In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ANTHONY LOPEZ,** **Defendant and Appellant.**

Case No. S250829

Fifth Appellate District, Case No. F074581
Tulare County Superior Court, Case No. VCF314447
The Honorable Kathryn T. Montejano, Judge

ANSWER BRIEF ON THE MERITS

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
KATHLEEN A. MCKENNA
Supervising Deputy Attorney General
RACHELLE A. NEWCOMB
Deputy Attorney General
F. MATT CHEN
Deputy Attorney General
State Bar No. 305105
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7768
Fax: (916) 324-2960
Email: Matt.Chen@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

Page

Issues Presented 12

Introduction 13

Statement of the Case 15

A. Charging Decisions 15

B. Jury Trial 16

C. Verdict, Sentencing, and Appeal 18

Argument 18

I. Section 459.5 Prohibits Charging a Defendant with Both Shoplifting and Theft of the Same Property, Even in the Alternative; However, Proposition 47 Does Not Alter the Prosecutor's Duty to Charge the Case According to the Evidence 18

A. Burglary, Theft, and Shoplifting 19

B. Standards of Statutory Construction 21

C. The Voters' Intent Behind Proposition 47 22

D. Proposition 47 Does Not Eliminate a Prosecutor's Traditional Discretion to Charge a Defendant According to the Evidence and, if Necessary, to Subsequently Amend the Charges to Conform to the Established Evidence 23

1. The prosecutor's traditional charging discretion 23

2. Because the literal language of section 459.5 is ambiguous as applied when it is unclear whether a defendant had a preformed intent to steal, a prosecutor retains discretion to decide which offense to charge and pursue 24

E. Current Law Protects Against Potential Abuses of Prosecutorial Charging Decisions Without Improperly Relinquishing the Jury's Factfinding Duties to the Trial Court 28

TABLE OF CONTENTS
(continued)

Page

II. Although Section 459.5 Prohibits the Prosecution from Charging Both Shoplifting and Theft of the Same Property, Appellant Nonetheless Forfeited His Claim by Failing to Demur to the Information 30

III. Counsel Was Not Ineffective for Failing to Object; of the Possibilities That Could Have Occurred, None Show That a More Favorable Outcome Was Reasonably Probable 35

A. Legal Standards 35

B. If Counsel Had Objected, the Prosecutor Could Have Chosen to Charge Only Petty Theft or to Charge Only Shoplifting in Language Encompassing Petty Theft as a Lesser Included Offense, in Which Case Appellant Fails to Show Prejudice in Light of His Conviction for Petty Theft 37

1. The prosecutor could have exercised her charging discretion to charge only petty theft and not shoplifting 37

2. The prosecutor could have exercised her charging discretion to charge only shoplifting in language encompassing petty theft as a lesser included offense, and the trial court would have instructed the jury on petty theft as a lesser included offense 41

a. Procedural background 41

b. Petty theft is not a lesser included offense of shoplifting under the accusatory pleading test because the alleged facts in count 2 do not include all the elements in count 1 42

TABLE OF CONTENTS
(continued)

Page

c. The prosecution could have charged only shoplifting under both a taking and a preformed intent theory, and the trial court would have instructed the jury on petty theft as a lesser included offense 43

3. Under either charging possibility, appellant fails to demonstrate prejudice because the jury ultimately convicted him of petty theft, an act that would have been encompassed in either charging decision 47

Conclusion 50

Certificate of Compliance 51

TABLE OF AUTHORITIES

Page

CASES

California School Employees Assn. v. Governing Board
(1994) 8 Cal.4th 333 22

City of San Jose v. Superior Court
(2017) 2 Cal.5th 608 ..... 21, 22

Gerstein v. Pugh
(1975) 420 U.S. 103 ..... 24, 29

In re Clark
(1993) 5 Cal.4th 750 37

In re Hardy
(2007) 41 Cal.4th 977 36

In re Jovan B.
(1993) 6 Cal.4th 801 39

In re Neely
(1993) 6 Cal.4th 901 35

In re Reeves
(2005) 35 Cal.4th 765 ..... 22, 25

In re Williamson
(1954) 43 Cal.2d 651 33

In re Wilson
(1992) 3 Cal.4th 945 36

Kimmelman v. Morrison
(1986) 477 U.S. 365 36

McCleskey v. Kemp
(1987) 481 U.S. 279 23

People ex rel. Lockyer v. Shamrock Foods Co.
(2000) 24 Cal.4th 415 21

TABLE OF AUTHORITIES
(continued)

Page

People v. Babaali
(2009) 171 Cal.App.4th 982 42

People v. Birks
(1998) 19 Cal.4th 108 ..... 23, 26, 28

People v. Bradford
(1997) 15 Cal.4th 1229 45

People v. Canty
(2004) 32 Cal.4th 1266 21

People v. Catlin
(2001) 26 Cal.4th 81 ..... 24, 26, 27, 30

People v. Collins
(1963) 217 Cal.App.2d 310 30

People v. Crosby
(1962) 58 Cal.2d 713 44

People v. Eid
(2014) 59 Cal.4th 650 46

People v. Farrow
(1982) 133 Cal.App.3d 147 39

People v. Goldman
(2014) 225 Cal.App.4th 950 ..... *passim*

People v. Henry
(2018) 28 Cal.App.5th 786 33

People v. Huggins
(2006) 38 Cal.4th 175 36

People v. Jennings
(1991) 53 Cal.3d 334 31

TABLE OF AUTHORITIES
(continued)

Page

People v. Kelly
(1992) 1 Cal.4th 495 36

People v. Martinez
(2018) 4 Cal.5th 647 21

People v. Mayfield
(1993) 5 Cal.4th 142 36

People v. McGee
(1993) 15 Cal.App.4th 107 34

People v. Mendoza Tello
(1997) 15 Cal.4th 264 36

People v. Moon
(2005) 37 Cal.4th 1 42

People v. Mower
(2002) 28 Cal.4th 457 29

People v. Parmar
(2001) 86 Cal.App.4th 781 23

People v. Pitts
(1990) 223 Cal.App.3d 606 38

People v. Price
(1991) 1 Cal.4th 324 ..... 37, 49

People v. Ray
(1996) 13 Cal.4th 313 36

People v. Reed
(2006) 38 Cal.4th 1224 ..... 42, 43, 46, 47

People v. Richardson
(2008) 43 Cal.4th 959 23

TABLE OF AUTHORITIES
(continued)

Page

People v. Scott
(1994) 9 Cal.4th 331 34

People v. Shabtay
(2006) 138 Cal.App.4th 1184 ..... 33, 34

People v. Shoaff
(1993) 16 Cal.App.4th 1112 42

People v. Shockley
(2013) 58 Cal.4th 400 ..... 42, 45, 46

People v. Smith
(2013) 57 Cal.4th 232 ..... 44, 46

People v. Spencer
(1972) 22 Cal.App.3d 786 ..... 30, 44

People v. Spicer
(2015) 235 Cal.App.4th 1359 ..... 24, 29

People v. St. Martin
(1970) 1 Cal.3d 524 40

People v. Steele
(2000) 83 Cal.App.4th 212 42

People v. Superior Court (Mendella)
(1983) 33 Cal.3d 754 ..... 38, 39, 43, 44

People v. Superior Court (*Romero*)
(1996) 13 Cal.4th 497. (CT 99, 271.) 18

People v. Tenorio
(1970) 3 Cal.3d 89 23

People v. Traylor
(2009) 46 Cal.4th 1205 40

TABLE OF AUTHORITIES
(continued)

Page

People v. Valenzuela
(June 3, 2019, S239122) __ Cal.5th __ [2019 WL 2332395], p. *4 13

People v. Valli
(2010) 187 Cal.App.4th 786 23

People v. Whaley
(2008) 160 Cal.App.4th 779 21

People v. Whitmer
(2014) 59 Cal.4th 733 39

People v. Williams
(2010) 49 Cal.4th 405 20

People v. Yuksel
(2012) 207 Cal.App.4th 850 22

Rideout v. Superior Court of Santa Clara County
(1967) 67 Cal.2d 471 24

Strickland v. Washington
(1984) 466 U.S. 668 (*Strickland*) 35, 36

Williams v. Taylor
(2000) 529 U.S. 362 36

STATUTES

Health & Safety Code
§ 11350 20
§ 11357 20
§ 11377 20

TABLE OF AUTHORITIES
(continued)

Page

Penal Code
§ 18, subd. (a) 48
§ 19 ..... 20, 21
§ 288 32
§ 288.4 22
§ 288.5, subd. (a) 31
§ 288.5, subd. (c) 32
§ 290 ..... 15, 16, 27
§ 459 ..... 19, 20
§ 459.5 ..... *passim*
§ 459.5, subd. (a) ..... *passim*
§ 459.5, subd. (b) ..... *passim*
§ 460 20
§ 484 20
§ 484(a) 41
§ 487 20
§ 488 20
§ 490 ..... 20, 21
§ 666 ..... *passim*
§ 666, subd. (a) 48
§ 667, subds. (b)-(i) 16
§ 667.5, subd. (b) 16
§ 739 ..... 38, 43, 44
§ 954 34
§ 1004 ..... 30, 31
§ 1009 ..... 37, 38, 43
§ 1012 31
§ 1170, subd. (h) 27, 48
§ 1203.066, subd. (b) 32
§ 1387 40

CONSTITUTIONAL PROVISIONS

California Constitution, Article I
§ 15 35

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

CALCRIM
No. 1700.....17

ISSUES PRESENTED

1. Can the prosecution charge theft and shoplifting of the same property in contravention of the language in Penal Code section 459.5, "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"?
2. If not, was trial counsel ineffective for failing to object to the theft charge?

