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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re H. W. a Person Coming Under the Juvenile Court Law	SUPREME COURT CASE NO: S237415
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs and Respondents v. H. W. Defendant and Appellant	

THIRD APPELLATE DISTRICT CASE NO: C079926
SACRAMENTO COUNTY SUPERIOR COURT CASE NO: JV137101
THE HONORABLE STACY BOULWARE EURIE, JUDGE

APPELLANT'S REPLY BRIEF ON THE MERITS

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By Appointment of the Supreme Court of the State of California
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APPELLANT'S REPLY BRIEF ON THE MERITS

INTRODUCTION

Penal Code[1] section 466 prohibits the possession of specific tools with the felonious intent to break or enter into a building or vehicle. In addition to the tools enumerated in the statue, section 466 criminalizes the possession of any "other instrument or tool" - with the requisite felonious intent. (§ 466.)

On October 13, 2014, appellant, H. W., (hereafter "H. W.") used a pair of pliers to remove an anti-theft device from a pair of blue jeans at a Sears Department store. In Count II of its April 14, 2015, juvenile wardship petition, the

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

Sacramento District Attorney charged H. W. with possession of burglar's tools, pursuant to section 466.

To sustain a true finding for possession of burglary tools, in violation of section 466, the prosecution must establish three elements: (1) possession by the minor defendant; (2) of a tool within the purview of the statute; (3) with the intent to use the tool for the felonious purpose of breaking or entering into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle. (see § 466; *People v. Southard* (2007) 152 Cal. App. 4th 1079, 1084 – 1085.) (*Southard*)

Pliers are not specifically enumerated in section 466. Pliers also do not fall within the scope of the statute's "other instrument or tool" provision because they are not similar to the tools enumerated in the statute. Furthermore, H. W. did not possess the pliers with the requisite "felonious intent" or "burglarious purpose." Instead, he used the pliers to commit misdemeanor shoplifting as defined in section 459.5.

Nevertheless, on July 1, 2015, the Sacramento County Juvenile Court sustained Count II of the April 14, 2015, wardship petition. The Third Appellate District, in a published opinion (*In re H. W.* (2016) 2 Cal. App. 5th 937), subsequently affirmed the juvenile court's judgment. The Third Appellate District erred when it determined H. W. possessed a "burglary tool", within the meaning of section 466, with the requisite felonious intent.

Respondent disagrees and asserts: "pliers constitute an 'other instrument or tool' under Section 466" and "sufficient evidence demonstrates appellant harbored

the necessary intent under section 466." (Respondent's Answer Brief on the Merits, hereafter "ABM", pp. 12, 22.) In support of its position, respondent makes a number of points. However, its position can be reduced to four essential arguments:

A. Section 466 is not ambiguous and its plain meaning should control. Because pliers are commonly understood to be a tool, they fall within the "other instrument or tool" provision of section 466. (ABM, pp. 14 – 17);

B. Even if the language of section 466 is ambiguous, pliers serve the same function and purpose as the tools enumerated in the statute. Thus, pliers are sufficiently similar to qualify as an "other instrument or tool" within the meaning of section 466. (ABM, pp. 18 – 21);

C. H. W. violated section 466 because he possessed pliers with the intent to commit a theft. Accordingly, it was unnecessary to prove he possessed the pliers with a "felonious intent" or "burglarious purpose." (ABM, pp. 22 – 26); and

D. The passage of Proposition 47, and the ensuing enactment of section 459.5, are not properly before this Court. Moreover, section 459.5 has no bearing upon the issue of H. W.'s intent. (ABM, pp. 26 – 40).

Respectfully, as discussed more fully below, each of respondent's arguments lacks merit. First, H. W.'s pliers did not qualify as a "burglary tool", within the meaning of section 466, merely because they can be broadly defined as a "tool" or "instrument". Second, the meaning of "other instrument or tool",

within the context of section 466, is ambiguous and H. W.'s pliers were not "similar" to the tools enumerated in the statute. Third, H. W. did not violate section 466 because he possessed the pliers with the intent to commit misdemeanor shoplifting – not felony burglary. Finally, to properly determine whether H. W. possessed the requisite "felonious intent" or "burglarious purpose", this Court must consider the impact of the recently enacted section 459.5.

ARGUMENT

I.

