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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ROGER N. BRITO, Defendant and Appellant.	B290418 (Los Angeles County Super. Ct. No. YA097594)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edmund W. Clarke, Jr., Judge. Affirmed.

The Law Offices of Michelle T. LiVecchi-Raufi and Michelle T. Livecchi-Raufi, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephanie C. Brenan and

Charles S. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Roger Brito was stopped by a police officer after driving a stolen car, roughly 24 hours after the car was stolen. He ran away from the officer but was arrested soon thereafter, having discarded a shirt the officer had seen him wearing. The state charged appellant with the felony of unlawfully driving a vehicle without the owner's consent in violation of Vehicle Code section 10851 (Section 10851). Appellant presented no evidence at trial. In defining the elements of the Section 10851 charge, the trial court instructed the jury on unlawful driving, eliminating any reference to the statute's separate prohibition of unlawful taking. The court also gave the standard flight instruction. In closing argument, appellant's counsel argued the prosecution had failed to prove appellant knew he lacked the owner's consent to drive the car. In rebuttal, the prosecutor noted appellant's failure to present evidence explaining how he came to be driving the stolen car, and urged the jury to reject as unreasonable any inference that appellant had obtained the car from anyone he believed to be the owner. The jury convicted appellant of the felony unlawful driving charge.

On appeal, appellant contends (1) the prosecutor committed prejudicial misconduct by (a) drawing attention to appellant's failure to testify, in violation of the rule

established in *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*), and (b) misrepresenting the prosecution's burden of proof; (2) the trial court prejudicially erred by delivering the standard jury instruction on flight as evidence of consciousness of guilt; and (3) the "absurd consequences" doctrine of statutory interpretation and the constitutional guarantee to equal protection of the law require that we apply Proposition 47 to his felony unlawful driving conviction, requiring reversal due to the prosecution's failure to prove that the value of the stolen car exceeded $950.[1]

We affirm.

STATEMENT OF THE CASE

The state brought a felony charge against appellant, under Section 10851, subdivision (a), for driving a vehicle without the owner's consent and with the intent to deprive the owner of title and possession. It further charged appellant with two misdemeanor offenses: (1) resisting, delaying, or obstructing a peace officer, in violation of Penal Code section 148, subdivision (a)(1); and (2) possession of

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[1] Proposition 47 was a 2014 ballot initiative that reduced certain felony offenses to misdemeanors, including by enacting Penal Code section 490.2, subdivision (a). (*People v. Lara* (2019) 6 Cal.5th 1128, 1130, 1132 (*Lara*).) As relevant here, that statute provides as follows: "[O]btaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ." (Pen. Code, § 490.2, subd. (a).)

methamphetamine, in violation of Health and Safety Code section 11377. Prior convictions were alleged for purposes of appellant's sentence on the felony count.

A jury convicted appellant on all counts. The trial court sentenced appellant to a five-year prison term on the felony count, as well as concurrent six-month terms on each of the other counts. Appellant timely appealed.

PROCEEDINGS BELOW

A. *Prosecution Case*

Around 5:30 p.m. on January 25, 2018, Daxaben Ahir and her nephew Priyank Ahir were working at a motel in Los Angeles. Preparing to leave, Daxaben started her Lexus SUV and left it running, with the key inside, as she re-entered the motel to get change. Priyank then saw a man walk toward the car. Priyank quickly exited the motel, only to see the car speeding away. The man he had seen was gone.

Approximately 24 hours later, Torrance Police Department Officer Keith Crofton began following Daxaben's stolen car, which had been identified by a license plate reader. Appellant, who was driving the car, made several turns and then parked in a grocery store parking lot, where Officer Crofton parked behind the car, blocking it. The officer then activated the flashing overhead lights on his vehicle, which was marked as belonging to the Torrance Police Department.

Unbidden, appellant exited the stolen car. Officer Crofton, wearing his patrol uniform and partially emerging from his own vehicle, ordered appellant to re-enter the car. Instead, appellant took several steps toward the officer. Drawing his gun, Officer Crofton ordered appellant to get on the ground. Appellant ran away.

Remaining with the stolen car, Officer Crofton reported the direction in which appellant had run. Other officers arrested appellant nearby and found a discarded flannel shirt, which Officer Crofton identified as appellant's. The officers found a useable quantity of methamphetamine in appellant's pocket.

B. *Defense Case*

Appellant presented no evidence in his defense.

C. *Jury Instructions*

Without objection, the trial court granted the prosecutor's request to remove any reference to "taking" a vehicle from the jury instruction on the elements of the Section 10851 charge (CALCRIM No. 1820).[2] The court instructed the jury that the prosecution was required to prove the following two elements: (1) "The defendant drove

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[2] The prosecutor explained the purpose of this request was "to avoid any Prop. 47 issues." The court also removed references to "taking" a vehicle from its instructions on union of act and intent (CALCRIM No. 252) and possession of recently stolen property as evidence of a crime (CALCRIM No. 376).

someone else's vehicle without the owner's consent;" and (2) "When the defendant did so, he intended to deprive the owner of possession or ownership of the vehicle for any period of time."