This Court subsequently requested supplemental briefing on the following issues:

Assuming, solely for the sake of argument, and without prejudice to any contrary argument, that Penal Code section 459.5, subdivision (b), prohibits the prosecution from charging both shoplifting and theft of the same property under any circumstances:

3. Did defendant forfeit the argument under Penal Code section 459.5 by failing to object to the prosecution's charging both shoplifting and theft?
4. If defendant had objected, what should the trial court's ruling have been? Might it have ordered the prosecution to choose between a shoplifting charge and a theft charge? If so, and given the potential difficulty in proving the intent required for shoplifting, might the prosecution have chosen to charge only petty theft with a prior? In that event, would defendant have been prejudiced by the failure to object?
5. Was petty theft with a prior a lesser included offense of shoplifting under the accusatory pleading test? If so, could the trial court have instructed the jury on shoplifting as the charged offense and on petty theft as a lesser included offense? If not, and assuming defendant had objected to charging both crimes, could the prosecution have

moved to amend the charging document to make the theft charge a lesser included offense of shoplifting under the accusatory pleading test? If that had occurred, could the trial court have instructed on shoplifting as the charged offense and on petty theft as a lesser included offense? In that event, would defendant have been prejudiced by the failure to object?

INTRODUCTION

This case concerns yet another "interpretive issue" concerning Proposition 47, the Safe Neighborhoods and Schools Act. (See *People v. Valenzuela* (June 3, 2019, S239122) __ Cal.5th __ [2019 WL 2332395], p. *4 [cataloging the "many interpretive issues" generated by Proposition 47].) Among other things, Proposition 47 created the new misdemeanor offense of shoplifting, defined as the entry into a commercial establishment during regular business hours with the intent to commit larceny, where the property taken or intended to be taken does not exceed $950. (Pen. Code, § 459.5, subd. (a).)[1] The crime encompasses behavior that could otherwise amount to burglary or theft. Thus, to ensure application of the new law in appropriate cases prospectively, the Legislature mandated that "an act of shoplifting" be charged exclusively under the shoplifting statute and prohibited alternative charges of burglary or theft based on the same property. (§ 459.5, subd. (b).)

Appellant Anthony Lopez was arrested after stealing items from a Walmart store. The prosecutor initially charged shoplifting alone. But when the preliminary hearing evidence indicated that appellant might have formed an intent to steal after entering the store, making the crime theft and not shoplifting, she amended the charges to allege both crimes, without

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

objection. A jury hung on the shoplifting charge but found appellant guilty on the petty theft charge. On appeal, appellant contends that he should not have been charged with both offenses and asks this Court to reverse the judgment and vacate his conviction.

The plain language of section 459.5, subdivision (b), prohibits a prosecutor from charging a defendant with both shoplifting and petty theft of the same property. But the statute does not abrogate the prosecution's traditional discretion to determine when an "act of shoplifting" has occurred when considering what offense to charge, nor does the statute abrogate the prosecution's ability to amend the charges, where, as here, the evidentiary picture shifts at or before trial.

The statutory language in section 459.5 provides no guidance as to how it should be determined in advance of trial that an "act of shoplifting" has occurred. It is at least ambiguous in this respect and must be understood in light of the well established discretion entrusted to prosecutors to exercise charging discretion within ethical bounds. Permitting prosecutors discretion to select and amend charges under section 459.5 in the face of ambiguous or shifting evidence prevents petty thieves from seeking refuge behind an interpretation of section 459.5 that reduces it to a statutory trap door. The electorate did not intend to allow petty thieves to use section 459.5, subdivision (b), as a sword to avoid criminal liability altogether but rather as a shield against more serious charges that an "act of shoplifting" might also have supported prior to Proposition 47. At the same time, such prosecutorial discretion does not undermine the intent of the electorate in establishing the "shield" aspect of the statute because defendants will be convicted of burglary or theft only when the evidence establishes something other than "an act of shoplifting."

In this case, there was error because the prosecutor was permitted to charge theft in addition to shoplifting of the same property. But the error

was forfeited because appellant did not object to the alternative charging. Moreover, the failure to object did not amount to ineffective assistance of counsel. Had counsel objected, the prosecutor could have properly chosen to charge only petty theft. Given the ambiguity about when appellant formed the intent to steal, there is no reasonable possibility the prosecutor would have proceeded solely on the shoplifting charge. Or, the prosecutor could have proceeded by charging shoplifting in language that encompassed petty theft as a lesser included offense, in which case the trial court would have been obligated to instruct the jury on petty theft as a lesser included offense.

STATEMENT OF THE CASE

A. Charging Decisions

In the original felony complaint, the District Attorney charged appellant with a single count of shoplifting (§ 459.5) based on the theft of merchandise from Walmart.[2] (CT 8.) At the preliminary hearing, Dinuba Police Officer Chad Georges, the responding officer, testified that appellant had told him that "he went to Wal-Mart to purchase some items. He said he at the time needed some money, and he took the other items that he didn't purchase at the register." (CT 40.) On cross-examination, Officer Georges elaborated that appellant did not say whether he had intended to take the items when he went into the store. (CT 40.)

After the evidence was presented, the prosecutor informed the court that she intended to amend the complaint to include an additional charge of petty theft with a prior (§ 666). (CT 32, 42.) Defense counsel did not object. (CT 32, 42.) When the court asked defense counsel for input, she

---

[2] The shoplifting offense was charged as a felony based on a prior conviction requiring registration under section 290 (§ 459.5). (CT 70-71; RT 152.)

simply replied, "Submitted." (CT 43.) The court granted the prosecutor's request and held appellant to answer on both charges. (CT 26-27, 42.)

The subsequent information and amended information each included charges of shoplifting and petty theft with a prior.[3] (CT 47-50, 68-71.) Both charges were based on the Walmart theft on February 12, 2015. (CT 47-50, 68-71.) The information further alleged in both counts that appellant, a registered sex offender (§ 290), had suffered a prior conviction for a serious or violent felony, designated a "strike" (§ 667, subd. (b)-(i)), and had served three prior prison terms (§ 667.5, subd. (b)). (CT 68-71.) Appellant pled not guilty and denied all allegations. (CT 75.) Appellant did not demur or otherwise object to the information.

B. Jury Trial

In February 2015, Walmart asset protection officer Jerry Hairabedian observed via camera as appellant, who was with a female companion, selected a home stereo theater unit inside the store. (1RT 74, 76-77.) Hairabedian continued his surveillance from the sales floor. (1RT 77-78.) He noticed that appellant had an empty Walmart bag inside the shopping cart. (1RT 77-78.) Appellant placed several small items inside the Walmart bag, and his companion placed several items on top of the stereo unit. (1RT 77-78, 81, 86.)

When appellant and his companion went to the front register, appellant's companion paid for her items, but appellant's items, including his Walmart bag, remained in the shopping cart. (1RT 81-82.) They both exited the store with appellant pushing the shopping cart. (1RT 82.) Neither paid for appellant's items. (1RT 90.)

---

[3] The petty theft with a prior offense was also charged as a felony based on prior theft and sex offense convictions. (CT 68; RT 38, 47.) For brevity, respondent refers to this offense as petty theft.

Outside the Walmart doors, Hairabedian stopped appellant and asked him about the unpaid merchandise inside the shopping cart. (1RT 83.) Appellant admitted that the items had not been paid for. (1RT 83.) Hairabedian brought appellant back to the loss prevention office, recovered the merchandise, which totaled close to $500, and called the police. (1RT 83-88.)

Appellant told Officer Georges that he had gone to Walmart to purchase a few items and had only five dollars on him. (1RT 120-121, 125-126.) He claimed that, although he had not intended to steal anything prior to entering the store, he subsequently decided to steal merchandise once inside and left the store without paying for it. (1RT 126-127.) The parties stipulated that appellant had "suffered a prior qualifying theft-related offense as required by Penal Code Section 666." (1RT 143.)

