Filed 4/24/17 P. v. Villeda CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. EFRAIN ENRIQUE VILLEDA et al., Defendants and Appellants.	B270378 (Los Angeles County Super. Ct. No. PA083913)

APPEALS from judgments of the Superior Court of Los Angeles County, Cynthia L. Ulfig, Judge. Affirmed as modified and remanded.

Elana Goldstein, under appointment by the Court of Appeal, for Defendant and Appellant Efrain Enrique Villeda.

Theresa Ostermann Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant Antoinette Wizar.

Kamala D. Harris, Attorney General, Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney

General, Mary Sanchez and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendants Efrain Enrique Villeda and Antoinette Renee Wizar of unlawfully driving or taking a vehicle. (Veh. Code, § 10851, subd. (a).) The jury also convicted Mr. Villeda of making criminal threats (Pen. Code, § 422, subd. (a))[1] and Ms. Wizar of petty theft (§§ 484, subd. (a), 490.2). The trial court found Mr. Villeda had served five prior separate prison terms. (§ 667.5, subd. (b).) Mr. Villeda was sentenced to 8 years in state prison. As to Ms. Wizar, the trial court imposed and suspended a 42-month sentence. Ms. Wizar was placed on formal probation for 3 years. We affirm the judgments of conviction but remand for resentencing as to Mr. Villeda.

---

[1] Further statutory references are to the Penal Code unless otherwise noted.

II. THE EVIDENCE

A. July 11, 2015

On July 11, 2015, Antonio Gonzalez's Chevy Suburban was stolen. His wife, Guadalupe Gonzalez, had parked the vehicle near her daughter's house. Ms. Gonzalez left the ignition key inside the unlocked Suburban. An hour later, the vehicle was missing. The Suburban contained paperwork reflecting Mr. Gonzalez's ownership of it. Neither Mr. nor Mrs. Gonzalez gave Mr. Villeda or Ms. Wizar permission to take or drive the car. Items Ms. Gonzalez had left in the vehicle, including two infant car seats, were missing upon its return.

B. July 14, 2015

Three days later, on July 14, 2015, defendants entered a CVS pharmacy. The pharmacy was two blocks from where the Suburban was stolen. Ms. Wizar was carrying a large reusable shopping bag. A store employee, Rene Tovar, noted the bag appeared to be empty. Mr. Tovar lost sight of Ms. Wizar. He reencountered her standing in an aisle. Her shopping bag was full. Surveillance videotape showed Ms. Wizar moving merchandise from the store's shelves into her bag. But the cameras did not capture the entire aisle. And there was no videotape of Ms. Wizar putting anything into her clothing. The surveillance cameras also captured Mr. Villeda taking items off the shelves. John Medina, the store manager, saw what looked like boxes concealed under Mr. Villeda's shirt. The shape and

size of the boxes made Mr. Medina think they contained blood pressure monitors worth $100 to $175 each.

After Mr. Tovar confronted her, Ms. Wizar removed items from her clothing. Mr. Tovar testified: "[S]he started taking stuff out of her pants, which I didn't even know it was there, and she just handed it to me." Mr. Tovar told an investigating officer, Detective Elliott Kane, that Ms. Wizar removed merchandise from her pants and also from underneath her shirt. When Mr. Tovar started yelling for his manger, Mr. Medina, Ms. Wizar emptied her shopping bag onto the floor. The bag had contained 25 to 30 items, including cosmetics, hair products and men's shaving merchandise. Mr. Tovar testified all of the goods belonged to CVS.

According to Mr. Tovar, Ms. Wizar never said she intended to pay for the items she had taken from the store's shelves. Mr. Medina was less certain. Mr. Medina did not remember whether Ms. Wizar had offered to pay for the items. But he vaguely remembered Ms. Wizar saying she had money. Mr. Medina further testified Ms. Wizar may have had money in her hand at the time she made the statement.

