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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MAURICE LAMAR EZELL,

Defendant and Appellant.

F068132

(Super. Ct. No. BF148568A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Michael E. Dellostritto, Judge.

Meredith J. Watts, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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Maurice Lamar Ezell (defendant) was charged by information with unlawfully taking a vehicle (Veh. Code, § 10851, subd. (a); count 1), receiving a stolen vehicle (Pen. Code,¹ § 496d, subd. (a); count 2), recklessly evading a peace officer (Veh. Code, § 2800.2; count 3), kidnapping during the commission of a carjacking (§ 209.5; count 4), kidnapping (§ 207, subd. (a); count 5), carjacking (§ 215, subd. (a); count 6), making a criminal threat (§ 422; count 7), misdemeanor hit and run (Veh. Code, § 20002, subd. (a); count 8), and misdemeanor obstruction of a peace officer (§ 148, subd. (a)(1); count 9). As to each felony count, it was further alleged defendant had served a prior prison term. (§ 667.5, subd. (b).) A jury subsequently convicted him as charged on counts 1, 3, 6, 8, and 9; acquitted him on counts 4 and 7; and convicted him of the lesser included offense of false imprisonment with violence or menace on count 5.² Defendant admitted the prior prison term allegation. On September 16, 2003, he was sentenced to a total term of 11 years four months in prison. The sentence included a one-year consecutive term for the prior prison term enhancement.

On November 4, 2014, voters enacted Proposition 47, “the Safe Neighborhoods and Schools Act” (Proposition 47 or the Act), which went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) The Act reduced certain felony or wobbler drug- and theft-related offenses to misdemeanors, unless committed by an ineligible defendant. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108; see § 1170.18, subd. (i).) Insofar as is pertinent here, it also provided a mechanism by which a person who had completed his or her sentence for a conviction of a felony that was made a misdemeanor by the Act, could apply to the trial court that entered the judgment of conviction and have the felony offense designated as a misdemeanor. (§ 1170.18,

¹ Further statutory references are to the Penal Code unless otherwise stated.

² The jury returned no verdict on count 2, which was charged in the alternative to count 1 and dismissed on the People’s motion.

subds. (f), (g).) While defendant's appeal was pending, the conviction underlying the prior prison term enhancement imposed in the current case was designated a misdemeanor under the Act.

On appeal, we hold: (1) Defendant's carjacking conviction is supported by substantial evidence, and (2) A previously imposed sentence enhanced by a section 667.5, subdivision (b) prior prison term is not altered by the granting of a Proposition 47 application reducing the felony that gave rise to that prior prison term to a misdemeanor. The Act does not so operate retroactively. Accordingly, we affirm.

FACTS

I

PROSECUTION EVIDENCE

At approximately 10:30 a.m. on October 5, 2012, Dr. Meghan Hamill, a psychologist for the Department of Corrections and Rehabilitation, pulled into a Jiffy Lube parking lot on the corner of H and 24th Streets in Bakersfield. She saw defendant, who was wearing dark clothing, and had long dreadlocks and a Rastafarian hat. He looked at her, then leaned on the railing next to where cars went into the Jiffy Lube. Hamill's instinct told her something was wrong, and she asked the Jiffy Lube attendant not to leave her keys in the car. She subsequently watched defendant for five or 10 minutes, during which time he was kind of scanning and watching. It did not seem to her to be normal behavior, because he was not waiting for his car.

Around the same time, Jerry Crafton was fueling his red Ford F350 pickup at the Chevron in the same complex. When he finished, he went inside the store to get a receipt, leaving the doors of the truck unlocked and the key in the ignition. Hamill saw defendant get into the truck and drive southbound toward 23d Street. Crafton exited the store to see his truck making a fast turn onto 23d Street. The police were called.

Around noon, Bakersfield Police Officer Underhill received a broadcast from a sergeant who was following a red pickup that had been reported stolen earlier in the day.

Because the sergeant was in an unmarked car, Underhill responded in his marked unit. Underhill made contact with the other vehicles in the area of K Street and 11th Street, took up a position directly behind the red pickup, and activated his lights and siren. A pursuit ensued, with the truck being driven well above the speed limit, occasionally running stop signs, and exercising no caution at the various intersections.

