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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JOSEPH LANE DURSMA,<br><br>Defendant and Appellant. | B280498<br><br>(Los Angeles County Super. Ct. No. NA034161) |

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

A. William Bartz, Jr., 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, Mary Sanchez and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Joseph Lane Dursma appeals the trial court's order denying his petition to recall his felony sentence for second degree burglary (Pen. Code, § 459)[1] and to resentence him for misdemeanor shoplifting (§ 459.5) pursuant to Proposition 47 (§ 1170.18). We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *Dursma's 1998 burglary conviction*

On January 20, 1998, Dursma was charged with the second degree commercial burglary (§ 459) of Long Beach Truck and Auto Parts, along with three prior serious felony conviction enhancements and two on-bail enhancements (§§ 667, subds. (b)–(i), 12022.1). Following a jury trial, Dursma was convicted of the burglary. The trial court subsequently found the on-bail enhancement allegations not true, the prior serious felony conviction allegations true, and sentenced Dursma to a three-strikes prison term of 25 years to life. Dursma filed a notice of appeal, but abandoned that appeal a month later.

2. *Proposition 47 Petition and Hearing*

In 2014, the electorate passed Proposition 47, codified in relevant part as section 1170.18, which reduced penalties for certain theft and drug offenses by amending existing statutes. Proposition 47 also added several new provisions to the Penal Code, including section 459.5, which created the crime of shoplifting. (See *People v. Gonzales* (2017) 2 Cal.5th 858, 863.)

On July 8, 2015, Dursma, represented by counsel, filed a petition pursuant to section 1170.18 seeking to have his felony burglary sentence recalled and to be resentenced for

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

misdemeanor shoplifting under section 459.5. Dursma's Proposition 47 petition alleged that he was eligible for resentencing as a misdemeanant for having committed shoplifting, rather than as a felon for having committed burglary. His petition asserted that the "value of the items [he] took or attempted to take did not exceed $950." Noting that Dursma "did not take any items from the store. . . . [and there] was no testimony as to how much money was contained in the safe [that Dursma attempted to break into], or whether there was any money in the safe at all," the petition argued "there is no evidence that [Dursma] stole or attempted to steal money or property valuing over $950."

Because Dursma abandoned his appeal of his conviction, no reporter's transcript of his trial was ever prepared; therefore, for purposes of Dursma's Proposition 47 petition, the parties and the trial court relied on the evidence presented at the preliminary hearing. That evidence was as follows.

Larry Byrne, whose father owned Long Beach Truck and Auto Parts, testified that in the early evening of October 3, 1997, Dursma's girlfriend Laurie came into the store to use the telephone. About 15 or 30 minutes later, Dursma himself came into the store. Byrne knew both Dursma and Laurie.

Dursma spoke to Laurie for a few minutes and then asked Byrne if he could use the bathroom, which was located in the rear of the store. Byrne, who was about to close up for the night, agreed. As he was in the process of closing up shortly thereafter, Byrne looked inside both the men's and the women's bathrooms and saw that they were empty. He assumed Dursma had already left the store. As Byrne continued to close up, he saw Laurie

outside. She said Dursma had left, so Byrne set the store's burglary alarm, locked all the doors and left.

A few hours later, Long Beach police officers responded to a silent security alarm at the auto parts store. The building was still locked. Called to the scene, Byrne's father gave the officers access. Inside the store's office, officers observed that a safe had been turned on its side and there were a couple of crowbars sticking out from its hinged edge; there were also tools, including a sledgehammer, lying on the floor. Byrne testified the safe had been in its normal condition when he closed up. Near the customer counter, officers found a shotgun lying on the floor. This shotgun was usually kept under the counter in a case or sleeve. Dursma was discovered hiding in a crawlspace inside the store's second story attic.

At the hearing on Dursma's Proposition 47 petition, his attorney argued that the value of the shotgun was irrelevant because the evidence showed he had not attempted to steal the shotgun; rather, the evidence showed only that he had unsuccessfully tried to break into the safe. The following colloquy occurred:

"The Court: What is the value of the safe? He wasn't going to steal the safe, was he?

"[Defense counsel]: He was not going to steal the safe.

"The Court: He was going to steal what was in it.

"[Defense counsel]: He attempted to break in but wasn't able to. There was no property available to him, so —

"The Court: You have to show that the property taken or attempted to be taken was less than $950. How much was in the safe?