THE THIRD APPELLATE DISTRICT ERRED WHEN IT AFFIRMED THE JUVENILE COURT'S JURISDICTION ORDER, SUSTAINING COUNT II OF THE WARDSHIP PETITION, BECAUSE H. W. DID NOT POSSESS A "BURGLARY TOOL", WITHIN THE MEANING OF SECTION 466, WITH THE REQUISITE "FELONIOUS INTENT" OR "BURGLARIOUS PURPOSE"

A.

H. W.'S PLIERS DID NOT QUALIFY AS A "BURGLARY TOOL", WITHIN THE MEANING OF SECTION 466, MERELY BECAUSE THEY CAN BE BROADLY DEFINED AS A "TOOL" OR "INSTRUMENT"

Respondent acknowledges "pliers do not fall within the specific devices listed in section 466." (ABM, p. 12.) Nevertheless, it contends pliers "constitute an 'other instrument or tool' as defined in the statute" because they are "similar to the

enumerated devices in both function and purpose." (ABM, p. 12.) Respectfully, respondent is incorrect.

Section 466 prohibits the possession of "burglary instruments or tools" and provides, in relevant part:

> Every person having upon him or her in his or her possession a picklock, crow, keybit, crowbar, screwdriver, vise grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, bump key, floor-safe door puller, master key, ceramic or porcelain spark plug chips or pieces, *or other instrument or tool* with intent feloniously to break or enter into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle as defined in the Vehicle Code...is guilty of a misdemeanor....

(emphasis added)(§ 466.)

It is undisputed H. W. used pliers to remove an anti-theft device from a pair of jeans at a Sears department store, during store hours. (CT, p. 34; RT, pp. 27 – 35, 42 – 43, 50, 54.) However, ordinary pliers are not specifically identified in section 466. Instead, the statute specifically refers to "vise grip pliers" and "water pump pliers" (§ 466.) There is no evidence the tool recovered from H. W. was identified as either "vise grip pliers" or "water pump pliers."

As discussed more fully in Appellant's Opening Brief on the Merits, water pump pliers and vise grip pliers are not the same as ordinary pliers. (see Appellant's Opening Brief on the Merits, hereafter "OBM" p. 12.) Vise grip and water pump pliers are specialized tools designed to perform different tasks than ordinary pliers. Pliers are "small pincers" used for holding small objects, bending and cutting wire and "handling things." Unlike vise grip or water pump pliers, ordinary pliers do not have a locking mechanism and cannot be used to create

leverage. (OBM, pp. 12 – 13.) Accordingly, contrary to respondent's claim, ordinary pliers are not "similar in both function and purpose" to vise grip and water pump pliers. (ABM, p. 12.)

Respondent's position rests upon the premise the phrase "other instrument or tool" is not ambiguous and the plain meaning of section 466 should control. (ABM, p. 15.) Respondent then concludes, based upon this faulty premise, pliers automatically fall within the "other instrument of tool" provision in section 466 merely because they are commonly understood to be a tool. (ABM, pp. 15 – 17.)

However, in light of its disparate appellate interpretations, the meaning of the phrase "other instrument or tool" – within the context of section 466 - is ambiguous. (*People v. Leiva* (2013) 56 Cal. 4th 498, 510 ["split between the Courts of Appeal reflects uncertainty"]); see *People v. Gordon* (2001) 90 Cal. App. 4th 1409, 1412 (*Gordon*), superseded by statute as stated in *People v. Diaz* (2012) 207 Cal. App. 4th 396, 401, 403 – 404 (*Diaz*) ["other instrument or tool" provision limited to instruments and tools used to break into or gain access to property in a manner similar to using items enumerated in section 466"]; *People v. Kelly* (2007) 154 Cal. App. 4th 961, 967 – 968 (*Kelly*) ["other instrument or tool" includes any tool "the evidence shows are possessed with the intent to be used for burglary."].)