They turned into an alley near Brundage Lane and South N Street. The pickup struck a fence, then drove into the backyard of a house and stopped. Defendant got out of the passenger side; made eye contact with Underhill, who identified himself as a police officer and ordered him to stop; and fled on foot. Underhill followed, also on foot. Defendant ran directly into the traffic lanes on Brundage. He ran through a car wash, where employees tried to tackle him, then back toward P Street. Defendant then jumped into the window of a vehicle that was stopped at a red light.³

Bakersfield Police Officer Shaff and his partner, Officer Setser, responded to the area. Shaff observed defendant on Brundage, running eastbound in the roadway toward P Street. Defendant — who was being pursued by several officers on foot, as well as people who were not in uniform — dove head first through an open window on the passenger side of a white Ford Taurus, which was among several cars in the turn lane on Brundage at the intersection of P Street.⁴ Setser saw the vehicle lunge forward a bit, then turn into oncoming traffic lanes and make a quick northbound turn onto P Street. Defendant was sitting forward in his seat, looking around and in the direction of Shaff's vehicle, as well as toward Precious Brown, the driver of and only other person in the Taurus.

³ Among the items subsequently found in the pickup was a hat with dreadlocks sewn into it.

⁴ Shaff believed the people not in uniform might have been detectives. Setser also believed those in pursuit were officers, although at least one may have been wearing plain clothes that day.

Brown recalled seeing squad cars pass with their lights activated. She was in the left-turn lane, waiting to turn onto P Street. There was a car in front of her and cars on the side of her. After she saw the squad cars, she saw a Black male running from two Hispanic people dressed in brown shirts and blue jeans. She did not see any police officers chasing this person, and did not see anything in the Hispanic men's hands.

Brown continued waiting for the light to change, but then she heard someone yell. When she looked in her mirror in the direction from which the voices were coming, one of the Hispanic men was on the ground, and the Black man was coming through her window. She hit the button to make sure the doors were locked. She had automatic windows that she could access from her driver's door, but could not get the windows up fast enough to prevent the Black man from coming in her car. Everything happened very fast. The man jumped head first into the passenger side and immediately told her to drive or he would kill her.⁵ Although he did not say anything about a weapon or show her one, she was afraid and "just hit the gas." She just "went numb." She drove around the car in front of her, turned left, and went northbound on P Street. She could not remember whether the light turned green or if cars were coming at her. Brown explained that she was in shock and unable to concentrate. Once Brown made the turn onto P Street, she was not in control of the vehicle. She had her hands up and the man was using his left hand to steer from the passenger side. She told him that she had a daughter and to just let her go and he could have the car. He said he did not want it and to just drive. She remembered pressing the gas and then letting off, because she was debating whether she should roll out of the car. She decided against it, because she feared getting hit by other vehicles. Brown did not look at the man, her focus was on the officer she saw behind her. She denied ever having met defendant, or knowing anyone named Maurice Ezell or Meisha McMurray.

⁵ She distinctly remembered him saying this; it was not possible he told her to drive and said "they" were trying to kill him.

Shaff activated his overhead lights and siren and positioned his patrol vehicle directly behind the Taurus. On P Street, Shaff was about two car lengths behind the Taurus, and was able to partially see inside. The Taurus was being driven at a moderate speed, and it did not appear to Shaff as if anyone was yanking the steering wheel.

Setser also described Brown as driving the speed of traffic “almost like normal,” but on the far right-hand side of the roadway, which was not normal. Setser was able to see into the Taurus’s interior from the rear, but did not remember seeing where the occupants’ hands were. He could see the tops of Brown’s shoulders and her neck and head. He did not see her hands up.

The Taurus turned eastbound onto 6th Street, then northbound onto Q Court. It stopped directly in front of a residence on Q Court, and defendant got out and ran, leaving Brown in the car.

Shaff and other officers chased defendant through the yard. When defendant fell, Shaff yelled at him to get on the ground. Instead of complying, defendant ran toward Shaff. A struggle ensued, and eventually the officers were able to get defendant face down on his stomach and place him in handcuffs.

Shaff spoke to Brown at the scene. She was shaking and hysterical and could barely talk. Setser also made contact with her after defendant was in custody. He described her as terrified. She was able to talk to him, but was extremely distraught. She told Setser that she was driving the vehicle. She never said anything about defendant grabbing the wheel and controlling the car. She said she did not know where she was supposed to drive, and defendant was telling her where to turn.

Shaff also spoke to defendant after reading him his rights. Defendant admitted stealing the red truck. He said he did it because he was “a dope fiend.” He also admitted he knew the officers were behind him during both the vehicle and the foot pursuits. He said he was trying to get away from them, as well as people chasing him who were not in uniform. When Shaff asked about him diving into Brown’s car, he said he asked Brown

to go, because, he told her, he was being chased by people with guns. He denied threatening Brown, and said he had never met her before.