During deliberations, the jury submitted five questions and/or notes to the court. (CT 236-243.) Each question and note involved the issue of intent: (1) "Did the record show Jerry saw the defendant produce the bag, or was it said that he went to the floor and saw a bag present?"; (2) "Can we use the instructions from 1800 to determine the intent? (For the shoplifting charge.) We just need clarification"; (3) "Can we use the prior conviction be used [*sic*] to show intent for shoplifting?"; (4) "Does #2 of 1700 mean prior intent, or intent once he enters the store?"[4]; and (5) "The jury is split on the decision for shoplifting, based on intent, it is divided 5/7." (CT 239-243.)

---

[4] Paragraph "2" of CALCRIM No. 1700, as provided to the jury, stated: "When he entered a commercial establishment, he intended to commit theft while the establishment was opened during regular business hours." (CT 229; RT 190.)

C. Verdict, Sentencing, and Appeal

The jury ultimately found appellant guilty of petty theft but failed to reach a verdict regarding the shoplifting charge, which the prosecutor later dismissed. (CT 237-238, 244.) The court subsequently found the prison prior and sex offender allegations to be true. (CT 238; RT 253-254.) It later struck appellant's prior "strike" pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. (CT 99, 271.) The court denied probation and sentenced appellant to the middle-term of two years on count 1. (CT 269, 272.) It stayed the one-year sentences on each of his prison priors. (CT 269, 272.)

The Fifth District Court of Appeal affirmed, finding that alternate charging under section 459.5 of shoplifting or theft is appropriate when it is unclear when the defendant formed the intent to steal and that, to conclude otherwise, would lead to the absurd result of allowing a defendant to avoid liability for criminal conduct. (Slip Opinion at p. 9.) This Court granted appellant's petition for review and ordered supplemental briefing on three additional issues.

ARGUMENT

I. SECTION 459.5 PROHIBITS CHARGING A DEFENDANT WITH BOTH SHOPLIFTING AND THEFT OF THE SAME PROPERTY, EVEN IN THE ALTERNATIVE; HOWEVER, PROPOSITION 47 DOES NOT ALTER THE PROSECUTOR'S DUTY TO CHARGE THE CASE ACCORDING TO THE EVIDENCE

Section 459.5 prohibits a prosecutor from charging a defendant with both shoplifting and petty theft of the same property, even in the alternative. Accordingly, the prosecutor here should not have charged appellant in two separate counts. Rather, the prosecutor should have charged appellant with only shoplifting, in language that recognized appellant had entered Walmart with the intent to commit larceny *and* had actually taken property from

Walmart. Alternatively, if she believed the evidence did not show preformed intent, she could have charged only theft. Each of these options would have satisfied the requirements of section 459.5.

When the evidence is ambiguous as to whether a defendant had preformed his intent to commit larceny before entering a commercial establishment or whether he formed his intent only after he entered, the prosecutor must exercise her discretion to charge the case appropriately. That is, both before and after the enactment of Proposition 47, a prosecutor has a duty to charge only the offense she believes she can prove beyond a reasonable doubt in clear language that notices the defendant. This discretion includes the decision to move to amend the information to conform to the proof when subsequent evidence suggests that the defendant has committed an uncharged included or related offense. Interpreting section 459.5 in this way effectuates the voters' intent to impose misdemeanor punishment when a defendant commits an act of shoplifting as defined by the statute, ensures that culpable criminals do not escape punishment entirely, and respects the protections established in the Penal Code that safeguard a defendant's right to due process and maintain a prosecutor's duty to charge only what the evidence will prove.

Here, the prosecutor erred in charging both shoplifting and theft in separate counts rather than both of its theories of shoplifting liability—the intent to commit larceny upon entry *and* the completed theft—in one count. However, as will be shown, *post*, in Arguments II and III, any error in charging shoplifting and theft in separate counts was forfeited and harmless. Thus, the judgment should be affirmed.

A. Burglary, Theft, and Shoplifting

Burglary is defined as entry into a specifically listed structure, such as a home or a store, with an intent to commit any felony or to commit grand or petty larceny. (§ 459.) Unless the burglary is of a specified inhabited

structure, it is burglary of the second degree. (§ 460.) Second degree burglary is punishable as a wobbler, meaning it may be punished as either a misdemeanor or a felony. (*People v. Williams* (2010) 49 Cal.4th 405, 461, fn. 6.)

Theft is defined as the felonious taking of the personal property of another. (§ 484) As pertinent here, unless the value of the item or items taken exceeds $950, the theft is classified as "petty theft." (§§ 487, 488.) Petty theft is punishable as a misdemeanor. (§§ 19, 490.)

On November 4, 2014, the voters approved Proposition 47, the "Safe Neighborhoods and Schools Act" ("the Act"). Proposition 47 reduced the penalties for, inter alia, certain acts of theft (§§ 487, 666) and drug possession (Health & Saf. Code, §§ 11350, 11357, 11377). (The Act, §§ 6-13.)

The Act also created the new crime of shoplifting, which is defined 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, subd. (a).) The new shoplifting crime includes only those defendants who do not have certain prior convictions for serious or violent crimes, as defined. (§ 459.5, subd. (a).) It also limits its reach to only those defendants who enter with an intent to commit larceny (burglary; § 459), or who actually take from (theft; § 484), a commercial establishment during its regular business hours an item or items totaling less than $950. (§ 459.5, subd. (a).) Thus, shoplifting under section 459.5 includes only those burglaries where the felonious intent at entry is the intent to commit larceny and only those thefts that involve: (1) a certain class of victim (a commercial establishment); (2) a certain value of property ($950 or less); and (3) a certain period of time (the commercial establishment's regular business hours).

Shoplifting is punishable as a misdemeanor. (§ 459.5, subd. (a).) Both before and after the enactment of section 459.5, petty theft, including theft by shoplifting, qualified for misdemeanor punishment only, as long as the thief did not have specified prior criminal convictions. (§§ 19, 459.5, subd. (a), 490, 666.) Yet only after the enactment of section 459.5 did the specific shoplifting type of burglary qualify for misdemeanor only, rather than wobbler, punishment. (*People v. Martinez* (2018) 4 Cal.5th 647, 651 ["Proposition 47 added new provisions to the Penal Code carving out a lesser crime from a preexisting felony"].) To ensure that the less culpable shoplifting burglar receive only misdemeanor punishment, section 459.5, subdivision (b), specifies that an "act of shoplifting . . . shall be charged as shoplifting." (§ 459.5.) It also clarifies that a "person who is charged with shoplifting" may not "also be charged with burglary or theft of the same property." (*Ibid.*)

B. Standards of Statutory Construction

Issues of statutory construction are questions of law that are reviewed de novo on appeal. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; *People v. Whaley* (2008) 160 Cal.App.4th 779, 792.) In interpreting a voter initiative, such as Proposition 47, the court applies the same principles that govern the construction of a statute. (*People v. Canty* (2004) 32 Cal.4th 1266, 1276.) The "fundamental task . . . is to determine the [voter]'s intent so as to effectuate the law's purpose." (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616, internal quotations omitted.) This requires examining the statutory language, "giving it a plain and commonsense meaning" and considering it "in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment." (*Ibid.*, internal quotations omitted.)

Seemingly clear statutory language may still be ambiguous as applied if its application "reveals ambiguities that the Legislature apparently did not foresee." (*In re Reeves* (2005) 35 Cal.4th 765, 770-771.) If the statute is ambiguous, this Court may look to the statute's background and history to determine the voters' intent and purpose. (*Id.* at p. 771.) Even if the language is clear, this Court may reject a literal interpretation that "would result in absurd consequences the [voters] did not intend." (*City of San Jose*, *supra*, at p. 616, internal quotations omitted; see *California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 340 [rejecting literal interpretation of statutory language to avoid unintended and capricious results]; *People v. Yuksel* (2012) 207 Cal.App.4th 850, 855 [use of the different words "children" and "minor" in section 288.4 refers to the same thing—any other interpretation would lead to absurd results].)

C. The Voters' Intent Behind Proposition 47

One of Proposition 47's stated purposes is to "require misdemeanors instead of felonies for non-serious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes." (The Act, § 3, bullet point (3); § 16.) As such, the intent behind section 459.5's creation of the crime of shoplifting was to ensure misdemeanor punishment for qualifying non-recidivist shoplifters:

> ***Shoplifting***. Under current law, shoplifting property worth $950 or less (a type of petty theft) is often a misdemeanor. However, such crimes can also be charged as burglary, which is a wobbler. Under this measure, shoplifting property worth $950 or less would always be a misdemeanor and could not be charged as burglary.

(Official Voter Information Guide, Analysis by Legislative Analyst, p. 35, original bold and italics.)

D. Proposition 47 Does Not Eliminate a Prosecutor's Traditional Discretion to Charge a Defendant According to the Evidence and, if Necessary, to Subsequently Amend the Charges to Conform to the Established Evidence

Although section 459.5 prohibits a prosecutor from charging both shoplifting and petty theft of the same property, the prosecutor has a duty to select which offense to charge based on what she believes she can prove beyond a reasonable doubt. This interpretation effectuates the voters' intent to impose commensurate punishment for culpable conduct, allowing prosecutors to exercise their traditional charging discretion in ambiguous factual situations, and fulfills Proposition 47's stated purpose of prohibiting prosecutors from charging the wobbler offense of burglary, rather than shoplifting in unambiguous factual situations.