Ms. Wizar exited the store but returned briefly. She picked something up from the floor and left again. She got into the driver's seat of the stolen Suburban and drove away. Meanwhile, Mr. Medina had called an emergency operator. He started to read the Suburban's license plate number to the operator. As he did so, Mr. Villeda began yelling at Mr. Medina. Mr. Medina testified, "[Mr. Villeda] told me [to] get off the fucking phone before he fucking kills me." Mr. Medina also recalled: "[H]e [said he] will do 30 days in jail. When he gets out he's going to f'ing kill me." At trial, Mr. Medina could not recall Mr. Villeda saying

anything about the license plate. But he told Detective Kane that Mr. Medina had said: "You better get off that phone. If you get that license plate, I'll do my 30 days and I'll come back and fucking kill you." Mr. Medina was walking toward the Suburban and reading its license plate number to the emergency operator when Ms. Wizar drove away. Although Mr. Villeda had appeared to be waiting for Ms. Wizar outside the store, Ms. Wizar drove off without him.

C. July 15, 2015

The following day, July 15, 2015, Officer Steve Norris was at a Chevron gas station located approximately four miles from the CVS pharmacy. Officer Norris saw Ms. Wizar exit the Suburban's rear passenger door and enter the gas station's market. While in the market, Ms. Wizar was detained on suspicion of theft. As she was being detained, a male Hispanic, later identified as Frank Sarabia, got out of the Suburban. He briefly entered the store and then left. He walked back to the Suburban, pretended to pump gas into it, then reentered the vehicle on the front passenger side.

Officer Steven Martinez determined the Suburban had been stolen. Officer Norris exited the store to observe the vehicle while Officer Martinez telephoned for back up. Just as the Suburban pulled out of the gas station, a police helicopter appeared over head and pursued it. Mr. Villeda was arrested shortly thereafter. He had been driving the vehicle. There were 67 items inside the Suburban with sales stickers attached. There were no purchase receipts for the

merchandise. The goods included cosmetics, shampoo, tools and dog leashes.

Following his arrest, Mr. Villeda told Officer Kane he had stolen some deodorant from the CVS pharmacy and concealed it underneath his shirt. Mr. Villeda denied threatening Mr. Medina. Mr. Villeda also said he had purchased the Suburban several days earlier. However, he was not able to name the seller.

III. DISCUSSION

A. Ms. Wizar's Appeal

1. Sufficiency of the evidence

a. unlawful driving or taking

The conviction under Vehicle Code section 10851, subdivision (a), required proof Ms. Wizar had a specific intent to permanently or temporarily deprive the owner of title to or possession of the Suburban. (Veh. Code, § 10851, subd. (a); *People v. Moon* (2005) 37 Cal.4th 1, 26; *People v. Barrick* (1982) 33 Cal.3d 115, 134.) Ms. Wizar challenges the sufficiency of the evidence she had such specific intent. We find substantial evidence supported the jury's verdict.

The applicable standard of review is as follows: "'[W]e review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ". . . We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" [Citation.] A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support'" the jury's verdict. [Citation.]' (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 (*Zamudio*), italics omitted.)" (*People v. Manibusan* (2013) 58 Cal.4th 40, 87; accord, *People v. Banks* (2014) 59 Cal.4th 1113, 1156, overruled on another point in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

The question of intent is for the trier of fact and may be inferred from circumstantial evidence. (*People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1577; *People v. Green* (1995) 34 Cal.App.4th 165, 181.) Knowledge the vehicle is stolen is not an element of the offense, but it may be evidence of the necessary specific intent. (*People v. O'Dell, supra,* 153 Cal.App.4th at p. 1574; *People v. Green, supra,* 34 Cal.App.4th at p. 180.) Also, flight upon apprehension may indicate guilt. (*People v. O'Dell, supra,* 153 Cal.App.4th at pp. 1576-1577; *In re Robert V.* (1982)

132 Cal.App.3d 815, 821.) The jury was so instructed.[2] Further, as the Court of Appeal has held, "Once the unlawful taking of the vehicle has been established, possession of the recently taken vehicle by the defendant with slight corroboration through statements or conduct tending to show guilt is sufficient to sustain a conviction of Vehicle Code section 10851. (*In re Robert V.*[, *supra,*] 132 Cal.App.3d [at pp.] 821-822.)" (*People v. Clifton* (1985) 171 Cal.App.3d 195, 200; accord, *People v. Green, supra,* 34 Cal.App.4th at p. 181; *People v. Windham* (1987) 194 Cal.App.3d 1580, 1590.)