Thus, as discussed more fully in Argument I-B, below, this Court must look beyond the plain language of the statute to determine the Legislature's intent. (*People v. Leiva, supra,* 56 Cal. 4th at p. 510; *People v. Woodhead* (1987) 43 Cal. 3d 1002, 1008.) A careful review of the legislative history, statutory context and

appellate construction of section 466, reveals the Legislative intent to limit the scope of the items included within statute to tools or instruments used to break into or gain access to property. (see pp. 10 - 16, *infra.*)

Furthermore, respondent's reliance on the reasoning in *People v. Harris* (1950) 98 Cal. App. 2d 662, is misplaced. (ABM. pp. 15 – 16.) The defendant in *Harris, supra,* was a prisoner found in possession of a "metal wood chisel ... with a sharpened point." (*Id.* at p. 663.) He was charged with, and subsequently convicted of, violating former Penal Code section 4502[2]. (*Id.* at p. 663.) At that time, section 4502 prohibited "any prisoner committed to a state prison" from possessing, carrying, having in his custody, "... any dirk or dagger or sharp instrument ..." (*Id.* at p. 663.) On appeal, the defendant argued the term "sharp instrument" was ambiguous. (*Id.* at p. 666.)

The Court of Appeal flatly rejected the defendant's theory:

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[2] Current section 4502 provides, in relevant part: "(a) Every person who, while at or confined in any penal institution, while being conveyed to or from any penal institution, or while under the custody of officials, officers, or employees of any penal institution, possesses or carries upon his or her person or has under his or her custody or control any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag, or metal knuckles, any explosive substance, or fixed ammunition, any dirk or dagger or sharp instrument, any pistol, revolver, or other firearm, or any tear gas or tear gas weapon, is guilty of a felony ....(b) Every person who, while at or confined in any penal institution, while being conveyed to or from any penal institution, or while under the custody of officials, officers, or employees of any penal institution, manufactures or attempts to manufacture any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag, or metal knuckles, any explosive substance, or fixed ammunition, any dirk or dagger or sharp instrument, any pistol, revolver, or other firearm, or any tear gas or tear gas weapon, is guilty of a felony....(§ 4502.)

> The Legislature was not required to list every type of sharp instrument in the statutory prohibition. All that is required is that the crime must be clearly defined so that any reasonable person will know what constitutes a violation. [Citation] The present defendant obviously knew what the statute meant, and knew that he was violating it. His flight upon the request of the guard to produce the object in his pocket, amply demonstrates this...The chisel was clearly a 'sharp instrument' within the meaning of section 4502. ...This section of the Penal Code was passed 'to protect inmates and officers of state prisons from the peril of assaults with dangerous weapons perpetrated by armed prisoners.' [Citation] The statute should be reasonably construed to accomplish this beneficent purpose.

(*Id.* at pp. 666 – 667.)

The distinctions between the reasoning in *Harris* and the facts and circumstances of this case are readily apparent. Former and current ection 4502 prohibit prisoners from possessing dangerous weapons. (§ 4502.) A "sharp instrument" is an inherently dangerous weapon and an obvious safety threat within a penal institution – particularly when possessed by a prisoner. Furthermore, any reasonable inmate would know possession of a sharpened metal chisel would violate section 4502.

Here, possession of pliers by an individual – without more – is neither dangerous nor illegal. Instead, section 466 criminalizes the possession of specifically enumerated tools and instruments only when the person harbors an intent to use them with a "felonious intent" or for a "burglarious purpose." The countless workmen and private citizens who possess a pair of ordinary pliers would be surprised to learn they are - based upon the respondent's reasoning - in violation of section 466.

Contrary to respondent's claim, pliers do not automatically qualify as an

item prohibited by the "other instrument or tool" provision of section 466. Instead, pliers can only fall within the scope of section 466 if they are similar to those tools and instruments enumerated in the statute.

B.

THE MEANING OF "OTHER INTRUMENT OR TOOL", WITHIN THE CONTEXT OF SECTION 466, IS AMBIGUOUS AND H. W.'S PLIERS WERE NOT "SIMILAR" TO THE TOOLS ENUMERATED IN THE STATUTE

Respondent recognizes the latent ambiguity of the phrase "other instrument or tool" and argues, in the alternative:

> ...even if this Court determines that the phrase 'other instrument or tool' is ambiguous, the application of extrinsic aids demonstrates that pliers qualify as a burglary tool under section 466.

(ABM, pp. 17 – 18.) Respondent's construction of section 466 is incorrect.

As discussed more fully above in Argument I-A, the meaning of "other instrument or tool", within the context of section 466 is ambiguous. (pp. 6 - 7, *supra*.) "When a term or phrase in a statute is unclear or contains a latent ambiguity" a reviewing court must look to:

> ...a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.'