1. The prosecutor's traditional charging discretion

Prosecutorial discretion "is essential to the criminal justice process . . . ." (*McCleskey v. Kemp* (1987) 481 U.S. 279, 297; see also *People v. Valli* (2010) 187 Cal.App.4th 786, 801 [prosecutor's discretion is basic to California justice system].) This discretion "is greatest before charges are filed" (*People v. Parmar* (2001) 86 Cal.App.4th 781, 806) because the prosecutor must investigate and determine what charges the evidence may support. (*Id.* at p. 807; accord *People v. Tenorio* (1970) 3 Cal.3d 89, 94.)

Prosecutors "have broad discretion to decide whom to charge, and for what crime." (*People v. Richardson* (2008) 43 Cal.4th 959, 1013.) "This prosecutorial discretion to choose, for each particular case, the actual charges from among those potentially available arises from '"the complex considerations necessary for the effective and efficient administration of law enforcement."' [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 134.)

That is not to say that the prosecutor has unfettered discretion in her charging decisions. Under existing law, a prosecutor may not charge a suspect with a crime without probable cause. (*Gerstein v. Pugh* (1975) 420 U.S. 103, 121, fn. 22; *People v. Spicer* (2015) 235 Cal.App.4th 1359, 1373-1374; accord, *Rideout v. Superior Court of Santa Clara County* (1967) 67 Cal.2d 471, 474.) Indeed, a prosecutor has an ethical duty to charge only those offenses she believes she can prove beyond a reasonable doubt. (See *People v. Catlin* (2001) 26 Cal.4th 81, 109 ["A prosecutor abides by elementary standards of fair play and decency by refusing to seek indictments until he or she is completely satisfied the defendant should be prosecuted and the office of the prosecutor will be able to promptly establish guilt beyond a reasonable doubt"], internal quotation marks omitted.) The prosecutor's charging discretion is necessarily guided by these considerations.

2. Because the literal language of section 459.5 is ambiguous as applied when it is unclear whether a defendant had a preformed intent to steal, a prosecutor retains discretion to decide which offense to charge and pursue

Initially, section 459.5 appears unambiguous when read literally: "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." (§ 459.5, subd. (b).) A prosecutor may charge only shoplifting when the defendant engages in conduct that constitutes shoplifting, as defined by subdivision (a). (§ 459.5, subd. (b).) When a prosecutor charges shoplifting, she may not also charge that defendant in separate counts of theft or burglary of the same property. (*Ibid.*) In short, *when the evidence demonstrates at the time of charging* that the defendant's conduct constitutes an "act of shoplifting," section 459.5 mandates the prosecutor to charge shoplifting rather than burglary or

theft. (*Ibid.*) The statute thus presumes that the evidence will be clear at the time of charging whether a defendant's conduct constitutes shoplifting.

But the evidence available to the prosecutor may be ambiguous regarding *when* the defendant formed the intent to commit larceny, instilling doubt as to how to charge the defendant's conduct and under which statute. Under these facts, section 459.5 is ambiguous as applied. (See *In re Reeves*, *supra*, 35 Cal.4th at pp. 770-771 [statute is ambiguous when "effort to apply this seemingly plain statute to the case at hand reveals ambiguities the Legislature apparently did not foresee"].) In other words, does the defendant's conduct in fact constitute shoplifting, whether it be only the burglarious preformed "intent to commit larceny" portion of the shoplifting statute or also the completed taking portion of the statute? Or does his conduct constitute theft? In these uncertain circumstances, the shoplifting statute reveals an unforeseen and absurd result if interpreted, as appellant suggests, to preclude the prosecutor at the initial charging stage from charging the burglarious and actual taking theories of liability for shoplifting or charging merely petty theft, either as defined by the shoplifting statute or as defined by the theft statutes.

The instant case particularly demonstrates this ambiguity. After the prosecutor reviewed the limited evidence available at the time she filed the original complaint, she charged appellant with shoplifting in the specific "or" language contained in section 459.5; specifically, that the property was "taken *or* intended to be taken." (CT 8, italics added.) At the preliminary hearing, she presented evidence showing that appellant had placed items from Walmart into a Walmart bag. (CT 37.) However, testimony also revealed that appellant had told Officer Georges that he entered Walmart to purchase items and then decided to steal items. (CT 40.) On cross-examination, Georges clarified that appellant had not said whether he had intended to take the items when he entered the store. (CT 40.) This

showed that appellant may have formed his intent to steal *after* entering Walmart, which would have shown his conduct to be petty theft. Because it had become ambiguous whether appellant in fact committed shoplifting, via entry with burglarious intent or via theft of property, the prosecutor was thus faced with a dilemma: what offense, or offenses, could she charge under the plain language of section 459.5?

When it is ambiguous whether a defendant committed shoplifting based solely on intent, shoplifting via theft, or only petty theft, section 459.5 retains a prosecutor's traditional charging discretion in choosing which offense to charge and in drafting the charging language accordingly. This fundamental aspect of prosecutorial discretion is based on the prosecutor's duty to charge only what she believes she can prove beyond a reasonable doubt. (*People v. Catlin*, *supra*, 26 Cal.4th at p. 109; *People v. Birks*, *supra*, 19 Cal.4th at p. 134.) Thus, if the prosecutor has evidence she believes is sufficient to obtain a conviction for shoplifting, under either a burglary or a theft theory, it is well within her discretion to charge shoplifting under both theories; if she believes the evidence is sufficient only to obtain a conviction for petty theft, she may charge petty theft instead of shoplifting. In the same vein, the prosecutor may subsequently move to amend the charges to conform to the proof if subsequent evidence demonstrates that the defendant committed an uncharged offense.[5] Section 459.5, however, does not allow the prosecutor to charge *both* shoplifting and petty theft in separate counts, even in the alternative, simply because the evidence supports a finding of guilt on either offense—such an

[5] A circumstance in which a prosecutor may need to amend charges to conform to proof is discussed *post*, in Argument III.B.1. Similarly, her discretion to do so is discussed *post*, in Arguments III.B.1 and III.B.2.

approach directly contravenes the express prohibition contained in section 459.5, subdivision (b).

This interpretation is consistent with the language of section 459.5, effectuates the voters' intent behind Proposition 47, and preserves the prosecutor's duty to charge a case according to the evidence. As discussed *ante* in Argument I.C, Proposition 47 was intended to *reduce* penalties for certain criminal conduct by limiting a prosecutor's discretion to charge felonies instead of misdemeanors but not to *preclude* penalties for conduct when there is evidence to support a charge that the prosecutor believes can be proven beyond a reasonable doubt.[6] Consistent with that purpose, section 459.5 was intended to prevent prosecutors from charging burglary, with its commensurate wobbler punishment, where the felonious intent to support the burglary encompassed only an intent to commit larceny from a commercial establishment of items worth $950 or less. (Official Voter Information Guide, Analysis by Legislative Analyst, p. 35.) By allowing the prosecutor to initially charge either shoplifting under both a burglary and theft theory of liability or only petty theft, the defendant avoids being charged with burglary, which previously could have been prosecuted as a misdemeanor or felony. (§ 459.5, subd. (b).) And, in this manner, the prosecutor properly exercises her traditional charging discretion by charging only the offense she believes she can prove beyond a reasonable doubt, whether that be shoplifting or petty theft. (*People v. Catlin*, *supra*,

---

[6] Notably, appellant does not fall within the spirit of Proposition 47's intended purpose to reduce punishment for certain offenders, given his prior convictions and section 290 registration that made his current offenses ineligible to be designated as misdemeanors under Proposition 47. (See § 459.5, subd. (a) ["Shoplifting shall be punished as a misdemeanor, except that a person with one or more prior convictions . . . for an offense requiring registration pursuant to subdivision (c) of Section 290 may be punished pursuant to subdivision (h) of Section 1170"].)

26 Cal.4th at p. 109; *People v. Birks*, *supra*, 19 Cal.4th at p. 134.) This approach effectuates the voters' intent in enacting Proposition 47 and preserves the prosecutor's traditional charging discretion.

As applicable in this case, the prosecutor properly exercised her charging discretion initially in choosing to charge appellant with shoplifting under section 459.5. When evidence was adduced at the preliminary hearing tending to show that appellant had formed his intent to steal after he entered the Walmart store, the prosecutor could have again exercised her charging discretion to move to amend the charges to conform to the proof. That is, she could have charged either petty theft only or she could have charged shoplifting under both theories of liability contained in the shoplifting statute if she believed she could still prove the offense beyond a reasonable doubt. Either decision would have been a proper exercise of prosecutorial discretion under these circumstances.