Viewed in the light most favorable to the judgment, the evidence and reasonable inferences therefrom support Ms. Wizar's conviction. Mr. Villeda and Ms. Wizar were in possession of the Suburban for four days after it was stolen from a nearby location. Documents inside the vehicle named Mr. Gonzalez as the owner. And although Mr. Villeda claimed to have purchased the Suburban, he was unable to identify the seller. Items belonging to Ms. Gonzalez, including two infant car seats, had been removed from the vehicle. When the Suburban was recovered, it contained multiple items with sales stickers attached but no purchase receipts for the merchandise. The jury could reasonably infer that over the course of four days, defendants, operating as a team, had used the stolen vehicle to

---

[2] The jury was instructed: "If the defendant fled immediately after the crime was committed or after (he/she) was accused of committing the crime, that conduct may show that (he/she) was aware of (his/her) guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself."

commit thefts at nearby stores including the CVS and the gas station market. When confronted, Ms. Wizar drove the vehicle away to avoid apprehension. Ms. Wizar drove the Suburban away from the CVS pharmacy when Mr. Medina was reading the Suburban's license plate number to an emergency operator. Ms. Wizar drove away leaving Mr. Villeda behind. The foregoing was sufficient evidence from which the jury could reasonably conclude Ms. Wizar had the specific intent to permanently or temporarily deprive the owner of title to or possession of the Suburban.

b. petty theft

The petty theft conviction under sections 484, subdivision (a), and 490.2, required proof that Ms. Wizar had a specific intent to permanently deprive the owner of the property. (*People v. Avery* (2002) 27 Cal.4th 49, 54; *People v. Davis* (1998) 19 Cal.4th 301, 305, 307.) Ms. Wizar challenges the sufficiency of the evidence she had such specific intent. We apply the sufficiency of the evidence standard of review set forth above. We find substantial evidence supported the conviction.

First, Ms. Wizar argues CVS employees made no effort to ascertain whether she intended to pay for the merchandise in her shopping bag. She notes Mr. Medina could not recall whether she had offered to pay. Whether she intended to pay for the items was a question for the jury to determine. (*People v. Buonauro* (1980) 113 Cal.App.3d 688, 692; *People v. Jaso* (1970) 4 Cal.App.3d 767, 770.) Ms. Wizar took items from the store's shelves and placed them not only in her shopping bag but also in her clothes. The jury could reasonably conclude the only reason Ms. Wizar would have concealed merchandise in her clothes was

because she intended to steal it. Moreover, the jury could infer Ms. Wizar only offered to pay for the items, if at all, after she was caught; if she did offer to pay for the store's property in her possession, she did so only to avoid prosecution.

Second, Ms. Wizar argues there was no theft because she did not remove any CVS property from the store. That contention is without merit. A theft is complete when a defendant takes a store's property with the requisite intent. (*People v. Shannon* (1998) 66 Cal.App.4th 649, 652, 654.) As the Court of Appeal held in *Shannon*: "[O]ne need not remove property from the store to be convicted of theft of the property from the store. (*People v. Tijerina* (1969) 1 Cal.3d 41, 47; *People v. Buonauro*[*, supra,*] 113 Cal.App.3d [at p.] 692, fn. 1.) One need only take possession of the property, detaching it from the store shelves or other location, and move it slightly with the intent to deprive the owner of it permanently. (*People v. Khoury* [(1980)] 108 Cal.App.3d Supp.[1], 4-5.)" (*People v. Shannon, supra,* 66 Cal.App.4th at p. 654.) Further: "'Asportation of the property with the intention to appropriate it is sufficient to constitute larceny even though the property may subsequently be returned to the owner . . . . The fact that a thief is prevented by an officer from getting away with the property, or that he may change his mind and return the property to escape prosecution for the crime, does not relieve him from the consequences of the theft. [Citations.].'" (*Id.* at p. 656, citing *People v. Post* (1946) 76 Cal.App.2d 511, 514.) Given the evidence, the jury could reasonably conclude as follows. Ms. Wizar took items from the store's shelves, placed them in her shopping bag and hid then in her clothes with the intent to permanently deprive CVS of the property. She only offered to pay for the stolen items, if at all,

after she was caught. If she did so, it was to avoid prosecution. She fled the location when Mr. Medina telephoned an emergency operation. This was substantial evidence Ms. Wizar committed petty theft.