II

DEFENSE EVIDENCE

Meisha McMurray was a friend of defendant's who had frequent contact with him, both before and after he was in jail. She never talked to him about the facts of this case, however. McMurray had known Brown for almost two years. In 2012, they associated on a social basis on multiple occasions when defendant was with McMurray. In McMurray's opinion, Brown would have recognized defendant in October 2012.

Defendant testified and admitted being convicted in 2010 of possessing a weapon while incarcerated. With respect to the charged offenses, defendant admitted taking the red pickup for a "joy ride," attempting to drive away from the police at speeds faster than other cars were going, and crashing the truck.⁶ He crashed through a fence and into someone's yard, and someone came out with a pistol. A group of people tried to chase him, so he ran across the street. These people — including the one with the pistol — were civilians. Defendant was aware a police officer was chasing him, but the officer was about two blocks behind him when he crashed.

As defendant approached Brundage and P Street, he recognized Brown, dove into the car, and asked her for help. He told Brown the person chasing him had a gun and begged her to help him out, and she drove. Defendant did not threaten her, grab the steering wheel, or tell her where to turn.

When they reached P Street, Brown got "pretty frantic." She could hear the police and asked what was going on. She and defendant both were "freaking out," and defendant told her that he was not going to get her into trouble. Brown was concerned she would be arrested, and she mentioned she had a job and children. As soon as the

⁶ Defendant denied telling Shaff he took the truck because he was a "dope fiend."

police got behind them, defendant told her that she could stop and let him out, and he got out of her car. Once he was arrested, he told the officers he did not know Brown, because he did not want to get anybody in trouble. When he got into Brown's car, it was not his intent to take the car or kidnap her. He simply wanted to get away from the man with the pistol and the rest of the "angry mob" that was chasing him.

DISCUSSION

I

THE CARJACKING CONVICTION

Defendant contends his carjacking conviction must be reversed for insufficient evidence. The applicable legal principles are settled. The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is "reasonable, credible, and of solid value." (*People v. Johnson, supra*, at p. 578.) An appellate court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367). Furthermore, an appellate court can only reject evidence accepted by the trier of fact when the evidence is inherently improbable and impossible of belief. (*People v. Maxwell* (1979) 94 Cal.App.3d 562, 577.) "Where the circumstances support the trier of fact's finding of guilt, an appellate court cannot reverse merely because it believes the evidence is reasonably reconciled with the defendant's innocence. [Citations.]" (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1747.)

“ ‘Carjacking’ is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear.” (§ 215, subd. (a).) In other words, “[a] conviction for carjacking requires proof that (1) the defendant took a vehicle that was not his or hers (2) from the immediate presence of a person who possessed the vehicle or was a passenger in the vehicle (3) against that person’s will (4) by using force or fear and (5) with the intent of temporarily or permanently depriving the person of possession of the vehicle. [Citations.]” (*People v. Magallanes* (2009) 173 Cal.App.4th 529, 534.)

The robbery statute (§ 211) also contains a “felonious taking” requirement. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1056 (*Lopez*)). That component has been construed, in turn, “to include two necessary elements: caption or gaining possession of the victim’s property, and asportation or carrying away the loot. [Citations.]” (*Ibid.*) Although the California Supreme Court has found the analogy between robbery and carjacking to be “ ‘imperfect’ ” (*ibid.*), it has concluded “that in adopting the phrase, ‘felonious taking,’ from the robbery statute, the Legislature intended that those same words within section 215 be given the same construction” (*id.* at p. 1063).

Relying primarily on *Lopez*, defendant claims that, because Brown “remained continuously in possession and control of her car,” there was “no ‘caption’ nor ‘asportation’ ” of the vehicle as required for carjacking. He says that in order to have the requisite felonious taking, the carjacker must “drive the vehicle away.”

People v. Duran (2001) 88 Cal.App.4th 1371 (*Duran*) holds otherwise. There, Duran crashed his car while fleeing after having robbed a drugstore. When another motorist, Beardsley, stopped to help, Duran pulled a gun on him, forced him back into Beardsley’s car, and ordered him to drive Duran away from the scene. Beardsley’s wife

and infant son were in the vehicle, and Duran threatened the baby. Beardsley drove Duran around until Duran asked to be dropped off. (*Id.* at pp. 1374-1375.) Duran was convicted on three counts of kidnapping during a carjacking, but argued the convictions could not stand because he never succeeded in getting the car away from its owner, and carjacking requires a felonious taking of a motor vehicle. (*Id.* at p. 1375.)

