree.

First, the major premise of appellant’s argument is false. Aside from Martinez’s testimony, the People are not “left with” *only* the video evidence and Hughes’s testimony regarding appellant manipulating the sanding disks. Officer Blackburn testified that appellant admitted “retag[ging]” the wrench set, although we recognize the officer’s credibility on this point is subject to attack based on his failure to note this point in his police report.

Second, appellant’s contention that the evidence supports his claim that he was in a hurry because the store was about to close is undercut by the evidence that shows, as defense counsel conceded in closing argument, that appellant was not walking particularly quickly in the store. But third, and more fundamentally, appellant’s claim that he was rushing to buy the merchandise before the store closed does not persuasively explain his conduct, viz., removing 10 disks from one package, placing all 10 in another package, and presenting that package to the cashier for purchase. Appellant’s claim that his conduct was the inadvertent product of haste is, in our view, not plausible.

Finally, we note that it is uncontroverted that *somehow* the bar code sticker for a grate that cost \$12.57 was placed on a wrench set priced at approximately \$54.00 in such a way as to cover the wrench set bar code, and that appellant had already picked up the wrench set and had it with him when he entered the part of the store where the grate was located. The theory of appellant’s defense necessarily implies that it was mere coincidence that in addition to inadvertently removing all the disks from one package and placing them in another, he also happened to choose to purchase a set of tools (1) on which an incorrect price sticker had been placed which made it appear the set cost much less than it actually did, and (2) which he had in his possession while he was in the section of the store where the incorrect price sticker came from. On this record, although it is possible to infer that appellant accidentally placed the entire contents of one package

of sanding disks inside another package and presented that for payment, and that it was not appellant who placed the incorrect bar code sticker on the wrench set he presented for purchase, it is not, in our view, reasonably probable that the jury would have drawn this inference if the evidence of Martinez's prior misdemeanor conviction had been admitted. Therefore, any error in the admission of that evidence was harmless.

**DISPOSITION**

The judgment is affirmed.