Third, Ms. Wizar argues Mr. Tovar's testimony she had concealed items in her clothing was "inherently improbable" for several reasons: he never identified the "stuff" she removed from her pants as CVS merchandise; Mr. Medina did not see her remove any merchandise from her person; the act was not captured by surveillance cameras; and Mr. Medina saw items on the floor that may not have belonged to CVS. Witness credibility is an issue for the jury to decide. (*People v. Letner* (2010) 50 Cal.4th 99, 161-162; *People v. Hovarter* (2008) 44 Cal.4th 983, 996.) Here, Mr. Tovar testified he witnessed Ms. Wizar removing items from her pants. He told Detective Kane she had removed merchandise from her pants and also from underneath her shirt. The jury could reasonably conclude Mr. Tovar had no reason to lie.

2. The uncharged act evidence

Over the objection of Ms. Wizar's trial attorney, Deputy Public Defender Alissa Sterling, Officer Martinez testified as follows. He was in the Chevron gas station's market on July 15, 2015, when an employee approached him. The employee said Ms. Wizar was stealing items, putting them in her bag and in her jacket. Officer Martinez and his partner detained Ms. Wizar for a theft investigation. They found Ms. Wizar possessed items from the market's shelves—a pair of sunglasses and some cans or bottles of soda.

Ms. Wizar argues this was improper propensity evidence and, in allowing it, the trial court abused its discretion and deprived her of a fair trial. She asserts: "The evidence was irrelevant, included inadmissible hearsay statements of the clerk, and was more prejudicial than probative, allowing the jury to infer from this uncharged alleged act that [Ms.] Wizar had committed the offenses [at CVS] alleged on July 14, 2015, where there was otherwise insufficient evidence to so find."

Evidence of an uncharged criminal act is admissible to prove facts other than a defendant's disposition to commit crime including "motive, opportunity, intent, preparation, plan, knowledge, [and] identity." (Evid. Code, § 1101, subd. (b); *People v. Edwards* (2013) 57 Cal.4th 658, 711; *People v. Foster* (2010) 50 Cal.4th 1301, 1328.) Our Supreme Court has explained, "The relevance depends, in part, on whether the act is sufficiently similar to the current charges to support a rational inference of intent, common design, identity, or other material fact. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) 'The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] . . . In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.' [Citations.]" [Citation.]' ([*People v.*] *Ewoldt* [(1994)] 7 Cal.4th [380,] 402.) Greater similarity is required to prove the existence of a common design or plan. In such a case, evidence of uncharged misconduct must demonstrate "'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." [Citation.]' (*Ibid.*) To

show a common design, 'evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts.' (*Id.* at p. 403.)" (*People v. Leon* (2015) 61 Cal.4th 569, 598.)

A trial court may exclude uncharged act evidence under Evidence Code section 352 "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) But a defendant cannot seek to exclude relevant evidence merely because it is helpful to the prosecution. (*People v. Brown* (2014) 59 Cal.4th 86, 102; *People v. Doolin* (2009) 45 Cal.4th 390, 439 [prejudicial under Evidence Code section 352 not synonymous with damaging].) Our Supreme Court has explained: "For purposes of Evidence Code section 352, evidence is considered unduly prejudicial if it tends to evoke an emotional bias against the defendant as an individual and has a negligible bearing on the issues. (*People v. Padilla* (1995) 11 Cal.4th 891, 925[, disapproved on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1].) Put another way, evidence should be excluded ""when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' [Citation.]" (*People v.* Doolin[, *supra,*] 45 Cal.4th [at p.]

439.)' (*People v. Howard* (2010) 51 Cal.4th 15, 32.)" (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1091-1092.)