In disagreeing, the *Duran* court found it “persuasive that other jurisdictions have affirmatively ruled that a ‘taking’ can occur when the victim remains with the car under other similar carjacking statutes. [Citations.]” (*Duran, supra*, 88 Cal.App.4th at p. 1376.) In addition, the court was “substantially aided” (*ibid.*) by this court’s rationale in *People v. Alvarado* (1999) 76 Cal.App.4th 156, 160 (*Alvarado*), wherein we examined the legislative history of section 215 with respect to the felonious taking requirement. *Duran* concluded: “Here, we adopt the sound reasoning of *Alvarado* and similarly hold that the Legislature intended that the well-established robbery definition of dominion and control be applied to the new crime of carjacking. When Duran entered the car he threatened to kill the entire family if Beardsley did not take him where he wanted to go. As Beardsley drove the car, Duran told him at gunpoint when to speed up and slow down, when to get on the freeway and when to get off, as well as where and when to turn. A taking occurred when Duran imposed his dominion and control over the car by ordering Beardsley to drive; Beardsley’s response in driving the car where Duran directed him provided the asportation element of the completed crime. [¶] There was sufficient evidence on which the jury could find that a felonious taking had taken place under the carjacking statute.” (*Duran, supra*, at p. 1377.)

Defendant argues *Lopez* says “a completed carjacking occurs whether the perpetrator drives off with the carjacking victim in the car or forcibly removes the victim from the car before driving off” (*Lopez, supra*, 31 Cal.4th at p. 1062), and cites *Duran* as an example of the first scenario. He also points out that *Lopez* disapproved our opinion in *Alvarado*, on which *Duran* relied. (*Lopez, supra*, 31 Cal.4th at p. 1063, fn. 2.) From

this, he posits that because it avoided discussing dominion and control, *Lopez* implicitly disapproved the theory an accused could be convicted of carjacking even if he did not himself both take possession of the car and drive it away.

We are not convinced. The language of cases must be analyzed and understood in the context of their facts. (*In re Marriage of Davis* (2015) 61 Cal.4th 846, 861; *People v. Walker* (1983) 146 Cal.App.3d 34, 40, fn. 6.) In *Lopez*, the victim was seated in his van in a parking lot when the defendant ordered him out at gunpoint. When the victim complied, the defendant got into the van. The victim returned to the vehicle to retrieve some items; the defendant pointed the gun at him and pulled the trigger twice, but the gun did not fire. The defendant then fled. (*Lopez, supra*, 31 Cal.4th at p. 1055.) The defendant was convicted, inter alia, of carjacking. (*Ibid.*) The issue confronting the state Supreme Court was whether a completed carjacking requires actual movement of a motor vehicle. (*Ibid.*) The portion of *Lopez* quoted by defendant, *ante*, was part of a discussion of the Attorney General's argument that movement of the vehicle should be a sufficient, but not necessary, condition for carjacking. (*Id.* at p. 1062.) Given the facts and issue confronting it, the *Lopez* court had no occasion or need to address dominion and control. It never disapproved *Duran*'s conclusion in that regard, and only disapproved *Alvarado* "to the extent it suggests that the victim's flight from the vehicle satisfies the asportation requirement of carjacking." (*Lopez, supra*, at p. 1063, fn. 2.) *Lopez* does not require reversal of defendant's carjacking conviction.

Unless physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) " " "To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury

to determine the credibility of a witness” ’ ’ ” (*People v. Barnes* (1986) 42 Cal.3d 284, 306.)

Brown’s testimony was neither physically impossible nor inherently improbable. If credited by the jury, it was sufficient to establish both her car’s movement (asportation) and defendant’s imposition of his dominion and control over the vehicle (caption). (See *Duran, supra*, 88 Cal.App.4th at p. 1377; *People v. Gray* (1998) 66 Cal.App.4th 973, 985; cf. *People v. Hill* (1998) 17 Cal.4th 800, 852.) It was also sufficient to establish the requisite use of fear to accomplish the taking. (See *People v. Magallanes, supra*, 173 Cal.App.4th at p. 534.)

Defendant points to reasons he claims the jury “obviously” determined Brown was an unreliable witness, such as defendant’s acquittal on some of the other charges, and the fact pursuing officers neither saw Brown’s hands up nor defendant controlling the steering wheel as Brown claimed. The jury’s verdicts can be explained by reasons other than a finding Brown lacked credibility, however, and the officers never testified they could completely see inside the car. Moreover, the jury reasonably could have attributed discrepancies between Brown’s testimony that she locked the car doors and started to roll up the windows and what was apparently shown by a photograph of the vehicle admitted into evidence, and between Brown’s statements at the scene and testimony at trial, to Brown’s shock and emotional state at the time of the incident.