The court delivered several instructions on burdens of proof, including instructions on the prosecution's burden of proof beyond a reasonable doubt (CALCRIM No. 220), neither side's burden to produce all relevant evidence (CALCRIM No. 300), and appellant's right to refrain from testifying or producing evidence (CALCRIM No. 355). It further instructed the jury on evaluating the sufficiency of circumstantial evidence (CALCRIM No. 224), instructing it, inter alia, that "when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

The court instructed the jury that it could infer appellant's awareness of his guilt if it found he had tried to hide evidence (CALCRIM No. 371) or if it found he had fled immediately after the crime (CALCRIM No. 372).[3] It further instructed the jury that neither finding would be sufficient to prove guilt.

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[3] The trial court overruled appellant's objection to the flight instruction.

D. *Closing Arguments*

1. *Prosecutor's Closing Argument*

The prosecutor argued that appellant fled from Officer Crofton because he was conscious of his guilt of driving a stolen car. He argued that appellant further demonstrated consciousness of guilt by attempting to hide evidence that could identify him as the driver, viz., his flannel shirt. He then suggested that the jury should find appellant knew the car was stolen because, as evidenced by his possession of the car only 24 hours after its theft, appellant stole the car himself. However, he reminded the jury that the prosecution was not required to prove appellant stole the car, and that the case was about driving the car, rather than taking it. He argued that appellant's flight and discarding of the shirt also showed appellant knew the car was stolen.

2. *Defense Closing Argument*

Appellant's counsel argued that appellant might have run from Officer Crofton because he had methamphetamine in his pocket, urging the jury to reject an inference that he ran because he knew the car was stolen.[4] She also urged the jury to reject an inference that appellant was trying to hide evidence when he discarded his flannel shirt, arguing that he instead discarded it because he got hot while running. She argued that if he had known the car was stolen, he would have tried to evade Officer Crofton before parking the

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[4] Appellant's counsel conceded the prosecution had proved the charges of possession of methamphetamine and resisting or obstructing a peace officer.

car. She argued that appellant's mere possession of the car 24 hours after its theft was insufficient to prove he stole it himself, and that no other evidence established his knowledge that it was stolen.

3. *Prosecutor's Rebuttal Argument*

In rebuttal, the prosecutor again reminded the jury that the state had not charged appellant with stealing the car, clarifying that he had suggested appellant stole the car only to support a finding that appellant knew the car was stolen at the time he was driving it. Responding to the defense theory that appellant did not know the car was stolen, the prosecutor observed that appellant was in possession of the car within a day of its theft, and that one "typically" acquires a car in a sale or as a loan. He then remarked, "And sometimes evidence is actually the absence of evidence. . . . Maybe he purchased the car. Where is the paperwork?"

Appellant's counsel objected on the grounds that the prosecutor was shifting the burden of proof and arguing matters beyond the scope of proper rebuttal. The court advised the prosecutor, in the presence of the jury, to "be cautious about that kind of argument." During a sidebar, the court clarified that it was cautioning the prosecutor not to call attention to the absence of testimony from appellant himself. The court then reminded the jury that it had been instructed not to consider appellant's failure to testify, and stated the prosecutor was not arguing for such consideration.

The prosecutor resumed, "So I'm asking you to think about the absence of evidence as evidence." He argued that "the most obvious scenario" was that appellant knew the car was stolen, but acknowledged the jury might think of other possible, albeit not reasonable, scenarios. He pointed out the absence of any purchase record supporting the possibility that someone sold the car to appellant, as well as appellant's failure to call any witness claiming to have loaned the car to him. The prosecutor asserted, "[P]art of my case is the absence of that evidence." Again noting the absence of testimony from a "loaner," he told the jury that "the defense has the same subpoena power as the People."[5]

The prosecutor acknowledged that his theory that appellant knew the car was stolen relied on circumstantial evidence, viz., the short time between the theft and appellant's possession; his flight; and his discarding of the shirt. The prosecutor then paraphrased CALCRIM No. 224, reminding the jury that the law required it to reject unreasonable conclusions, and accept only reasonable ones, when evaluating circumstantial evidence. In concluding, he stated, "And the government's case has been presented unopposed. The facts are unopposed. There is only one

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[5] Following the prosecutor's reference to the defense subpoena power, appellant's counsel again objected on a "burden-shifting" ground. The trial court implicitly overruled the objection, noting the defense had options to compel witnesses to testify.

reasonable conclusion based on this evidence and that is that the defendant was driving a car that he knew was stolen."