"[Defense counsel]: That's unknown. And it's my argument that because he was unable to actually open the safe, there was no property for him to steal; and, therefore, there was no value to the property . . . there was nothing taken or intended to be taken.

"The Court: Well, that would make this nothing more than a simple trespass.

"[Defense counsel]: However . . . he entered the establishment during regular business hours with the intent to commit larceny, as is defined in [the] shoplifting statute."

At the close of the hearing, the trial court took the eligibility question under submission, and subsequently issued a written memorandum of decision on November 9, 2016. The memorandum reiterated the facts of the case as set forth in the preliminary hearing transcript and then concluded Dursma was ineligible for Proposition 47 relief. The trial court noted that the shoplifting statute requires "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours" (§ 459.5), and reasoned: "The record is devoid of any facts to suggest that Petitioner intended to commit larceny *while the store was open during regular business hours* and instead shows that it was Petitioner's intent to conceal himself in the store until past closing and then to commit theft."[2]

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[2] The record supports the trial court's conclusion that Dursma intended to commit theft after business hours. As the court reasoned: "[Dursma] asked Byrne to use the restroom upon entering the store only to disappear when Byrne was closing the store and checking the restrooms for Petitioner. Also, Petitioner did not set off the alarm for over two hours past closing, suggesting that he did not move or attempt to open the safe until waiting what he deemed to be a sufficient amount of time.

Regarding the value of the property taken or attempted to be taken, the trial court concluded "there is no information provided [about] the contents of the safe or the value thereof. As for the shotgun, the People argued at the eligibility hearing that Petitioner intended to take the shotgun (in addition to breaking into the safe) and that the shotgun was valued at over $950. While the Court is unconvinced that Petitioner intended to steal the shotgun, there is again no information provided regarding the possible value of the shotgun. Further, in light of Petitioner's failure to show that he intended to 'commit larceny while that establishment is open during regular business hours,' it is of no consequence whether the value of the property intended to be taken exceeded $950."

Dursma timely appealed from the order denying his Proposition 47 petition.

**STANDARD OF REVIEW**

"Where an appeal involves the interpretation of a statute enacted as part of a voter initiative, the issue on appeal is a legal one, which we review de novo. ([*People v. Arroyo* (2016) 62 Cal.4th 589,] 593 . . .) Where the trial court applies disputed facts to such a statute, we review the factual findings for substantial evidence and the application of those facts to the statute de novo. [Citation.] ' "[A]n order is presumed correct; all intendments are indulged in to support it on matters as to which

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Further, Petitioner attempted to open the safe using crow bars and a sledgehammer, actions which were hardly furtive and could not have been attempted during regular business hours. Finally, his girlfriend falsely informed Byrne that Petitioner had left the store [which] suggests that she was helping to conceal Petitioner in the store until after closing."

the record is silent, and error must be affirmatively shown." ' (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1046 . . .) In addition, we must ' "view the record in the light most favorable to the trial court's ruling." ' [Citation.]" (*People v. Johnson* (2016) 1 Cal.App.5th 953, 960 [Proposition 47 resentencing case]; accord *People v. Hallam* (2016) 3 Cal.App.5th 905, 911–912 [trial court's decision on section 1170.18 petition is inherently factual, which we review for substantial evidence, while trial court's legal interpretation of the statute is reviewed de novo].)

We will affirm a trial court's decision on any proper ground, even if it is not the ground specified by the court. (*People v. Zamudio* (2008) 43 Cal.4th 327, 351, fn. 11 [" 'we review the [trial court's] ruling, not the court's reasoning and, if the ruling was correct on any ground, we affirm' "]; accord *People v. Rogers* (2009) 46 Cal.4th 1136, 1162, fn. 14.)

**DISCUSSION**

1. *Proposition 47*

"In 2014, the electorate passed initiative measure Proposition 47, known as the Safe Neighborhoods and Schools Act (the Act), reducing penalties for certain theft and drug offenses by amending existing statutes. [Citation.] The Act also added several new provisions, including Penal Code section 459.5, which created the crime of shoplifting. . . . Shoplifting is punishable as a misdemeanor unless the defendant has previously been convicted of a specified offense. (§ 459.5, subd. (a).) Section 459.5, subdivision (b) contains an explicit limitation on charging: 'Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.'