(*People v. Leiva, supra,* 56 Cal. 4th at p. 510; *People v. Woodhead, supra,* 43 Cal. 3d at p. 1008.) Here, to properly discern the Legislature's intent, this Court should

carefully consider section 466's Legislative history, statutory context, and the *ejusdem generis* canon of construction. (see pp. 14 – 15, *infra*.)

Legislative History of Section 466

The evolution of section 466 provides important insight into the Legislature's intent with respect to the statute's scope. (Code Am.1873-74, c. 178, p. 463 § 1; Stats.1977, c. 725, p. 2309, § 1; Stats.1977, c. 1147, p. 3685, § 2; Stats.1984, c. 82 (A.B. 1895), § 1; Stats.2001, c. 854 (S.B.205), § 28; Stats.2002, c. 335 (A.B.2015), § 1; Stats.2008, c. 119 (S.B.1554), § 1.) Each time the Legislature amended section 466 since 1984, it added tools specifically designed for the purpose of "breaking or entering" to the list of prohibited items. (Stats.1984, c. 82 (A.B. 1895), § 1; Stats.2001, c. 854 (S.B.205), § 28; Stats.2002, c. 335 (A.B.2015), § 1; Stats.2008, c. 119 (S.B.1554), § 1.) Indeed, when the Legislature enacted A. B. 2015 in 2002, it unequivocally excluded "other common objects such as rocks or pieces of metal that can be used to break windows." (Stats. 2002 Ch. 335 § 2 (A.B. 2015).)

Respondent attempts to counter this argument by pointing to the Legislature's 2002 addition of an apparently dissimilar item - "ceramic or porcelain spark plug chips or pieces" - to section 466. (ABM, p. 19.) Respondent's argument does not succeed. As the *Diaz* Court noted, the 2002 amendment was a

clarification - not a repudiation - of the *Gordon* Court's limited interpretation of the statute[3]:

> When the Legislature added 'ceramic or porcelain spark plug chips or pieces' in 2002 in response to *Gordon,* legislative analyses noted the bill was intended to resolve a conflict between *Gordon* and another opinion, subsequently superseded by the Supreme Court's grant of review, which held ceramic chips *could* constitute a burglary tool. One analysis noted *Gordon* 'found that an instrument is not a burglar tool just because it can accomplish the same purpose as the listed tools, but that the device must be similar to those specifically listed.... *This bill resolves the conflict ... by adding ceramic or porcelain spark plugs [or pieces] to the enumerated list of 'burglar's tools' within...[s]ection 466.*' [Citation][4]

(emphasis in original) (*Diaz, supra,* 207 Cal. App. 4th at p. 403.) Indeed, the amendment was consistent with the *Gordon* Court's *ejusdem generis* construction of "other instrument or tool":

> Another analysis noted the Supreme Court will likely 'consider the effect of the general reference to 'other instrument or tool' in the burglary tool statute, in light of the very specific items that are defined as burglary tools.' [Citation][5] Additionally, another analysis noted, 'AB 2015 will allow justice to be served *without opening section 466 to include an overly broad range of generic objects, such as rocks or pieces of tile, that could be used to break windows.*' [Citation][6] The legislation and associated analyses demonstrate the Legislature accepted *Gordon*'s application of *ejusdem generis* in interpreting section 466. The Legislature did not resolve the conflict concerning section 466 by amending the statute to eliminate

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[3] In *Gordon, supra,* determined a ceramic piece from a spark plug did not fall within the meaning of "other instrument or tool." (*Gordon, supra,* 90 Cal. App. 4th at p. 1412.) Instead, the Court determined the meaning of the phrase "was restricted to a form of device similar to those expressly set forth in the statute." (*Ibid.*)

[4] (Assem. Com. On Pub. Safety Rep. on Assem. Bill No. 2015 (2001 – 2002 Reg. Sess.) April 2, 2002, pp. 2 – 3.)

[5] (Sen. Com. On Pub. Safety Rep. on Assem. Bill No. 2015 (2001 – 2002 Reg. Sess.) June 11, 2002, p. F.)

[6] (Sen. Rules Com. Off. Of Sen. Floor Analyses, 3d reading analyses of Assem. Bill No 2015 (2001 – 2002 Reg. Sess.) as amended June 25, 2002, p. C.)

> *Gordon*'s requirement of similarity of purpose and design. Rather, it added an item to the list without supplanting the usual *ejusdem generis* canon that applies when specific and general words are used together in a statute.