E. *Jury Question and Response*

During its deliberations, the jury submitted the following question (quoting from CALCRIM No. 1820, as modified): "In the following statement: '1) The defendant drove someone else's vehicle w/o the owner's consent;' should we only consider the true owner of the vehicle or is it fair to question that the defendant may have believed the car was owned by someone else who gave him permission to drive the vehicle, not knowing the vehicle was stolen?" The prosecutor argued that the question showed the jury was impermissibly considering facts not in evidence, and asked the court to instruct the jury to base its decision on the evidence rather than speculation. The court rejected the prosecutor's request and submitted the following response to the jury: "In evaluating the evidence in this case, you may consider the defendant's beliefs regarding permission and ownership in deciding paragraph 2 of instruction 1820. For paragraph 1, the actual owner applies." The paragraphs referenced by the court read as follows: (1) "The defendant drove someone else's vehicle without the owner's consent;" and (2) "When the defendant did so, he intended to deprive the owner of possession or ownership of the vehicle for any period of time."

DISCUSSION

Appellant contends (1) the prosecutor engaged in prejudicial misconduct by (a) committing *Griffin* error, and (b) misrepresenting the prosecution's burden of proof; (2) the trial court prejudicially erred by instructing the jury on flight as evidence of consciousness of guilt; and (3) the absurd consequences doctrine and equal protection doctrine require application of Proposition 47 to his driving-based Section 10851 conviction, rendering his conviction for a felony unsound due to the absence of evidence of the stolen car's value.

A. *Vehicle Code Section 10851*

Section 10851 imposes criminal liability on "[a]ny person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle . . . ." (Veh. Code, § 10851, subd. (a).) Section 10851 "can be violated by a range of conduct, only some of which constitutes theft." (*Lara*, *supra*, 6 Cal.5th 1128, 1135.) As most relevant here, it can be violated by posttheft driving, which "'consists of driving a vehicle without the owner's consent after the vehicle has been stolen, with the intent to temporarily or permanently deprive the owner of title or possession.'" (*Id.* at p. 1136, quoting *People v. Page* (2017) 3 Cal.5th 1175, 1188 (*Page*).) "'Where the evidence shows a

"substantial break" between the taking and the driving, posttheft driving may give rise to a conviction under Vehicle Code section 10851 distinct from any liability for vehicle theft.'"[6] (*Lara*, *supra*, at p. 1136, quoting *Page*, *supra*, at p. 1188.) Such a conviction is distinct from a theft conviction even if the convicted posttheft driver also stole the vehicle. (See *Lara*, *supra*, at p. 1137 [evidence amply supported defendant's posttheft driving conviction, regardless of whether defendant was involved in the theft]; *Page*, *supra*, at p. 1189 [defendant cannot prove Section 10851 conviction was based on theft rather than posttheft driving merely by declaring or testifying that he stole the vehicle].)

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[6] Here, as in *Lara*, "the unlawful driving instruction was incomplete: While the instruction specified driving as the alleged illegal act, it did not refer expressly to posttheft driving." (*Lara*, *supra*, 6 Cal.5th at p. 1138; see also *id.* at p. 1132 [instruction required findings that defendant drove vehicle without owner's consent and with intent to deprive owner of possession or ownership].) However, again as in *Lara*, it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict had it received a complete instruction. (*Id.* at p. 1138.) The prosecutor reminded the jury both in his initial argument and in rebuttal that appellant was not charged with taking or stealing the car. Although the prosecutor suggested appellant had stolen the car (relying solely on his possession of the car the next day), the prosecutor clarified that this argument was relevant only to a finding that appellant had the requisite intent when driving the car roughly 24 hours later. Neither the prosecutor nor the trial court suggested the jury could base a conviction on a finding that appellant drove the car during the theft, rather than after the substantial, 24-hour break.

Generally, a Section 10851 offense is a "wobbler" punishable as either a felony or a misdemeanor. (*Lara*, *supra*, 6 Cal.5th at p. 1131, citing *People v. Park* (2013) 56 Cal.4th 782, 789; Veh. Code, § 10851, subd. (a) [violations "shall be punished by imprisonment in a county jail for not more than one year or pursuant to subdivision (h) of Section 1170 of the Penal Code or by a fine of not more than five thousand dollars ($5,000), or by both the fine and imprisonment"].) However, now that Proposition 47 has taken effect, "theft-based violations fall within Penal Code section 490.2, making them misdemeanors unless the vehicle stolen was worth more than $ 950." (*Lara*, *supra*, at pp. 1135-1136, citing *Page*, *supra*, 3 Cal.5th at pp. 1182-1183.) On the other hand, "a violation committed by posttheft driving may be charged and sentenced as a felony regardless of value." (*Lara*, *supra*, at p. 1136.)

B. *Asserted Prosecutorial Misconduct*

Appellant contends the prosecutor committed prejudicial misconduct in closing argument in two ways. First, appellant argues the prosecutor called attention to his failure to testify, in violation of the rule established in *Griffin*, *supra*, 380 U.S. 609. Second, appellant contends the prosecutor misrepresented the prosecution's burden of proof as requiring only a reasonable account of the evidence unrebutted by defense evidence.