“ ‘In reviewing a sufficiency of evidence challenge, we view the evidence in the light most favorable to the verdict and determine whether *any* rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.’ [Citation.]” (*People v. Davis* (2013) 57 Cal.4th 353, 357; see *People v. Bolin* (1998) 18 Cal.4th 297, 331 [reversal for insufficient evidence unwarranted unless it appears “ ‘upon no hypothesis whatever’ ” does sufficient substantial evidence to support conviction exist].) Sufficient substantial evidence exists here.

II

PROPOSITION 47'S EFFECT ON PRIOR PRISON TERM ENHANCEMENTS

A. Background

With respect to each felony count, the information alleged, and the trial court found, upon defendant's admission, that defendant had incurred the following enhancement under section 667.5, subdivision (b): A conviction for violating Health and Safety Code section 11350, subdivision (a), suffered on or about December 10, 2002, in Kern County Superior Court case No. BF100707D.

Defendant was sentenced on September 16, 2013. In pertinent part, the trial court impliedly designated count 6 as the principal term, imposed the upper nine-year term for the underlying offense, and enhanced the sentence by one year pursuant to section 667.5, subdivision (b).

Proposition 47 went into effect on November 5, 2014. (Cal. Const., art. II, § 10, subd. (a).) On July 6, 2015, defendant filed a petition to have his conviction in case No. BF100707D, as to which defendant had completed his sentence, reduced to a misdemeanor pursuant to section 1170.18, subdivisions (f) and (g). The district attorney agreed defendant was entitled to relief, and, on July 22, 2015, the court granted the petition.⁷ It reclassified defendant's conviction for violating Health and Safety Code section 11350, subdivision (a) as a misdemeanor "for all purposes," (capitalization omitted) but expressly stated that no further sentence modification was ordered.

The issue before us is whether the additional one-year term imposed by the trial court pursuant to section 667.5, subdivision (b), for defendant's prior conviction in case No. BF100707D must now be stricken because, subsequent to defendant's September 16, 2013, sentencing, that prior conviction was reduced to a misdemeanor pursuant to

⁷ The petition was ruled on by a different judge than presided over trial and imposed sentence in defendant's current carjacking case. (See § 1170.126, subd. (j).)

section 1170.18, subdivision (f). Defendant says it must. The Attorney General disagrees, as do we.

B. Analysis

Section 1170.18, enacted as part of Proposition 47, provides in pertinent part:

“(f) A person who has completed his or her sentence for a conviction . . . of a felony . . . who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.

“(g) If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor.”

Defendant was convicted, in case No. BF100707D, of possession of a controlled substance in violation of Health and Safety Code section 11350, subdivision (a). At the time, the offense was a felony, as the statutorily prescribed punishment was imprisonment in the state prison. (Health & Saf. Code, former § 11350, subd. (a); see § 17, subd. (a).) Post-Proposition 47, Health and Safety Code section 11350, subdivision (a) is a misdemeanor, punishable “by imprisonment in a county jail for not more than one year,” unless the offender has certain specified prior convictions.⁸ According to the probation officer’s report, defendant has no such prior convictions, and the Attorney General does not claim otherwise. Thus, had the Act been in effect at the time defendant committed the violation of Health and Safety Code section 11350, subdivision (a) for which he was convicted in case No. BF100707D, he could only have been convicted of a misdemeanor.

Subdivision (k) of section 1170.18, provides in pertinent part:

⁸ The prior convictions enumerated in the statute are “for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code.” (Health & Saf. Code, § 11350, subd. (a).)

“Any felony conviction that is . . . designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.”⁹

Defendant argues his conviction in case No. BF100707D is now “a misdemeanor for all purposes” except certain firearm restrictions. (§ 1170.18, subd. (k).) He says, “[S]ince that conviction is now a misdemeanor, it follows that it should no longer be considered a conviction upon which a Penal Code section 667.5, subdivision (b) prison prior can be supported.”¹⁰

In *People v. Park* (2013) 56 Cal.4th 782 (*Park*), the defendant’s sentence for his current crimes was enhanced by five years under section 667, subdivision (a), based on his prior conviction of a serious felony. *Prior to* the defendant’s commission of his current crimes, however, the trial court reduced the prior offense to a misdemeanor under section 17, subdivision (b)(3), and then dismissed it pursuant to section 1203.4, subdivision (a)(1). (*Park, supra*, 56 Cal.4th at p. 787.)

Section 17, subdivision (b)(3) states in part, “When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail . . . , it is a misdemeanor for all purposes . . . [¶] . . . [¶] . . . [w]hen the court grants probation to a defendant without imposition of sentence and at the time of granting probation . . . declares the offense to be a misdemeanor.”

