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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ABIGAIL CONCEPCION,

Defendant and Appellant.

B279788

Los Angeles County  
Super. Ct. No. LA082494

APPEAL from a judgment of the Superior Court of Los Angeles County, Susan M. Speer, Judge. Affirmed.

R.E. Scott & Associates and R.E. Scott, 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, Assistant Attorney General, Kenneth C. Byrne and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant and appellant Abigail Concepcion of grand theft for stealing designer items from a department store. Concepcion's sole contention on appeal is the trial court abused its discretion in declining to reduce her felony conviction to a misdemeanor under Penal Code section 17, subdivision (b) (section 17(b)).<sup>1</sup> We find no abuse of discretion and therefore affirm.

### **FACTS AND PROCEDURAL BACKGROUND**

At about 8:30 p.m. on December 28, 2015, Ryan Hallenbeck was working as a loss prevention agent at a Nordstrom store. Hallenbeck was watching the first floor of the store through its closed-circuit television system (CCTV).<sup>2</sup> Hallenbeck noticed Concepcion in the handbags department at a table of merchandise on sale. Concepcion caught Hallenbeck's attention because she had a silver Nordstrom shopping bag; during the holiday season Nordstrom uses red and white holiday bags instead of its usual silver bags.

Concepcion picked up a red and black Alexander McQueen clutch purse. Hallenbeck then saw Concepcion with a Michael Kors wallet. Hallenbeck also saw Concepcion pick up a Michael Kors phone case. Concepcion put the clutch and the wallet into the silver shopping bag. Concepcion walked past three open cash registers and out the door of the store toward the parking structure. Hallenbeck and a fellow loss prevention employee, David Covarrubias, followed Concepcion out. Hallenbeck stopped Concepcion about 10 feet outside the door and "asked her to come back in the office and talk about the missing merchandise."

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<sup>1</sup> Statutory references are to the Penal Code.

<sup>2</sup> The Nordstrom CCTV video was played for the jurors at trial.

When Hallenbeck stopped her, Concepcion had the clutch and the wallet in the silver shopping bag and the phone case under her arm.

All three items still had the price tags on them. The clutch was priced at \$877.98, marked down from its original price of \$1499. The prices on the phone case and the wallet were \$55 and \$58, respectively.

The People charged Concepcion with one count of grand theft in violation of section 487, subdivision (a). The case proceeded to trial in November 2016. The jury convicted Concepcion and found the crime to be grand theft rather than petty theft.

On December 7, 2016, the parties appeared before the trial court for sentencing. The prosecutor filed a sentencing memorandum asking the court to impose the midterm of two years in the state prison (to be served in the county jail). The prosecutor noted Concepcion had 11 prior misdemeanor convictions and two felony convictions. The probation department also recommended the trial court deny probation and sentence Concepcion to state prison. The probation officer noted Concepcion was on misdemeanor probation for theft when she stole the items from Nordstrom.

Concepcion's attorney moved to reduce the grand theft conviction to a misdemeanor under section 17(b). Counsel argued the dollar amount of the stolen items was "about \$40 over . . . the sort of dividing line between grand theft and petty theft." Referring to the then-recently adopted Proposition 47,<sup>3</sup> counsel asked the court "to recognize this as misdemeanor conduct."

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<sup>3</sup> The Safe Neighborhoods and Schools Act, section 1170.18.

The trial court stated, “The motion to reduce to a misdemeanor is denied. She has an extensive record. It’s mostly misdemeanor stuff, but [an] extensive record for theft dating back to 1997. She hasn’t earned a misdemeanor.” The court also rejected the prosecutor’s request for a state prison sentence. Instead, the court placed Concepcion on probation for five years and ordered her to serve 180 days in the county jail and to perform 60 days of community labor.

### DISCUSSION

On appeal, Concepcion does not challenge her conviction or the evidence against her. Her sole contention is the trial court abused its discretion in denying her section 17(b) motion to reduce her felony conviction to a misdemeanor.

Section 17(b) “authorizes the reduction of ‘wobbler’ offenses--crimes that, in the trial court’s discretion, may be sentenced alternately as felonies or misdemeanors--[. . .] by declaration as a misdemeanor . . . .” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974 (*Alvarez*)). “Trial courts have broad authority in ruling on motions under section 17 to reduce a crime to a misdemeanor.” (*People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1457.) The court’s exercise of that authority “must be an intensely fact-bound inquiry taking all relevant factors, including the defendant’s criminal past and public safety, into due consideration.” (*Alvarez*, at pp. 981-982.)