1. *Standard of Review*

If a prosecutor's conduct "infects the trial with unfairness," it violates the federal Constitution and is reviewed for prejudice under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (*People v. Booker* (2011) 51 Cal.4th 141, 184, 186 (*Booker*).) If the prosecutor's conduct does not infect the trial with unfairness but does "involve[] the use of deceptive or reprehensible methods of persuasion," it violates only state law and is reviewed for prejudice under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*Booker*, *supra*, 51 Cal.4th at pp. 184, 186.) While the *Chapman* standard requires reversal unless the error is harmless beyond a reasonable doubt, the *Watson* standard requires reversal only if the defendant has demonstrated a reasonable probability that he would have obtained a more favorable result absent the error. (*People v. Gonzalez* (2018) 5 Cal.5th 186, 195-196.)

2. *Governing Principles*

The rule established in *Griffin*, *supra*, 380 U.S. 609, prohibits a prosecutor from commenting upon a defendant's failure to testify. (*People v. Thomas* (2012) 54 Cal.4th 908, 945 (*Thomas*).) A prosecutor indirectly violates the rule "'if he or she argues to the jury that certain testimony or evidence is uncontradicted, [and] if such contradiction or denial could be provided *only* by the defendant . . . .' [Citation.]" (*Ibid.*) Similarly, under the *Griffin* rule, a

prosecutor "cannot refer to the absence of evidence that only the defendant's testimony could provide." (*People v. Brady* (2010) 50 Cal.4th 547, 565-566 (*Brady*).) However, the rule does not otherwise forbid comment on the absence of defense evidence. (See *id.* at p. 566.)

A defendant challenging a prosecutor's remarks to the jury bears the burden of establishing a reasonable likelihood that the jury construed the remarks in an objectionable fashion. (*People v. Potts* (2019) 6 Cal.5th 1012, 1036 (*Potts*).) It is error for a prosecutor to "misstate[] the law by, for example, making remarks that would 'absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements.' [Citation.]" (*Ibid.*) Thus, a prosecutor may neither state that a defendant has a burden to produce evidence, nor "suggest that deficiencies in the defense case can make up for shortcomings in its own." (*People v. Centeno* (2014) 60 Cal.4th 659, 673 (*Centeno*).) Further, "it is error for the prosecutor to suggest that a 'reasonable' account of the evidence *satisfies the prosecutor's burden of proof*." (*Id.* at p. 672.) Nevertheless, "[i]t is permissible to argue that the jury may reject impossible or unreasonable interpretations of the evidence and to so characterize a defense theory." (*Ibid.*)

3. *Analysis*

The prosecutor did not commit *Griffin* error. Instead, the prosecutor permissibly observed the absence of evidence explaining how appellant might have obtained possession of

the stolen car without knowing he lacked the owner's consent to drive it. Appellant's testimony was not the only potential source of the absent evidence. Indeed, appellant concedes that if someone whom he believed to be the owner had loaned or sold the car to appellant, "a 'loaner' or 'seller' could have been brought in by the defense to testify." The prosecutor expressly referred to appellant's failure to call such witnesses, and underscored his focus on witnesses other than appellant by observing that appellant had the power to subpoena witnesses. Thus, there is no reasonable likelihood the jury understood the prosecutor's argument as a comment on appellant's failure to testify. (See *Thomas*, *supra*, 54 Cal.4th at p. 945 [no *Griffin* error in prosecutor's comments on absence of alibi evidence "framed in terms of the failure to call some person *other than defendant*"]; *People v. Sanchez* (2014) 228 Cal.App.4th 1517, 1526-1527 [no *Griffin* error in prosecutor's comments emphasizing defense's failure to explain defendant's presence at crime scene, where other logical witness could have testified on the subject]; *People v. Taylor* (2010) 48 Cal.4th 574, 632-633 [no *Griffin* error in prosecutor's comments on defendant's failure to call any witness, such as hypothetical friend or neighbor, to provide nonfelonious reason for defendant's entry into victim's home].) For the same reasons, the prosecutor did not commit *Griffin* error by characterizing "the government's case" and "[t]he facts" as unopposed.[7] (See *Brady*, *supra*, 50

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[7] The cases on which appellant relies are distinguishable.

Cal.4th at p. 566 [no *Griffin* error in prosecutor's argument that defense did not refute identification evidence, where defendant could have presented relevant evidence without testifying].)