"Section 1170.18 now permits a defendant serving a sentence for one of the enumerated theft or drug offenses to petition for resentencing under the new, more lenient, provisions. If the offense committed by an eligible defendant would have been a misdemeanor under the Act, resentencing is required unless 'the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.18, subd. (b).) A person who has already completed a felony sentence may petition to have his conviction designated a misdemeanor. (§ 1170.18, subds. (f), (g).)" (*People v. Gonzales*, *supra*, 2 Cal.5th at p. 863, fns. omitted.)

2. *The trial court properly concluded that Dursma was not eligible for Proposition 47 relief because he did not demonstrate that he committed the crime of shoplifting*

As enacted in 2014, section 459.5, subdivision (a), defines shoplifting as "*entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours*, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." (§ 459.5, italics added.)

The facts of the present case highlight an ambiguity in the language of section 459.5 with regard to what must occur "during regular business hours" for a crime to constitute shoplifting. Under one possible interpretation of the statute, an individual commits the crime of shoplifting if he or she (1) enters a commercial establishment while the establishment is open during regular business hours, and (2) has the intent to commit larceny. Under this interpretation, it does not matter whether the perpetrator intends to commit larceny *before* or *after* the business closes, so long as he enters an open commercial establishment

with a larcenous intent.[3] Under a second possible reading of the statute, both the entry *and* the larceny must occur during regular business hours—that is, the offender must intend to commit the larceny while the establishment is open. We need not resolve this issue in the present case, however, because Dursma failed to

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[3] Some cases have assumed without deciding that the italicized language requires only that the perpetrator enter a commercial establishment while the establishment is open during regular business hours, and with an intent to commit larceny. (E.g., *In re J.L.* (2015) 242 Cal.App.4th 1108, 1114 ["The crime of shoplifting has three elements: (1) entry into a commercial establishment, (2) while the establishment is open during regular business hours, and (3) with intent to commit larceny of property valued at $950 or less. (§ 459.5, subd. (a).)"]; accord *People v. Hallam*, *supra*, 3 Cal.App.5th at p. 911; see also *People v. Gonzales*, *supra*, 2 Cal.5th at p. 873 [although employee who enters workplace one minute before opening time with intent to steal commits *burglary*, while same employee commits only *shoplifting* by entering a minute later, this result is not any "more absurd than requiring that first degree burglary be committed during nighttime, which our Penal Code did until 1982"].) That interpretation, however, requires reading section 459.5 as though it had defined shoplifting as "entering a commercial establishment *while that establishment is open during regular business hours* with intent to commit larceny, where the value of the property that is taken or intended to be taken does not exceed $950." But as written, the phrase "entering a commercial establishment *with intent to commit larceny while that establishment is open during regular business hours*" appears to require that the larceny be planned for regular business hours.

carry his evidentiary burden of proving that the value of the property he intended to steal did not exceed $950.[4]

As we have noted, to constitute shoplifting, the value of the property that is taken or intended to be taken may not exceed $950. Dursma concedes there was no information provided at the Proposition 47 hearing regarding the value of either the shotgun or the contents of the safe, but he urges that "the prosecution must bear the burden of proof" on this issue. Not so. To the contrary, our Supreme Court recently has held that "[t]he ultimate burden of proving section 1170.18 eligibility lies *with the petitioner*. [Citation.]" (*People v. Romanowski* (2017) 2 Cal.5th 903, 916, italics added [Proposition 47 petitioner has burden to prove reasonable and fair market value of stolen access card information].) Accordingly, because Dursma introduced no evidence regarding the value of the shotgun or the contents of the safe, he failed to carry his burden of demonstrating that he was entitled to Proposition 47 relief.[5]

Thus, because Dursma did not demonstrate that the property he intended to take had a value of less than $950, he

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[4] Another unresolved issue raised by the shoplifting statute is whether Dursma's entry into the store's business office—i.e., an area not open to members of the public—precluded relief under Proposition 47. This issue currently is before our Supreme Court in *People v. Colbert* (2016) 5 Cal.App.5th 385 (review granted Feb. 15, 2017, S238954).

[5] Dursma asserts that the trial court never addressed the value of the property he attempted to take, and thus we should remand for the trial court to make this determination. In fact, as noted *ante* (at p. 6) the trial court *did* find that no information had been provided as to the value of either the shotgun or the contents of the safe. Accordingly, remand is unnecessary.

failed to demonstrate that he was entitled to Proposition 47 relief.

**DISPOSITION**

The trial court's order is affirmed.

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EDMON, P. J.

We concur:

LAVIN, 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.