On review, an appellate court is bound by an “extremely deferential and restrained standard.” (*Alvarez*, 14 Cal.4th at p. 981.) Concepcion, as the appellant, bears the burden “ ‘to clearly show that the sentencing decision was irrational or arbitrary. . . . In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination . . . will not be set aside on review.’ ” (*Id.* at pp. 977-978.)

Noting the prices of the three items she stole total \$990.98, Concepcion first argues that “if the offense had occurred at Walmart the results would have been different.” Concepcion asserts, “Ultimately, the amount of the loss is based on an arbitrarily set value determined unilaterally by Nordstrom’s [*sic*] alone and bears no relationship to the true market value of the property . . . .” Concepcion misses the point. The jury was entitled to conclude that what Nordstrom was charging for the purse, the wallet, and the phone case reflected their fair market value.

“The value of property is the fair market value of the property. *Fair market value* is the highest price the property would reasonably have been sold for in the open market at the time of, and in the general location of, the theft. *Fair market value* is the price a reasonable buyer and seller would agree on if the buyer wanted to buy the property and the seller wanted to sell it, but neither was under an urgent need to buy or sell.” (CALCRIM No. 1801. See also *People v. Tijerina* (1969) 1 Cal.3d 41, 45 “[i]n the absence of proof . . . that the price charged by a retail store from which merchandise is stolen does not accurately reflect the value of the merchandise in the retail market, that price is sufficient to establish the value of the merchandise within the meaning of sections 484 and 487”]; *People v. Pena* (1977) 68 Cal.App.3d 100, 102-104 [theft of leather jackets from Macy’s; “‘fair market value’ means the highest price obtainable in the market place rather than the lowest price or the average price”].)

Concepcion cites *People v. Perkins* (2016) 244 Cal.App.4th 129. That case does not support Concepcion’s argument. Perkins had been convicted of one felony count of receiving stolen property—a credit card—and three felony counts of grand theft of a firearm (as well as other crimes). The victim from whom the

guns had been stolen testified he had paid \$1300, \$900, and \$800, respectively, for the three weapons. (*Id.* at pp. 132-134.) After voters approved Proposition 47, Perkins submitted a form request to the court to reduce his felony convictions on the “wobblers” to misdemeanors. In error, Perkins checked the box on the form for receiving stolen property but then listed his crimes as grand theft. (*Id.* at pp. 134-135.) The court of appeal affirmed the superior court’s denial of Perkins’s petition. (*Id.* at p. 142.) The court held Perkins had not established the value of the credit card was \$950 or less. (*Id.* at p. 137.) The court noted Perkins could file a new, corrected form to reduce the grand theft convictions “showing, for each conviction, that the stolen firearm did not exceed \$950 in value.” (*Id.* at p. 141.)<sup>4</sup>

Concepcion also contends the trial court “failed to state any substantive reasons for its denial of the motion.” But the court did give reasons: Concepcion’s “extensive record,” including her “extensive record for theft dating back to 1997.” As the prosecutor noted in his sentencing memorandum and the probation officer noted in her report to the court, Concepcion had 11 misdemeanor convictions and two felony convictions spanning a 20-year period. One of the felony convictions was for sale or

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<sup>4</sup> Concepcion also cites *People v. Vandiver* (2017) 9 Cal.App.5th 152. As the Attorney General notes, that opinion was vacated. The Supreme Court denied review of the later-published opinion (10 Cal.App.5th 256) and ordered the opinion not to be officially published. (*People v. Vandiver* (June 15, 2017, No. S242070) 2017 Cal. LEXIS 4824.) Therefore, it is improper to cite that decision. (See Cal. Rules of Court, rule 8.1115 (a) & (e)(3).)

transportation for sale of a controlled substance.<sup>5</sup> Concepcion was convicted of forging a name on an access card in 1997, of carrying a concealed weapon in 1999, of shoplifting in 2009, of larceny in Las Vegas in August 2015, and of petty theft in two cases in Los Angeles and San Bernardino Counties in August and September 2015, respectively. As noted, probation reported Concepcion was still on probation in at least the Los Angeles theft case when she stole the items from Nordstrom in December 2015. Concepcion also had convictions for driving without a license, driving with a suspended license, and trespass.

On this record, the trial court did not abuse its broad discretion in denying Concepcion's motion to reduce her grand theft conviction to a misdemeanor.

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<sup>5</sup> The other felony conviction was for possession of a controlled substance. That conviction now would be a misdemeanor under Proposition 47.

**DISPOSITION**

Concepcion's conviction and sentence are affirmed.

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EGERTON, J.

We concur:

LAVIN, Acting P. J.

DHANIDINA, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.