Nor did the prosecutor mischaracterize the prosecution's burden of proof as requiring only a reasonable account of the evidence. Before asserting that the evidence supported only one reasonable conclusion -- viz., that appellant knew the car was stolen -- the prosecutor paraphrased the jury instruction (CALCRIM No. 224) requiring the jury to reject unreasonable conclusions and accept only reasonable ones when evaluating circumstantial evidence. The prosecutor thereby permissibly urged the jury to reject the defense theory as founded on unreasonable inferences. (See *People v. Dalton* (2019) 7 Cal.5th 166,

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(See *People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1245 [prosecutor committed *Griffin* error by falsely asserting nobody had testified for defense when, in fact, various witnesses had done so, thereby drawing attention to defendant's failure to testify]; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 459, 468 [prosecutor committed *Griffin* error by characterizing kidnapping as undisputed, where defendant allegedly kidnapped victim by entering her car late in the evening and forcing her to drive elsewhere, apparently with no other witnesses]; *People v. Medina* (1974) 41 Cal.App.3d 438, 457-460 (*Medina*) [prosecutor committed *Griffin* error by claiming witnesses' testimony was unrefuted, where prosecutor left no doubt that only defendants could have refuted the testimony]; *People v. Vargas* (1973) 9 Cal.3d 470, 476 [prosecutor committed *Griffin* error by observing there had been no denial of defendant's presence at crime scene, where only defendant could have denied it].)

351-352 [finding no error in prosecutor's arguments concerning evaluation of circumstantial evidence, which included comments that reasonable interpretation was "all we're looking for" and "all we're talking about"], citing *Centeno*, *supra*, 60 Cal.4th at p. 672.) There is no reasonable likelihood the jury understood the prosecutor to be disavowing his burden of proof beyond a reasonable doubt.

The prosecutor did, in passing, stray beyond permissible comment on the absence of defense evidence, by suggesting that "deficiencies in the defense case can make up for shortcomings in [the prosecution's] own." (*Centeno*, *supra*, 60 Cal.4th at p. 673.) Specifically, in the following remarks, the prosecutor erroneously characterized the absence of defense evidence as prosecution evidence: "[S]ometimes evidence is actually the absence of evidence. . . . So I'm asking you to think about the absence of evidence as evidence. . . . [P]art of my case is the absence of that evidence [viz., any record of appellant's purchase of the car or any testimony from a witness who loaned the car to appellant]."[8] The prosecutor misstated the law; the

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[8] Contrary to appellant's claim, the prosecutor never told the jury that an acquittal must be based on evidence. Thus, *People v. Hill* (1998) 17 Cal.4th 800 (*Hill*), on which appellant relies, is inapposite. There, the prosecutor expressly asserted that a reasonable doubt must be based on evidence. (*Id.* at p. 831.) Our Supreme Court deemed even this assertion "somewhat ambiguous," but held that the jury was reasonably likely to have understood it, in its context, as erroneously implying a defense

absence of evidence is not evidence. (Evid. Code, § 140 ["'Evidence' means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact"]; see also *People v. Flores* (1992) 3 Cal.App.4th 200, 210 ["absence of evidence as to what occurred" during two-minute interval was not evidence, leaving only speculation to support conclusion that fetus/infant breathed during interval]; cf. *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 655 ["If an absence of evidence could satisfy the burden of proof, the concept of burden of proof would have no meaning"].) Moreover, by expressly characterizing the absence of defense evidence as part of his case, the prosecutor implied that shortcomings in his case could be mitigated by appellant's failure to produce evidence. This was error under state law.[9] (See *Booker*, *supra*, 51 Cal.4th at pp. 184, 186.)

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burden to produce evidence. (*Id.* at pp. 831-832.) Here, the prosecutor made no such statement.

[9] The cases on which respondent relies are inapposite with respect to the prosecutor's comments characterizing the absence of defense evidence as prosecution evidence. (See *People v. Young* (2005) 34 Cal.4th 1149, 1195-1196 [prosecutor permissibly commented on absence of any evidence that might have supported reasonable interpretation other than that defendant killed victim]; *People v. Boyette* (2002) 29 Cal.4th 381, 434 [prosecutor permissibly challenged credibility of defendant's testimony by pointing out absence of corroborating evidence]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1339-1340 [prosecutor permissibly commented on absence of evidence contradicting prosecution evidence].)

The prosecutor's erroneous comments, however, were not prejudicial. They were made only in passing and were unaccompanied by any other form of error. Further, we cannot lightly infer the jury relied on the absence of defense evidence to compensate for shortcomings in the prosecution case, where the prosecution case had no serious shortcomings. The only disputed issue was whether appellant knew he lacked the owner's permission to drive the car. Appellant's knowledge was supported by evidence of appellant's consciousness of guilt (viz., his flight from Officer Crofton and his discarding of his shirt, reasonably viewed as an attempt to avoid identification as the driver), as well as evidence that only 24 hours had passed between the theft of the car and the discovery of appellant driving it (rendering it less likely that appellant obtained permission from a putative owner). There was ample evidence to satisfy the prosecution's burden of proof, on which the trial court properly instructed the jury. Appellant has not rebutted the presumption that the jury followed the court's instructions.[10]