E. Current Law Protects Against Potential Abuses of Prosecutorial Charging Decisions Without Improperly Relinquishing the Jury's Factfinding Duties to the Trial Court

Appellant argues that, when the element of intent is in question, as in this case, the prosecutor may simply charge the defendant with theft and, if the defendant objects, the trial court can resolve the matter during pretrial proceedings. (AOB 25.) To the extent appellant is suggesting that the trial court itself should determine whether the defendant's intent was to commit shoplifting or theft at the charging stage, he is mistaken. Appellant's suggested procedure would improperly elevate the trial court, prior to any trial, to the role of sole factfinder in determining a defendant's guilt right at the outset.

Instead, should a defendant demur to a charge of theft on the grounds that section 459.5 precludes such a charge when "an act of shoplifting" has occurred, the trial court's involvement extends only to a determination as to

whether there is reasonable or probable cause—"such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused" (*People v. Mower* (2002) 28 Cal.4th 457, 473)—to believe the defendant committed only theft. As discussed *ante* in Argument I.D.1, existing law prohibits a prosecutor from charging a suspect with a crime without probable cause. (*Gerstein v. Pugh*, *supra*, 420 U.S. at p. 121, fn. 22; *People v. Spicer*, *supra*, 235 Cal.App.4th at pp. 1373-1374.) Thus, the proper response to a demurrer based on section 459.5 is for the trial court to determine, as it has always done, whether there is probable cause to believe the defendant has committed the charged crime, and then allow the prosecutor to choose the appropriate offense to charge.[7] Under this approach, the trial court appropriately would operate as a gatekeeper, allowing only those charges supported by probable cause to proceed. This approach would avoid elevating the trial court, over the jury, to the role of ultimate factfinder. Yet, it would also eliminate any concern (see AOB 29) that a prosecutor would be able to circumvent the intent of Proposition 47 and the statute itself during the charging process.

As applicable in this particular case, had appellant objected to the charging of both shoplifting and theft of the same property based on section 459.5, the trial court could have determined, based on the evidence before it, whether there was probable cause to believe appellant had committed only theft. In this case, because substantial evidence adduced at the preliminary hearing supported *either* shoplifting under either theory of liability or theft, there was probable cause for both offenses. Thus, the trial court could have

---

[7] As argued *post* in Argument II, a defendant bears the burden of challenging the charges brought against him based on section 459.5 and must demur in order to preserve that issue for appeal.

permitted the prosecution to proceed by exercising her discretion to select which offense to charge based on what she believed she could prove beyond a reasonable doubt. (*People v. Catlin*, *supra*, 26 Cal.4th at p. 109.)

In sum, a defendant may demur to a charge of theft when he believes he has been incorrectly charged in violation of section 459.5's language requiring a prosecutor to charge shoplifting when the offending conduct constitutes an "act of shoplifting." In turn, the trial court may determine whether the charge of theft is supported by probable cause. If probable cause supports the theft offense, the prosecutor may exercise her discretion to choose which offense to charge based on what she believes she can prove beyond a reasonable doubt.

II. ALTHOUGH SECTION 459.5 PROHIBITS THE PROSECUTION FROM CHARGING BOTH SHOPLIFTING AND THEFT OF THE SAME PROPERTY, APPELLANT NONETHELESS FORFEITED HIS CLAIM BY FAILING TO DEMUR TO THE INFORMATION

This Court asked the parties to address various supplemental issues, including whether appellant had forfeited, by failing to object below, his argument that section 459.5, subdivision (b), prohibits the prosecution from charging both shoplifting and theft of the same property. The answer is yes—by failing to object or demur to the information, appellant forfeited his claim of charging error on appeal.

Generally, a defendant's failure to object to an amendment of the information forfeits his right to assert the error on appeal. (*People v. Collins* (1963) 217 Cal.App.2d 310, 313 [failure to object to amendment of information in adding additional charge waived right to assert error]; *People v. Spencer* (1972) 22 Cal.App.3d 786, 799 ["claim that the court erred in ordering the filing of an amended information cannot be raised for the first time on appeal"].) Section 1004, subparagraph 5, permits a defendant to demur to the information when "it contains matter which, if true, would constitute a legal justification or excuse of the offense charged,

or other legal bar to the prosecution." (§ 1004, par. 5, italics added.) "When any of the objections mentioned in Section 1004 appears on the face of the accusatory pleading, it can be taken only by demurrer, and failure so to take it shall be deemed a waiver thereof, except that the objection to the jurisdiction of the court and the objection that the facts stated do not constitute a public offense may be taken by motion in arrest of judgment." (§ 1012.)

"The purpose of the waiver rule is twofold. First, it permits correction of pleading defects prior to trial, thereby promoting efficiency and conserving judicial resources. Second, it prevents '[a] defendant from speculating on the result of the trial and raising the objection after an unfavorable verdict.' [Citation.] This rule is of long standing; . . . a criminal defendant 'cannot, under our system, lie by until he shall see the result of a trial of his case on the merits and then be permitted to take advantage of a mere uncertainty in the indictment by motion in arrest of judgment.' [Citation.]" (*People v. Jennings* (1991) 53 Cal.3d 334, 357.) Had appellant pointed out the alleged error, the trial court could have addressed the matter. But because appellant here did not demur to the information or otherwise object to the charging of both shoplifting and petty theft, his claim is forfeited on appeal. (§ 1012.)

People v. Goldman (2014) 225 Cal.App.4th 950 (*Goldman*) is instructive on this point. There, the defendant molested his nieces over a period of several years. (*Id.* at p. 952.) He was charged with and convicted of discrete sexual offenses and one count of continuous sexual abuse under section 288.5, subdivision (a). (*Ibid.*) On appeal, the defendant argued that he had been illegally convicted of a discrete sexual offense against a victim that had occurred during the same time period as alleged for the continuous

sexual abuse. (*Id.* at p. 954.) The defendant pointed to the language in section 288.5, subdivision (c),[8] which prohibits the charging of discrete sexual offenses against the same victim for the same period of time unless the discrete sexual offenses are charged in the alternative. (*Id.* at pp. 954-955.)

The Court of Appeal held that appellant's claim was forfeited by his failure to demur to the information below. (*Goldman*, *supra*, 225 Cal.App.4th at p. 956.) It reasoned, "The charging prohibition found in section 288.5, subdivision (c) is, in the words of the demurrer statute, a 'legal bar to the prosecution.'" (*Ibid.*, citing § 1004, par. 5.) The Court explained that the prosecutor was "barred from charging a discrete sexual offense committed against the same victim during the period alleged for the continuous sexual abuse unless it is charged in the alternative." (*Goldman*, at p. 956.) It concluded, "Because it is a legal bar to prosecution, a defendant must demur to preserve for appeal an objection to the improper charging." (*Ibid.*) The defendant's failure to do so forfeited his claim on appeal. (*Ibid.*) The Court of Appeal further held that the defendant had failed to show that counsel was ineffective in failing to demur given the lack of prejudice because, had counsel objected, a "slight amendment to the information would have corrected the . . . problem . . . ." (*Id.* at p. 958.)

---

[8] Section 288.5, subdivision (c), provides: "No other act of substantial sexual conduct, as defined in subdivision (b) of Section 1203.066, with a child under 14 years of age at the time of the commission of the offenses, or lewd and lascivious acts, as defined in Section 288, involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved in which case a separate count may be charged for each victim."

Similarly here, section 459.5's prohibition against charging both shoplifting and theft of the same property is an alleged "charging prohibition" that constitutes a "legal bar to the prosecution." (*Goldman, supra*, 225 Cal.App.4th at p. 956.) Under section 459.5, subdivision (b), the prosecutor here was barred from charging appellant with both shoplifting and petty theft. Thus, appellant was required to demur to the information "to preserve for appeal an objection to the improper charging." (*Ibid.*) Appellant's failure to do so forfeited his claim.

Appellant argues that his claim is not forfeited, analogizing to the Court of Appeal's opinion in *People v. Henry* (2018) 28 Cal.App.5th 786, 791, fn. 3 (*Henry*). (AOB 31-32.) Appellant's reliance is misplaced. As appellant recognizes, *Henry* involved the application of the *Williamson*[9] rule. (AOB 31.) That rule, which provides, "if a general statute includes the same conduct as a special statute, the court infers that the Legislature intended that conduct to be prosecuted exclusively under the special statute" (*Henry*, at p. 791), is inapplicable here. As appellant himself concedes, "shoplifting and theft are distinct crimes." (AOB 42.) Furthermore, the Court of Appeal reached the merits of the defendant's claim despite his failure to raise any objection below in part because "the issue is one of law based on undisputed facts." (*Id.* at p. 791, fn. 3.) Unlike the circumstances in *Henry*, where the facts unequivocally showed that the defendant provided an officer with false information when pulled over, this case involves a dispositive factual dispute regarding appellant's intent. *Henry* is thus inapposite.