⁹ The specified statutes contain restrictions and prohibitions on firearm possession for certain persons.

¹⁰ In a single, parenthetical sentence, defendant further asserts the 2002 misdemeanor “can be considered to have ‘washed out’ and thereby be too remote to enhance the current sentence. (Pen. Code, §[]667.5, subd. (b).)” As he does not expand on his claim, we decline to address it. (See *People v. Hardy* (1992) 2 Cal.4th 86, 150; *People v. Wharton* (1991) 53 Cal.3d 522, 563.)

In *Park*, the Court of Appeal held the conviction remained a prior serious felony for purposes of sentence enhancement under section 667, subdivision (a), but the California Supreme Court disagreed: “[W]hen the court in the *prior proceeding* properly exercised its discretion by reducing the . . . conviction to a misdemeanor, that offense no longer qualified as a prior serious *felony* within the meaning of section 667, subdivision (a), and could not be used, under that provision, to enhance defendant’s sentence.” (*Park, supra*, 56 Cal.4th at p. 787, first italics added.)

In *Park*, the reduction and dismissal occurred prior to the defendant’s commission of his current crimes. (*Park, supra*, 56 Cal.4th at p. 787.) Here, the reduction to a misdemeanor pursuant to section 1170.18, subdivision (f), occurred *after* defendant’s commission, conviction, and sentence for his current crimes. In *Park*, in response to an argument that *People v. Feyrer* (2010) 48 Cal.4th 426 and *People v. Banks* (1959) 53 Cal.2d 370 were contrary to their conclusion, the court stated: “There is no dispute that, under the rule in those cases, defendant would be subject to the section 667[, subdivision](a) enhancement had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor.” (*Park, supra*, 56 Cal.4th at p. 802.)

The issue before us is not whether defendant’s conviction and prison commitment in case No. BF100707D can now be used to enhance a future sentence pursuant to section 667.5, subdivision (b), should defendant commit a new felony upon release from prison on his current sentence. The issue is whether defendant’s current sentence, enhanced pursuant to section 667.5, subdivision (b), must now be altered because, *subsequent to* defendant’s sentencing, the conviction that gave rise to that enhancement was reduced to a misdemeanor pursuant to section 1170.18, subdivision (f). In other words, does the Act operate retroactively? To make that determination, we look to the language of section 1170.18 and to voter intent.

Section 3 specifies that no part of the Penal Code “is retroactive, unless expressly so declared.”¹¹ This language “erects a strong presumption of prospective operation, codifying the principle that, ‘in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature [or electorate] . . . must have intended a retroactive application.’ [Citations.] Accordingly, ‘a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective.’” [Citation.]” (*People v. Brown* (2012) 54 Cal.4th 314, 324.)

An “important, contextually specific qualification” to the prospective-only presumption regarding statutory amendments was set forth in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). (*People v. Brown, supra*, 54 Cal.4th at p. 323.) That qualification is: “When the Legislature [or electorate] has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature [or electorate] intended the amended statute to apply to all defendants whose judgments are not yet final on the statute’s operative date. [Citation.]” (*Ibid.*, fn. omitted.)

Although *Estrada*’s language is broad, the California Supreme Court has emphasized the rule’s narrowness (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1196): “*Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule’s application in a specific context by articulating the reasonable presumption that a legislative [or voter] act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments. [Citation.]” (*People v. Brown, supra*, 54 Cal.4th at p. 324.)

¹¹ Defendant claims he is not asking for retroactive application of subdivision (k) of section 1170.18; rather, he says, Proposition 47 is “inherently retroactive”

The question of retroactivity is ultimately one of legislative — or, in this case, voter — intent. (*People v. Shabazz* (2015) 237 Cal.App.4th 303, 312-313; see *People v. Nasalga* (1996) 12 Cal.4th 784, 793.) “To resolve this very specific retroactivity question, we apply the well[-]settled rules governing interpretation of voter intent[.]” (*People v. Shabazz, supra*, 237 Cal.App.4th at p. 313.) “ ‘In interpreting a voter initiative . . . , we apply the same principles that govern statutory construction. [Citation.] Thus, . . . “we turn first to the language of the statute, giving the words their ordinary meaning.” [Citation.] . . . The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate’s intent]. [Citation.] . . . When the language is ambiguous, “we refer to other indicia of the voters’ intent, particularly the analyses and arguments contained in the official ballot pamphlet.” [Citation.]’ [Citation.] [¶] In other words, our ‘task is simply to interpret and apply the initiative’s language so as to effectuate the electorate’s intent.’ [Citation.]” (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900-901.)