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[10] Appellant acknowledges that the jury's written question to the court during deliberations "indicated that it was actually entertaining the defense's theory, despite the alleged 'absence' of evidence." The trial court properly rejected the prosecutor's argument that the jury was thereby departing from the court's instructions, and submitted a response to the jury informing it that in evaluating the intent element of the Section 10851 charge, the jury could "consider the defendant's beliefs regarding permission and ownership . . . ." Thus, the record does not

(See *People v. Bennett* (2009) 45 Cal.4th 577, 596 [rejecting contention that prosecutor prejudicially shifted burden of proof to defendant by asking witnesses about availability of DNA evidence for retesting, in part due to presumption that jury followed instruction on prosecution's burden of proof].) Although the prosecutor should not have characterized the absence of defense evidence as prosecution evidence, it is not reasonably probable the verdict would have been more favorable to appellant in the absence of this comment.[11] In sum, most of the prosecutor's challenged remarks were permissible, and the few that were erroneous were not prejudicial.

C. *Flight Instruction*

Appellant argues the trial court prejudicially erred by instructing the jury with CALCRIM No. 372, the standard flight instruction.

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support appellant's claim that the jury question demonstrated it was confused about the burden of proof.

[11] On the issue of prejudice, too, the cases on which appellant relies are distinguishable. (See *Centeno*, *supra*, 60 Cal.4th at pp. 669-674 [prosecutor not only strongly implied that prosecution's burden required only reasonable account of evidence, but also illustrated burden with visual aid and hypothetical oversimplifying and trivializing deliberative process]; *Hill*, *supra*, 17 Cal.4th at pp. 845-847 [finding prejudice in cumulative error, including "onslaught" of prosecutorial misconduct in which "pervasive campaign to mislead the jury on key legal points" was only one component].)

1. *Standard of Review*

We review appellant's claim of instructional error de novo. (*People v. Rivera* (2019) 7 Cal.5th 306, 326.) Error in delivering a flight instruction not warranted by the evidence is reviewed for prejudice under the *Watson* standard. (See *People v. Turner* (1990) 50 Cal.3d 668, 694-695 (*Turner*); *People v. Crandell* (1988) 46 Cal.3d 833, 870 (*Crandell*), abrogated on another ground by *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.)

2. *Governing Principles*

Where the prosecution relies on evidence from which a reasonable jury could find flight reflecting consciousness of guilt, the trial court is statutorily required to give a standard flight instruction. (See *People v. Howard* (2008) 42 Cal.4th 1000, 1020; *People v. Price* (2017) 8 Cal.App.5th 409, 454-455 (*Price*) [CALCRIM No. 372 is consistent with the statutory requirement].)[12] The prosecution must rely on evidence that the defendant left the crime scene in circumstances suggesting "'a purpose to avoid being observed or arrested.'" (*People v. Bonilla* (2007) 41 Cal.4th 313, 328 (*Bonilla*), quoting *Crandell*, *supra*, 46 Cal.3d at p. 869.) "To obtain the

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[12] Contrary to appellant's contention, the standard flight instruction does not create an unconstitutional permissive inference of guilt. (See *Price*, *supra*, 8 Cal.App.5th at pp. 455-456.) This is true even where "the principal disputed issue is the defendant's mental state at the time of the crime," rather than whether the defendant committed the alleged acts. (*People v. Smithey* (1999) 20 Cal.4th 936, 983.)

instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence." (*Bonilla, supra,* at p. 328.)

3. *Analysis*

The trial court did not err in giving the standard flight instruction because there was substantial evidence of flight from which the jury could infer consciousness of guilt. The jury reasonably could have found appellant feared Officer Crofton would arrest him, relying on the officer's testimony that he blocked appellant with his marked police vehicle, turned on his overhead lights, and ordered appellant to get on the ground. Indeed, appellant concedes he "was well aware that an officer was pulling him over." Further, the jury was entitled to credit Officer Crofton's testimony that appellant ran from him and discarded the shirt he had been wearing, and to infer from his conduct that appellant was attempting to reduce the likelihood other officers would recognize him from Officer Crofton's description. On the basis of this evidence, the jury reasonably could have found appellant's purpose in running away was to avoid being arrested. That possibility warranted the instruction, regardless of whether the jury could have found, as appellant argues, that he ran away because he was afraid the officer would shoot him. (See *Bonilla*, *supra*, 41 Cal.4th at p. 328.)