We review the trial court's rulings under Evidence Code sections 352 and 1101 for an abuse of discretion. (*People v. Leon, supra,* 61 Cal.4th at p. 597; *People v. Edwards, supra,* 57 Cal.4th at p. 711.) A trial court abuses its discretion if it acts in an arbitrary, capricious or patently absurd manner that results in a manifest miscarriage of justice. (*People v. Foster, supra,* 50 Cal.4th at pp. 1328-1329; *People v. Gutierrez* (2009) 45 Cal.4th 789, 828.)

There was no abuse of discretion. The evidence was admissible under Evidence Code section 1101, subdivision (b). The theft at the gas station market was sufficiently similar to that at the CVS pharmacy to allow a reasonable inference Ms. Wizar had the same intent on both occasions. Her detention at the gas station occurred only one day after the events at CVS. In both cases, Ms. Wizar entered a store, took items from the shelves and placed them in her clothes and in a bag. In both cases, Mr. Villeda was also present at or near the scene. The items taken from CVS were similar to those found in the Suburban. The evidence supported an inference Ms. Wizar intended permanently to deprive store owners of property. It supported a finding Mr. Villeda and Ms. Wizar were working together and using the stolen Suburban to conduct thefts at stores, all within a limited geographic area. (Evid. Code, § 1101, subd. (b); e.g., *People v. Davidson* (2013) 221 Cal.App.4th 966, 973.) Further, that Mr. Villeda fled the gas station when Ms. Wizar was detained was probative of his intent and his

consciousness of guilt. The jury was so instructed.[3] (*People v. Abilez* (2007) 41 Cal.4th 472, 522 [jury could find flight manifested a consciousness of guilt]; *People v. Bonilla* (2007) 41 Cal.4th 313, 328-329 [same].) In defense of the petty theft charge, Ms. Sterling sought to cast doubt on Mr. Wizar's intent by suggesting she intended to pay for the items. The gas station theft evidence was relevant as tending to disprove that assertion. Moreover, the evidence was of a simple alleged theft. That Ms. Wizar was detained for theft at the gas station market was not likely to inflame the jurors' emotions and cause them to punish Ms. Wizar because of their emotional reaction. Hence it was not unduly prejudicial. The trial court could reasonably conclude the gas station theft evidence was not more prejudicial than probative.

Even if the trial court had abused its discretion, reversal is not required unless it is reasonably probable the verdict would have been more favorable to Ms. Wizar absent the uncharged acts evidence. (*People v. Carter* (2005) 36 Cal.4th 1114, 1152; *People v. Kipp, supra,* 18 Cal.4th at p. 374.) Ms. Wizar asserts the uncharged act evidence "allow[ed] the jury to infer . . . that [she] had committed the offenses alleged . . . where there was otherwise insufficient evidence to so find." For the reasons discussed above, we disagree the evidence was "otherwise insufficient." In light of the very strong evidence Ms. Wizar committed the charged crimes, it is not reasonably probable the verdict would have been more favorable to her absent evidence she was detained on suspicion of shoplifting at the gas station. Further, Ms. Wizar has not shown the trial court's routine

---

[3] See footnote 3, above.

evidentiary ruling rose to the level of a constitutional violation. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1289; *People v. Brown* (2003) 31 Cal.4th 518, 545.) As our Supreme Court held in *Brown*, "Th[e] routine application of state evidentiary law does not implicate defendant's constitutional rights." (*People v. Brown, supra,* 31 Cal.4th at p. 545, fn. omitted; accord, *People v. Mills* (2010) 48 Cal.4th 158, 194; *People v. Lewis, supra,* 46 Cal.4th at p. 1289.)

We also reject Ms. Wizar's argument the gas station market clerk's statement to Officer Martinez—that Ms. Wizar was stealing items—was inadmissible hearsay. The statement was not offered for the truth. It was offered to show why Officer Martinez detained Ms. Wizar. (*People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 [statements offered to prove hearer acted in conformity with information imparted]; *People v. Smith* (1970) 13 Cal.App.3d 897, 910 [statement offered to establish cause for officer's pursuit].)