Appellant also cites *People v. Shabtay* (2006) 138 Cal.App.4th 1184 (*Shabtay*) to support his contention that his claim is not forfeited. (AOB 32.) He points to the Court's finding that "[w]hile a demurrer does lie to

---

[9] *In re Williamson* (1954) 43 Cal.2d 651.

challenge an improper charging of more than one offense under section 954, the failure to demur does not justify a multiple-conviction that is improper as a matter of law." (AOB 32, citing *Shabtay*, at p. 1192.) Respondent agrees entirely with that finding. However, appellant here was not *convicted* of multiple offenses. If appellant had been convicted of both shoplifting and theft of the same property, those convictions would have been improper as a matter of law, in which case respondent would readily concede that such a claim of error would not be forfeited by appellant's failure to object below. Instead, appellant here was only *charged*, allegedly in violation of section 459.5, with both shoplifting and theft. This particular claim of error, that he was improperly charged (and not convicted), *is* forfeited by a failure to demur. (*Goldman*, *supra*, 225 Cal.App.4th at p. 956.) Appellant's reliance on *Shabtay* is thus misplaced.

For the same reasons, appellant's analogy to unauthorized sentences is without merit. Appellant's sentence, insofar as it involved a conviction for petty theft, was not itself unauthorized. An "unauthorized sentence" is one that "could not lawfully be imposed *under any circumstance* in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354, italics added.) Here, although the charging of both shoplifting and petty theft was unauthorized, the ultimate conviction and sentence involving *only* petty theft was not itself unauthorized. Specifically, appellant here seeks to overturn his conviction based on a pleading defect. A defect in pleading that results in a valid conviction and sentence does not render the sentence itself unauthorized. (Cf. *People v. McGee* (1993) 15 Cal.App.4th 107, 117 [claim not forfeited by failure to object when "error is not one of an impermissible amendment to the pleadings" but rather one involving the imposition of "an unauthorized sentence enhancement"].) Thus, the

"unauthorized sentence" exception to the general rule of forfeiture is inapplicable here.

For the foregoing reasons, this Court should conclude that appellant forfeited his claim of error by failing to demur or otherwise object to the information below.

III. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT; OF THE POSSIBILITIES THAT COULD HAVE OCCURRED, NONE SHOW THAT A MORE FAVORABLE OUTCOME WAS REASONABLY PROBABLE.

Although section 459.5 prohibits the prosecution from charging both shoplifting and theft of the same property, appellant nonetheless fails to demonstrate prejudice. Had counsel objected, the prosecutor could have moved to amend the information to charge only petty theft. Alternatively, the prosecutor could have moved to amend the information to charge shoplifting in language that encompassed petty theft as a lesser included offense, in which case the court would have instructed the jury on petty theft as a lesser included offense. In light of the jury's ultimate finding of guilt on the petty theft charge, there is no reasonable probability that either possibility would have resulted in a more favorable outcome for appellant. For the same reasons, appellant fails to demonstrate that defense counsel was ineffective in failing to object.

A. Legal Standards

The right to effective assistance of counsel is guaranteed by both the United States Constitution and article I, section 15, of the California Constitution. To prevail on an ineffective assistance of counsel claim, the burden is on appellant to prove that (1) counsel's performance was deficient and that (2) the deficiency resulted in prejudice to appellant's case. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*); *In re Neely* (1993) 6 Cal.4th 901, 908.) Appellant must prove both incompetence

and prejudice by a preponderance of the evidence. (*People v. Mayfield* (1993) 5 Cal.4th 142, 206; *In re Wilson* (1992) 3 Cal.4th 945, 956.)

To satisfy the incompetence prong of *Strickland*, appellant bears the burden of proving that defense counsel's performance fell below an objective standard of reasonably effective assistance. (*Strickland, supra*, 466 U.S. at pp. 687-688.) This standard is "highly demanding" and requires a showing that the defendant's trial was rendered unfair by the "gross incompetence" of his attorney. (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 382.) "Generally, failure to object is a matter of trial tactics as to which [a reviewing court] will not exercise judicial hindsight." (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) Courts must indulge a strong presumption that counsel acted within the wide range of reasonable assistance. (*Strickland*, at p. 689.) To show deficiency, "the record must *affirmatively* disclose [a] lack of a rational tactical purpose for the challenged act or omission." (*People v. Ray* (1996) 13 Cal.4th 313, 349, italics added.) Where the record fails to show the reason for counsel's challenged act, the appellate claim must be rejected unless counsel was asked for an explanation and failed to provide one or there can be no satisfactory explanation. (*People v. Huggins* (2006) 38 Cal.4th 175, 206; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Appellant must also prove the element of prejudice. To prove prejudice, appellant must show that defense counsel's mistakes were so severe that it is reasonably probable that, but for the alleged mistakes, appellant would have received a more favorable result. (*Williams v. Taylor* (2000) 529 U.S. 362, 391, 394.) In other words, prejudice is shown when there is a reasonable probability that, but for the alleged errors or mistakes, the result would have been different. (*In re Hardy* (2007) 41 Cal.4th 977, 1018.) A reasonable probability is that which is "sufficient to undermine confidence in the outcome." (*Ibid.*, citing *In re Avena* (1996) 12 Cal.4th

694, 721.) Thus, appellant "must establish prejudice as a demonstrable reality, not simply speculation as to the effect of the errors or omissions of counsel." (*In re Clark* (1993) 5 Cal.4th 750, 766, internal quotation marks omitted.) Where it is clear that the alleged errors did not prejudice appellant, courts may reject the ineffective assistance claim without addressing the challenged actions. (*People v. Price* (1991) 1 Cal.4th 324, 440.)

B. If Counsel Had Objected, the Prosecutor Could Have Chosen to Charge Only Petty Theft or to Charge Only Shoplifting in Language Encompassing Petty Theft as a Lesser Included Offense, in Which Case Appellant Fails to Show Prejudice in Light of His Conviction for Petty Theft

Had counsel objected to the prosecutor's charging decision here, several subsequent possibilities emerge. However, none of these possibilities was likely to have resulted in a result more favorable to appellant, particularly in light of the jury's ultimate finding of guilt on the petty theft charge.

1. The prosecutor could have exercised her charging discretion to charge only petty theft and not shoplifting

Had counsel objected, based on the prohibitory language in section 459.5, subdivision (b), the trial court here could have ordered the prosecutor to exercise her charging discretion to choose between shoplifting or petty theft. Because the prosecutor could have charged only petty theft, appellant cannot show prejudice.

Section 1009 provides in relevant part: "The court in which an action is pending may order or permit an amendment of an indictment, accusation or information, or the filing of an amended complaint, *for any defect or insufficiency*, at any stage of the proceedings . . . ." (§ 1009, italics added.) "[S]ection 1009 gives the trial court discretion to permit an amendment of

the information to charge any offense shown by the evidence taken at the preliminary examination [and] at any time during trial . . . ." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 903.) As discussed under Argument II, *ante*, alleged improper charging is a legal bar to prosecution and thus constitutes a defect in the information. (See *Goldman*, *supra*, 225 Cal.App.4th at p. 956.) As such, section 1009 granted the trial court discretion to order the prosecutor to charge either shoplifting or petty theft to address the alleged defect under section 459.5.

Had the court ordered the prosecutor to choose, section 1009 similarly granted the prosecutor discretion to amend the information to charge only shoplifting or petty theft. Section 1009 provides that the trial court may "permit" an amendment of an information "for any defect or insufficiency, at any stage of the proceedings . . . ." (§ 1009.) This permissive language necessarily implies that a prosecutor must first move to amend an information before the trial court may permit such a motion. That is, section 1009 contemplates that a prosecutor has the initial discretion to move to amend an information to correct any defect or insufficiency. Furthermore, under section 739,[10] "'the law is settled that unless the magistrate makes factual findings to the contrary, the prosecution may amend the information after the preliminary hearing to charge any offense shown by the evidence adduced at the preliminary hearing provided the new crime is transactionally related to the crimes for which the defendant has previously been held to answer.' [Citations.]" (*People v. Superior*

---

[10] "[I]t shall be the duty of the district attorney of the county in which the offense is triable to file in the superior court of that county . . . an information against the defendant which may charge the defendant with either the offense or offenses named in the order of commitment or any offense or offenses shown by the evidence taken before the magistrate to have been committed." (§ 739.)

Court (Mendella) (1983) 33 Cal.3d 754, 764, superseded by statute as noted in *In re Jovan B.* (1993) 6 Cal.4th 801.) Because the evidence adduced at the preliminary hearing was sufficient to establish probable cause to believe appellant had committed petty theft, such a charge was proper. (See Argument I.D.2, *ante*.) Thus, the prosecutor here could have moved to amend the information to charge only petty theft.