Even had we found error in giving the flight instruction, we would find no prejudice. Contrary to appellant's contention that the court "essentially told the jurors how to look at appellant's actions and what inferences to draw," the instruction required the jury neither to infer consciousness of guilt from flight nor to find flight in the first instance.[13] (See *Crandell*, *supra*, 46 Cal.3d at p. 870 [erroneous flight instruction not prejudicial in part because it left determination of "both the existence and significance of flight" to the jury].) Moreover, the court instructed the jury on an alternate basis for inferring appellant's consciousness of guilt: an attempt to hide evidence. The prosecutor argued that appellant demonstrated consciousness of guilt not only by fleeing, but also by attempting to hide evidence by discarding his flannel shirt. (See *Crandell*, *supra*, at p. 870 [erroneous flight instruction not prejudicial in part because defendant manifested consciousness of guilt through conduct other than flight].) Finally, although the prosecutor relied on the evidence of appellant's consciousness of guilt to argue that he knew he

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[13] Indeed, the instruction cautioned the jury that even if it found flight, it could not infer guilt from flight alone. Our Supreme Court has recognized that the cautionary aspect of the standard flight instruction may benefit the defense. (*People v. Streeter* (2012) 54 Cal.4th 205, 254 [flight instruction "benefitted the defense by 'admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory'"], quoting *People v. Jackson* (1996) 13 Cal.4th 1164, 1224.)

lacked the owner's consent to drive the car, he also relied on the temporal proximity between the car's theft and the discovery of appellant driving it. In sum, there is no reasonable probability the verdict would have been more favorable to appellant had the trial court not delivered the flight instruction. (See *Turner*, *supra*, 50 Cal.3d at pp. 694-695; *Crandell*, *supra*, at p. 870.)

D. *Application of Proposition 47*

Appellant contends we must interpret Proposition 47 to apply not only to those Section 10851 convictions based on theft but also to those, like his, based on posttheft driving, arguing that to interpret it otherwise would result in (1) absurd consequences, and (2) an equal protection violation. Relying on the premise that Proposition 47 applies to his conviction, he further argues that he was improperly convicted of a felony because the prosecution failed to prove the car's value exceeded $950.

1. *Standard of Review*

Issues concerning the interpretation of Proposition 47 are subject to de novo review. (See *People v. Gonzales* (2018) 6 Cal.5th 44, 49.) "Our interpretation of a ballot initiative is governed by the same principles that apply in construing a statute enacted by the Legislature." (*Ibid.*) Appellant's constitutional challenge to an interpretation of Proposition 47 is likewise subject to de novo review. (*People v. Superior*

Court (*J.C. Penney Corp., Inc.*) (2019) 34 Cal.App.5th 376, 387.)

2. *Governing Principles*

"When statutory language is unambiguous, we must follow its plain meaning ""whatever may be thought of the wisdom, expediency, or policy of the act, even if it appears probable that a different object was in the mind of the legislature."" [Citation.]" (*In re D.B.* (2014) 58 Cal.4th 941, 948.) Even our Supreme Court will not rewrite a statute simply because its plain language, interpreted literally, yields results that the Court views as "troubling" or "of arguable utility." (*Ibid.*) We may not depart from the literal interpretation of a clearly worded statute unless the results of that interpretation are so unreasonable that the lawmakers could not have intended them. (*Ibid.*)

"Both the state and federal constitutions extend to persons the equal protection of law." (*People v. Chatman* (2018) 4 Cal.5th 277, 287.) "[W]here the law challenged neither draws a suspect classification nor burdens fundamental rights, . . . [w]e find a denial of equal protection only if there is no rational relationship between a disparity in treatment and some legitimate government purpose."[14]

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[14] Appellant does not claim that the challenged classification here involves a suspect class. Although he argues the classification burdens his fundamental right to liberty, relying on *People v. Olivas* (1976) 17 Cal.3d 236, our Supreme Court has declined to read that case so broadly, reasoning that a criminal

(*Id.* at pp. 288-289.) "We first ask whether the state adopted a classification affecting two or more groups that are similarly situated in an unequal manner." (*Id.* at p. 289.) "If we deem the groups at issue similarly situated in all material respects, we consider whether the challenged classification ultimately bears a rational relationship to a legitimate state purpose." (*Ibid.*) The challenger bears the burden of showing "that no rational basis for the unequal treatment is reasonably conceivable." (*Ibid.*) To be rational and reasonably conceivable, the basis for the law need not be empirically substantiated, persuasive, or sensible; nor need it have been articulated by the lawmakers. (*Ibid.*)

Lawmakers exercise broad discretion in defining crimes and specifying punishment. (*Wilkinson*, *supra*, 33 Cal.4th at p. 838.) "[N]either the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles." (*Ibid.*)

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defendant "'does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives.' [Citation.]" (*People v. Wilkinson* (2004) 33 Cal.4th 821, 837-838 (*Wilkinson*); see also *ibid.* [holding rational basis test applicable to defendant's equal protection challenge to statutory scheme allowing more severe punishment for battery on custodial officer without injury than for such battery with injury].) We therefore reject appellant's contention that his equal protection challenge requires strict scrutiny rather than rational basis review.