Ms. Wizar challenges the trial court's failure to ask the prosecutor to respond to a proposed stipulation as well as the trial court's refusal to accept the stipulation. Ms. Wizar's trial attorney, Ms. Sterling, did not want the jury to hear the statement that led to Ms. Wizar's detention in the gas station market. Recognizing, however, that evidence Ms. Wizar was detained was relevant to Mr. Villeda's flight, Ms. Sterling proposed a stipulation. She offered to stipulate that Mr. Villeda left the gas station when he saw Ms. Wizar had been detained. The proposed stipulation was, "[T]hat [Ms. Wizar] was being detained inside and that Mr. Sarabia saw her being detained, went directly out to the car, and that was when [Mr. Villeda and Mr. Sarabia] drove away." The trial court rejected the proffered

stipulation stating: "No. The People will be able to present their case." We find no error or abuse of discretion. Neither the prosecutor nor the trial court was obligated to accept Ms. Wizar's proffered stipulation in lieu of Officer Martinez's testimony. (*People v. Chism* (2014) 58 Cal.4th 1266, 1307-1308; *People v. Rogers* (2013) 57 Cal.4th 296, 329-330.) The People were entitled to present persuasive evidence of defendants' guilt (*ibid*), including the uncharged act evidence. As our Supreme Court explained in *People v. Rogers, supra,* 57 Cal.4th at page 330, "'[A] criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it.' (*Old Chief v. United States* (1997) 519 U.S. 172, 186-187.)"

B. Mr. Villeda's Appeal

1. Prior prison term enhancements

Section 667.5, provides in relevant part: "Enhancement of prison terms for new offenses because of prior prison terms shall be imposed as follows: [¶] . . . [¶] (b) Except where subdivision (a) [concerning violent felonies] applies, where the new offense is any felony for which a prison sentence . . . is imposed . . . , in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term . . . *for any felony*; provided that no additional term shall be imposed under this subdivision for any prison term . . . prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody . . . ." (Italics added.)

The trial court found defendant had served five prior separate prison terms resulting from the convictions in: 1999, case No. LA033094; 2000, case No. LA035600; 2002, case No. LA039716; 2003, case No. LA043435; and 2010, case No. LA063517. The trial court imposed five prior separate prison term enhancements. (§ 667.5, subd. (b).) Mr. Villeda contends four of those five enhancements were unauthorized because the underlying felonies had been designated misdemeanors pursuant to Proposition 47, section 1170.18, subdivision (f). Prior to sentencing, Mr. Villeda presented evidence in the trial court that his 1999, 2000, 2003 and 2010 convictions had been designated misdemeanors. He argued the misdemeanor convictions did not support section 667.5, subdivision (b) enhancements. The trial court ruled Mr. Villeda was not a person the voters intended to benefit from Proposition 47.[4]

The trial court erred. Pursuant to section 1170.18, subdivision (k), a prior felony conviction designated a misdemeanor "shall be considered a misdemeanor for all purposes." The prior separate prison term enhancement does not apply to a prior felony conviction that has been designated a misdemeanor prior to sentencing on the enhancement. (*People v. Kindall* (2016) 6 Cal.App.5th 1199, 1203-1205; *People v. Abdallah* (2016) 246 Cal.App.4th 736, 746; Couzens & Bigelow, Sentencing

---

[4] Related issues are before our Supreme Court in *People v. Williams* (2016) 245 Cal.App.4th 458, review granted May 11, 2016, S233539, *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted April 27, 2016, S233011, *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 11, 2016, S233201, *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted March 30, 2016, S232900, and *People v. Evans* (2016) 6 Cal.App.5th 894, review granted February 22, 2017, S239635.

California Crimes, § 25:21; see *People v. Jones* (2016) 1 Cal.App.5th 221, 230, fn. 5; cf. *People v. Park* (2013) 56 Cal.4th 782, 787, 794; but see *People v. Acosta* (2016) 247 Cal.App.4th 1072, 1077-1079, review granted August 17, 2016, S235773.) Under *Kindall* and *Abdallah,* Mr. Villeda's 1999, 2000, 2003 and 2010 felony convictions (case Nos. LA033094, LA035600, LA043435, and LA063517) do not support the section 667.5, subdivision (b) enhancement. Those enhancements must be reversed. Only the enhancement premised on Mr. Villeda's 2002 conviction (case No. LA039716) remains. Upon remitter issuance, the trial court must resentence Mr. Villeda.

