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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES WILLIE COOPER,

Defendant and Appellant.

B286953

(Los Angeles County  
Super. Ct. No. A193360)

APPEAL from an order of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Affirmed.

Stephen Borgo, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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## I. INTRODUCTION

Defendant James Willie Cooper appeals from an order denying his motion to have five 1978 felony robbery convictions reduced to misdemeanors under Penal Code section 1170.18<sup>1</sup> (Proposition 47). We affirm the order.

## II. DISCUSSION

### A. *Wende* Brief

Defendant's appointed appellate counsel filed an opening brief in accordance with *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) requesting that we independently review the entire record to determine if there are any arguable issues. On March 16, 2018, we notified defendant that appointed appellate counsel had failed to find any arguable issues and defendant had 30 days within which to independently brief any grounds for appeal, contentions, or arguments he wanted us to consider. We have reviewed the record and are satisfied that defendant's appointed appellate counsel has fully complied with his responsibilities and no arguable issues exist. (*Wende, supra*, 25 Cal.3d at p. 441.) As discussed below, defendant's robbery convictions are not eligible for reduction under section 1170.18.

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<sup>1</sup> All further statutory references are to the Penal Code.

## B. *Supplemental Brief*

### 1. Ineffective assistance

Defendant filed a supplemental brief. Defendant argues he has been denied effective assistance of counsel in violation of his Sixth Amendment rights because his appointed appellate counsel filed a *Wende* brief. We conclude to the contrary. Defendant has received adequate and effective review on appeal given his appointed appellate counsel's compliance with the *Wende* procedure and our independent review of the record. (*Smith v. Robbins* (2000) 528 U.S. 259, 276, 278-279; *People v. Kelly* (2006) 40 Cal.4th 106, 117-119.) And because there are no arguable issues, defendant is not prejudiced.

### 2. Evidentiary hearing

Defendant asserts his appellate counsel should have argued it was an abuse of discretion not to hold an evidentiary hearing allowing defendant to “demonstrate eligibility from sources not limited to the record of conviction.” Defendant acknowledges he bore the burden of establishing eligibility under section 1170.18. (*People v. Romanowski* (2017) 2 Cal.5th 903, 916.) An evidentiary hearing may be warranted in some section 1170.18 cases upon a prima facie showing of a relevant issue of fact. (*People v. Page* (2017) 3 Cal.5th 1175, 1189; *People v. Romanowski, supra*, 2 Cal.5th at p. 916.) Here, however, defendant forfeited his claim an evidentiary hearing was necessary. (*People v. Clark* (2016) 63 Cal.4th 522, 552.) Defendant never requested an evidentiary hearing. He did not

present or attempt to present any evidence in the trial court. He does not now claim he has any evidence to offer in support of his motion. And, as discussed below, any evidence as to the value of the property involved in the robberies would be irrelevant to defendant's motion. There is no arguable issue on appeal with respect to the absence of an evidentiary hearing. Appointed appellate counsel was not ineffective in failing to present such an argument.

### 3. Section 490.2

Defendant asserts his robbery convictions should be reduced to misdemeanors under section 1170.18. Robbery is not among the offenses listed in section 1170.18 as eligible for reduction. Defendant argues his convictions nevertheless qualify for reduction under section 490.2 as thefts of property valued at less than \$951. Defendant contends—without citation to any evidence—that only \$600 in property was taken.

Section 490.2 was enacted as part of Proposition 47. The initiative reduced the punishment for certain theft- and drug-related offenses from felonies to misdemeanors. It also added section 490.2 defining petty theft. (Proposition 47, § 8.)

Section 490.2 makes obtaining property by theft a misdemeanor if the property's value does not exceed \$950. Section 490.2, subdivision (a) states, "Notwithstanding Section 487 or any other provision of law defining *grand theft*, *obtaining 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 . . . .” (Italics added.)<sup>2</sup>

Whether robbery can be a form of theft falling under section 490.2 is a question of statutory interpretation that we review de novo. (*People v. Gollardo* (2017) 17 Cal.App.5th 547, 552.) The same principles that govern statutory construction apply to voter initiatives. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900.) “In construing a statute, our role is to ascertain the Legislature’s intent so as to effectuate the purpose of the law. [Citation.] In determining intent, we must look first to the words of the statute because they are the most reliable indicator of legislative intent. [Citation.] If the statutory language is clear and unambiguous, the plain meaning of the statute governs. [Citation.]” (*People v. Lopez* (2003) 31 Cal.4th 1051, 1056.)

Section 490.2 by its clear terms applies only to theft. It applies to “obtaining any property by theft” including crimes statutorily defined as grand theft. It does not apply to nontheft crimes. Thus, we consider whether robbery is a theft offense.

Theft is defined in section 484, subdivision (a): “Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent

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<sup>2</sup> Section 490.2 was subsequently amended by Proposition 63, “[t]he Safety for All Act of 2016,” to add subdivision (c), “This section shall not apply to theft of a firearm.” Hence theft of a firearm cannot be a misdemeanor under section 490.2 even if its value is less than \$951. (Prop. 63, § 11.1, approved Nov. 8, 2016, eff. Nov. 9, 2016.)

representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft.” (§ 484, subd. (a).)