Appellant argues that, had counsel objected, the prosecutor would have been required to proceed solely on the shoplifting charge. (AOB 37-40.) Specifically, appellant argues, "Having made the decision to charge appellant with shoplifting . . . the People were obligated to pursue that charge alone." (AOB 40.) But nothing binds a prosecutor to an initial charging decision, particularly where evidence adduced at the preliminary hearing tends to show that appellant had committed a different but related offense. Indeed, it is well established that a prosecutor may even amend the information to include additional offenses up to the time of verdict. (*Mendella*, *supra*, 33 Cal.3d at p. 764; *People v. Farrow* (1982) 133 Cal.App.3d 147, 152.) As phrased, section 459.5 merely presupposes that it will be apparent to the prosecutor at the time of charging whether a defendant's conduct constitutes shoplifting—it does not serve to bind the prosecution to an initial shoplifting charge even in the face of shifting evidence at or after a preliminary hearing.

Indeed, permitting a prosecutor to amend the charges to conform to the proof furthers the voters' intent in enacting Proposition 47 by seeking commensurate punishment for culpable conduct and by not allowing certain criminals to escape punishment altogether. (See *People v. Whitmer* (2014) 59 Cal.4th 733, 743 [Court's formulation of theft rule "is likely to accord with the defendant's culpability in most cases"].) By requiring that a prosecutor who has charged shoplifting to adhere to that charge, regardless of what evidence may subsequently be adduced, appellant seeks to "leave

the People with a Hobson's choice" between pursuing the shoplifting charge or nothing at all.[11] (*People v. Traylor* (2009) 46 Cal.4th 1205, 1214-1215 [rejecting defendant's interpretation of section 1387[12] where it would result in "immun[ity] from prosecution for alleged negligent operation of a motor vehicle that resulted in the death of a nine-year-old boy"].) Rather than forcing a prosecutor to choose an all-or-nothing approach, especially where there is probable cause showing that the defendant committed some crime, allowing the prosecutor to exercise her discretion in amending the charges under these circumstances advances the legitimate goal of criminal justice. (Cf. *People v. St. Martin* (1970) 1 Cal.3d 524, 533 ["a defendant has no legitimate interest in compelling the jury to adopt an all or nothing approach to the issue of guilt. Our courts are not gambling halls but forums for the discovery of truth"].) This Court should reject appellant's argument to the contrary.

At the same time, this Court should decline to read section 459.5 as prohibiting a prosecutor from proceeding on a petty theft charge when the defendant subsequently introduces evidence that he had committed shoplifting under section 459.5. Such an interpretation would result in the absurd consequence of allowing a defendant to effectively dismiss a theft charge by testifying that he had formed his intent to steal prior to entering a commercial establishment and relying on the language in section 459.5—

---

[11] Appellant suggests that "a standard could be crafted that gave the prosecutor meaningful discretion to pick the appropriate charge." (AOB 25.) But this contention ignores exactly what occurred in this case. Here, the prosecutor properly exercised her discretion in charging shoplifting in the original complaint and, after hearing the evidence at the preliminary hearing, exercised her discretion to charge petty theft.

[12] "[S]ection 1387 limits, in most instances, the number of times prosecution 'for the same offense' may occur after prior complaints have been dismissed." (*Traylor*, at pp. 1211-1212.)

that "[a]ny act of shoplifting . . . shall be charged as shoplifting"—to argue that the prosecutor was required to have charged him with shoplifting *ab initio*. In short, a defendant may not use the language in section 459.5 to derail a theft charge by attempting to establish that his conduct constituted shoplifting *after the fact*. It would be absurd to interpret the statute to allow a defendant to escape liability by precluding a prosecutor from charging a legally valid and appropriate theory of liability. Contrary to appellant's suggestion that the potential for unpunished criminal conduct was contemplated under Proposition 47 (AOB 24, 26-27), nothing demonstrates or even suggests that the voters intended criminals to escape punishment entirely, regardless of how "slight" that likelihood would be.

2. The prosecutor could have exercised her charging discretion to charge only shoplifting in language encompassing petty theft as a lesser included offense, and the trial court would have instructed the jury on petty theft as a lesser included offense

Although the information charging appellant did not allege shoplifting in language that included petty theft as a lesser included offense, given the facts present in this particular case, the prosecutor could have amended the information to so reflect. If she had done so, then the trial court would have been required to instruct the jury to consider petty theft as a lesser included offense to shoplifting.

a. Procedural background

In the first amended information, the prosecution charged appellant in count 1 with petty theft with a prior, alleging in relevant part that he "did unlawfully[,] and in violation of Penal Code Section 484(a), steal[,] take and carry away the personal property of WALMART." (CT 68.) The information charged appellant in count 2 with shoplifting, alleging that he "did unlawfully, with intent to commit theft, enter a commercial establishment during regular business hours, to wit, WALMART, where the

property taken or intended to be taken was valued at less than $950.00." (CT 70.)

b. Petty theft is not a lesser included offense of shoplifting under the accusatory pleading test because the alleged facts in count 2 do not include all the elements in count 1

In determining whether an offense is lesser and necessarily included in another offense, a court will apply either the "elements test" or the "accusatory pleading test." (*People v. Shockley* (2013) 58 Cal.4th 400, 404.) The accusatory pleading test provides that, "if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former." (*People v. Reed* (2006) 38 Cal.4th 1224, 1228.) Put another way, a crime is a lesser included offense if the accusatory pleading "describes the greater offense in language such that the offender, if guilty, must necessarily have also committed the lesser crime." (*People v. Moon* (2005) 37 Cal.4th 1, 25-26.) Whether an offense is necessarily included in another "is not based upon the evidence presented at trial." (*People v. Babaali* (2009) 171 Cal.App.4th 982, 994-995.) "'It is of no consequence that the evidence at trial might also establish guilt of another and lesser crime than that charged. [Citations.]'" (*People v. Steele* (2000) 83 Cal.App.4th 212, 218.)

Here, under the accusatory pleading test, the charged petty theft was not a lesser included offense of shoplifting.[13] Count 1, petty theft, alleged

---

[13] Respondent recognizes that appellant here was charged with petty theft *with a prior*. However, in determining whether petty theft with a prior is a lesser included offense, the test is whether only *petty theft* itself is a lesser included offense. (See *People v. Shoaff* (1993) 16 Cal.App.4th 1112, 1116 ["Because the prior conviction and incarceration requirement of [petty theft with a prior] is not an element of an offense, the relevant question is not whether petty theft with a prior is a lesser and necessarily included offense of grand theft—the crime with which defendant was charged.

(continued...)

that appellant did in fact physically take and carry away Walmart's property. (CT 68.) Count 2, shoplifting, alleged that appellant took *or intended* to take that property. (CT 70.) This distinction demonstrates that the accusatory pleading did not describe the greater offense, shoplifting, in language such that appellant, if guilty, must necessarily have also committed the lesser crime, petty theft. That is, to commit shoplifting, appellant was required to *intend* to take Walmart's property prior to entry. To the extent he may also have taken and carried away the property, he had to do so with preformed intent. And, if found guilty of shoplifting, as charged in the information, based on his intent to take property, appellant would not necessarily have also committed petty theft, which requires an actual taking. (CT 68.) Thus, under the accusatory pleading test, the petty theft charged in this case was not a lesser included offense of shoplifting. (*People v. Reed*, *supra*, 38 Cal.4th at p. 1228.)

c. The prosecution could have charged only shoplifting under both a taking and a preformed intent theory, and the trial court would have instructed the jury on petty theft as a lesser included offense

Under section 739, "the prosecution may amend the information after the preliminary hearing to charge any offense shown by the evidence adduced at the preliminary hearing provided the new crime is transactionally related to the crimes for which the defendant has previously been held to answer.' [Citations.]" (*Mendella*, *supra*, 33 Cal.3d at p. 764.) Section 1009 similarly grants the trial court discretion to permit a prosecutor to amend an information "for any defect or insufficiency, at any stage of the proceedings . . . ." (§ 1009.) "[T]he test applied is whether or

---

(...continued)
Rather, the question is whether petty theft is a lesser and necessarily included offense of grand theft"].)

not the amendment changes the offense charged to one not shown by the evidence taken at the preliminary examination." (*People v. Spencer* (1972) 22 Cal.App.3d 786, 799, accord. *People v. Crosby* (1962) 58 Cal.2d 713, 723.)

Had defense counsel demurred, the prosecutor here could have moved to amend the information to correct the alleged defect in the information by removing the petty theft charge and rephrasing the shoplifting charge so that it encompassed petty theft as a lesser included offense. (§ 739; *Mendella*, *supra*, 33 Cal.3d at p. 764.) In other words, she could have properly proceeded on the theory that appellant had the requisite intent to steal when he entered Walmart and did actually take property from the store. For example, the prosecutor could have alleged that appellant "did unlawfully, with intent to commit theft, enter a commercial establishment during regular business hours, to wit, WALMART, where the property intended to be taken, *and was in fact taken*, was valued at less than $950.00." (See *People v. Smith* (2013) 57 Cal.4th 232, 244 [recognizing that the prosecution may choose to "allege a way of committing the greater offense that necessarily subsumes the lesser offense"].) As alleged, petty theft would have been a lesser included offense of shoplifting: if appellant had been found guilty of shoplifting, the greater offense, then under the accusatory pleading test, he would necessarily have also committed petty theft, the lesser offense.