2. Reduction of the unlawful driving or taking conviction to a misdemeanor

Mr. Villeda asserts this matter should be remanded for the trial court to determine whether his unlawful driving or taking conviction should be reduced to a misdemeanor pursuant to Proposition 47, section 1170.18. Ms. Wizar joins in the argument. We disagree. For the reasons stated in *People v. Sauceda* (2016) 3 Cal.App.5th 635, 642-651, review granted November 30, 2016, S237975, and *People v. Johnston* (2016) 247 Cal.App.4th 252, 255-259, review granted July 13, 2016, S235041, we hold Proposition 47 does not reduce unlawful driving or taking a vehicle to a misdemeanor even if the vehicle's value is less than $951.[5] Even if Proposition 47 does apply, the undisputed evidence at trial was that the Suburban was worth $3,000. Following

---

[5] The lead case pursuant to which this issue is before our Supreme Court is *People v. Page* (2015) 241 Cal.App.4th 714, review granted January 27, 2016, S230793.

remand, however, if defendants contest that evidence, and if our Supreme Court has not ruled so as to preclude it, either may file a Proposition 47 petition.

3. Presentence custody and credit

The trial court gave Mr. Villeda credit for 218 days in presentence custody. The parties agree the trial court erred. Mr. Villeda was arrested on July 15, 2015 and sentenced 219 days later, on February 18, 2016. He was entitled to credit for 219 days in presentence custody. (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48; *People v. Morgain* (2009) 177 Cal.App.4th 454, 469.) The trial court awarded Mr. Villeda 108 days of conduct credit. (§ 2933.1.) The parties agree the trial court erred. Mr. Villeda was not convicted of a violent felony. Therefore, he was not limited to conduct credit measured as 15 percent of his actual custody credit. (§ 2933.1; *People v. Kimbell* (2008) 168 Cal.App.4th 904, 908.) Mr. Villeda was entitled to 218 days of conduct credit. (§ 4019, subds. (a)(1), (b), (c), (f); *People v. Whitaker* (2015) 238 Cal.App.4th 1354, 1357-1362; *People v. Chilelli* (2014) 225 Cal.App.4th 581, 591.) The judgment must be modified and the abstract of judgment amended to reflect the correct presentence custody and conduct credits.

4. The local crime prevention programs fine

The trial court imposed on Mr. Villeda a $10 local crime prevention programs fine pursuant to section 1202.5, subdivision (a). That section states in part: "(a) In any case in which a defendant is convicted of any of the offenses enumerated in Sections 211, 215, 459, 470, 484, 487, subdivision (a) of Section 487a, or Section 488, or 594, the court shall order the defendant to pay a fine of ten dollars ($10) in addition to any other penalty or fine imposed." Defendant was not convicted of any of the enumerated offenses. Therefore, the local crime prevention programs fine was unauthorized. (*People v. Jefferson* (2016) 248 Cal.App.4th 660, 663.) Upon resentencing Mr. Villeda, the trial court must omit the fine. (*Ibid.*)

IV. DISPOSITION

The judgment as to Efrain Enrique Villeda is modified to: strike the prior separate prison term enhancements (Pen. Code, § 667.5, subd. (b)) premised on defendant's 1999 (case No. LA033094), 2000 (case No. LA035600), 2003 (case No. LA043435) and 2010 (case No. LA063517) convictions; award defendant credit for 219 days in presentence custody and 218 days of conduct credit; and to omit the $10 local crime prevention programs fine imposed pursuant to Penal Code section 1202.5, subdivision (a). The judgments are affirmed in all other respects. Upon remittitur issuance, the trial court is to resentence Mr. Villeda, prepare an amended abstract of judgment and deliver a copy of the amended abstract to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

KRIEGLER, J. DUNNING, J.*

---

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