(emphasis in original) (*Diaz, supra,* 207 Cal. App. 4th at pp. 403 – 404.)

The Legislature's decision - over the course of several decades - to selectively and carefully expand the list of prohibited items, to respond to changing circumstances, evinces its intent to limit the scope of section 466 to tools or instruments designed to break, enter or gain access into property. (*Id.* at pp. 403 – 404.) There is no indication the Legislature intended "other instrument or tool" as a catch-all provision to expand the list of prohibited tools to include any common item which could potentially be used to "effectuate a theft." (see *In re H. W., supra,* 2 Cal. App. 5th at p. 944.)

Statutory Context of Section 466

Current section 466 is found within Part 1, Title 13, Chapter 3 ("Burglarious and Larcenous Instruments and Deadly Weapons") of the Penal Code. The other statutes set forth in Chapter 3 of Title 13 prohibit the possession, sale, manufacture or duplication of enumerated tools designed for "gaining access" into property (see *Diaz, supra,* 207 Cal. App. 4th at p. 404; § 466.1; § 466.3; § 466.5; § 466.6; § 466.65; § 466.7; § 466.8; § 466.9 and § 469.)

Contrary to respondent's assertion, these statutes do not "contemplate more than just gaining access into property." (ABM, pp. 20 – 21.) Each of the statutes within Title 13 of Chapter 3 prohibit the possession, manufacture or use of key or key replacement tools specifically designed to unlawfully gain access into

property – not any random tool or instrument which could potentially be employed for a "burglarious purpose" or to "effectuate" a "theft."[7] (see *In re H. W., supra,* 2 Cal. App. 5th at p. 944.) Given its placement within the statutory context of Chapter 3 of Title 13, it is reasonable to conclude the Legislature intended to limit the scope of section 466 to tools designed to break or enter into property. (see *Renee J. v. Superior Court* (2001) 26 Cal. 4th 735, 743; *People v. Albillar* (2010) 51 Cal. 4th 47, 55; *People v. Gray* (2014) 58 Cal. 4th 901, 906.)

Appellate Court Interpretation of Section 466

As discussed more fully in Appellant's Opening Brief on the Merits, two lines of cases interpreting the phrase "other instrument or tool", within the context of section 466, have emerged. (OBM, pp. 8 – 10, 20 - 27.)

Here, the Third Appellate District adopted the "burglarious purpose" interpretation of "other instrument or tool" propounded by the First Appellate District in *Kelly, supra,* 154 Cal. App. 4th at pp. 967 - 968 ["'other instrument or tool,' includes tools that the evidence shows are possessed with the intent to be

[7] § 466.1 "Sale or provision of lock pick, tension bar, lock pick gun, tubular lock pick, or floor-safe door puller"; § 466.3 "Possession of tool, device, etc., designed to open, break into, tamper with or damage coin-operated machine with intent to commit theft"; § 466.5 "Motor vehicle master key; motor vehicle wheel lock master key; unlawful possession"; § 466.6 "Keys capable of operating motor vehicle or personal property registered under Vehicle Code; making other than by duplication of existing key"; § 466.65 "Possession of device, ignition or tools designed to bypass factory-installed ignition, start motorcycle"; § 466.7 "Motor vehicle keys; possession; knowledge of making without consent"; § 466.8 "Keys capable of opening entrance to residence or commercial establishment"; § 466.9 "Code grabbing devices; possession or use"; § 469 "Unauthorized making, duplicating or possession of key to public building."

used for burglary".] (*In re H. W., supra,* 2 Cal. App. 5th at pp. 944 – 955.) In doing so, the Third Appellate District rejected the "*ejusdem generis*" construction of "other instrument or tool" advanced by the Fourth Appellate District in *Gordon, supra,* 90 Cal. App. 4th at p. 1412, and *Diaz, supra,* 207 Cal. App. 4th at pp. 401 – 402, 404. ["section 466 is limited to instruments and tools used to break into or gain access to property in a manner similar to using items enumerated in section 466."] (*In re H. W., supra,* 2 Cal. App. 5th at pp. 944 – 945.)

As discussed more fully below, the Fourth Appellate District's "*ejusdem generis*" construction of the phrase "other instrument or tool" is more consistent with section 466's Legislative intent.