The Act clearly was intended to lessen punishment for “nonserious, nonviolent crimes like petty theft and drug possession” (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, subd. (3), p. 70)¹², in order “to ensure that prison spending is focused on violent and serious offenses” (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, § 2, p. 70). This purpose was conveyed to voters, both in the text of the then-proposed law and in the arguments supporting Proposition 47. (Voter Information Guide, Gen. Elec., *supra*, argument in favor of Prop. 47, p. 38; *id.*, rebuttal to argument against Prop. 47, p. 39; *id.*, text of Prop. 47, §§ 2, 3, p. 70.)

Nowhere, however, do the Act or the ballot materials reference section 667.5, subdivision (b) or mention recidivist enhancements, and the Act made no amendments to

¹² The voter guide can be accessed at <<http://vigarchive.sos.ca.gov/2014/general/en/pdf/>> [as of Mar. 25, 2016].

any such provisions. Two of the Act’s expressly stated purposes, however, are to “[a]uthorize *consideration* of resentencing for anyone who is currently serving a sentence for any of the offenses” that would be made misdemeanors by the Act, and to “[r]equire a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety.” (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, § 3, subds. (4), (5), p. 70, italics added.) Voters were assured the Act would keep dangerous criminals locked up (Voter Information Guide, Gen. Elec., *supra*, argument in favor of Prop. 47, p. 38), and that it would not require automatic release of anyone: “There is no automatic release. [Proposition 47] includes strict protections to protect public safety and make sure rapists, murderers, molesters and the most dangerous criminals cannot benefit.” (*Id.*, rebuttal to argument against Prop. 47, p. 39.)

“Imposition of a sentence enhancement under . . . section 667.5 requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction. [Citation.]” (*People v. Tenner* (1993) 6 Cal.4th 559, 563.)¹³

¹³ Section 667.5, subdivision (b) currently provides: “Except where subdivision (a) applies, where the new offense is any felony for which a prison sentence or a sentence of imprisonment in a county jail under subdivision (h) of Section 1170 is imposed or is not suspended, in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended for any felony; provided that no additional term shall be imposed under this subdivision for any prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody or the imposition of a term of jail custody imposed under subdivision (h) of Section 1170 or any felony sentence that is not suspended. A term imposed under the provisions of paragraph (5) of subdivision (h) of Section 1170, wherein a portion of the

“Sentence enhancements for prior prison terms are based *on the defendant’s status as a recidivist, and not on the underlying criminal conduct*, or the act or omission, giving rise to the current conviction. [Citations.]” (*People v. Gokey* (1998) 62 Cal.App.4th 932, 936, italics added; see *People v. Coronado* (1995) 12 Cal.4th 145, 158-159; *People v. Dutton* (1937) 9 Cal.2d 505, 507.) Thus, the purpose of an enhancement under section 667.5, subdivision (b) “is ‘to punish individuals’ who have shown that they are ‘hardened criminal[s] who [are] undeterred by the fear of prison.’” [Citation.]” (*In re Preston* (2009) 176 Cal.App.4th 1109, 1115.) The enhancement’s focus on the service of a prison term “indicates the special significance which the Legislature has attached to incarceration in our most restrictive penal institutions.” (*People v. Levell* (1988) 201 Cal.App.3d 749, 754.)

A person who refuses to reform even after serving time in prison is clearly and significantly more dangerous than someone who merely possesses drugs for personal use or shoplifts. We cannot conclude, from the language of the Act or the ballot materials, that voters deemed such persons to be nonserious, nondangerous offenders, and so intended the Act to reach back to ancillary consequences such as enhancements resulting from recidivism considered serious enough to warrant additional punishment. Accordingly, section 3’s default rule or prospective operation, and not *Estrada*’s narrow rule of retroactivity, applies.

People v. Flores (1979) 92 Cal.App.3d 461 (*Flores*) does not lead to a different result. In that case, the defendant was convicted in 1966 for possessing marijuana. In 1977, he sold heroin. His sentence for the 1977 offense was enhanced by one year, pursuant to section 667.5, because of his 1966 conviction. (*Flores, supra*, at pp. 464, 470.) On appeal, the defendant claimed the enhancement was improper under *Estrada*,

term is suspended by the court to allow mandatory supervision, shall qualify as a prior county jail term for the purposes of the one-year enhancement.”

because Health and Safety Code section 11357 was amended, in 1975, to make possession of marijuana a misdemeanor. (*Flores, supra*, at p. 470.) In agreeing with the defendant, the appellate court stated:

“The amendatory act imposing the lighter sentence for possession of marijuana can obviously be applied constitutionally to prevent the enhancement of a new sentence by reason of a prior conviction of possession. Moreover, in the case at bench we are not confronted by legislative silence with respect to its purpose regarding penalties for possession of marijuana.