Theft as a general term includes the common law crimes of larceny, theft by false pretenses and embezzlement. (*People v. Gonzales* (2017) 2 Cal.5th 858, 864.) “Larceny requires the taking of another’s property, with the intent to steal and carry it away. [Citation.]” (*People v. Gomez* (2008) 43 Cal.4th 249, 254-255.) Theft by false pretenses requires taking title to property as well as possession. (*People v. Gonzales, supra*, 2 Cal.5th at p. 864.) “[E]mbezzlement involves ‘an initial, lawful possession of the victim’s property, followed by its misappropriation.’ [Citation.]” (*Ibid*; § 484, subd. (a) [“Every person . . . who shall fraudulently appropriate property which has been entrusted to him or her . . . is guilty of theft”]; § 503 [“Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted”].) None of the theft offenses includes as an element the use of force or fear. A theft may be committed without the use of force or fear and without the victim being present but, as discussed below, a robbery cannot. (*People v. Gomez, supra*, 43 Cal.4th at p. 254.)

Robbery is defined as “the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (§ 211.) Robbery is an aggravated form of larceny. (*People v. Williams* (2013) 57 Cal.4th 776, 786-787.)

Unlike larceny, robbery requires the application of *force or fear* to deprive the victim of his or her property *from the victim's presence*. The application of force or fear is the central element that distinguishes robbery. (*People v. Ramos* (1982) 30 Cal.3d 553, 589, revd. on other grounds, *California v. Ramos* (1983) 463 U.S. 992, 1013-1014.) It is the element that makes robbery a more serious offense. (*People v. Gomez, supra*, 43 Cal.4th at p. 255.) Also unlike theft, robbery is statutorily defined as a serious and a violent felony. (§§ 667.5, subd. (c)(9), 1192.7, subd. (c)(19).)<sup>3</sup>

Additionally, the Legislature has placed all of the theft crimes in part 1, title 13 of the Penal Code, “Of Crimes Against Property.” (See *People v. Romanowski, supra*, 2 Cal.5th at pp. 903, 908 [by placing section 484e, theft of access card information, in part 1, title 13, chapter 5 of the Penal Code, “Larceny,” “the Legislature made clear that theft of access card information is a theft crime”].) Consistent with our conclusion robbery is not a theft crime, the Legislature has placed robbery in part 1, title 8 of the Penal Code, “Of Crimes Against the Person.” Title 8 also includes homicide, kidnapping and assault and battery.

Defendant was convicted of robbery, not theft. Robbery is a violent, more serious offense. Therefore, section 490.2, which applies to theft, does not apply to reduce defendant’s robbery convictions to misdemeanors. (See *People v. Bush* (2016) 245 Cal.App.4th 992, 1001 [theft from an elder]; *People v. Acosta* (2015) 242 Cal.App.4th 521, 526 [attempted car burglary].)

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<sup>3</sup> “[G]rand theft involving a firearm” is, however, a serious felony. (§ 1192.7, subd. (c)(26).)

Our conclusion is consistent with the voters' intent in adopting Proposition 47. Proposition 47's purpose was to "[r]equire misdemeanors instead of felonies for *nonserious, nonviolent* crimes like petty theft and drug possession . . . ." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), text of Prop. 47, § 3, p. 70, italics added.) Proposition 47's statement of Purpose and Intent assured voters that persons convicted of dangerous crimes such as murder, rape and child molestation would not benefit. (*Ibid.*) It further assured voters that defendants with prior convictions for specified violent or serious crimes would not benefit. (*Ibid.*) Robbery is neither a nonserious nor a nonviolent offense. It involves taking personal property from a victim's presence by the use of force or fear. To construe section 490.2 as encompassing robberies of property valued at less than \$951 would be inconsistent with the electorate's intent to reduce punishment for nonserious, nonviolent offenses.

Our conclusion is also consistent with our Supreme Court's recent decisions extending section 490.2's scope to other theft offenses. In *People v. Romanowski*, *supra*, 2 Cal.5th at pages 905-906, the court held theft of access card information in violation of section 484e, subdivision (d) is a theft offense falling under section 490.2. The court reasoned that a violation of section 484e, subdivision (d) is statutorily defined as grand theft, and section 490.2 expressly applies to 'any other provision of law defining grand theft,' including section 484e, subdivision (d). (*Id.* at p. 908.) The court also noted, "[s]ection 484e . . . resides in part 1, title 13, chapter 5 of the Penal Code, which is titled 'Larceny,'" making it clear the Legislature considered the crime a theft crime. (*Ibid.*) In *People v. Page*, *supra*, 3 Cal.5th at page 1187, the court held section 490.2 extends to vehicle theft (Veh.



Code, § 10851) when the vehicle is worth \$950 or less. The court reasoned that under a “straightforward reading of the statutory text” (*People v. Page, supra*, 3 Cal.5th at p. 1187) a code section that criminalizes theft of a vehicle is included within section 490.2’s sweep. (*Id.* at pp. 1180, 1183.) By contrast, robbery is not statutorily defined as a theft offense. We therefore conclude that robbery is not subject to reduction under section 490.2.

### III. DISPOSITION

The order denying defendant’s Penal Code section 1170.18 motion is affirmed.

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KIM, J.\*

We concur:

BAKER, Acting P.J.

MOOR, 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.