3. *Analysis*

Appellant's felony posttheft driving conviction violates neither the absurd consequences doctrine of statutory interpretation nor the constitutional guarantee to equal protection, despite the fact that Proposition 47 would have precluded a felony conviction on a theft theory (due to the absence of evidence at trial that the car's value exceeded $950). The plain language of Proposition 47 allows prosecutors to seek greater punishment for posttheft driving of a low-value car than for theft of the same car.[15] (*Lara*, *supra*, 6 Cal.5th at p. 1136 ["a violation committed by posttheft driving may be charged and sentenced as a felony regardless of value"].) This is not an absurd result, because defendants convicted of posttheft driving may have committed more culpable acts than defendants convicted of vehicle theft. For the same reason, the voters had a rational

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[15] In *Page*, our Supreme Court declined to consider whether either the absurd consequences doctrine or equal protection doctrine requires application of Proposition 47 to "those convicted for taking a vehicle *without* the intent to permanently deprive the owner of possession." (*Page*, *supra*, 3 Cal.5th at p. 1188, fn. 5.) The Court has since granted review of that question in another case. (*People v. Bullard* (Feb. 21, 2018, No. S239488) 2018 Cal. LEXIS 1032, at *1.) Recently, the Court noted that the question left open in *Page* concerns the application of Proposition 47 to "joyriding" offenses, and again declined to consider the issue because the facts before it concerned a conviction on a posttheft driving theory rather than a joyriding theory. (See *Lara*, *supra*, 6 Cal.5th at pp. 1136-1138 & fn. 3.)

basis for enacting this distinction in prosecutors' charging discretion.

For instance, a posttheft driver may have led law enforcement officers on a dangerous and resource-intensive pursuit. (Cf. *People v. Morales* (2019) 33 Cal.App.5th 800, 807 (*Morales*) [finding no absurdity in potential for more severe punishment of posttheft driving than for theft, in part because "[d]riving is an inherently dangerous activity, driving illegally even more so, and although the theft of a car is a single incident, driving a car without its owner's permission may be done many times, multiplying the threat to public safety"].) Alternatively, a posttheft driver may have used a stolen car to facilitate another crime (e.g., disposing of a body or selling stolen parts through a "chop shop"). (Cf. *People v. Van Orden* (2017) 9 Cal.App.5th 1277, 1286, review dismissed March 14, 2018, S241574 [contrasting Warren Beatty's character in film *Bonnie and Clyde*, who committed posttheft driving for purpose of crime spree, with Nicolas Cage's character in film *Gone in 60 Seconds*, who stole cars and delivered them to "evil mobster" for sole purpose of saving brother's life].) Theoretically, a posttheft driver familiar with car thieves or with their dumping grounds could repeatedly use stolen cars for other crimes without ever stealing a car himself. (Cf. *Lara*, *supra*, 6 Cal.5th at p. 1131 [recounting fact that defendant drove stolen car one day after police had found it parked at area "known as a dumping ground for stolen vehicles"].)

We need not assume defendants convicted of posttheft driving always have committed more culpable acts than those convicted of vehicle theft. Indeed, defendants convicted on a posttheft driving theory may also have committed the theft themselves. (See *Lara*, *supra*, 6 Cal.5th at p. 1137; *Page*, *supra*, 3 Cal.5th at p. 1189.) But it is sufficient that posttheft driving convictions may sometimes be based on more culpable acts. (See *Wilkinson*, *supra*, 33 Cal.4th at p. 839 [inferring Legislature rationally contemplated "that the ostensible 'lesser' offense of battery without injury sometimes may constitute a more serious offense and merit greater punishment than the 'greater' offense of battery accompanied by injury"].)

Moreover, the potential for disparate punishment unrelated to the culpability of the offenses can be avoided through prosecutorial discretion in electing to charge posttheft driving as a misdemeanor. (See *Wilkinson*, *supra*, 33 Cal.4th at p. 838 [finding rational basis in part because Legislature reasonably could withhold from trial courts discretion to reduce felonies to misdemeanors in cases "deemed serious enough by the prosecutor to warrant felony prosecution"]; *In re D.B.*, *supra*, 58 Cal.4th at pp. 947-948 [no absurdity resulted from interpreting statute to condition minors' eligibility for particular form of commitment only on most recently committed offense, even though interpretation could potentially reward minor for committing more crimes, in part because that result could be avoided by prosecutors' charging and dismissal decisions].) In enacting Proposition

47, the voters rationally could have intended to limit its categorical elimination of felony-charging discretion to those Section 10851 cases in which the prosecution could prove theft of a vehicle but could not also prove posttheft driving (or value in excess of $950). In sum, the challenged distinction between posttheft driving and theft convictions is neither absurd nor unsupported by a rational basis.[16]

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICAL REPORTS

MANELLA, P. J.

We concur:

COLLINS, J. CURREY, J.

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[16] We do not reach the question whether defendants convicted of driving a stolen vehicle under Section 10851 are similarly situated to those convicted of vehicle theft. At least one court has held they are not, and has rejected an equal protection challenge on that ground without reaching the question of a rational basis for the sentencing disparity. (*People v. Morales*, *supra*, 33 Cal.App.5th at pp. 808-809.)