“Effective January 1, 1976, Health and Safety Code section 11361.5, subdivision (b) was enacted to authorize the superior court, on petition, to order the destruction of all records of arrests and convictions for possession of marijuana, held by any court or state or local agency and occurring prior to January 1, 1976. [Citation.] In 1976, [Health and Safety Code] section 11361.7 was added to provide in pertinent part that: ‘(a) Any record subject to destruction . . . pursuant to Section 11361.5, or more than two years of age, or a record of a conviction for an offense specified in subdivision (a) or (b) of Section 11361.5 which became final more than two years previously, *shall not be considered to be accurate, relevant, timely, or complete for any purpose by any agency or person.* . . . (b) No public agency shall alter, amend, assess, condition, deny, limit, postpone, qualify, revoke, surcharge, or suspend any certificate, franchise, incident, interest, license, opportunity, permit, privilege, right, or title of any person because of an arrest or conviction for an offense specified in subdivision (a) or (b) of Section 11361.5 . . . on or after the date the records . . . are required to be destroyed . . . or two years from the date of such conviction . . . with respect to . . . convictions occurring prior to January 1, 1976. . . .’ [Citation.] ([Original italics].)” (*Flores, supra*, 92 Cal.App.3d at pp. 471-472.)

The appellate court found the statutory language clear and unambiguous. (*Flores, supra*, 92 Cal.App.3d at p. 472.) It concluded: “In view of the express language of the statute and the obvious legislative purpose, it would be unreasonable to hold that the Legislature intended that one who had already served a felony sentence for possession of marijuana should be subjected to the additional criminal sanction of sentence enhancement.” (*Id.* at p. 473.) The court found the new laws constituted “a legislative declaration that the old laws were too severe for the quantum of guilt involved” (*ibid.*),

and distinguished a situation in which the California Supreme Court refused to give retroactive effect to an amendment to section 17 (*Flores, supra*, at p. 473) in part because “[t]here was no suggestion there, as there is here, that the Legislature intended retroactive application” (*id.* at p. 474).

In *Flores*, as in *Park*, and in contrast to the present case, the current offense was committed *after* the earlier offense was reduced to a misdemeanor. Moreover, the Act contains no clear expression with respect to retroactivity as was found in *Flores*. The closest it gets is the statement, in subdivision (k) of section 1170.18, that “[a]ny felony conviction that is . . . designated as a misdemeanor under subdivision (g) shall be considered *a misdemeanor for all purposes*, except [specified firearm laws].” (Italics added.)

This language, the italicized portion of which is identical to that contained in section 17, subdivision (b), is not necessarily conclusive, however. (*Park, supra*, 56 Cal.4th at pp. 793, 794.) It has not been read to mean a defendant could avoid an imposed sentence enhancement in his current sentence by having the prior offense subsequently reduced to a misdemeanor. (*Id.* at p. 802.) Nothing in the language of the Act or the ballot materials indicates an intention to override the operation of section 667.5, subdivision (b), at least retroactively.

Defendant served a prison term for the prior conviction at a time the offense was a felony. It is the service of that prison term, coupled with defendant’s continuing recidivism, that section 667.5, subdivision (b) punishes. Absent a clear statement of the electorate’s intent to the contrary — which we do not find — we conclude that, because defendant served a prison term for his conviction in case No. BF100707D at a time when

the offense was a felony, and had his current sentence enhanced accordingly *before* the conviction was reduced, he is not entitled to relief.¹⁴

This conclusion does not render surplusage the “for all purposes” language of section 1170.18, subdivision (k). Our determination is one of the electorate’s intent. “Rules such as those directing courts to avoid interpreting legislative enactments as surplusage are mere guides and will not be used to defeat legislative intent. [Citations.]” (*People v. Cruz* (1996) 13 Cal.4th 764, 782.) Moreover, “ambiguities are not interpreted in the defendant’s favor if such an interpretation would provide an absurd result, or a result inconsistent with apparent legislative intent. [Citation.]” (*Id.* at p. 783.)

DISPOSITION

The judgment is affirmed.

DETJEN, J.

WE CONCUR:

GOMES, Acting P.J.

POOCHIGIAN, J.

¹⁴ We are not presented with a situation in which there is some constitutional infirmity in the prior conviction. (See, e.g., *People v. Sumstine* (1984) 36 Cal.3d 909, 914.)