Indeed, the language of section 459.5 itself contemplates the possibility that certain conduct that may appear to be shoplifting may in fact constitute merely theft. The statute refers to "property taken *or* intended to be taken." (§ 459.5, subd. (a), italics added.) That is, a defendant may commit shoplifting by merely intending to take property or by actually taking property. At the same time, a defendant may also commit only theft when he takes property without the preformed intent.

The language in section 459.5 demonstrates that petty theft may very well be a lesser included offense of shoplifting under certain circumstances like those present here, where the requisite intent to steal is contested or ambiguous. Thus, the prosecutor could have moved to amend the information to allege shoplifting in language that encompassed petty theft as a lesser included offense, especially in light of the evidence adduced at the preliminary hearing tending to show that appellant formed his intent to steal after entering the Walmart store. (CT 40.)

Under the specific circumstances present in this case, had the shoplifting charge been alleged to include petty theft as a lesser included offense, the trial court would have been *obligated* to instruct the jury on petty theft as a lesser included offense. "A trial court has a sua sponte duty to 'instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser.' [Citation.]" (*People v. Shockley* (2013) 58 Cal.4th 400, 403.) This duty to instruct exists even over a defendant's objection. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1345 [court has duty to instruct "notwithstanding a defendant's objection that such instruction is inconsistent with his or her theory of the case"].) The purpose of this rule is "to assure, in the interest of justice, the most accurate possible verdict encompassed by the charge and supported by the evidence." (*Shockley*, at p. 405, citing *People v. Breverman* (1998) 19 Cal.4th 142, 161.)

Here, substantial evidence supported a finding that appellant committed only petty theft and not shoplifting. At the preliminary hearing, evidence was introduced that appellant informed Officer Georges that "he went to Wal-Mart to purchase some items. He said he at the time needed some money, and he took the other items that he didn't purchase at the register." (CT 40.) Officer Georges elaborated that appellant did not say whether he had intended to take the items when he went into the store. (CT

40.) This evidence tended to show that appellant formed his intent to steal after entering the Walmart store, in which case his conduct would have constituted petty theft instead of shoplifting. (See §§ 459.5 & 666.) Because this constituted substantial evidence that appellant was "guilty only of the lesser" (*Shockley*, *supra*, 58 Cal.4th at p. 403), the trial court here would have been required to instruct the jury on the lesser included offense of petty theft under these circumstances.[14]

Appellant argues that the prosecutor could not have amended the information to include petty theft as a lesser included offense of shoplifting under the accusatory pleading test. (AOB 45-55.) He contends that the use of the accusatory pleading test would, "practically speaking, still be charging theft" and would "be the functional equivalent of charging theft." (AOB 46.) But appellant himself recognizes that this Court has repeatedly emphasized that lesser included offenses are *uncharged* offenses. (AOB 46; see *People v. Eid* (2014) 59 Cal.4th 650, 660 [lesser included offenses are "uncharged" offenses]; *People v. Reed*, *supra*, 38 Cal.4th at p. 1227 [question is "whether a defendant *charged* with one crime may be convicted of a lesser *uncharged* crime," original italics].) Thus, the use of *uncharged* offenses does not violate section 459.5's prohibition against "*charg*[*ing*]" a person, who is charged with shoplifting, with burglary or theft of the same property. (§ 459.5, subd. (b), italics added.)

As this Court has recognized, "[I]t is logically consistent to apply the accusatory pleading test when it is logical to do so (to ensure adequate

---

[14] The use of the accusatory pleading test to include petty theft as a lesser included offense does not allow prosecutors to allege shoplifting in a way that would *always* require a jury instruction on petty theft. There still must be substantial evidence that the defendant has committed only the lesser offense, and not the greater, to warrant an instruction on the lesser. (*People v. Smith*, *supra*, 57 Cal.4th at p. 244.)

notice) but not when it is illogical to do so (when doing so merely defeats the legislative policy . . .)." (*People v. Reed*, *supra*, 38 Cal.4th at p. 1231.) As discussed *ante*, in Argument I.C, the policy behind Proposition 47 was to *reduce* penalties for certain criminal conduct by limiting a prosecutor's discretion to charge felonies instead of misdemeanors but not to *preclude* penalties for conduct when there is evidence to support a charge that the prosecutor believes can be proven beyond a reasonable doubt. Contrary to what appellant suggests, use of the accusatory pleading test under these circumstances would be logical to ensure adequate notice, especially since theft and shoplifting are so closely related. (AOB 53.) At the same time, it would hardly be illogical to do so given the voters' intent behind Proposition 47. This Court should reject appellant's argument to the contrary.

3. Under either charging possibility, appellant fails to demonstrate prejudice because the jury ultimately convicted him of petty theft, an act that would have been encompassed in either charging decision

Appellant fails to demonstrate that counsel's failure to object was prejudicial because there is no reasonable likelihood that the prosecutor would have chosen to proceed solely on the shoplifting charge rather than the petty theft charge on which the jury reached a guilty verdict. Even assuming the prosecutor had chosen to proceed solely on the shoplifting charge, there is no reasonable likelihood she would have done so without amending the information to include petty theft as a lesser included offense, in which case the trial court would have instructed the jury on petty theft as a lesser included offense.

As demonstrated during the preliminary hearing, there was uncertainty about whether appellant had harbored the intent to steal when he entered the Walmart store or whether he had formed that intent after

entering the store. (CT 40.) The prosecutor was well aware of the difficulty in proving that only shoplifting had occurred. Given appellant's confession to the officer that he had formed the intent to commit theft once inside the store, there is no reasonable probability the prosecutor would have gambled on the shoplifting charge to the exclusion of the petty theft charge, particularly where both offenses carried the same punishment. (§ 666, subd. (a), § 18, subd. (a), § 459.5, subd. (a); § 1170, subd. (h).)

This conclusion is supported by the evidence introduced at trial, the prosecutor's closing argument to the jury, and the jury's own difficulty in determining appellant's intent. At trial, as in the preliminary hearing, evidence had been introduced tending to show either that appellant possessed the intent to steal when he entered the Walmart store or that he formed the intent to steal after entering the store. (1RT 77-78, 126.) In closing, the prosecutor argued that appellant either formed the intent to steal when he entered the store with the empty Walmart bag or formed the intent to steal after entering. (1RT 196-198.) Specifically, the prosecutor argued that appellant's possession of the empty Walmart bag showed that he "*might* have had the plan to already steal items" when he entered the store, that the empty Walmart bag "*seemed* to indicate that he had decided previously to commit the theft before he entered," and that the bag "*seemed* to show that he had decided previously to buy those, conceal them and then leave." (1RT 196, 198, italics added.) The prosecutor's equivocation demonstrates that she herself was not sold on the shoplifting theory. This uncertainty was justified, as demonstrated by the jury's difficulty when grappling with the intent element for shoplifting and its various questions submitted to the court on that issue, ultimately hanging five to seven. (CT 239-243.)

In light of the conflicting evidence, the prosecutor's equivocation, and the jury's difficulty in addressing the issue of appellant's intent, there is no

reasonable probability that the prosecutor would have gambled on the shoplifting charge, if forced to choose. For the same reasons, even if the prosecutor had proceeded solely on the shoplifting charge, there is no reasonable likelihood she would have continued without amending the information to include petty theft as a lesser included offense. And, because the jury ultimately found appellant guilty on the petty theft charge, appellant fails to demonstrate prejudice. For that reason, he similarly fails to demonstrate that counsel was ineffective in failing to object. (*People v. Price*, *supra*, 1 Cal.4th at p. 440.)

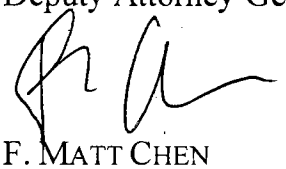
CONCLUSION

For the foregoing reasons, respondent respectfully requests this Court to affirm the judgment and sentence.

Dated: June 11, 2019

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
KATHLEEN A. MCKENNA
Supervising Deputy Attorney General
RACHELLE A. NEWCOMB
Deputy Attorney General



F. MATT CHEN
Deputy Attorney General
Attorneys for Plaintiff and Respondent

SA2019300096

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 10,855 words.

Dated: June 11, 2019

XAVIER BECERRA
Attorney General of California

F. MATT CHEN
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Lopez**
No.: **S250829**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

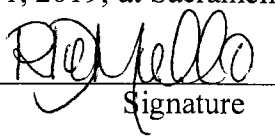
On June 11, 2019, I served the attached **Answer Brief on the Merits** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Caitlin M. Plummer
Law Office of Lichstein & Plummer
2852 Willamette Street, #164
Eugene, OR 97405-8200

Clerk of the Court
Fifth District Court of Appeal
2424 Ventura Street
Fresno, CA 93721

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 11, 2019, at Sacramento, California.

R. DeMello
Declarant


Signature

SA2019300096
13815596.docx