In *Gordon, supra,* Division One of the Fourth Appellate District held a ceramic piece from a spark plug did not fall within the meaning of "other instrument or tool." (*Gordon, supra,* 90 Cal. App. 4th at p. 1412.) The Court determined the meaning of the phrase "other instrument or tool" in section 466 "was restricted to a form of device similar to those expressly set forth in the statute." (*Ibid.*)

In making its determination, the Court was guided by the *ejusdem generis* rule of statutory construction - which applies when general terms follow a list of specific items or categories, or vice versa. (*Ibid.*; *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal. 4th 116, 141, superseded by statute on other grounds as stated in *Arias v. Superior Court* (2009) 46 Cal. 4th 969, 977.) Under this rule, application of the general term is "'restricted to those things that are similar to

those which are enumerated specifically.'" (*Gordon, supra,* 90 Cal. App. 4th at p. 1412; *Harris v. Capital Growth Investors XIV* (1991) 52 Cal. 3d 1142, 1160, fn. 7, superseded by statute on other grounds as stated in *Munson v. Del Taco* (2009) 46 Cal. 4th 661, 689 - 690.) The *ejusdem generis* canon:

> ...presumes that if the Legislature intends a general word to be used in its unrestricted sense, it does not also offer as examples peculiar things or classes of things since those descriptions then would be surplusage.

(*Kraus v. Trinity Mgmt. Services, Inc., supra,* 23 Cal. 4th at p. 141.)

In *Diaz, supra,* Division Three of the Fourth Appellate District reversed the defendant's conviction because the latex gloves and large bag found in her possession did not qualify as burglar's tools, under section 466. (*Diaz, supra,* 207 Cal. App. 4th at p. 400, 405.) The Court of Appeal decision relied, in part, upon the *Gordon* Court's "*ejusdem generis*" analysis:

> A bag containing latex gloves is not similar to the items enumerated in section 466. As exemplified in *Gordon,* the *ejusdem generis* canon of construction presumes that if the Legislature intends a word or words to be used in an unrestricted sense, it does not also offer as examples peculiar things or classes of things since those descriptions then would constitute surplusage.

(*Id.* at p. 401.)

The *Diaz* Court narrowed the scope of burglary tools countenanced by section 466 and concluded:

> ...section 466 is limited to instruments and tools used to break into or gain access to property in a manner similar to using items enumerated in section 466. That the perpetrator breaks into or enters property, or attempts to do so, *and* happens to have access to a tool that may be used in the course of the burglary is not enough. The tool must be for the purpose of breaking, entering, or otherwise gaining access to the victim's property...

(italics in original) (*Id.* at p. 404.)

Through application of these extrinsic aids, it is apparent section 466's "other instrument or tool" provision includes only items *similar* to the tools designed for breaking or entering specifically enumerated in the statute. (see *Gordon, supra,* 90 Cal. App. 4th at pp. 1412 – 1413; *Southard, supra,* 152 Cal. App. 4th at p. 1090; *Diaz, supra,* 207 Cal. App. 4th at pp. 403 – 404.)

H. W.'s Pliers did not Qualify as an "Other Instrument or Tool"

Contrary to respondent's assertion, H. W.'s pliers were not "similar" to the tools listed in section 466. (ABM, pp. 18 – 19.) Notwithstanding any theoretical utility posited by the respondent, there was no evidence H. W.'s pliers could be used for the purpose of "breaking, entering or otherwise gaining access" *into* a building, vehicle or other type of property. (ABM, p. 18; *Diaz, supra,* 207 Cal. App. 4th at p. 404; *Gordon., supra,* 90 Cal. App. 4th 1412 – 1413.)

Instead, the record established pliers were "commonly" used to remove anti-theft security devices from items of clothing. (RT, pp. 32 – 33, 52.) The anti-theft device is not a "lock" to prevent a person from gaining access into property. Instead, the device is designed to discourage theft by irreparably damaging the merchandise with ink - if it is "released by force." (RT, p. 43.) Accordingly, pursuant to the *ejusdem generis* canon of construction, H. W.'s pliers are not similar to the items enumerated in section 466 – and do not fall within the scope of the statute's "other instrument or tool" provision. (*Diaz, supra,* 207 Cal. App. 4th at p. 404; *Gordon., supra,* 90 Cal. App. 4th 1412 – 1413.)