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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAVID MICHAEL VINSON, Defendant and Appellant.	F059302 (Super. Ct. No. BF127977A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. David R. Lampe, Judge.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez, Jamie A. Scheidegger, and Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of the Facts and parts I, III, and IV of the Discussion.

David Michael Vinson stands convicted, following a jury trial, of committing petty theft after having previously been convicted of a theft offense. (Pen. Code,[1] § 666.) Following a bifurcated court trial, he was found to have served two prior prison terms. (§ 667.5, subd. (b).) Sentenced to a total of five years in prison and ordered to pay various fees and fines, he now appeals. For the reasons that follow, we affirm. In the published portion of this opinion, we conclude the amendment to section 666 that became effective on September 9, 2010, applies retroactively. In the unpublished portion, we reject Vinson's claims of insufficient evidence, and trial and sentencing error.

FACTS[*]

On May 23, 2009, Teresa Williams participated in a sporting event at the Rollerama in Bakersfield. At about 11:00 p.m., she and some friends went across the street to the Buckhorn, a bar with a pool table. Williams, who was preparing to play pool with Vinson, put her purse down on a table within arm's reach behind herself. As she bent over to rack the balls, Vinson hurriedly walked toward the men's bathroom, which was about six feet from the table.

Around this time, David Zulaica, one of Williams's friends, went into the men's room (a small, one-person arrangement) and noticed a red purse in the sink. While Zulaica was inside, Vinson entered, excused himself, and went right back out. When Zulaica exited the bathroom, Vinson was waiting outside and entered immediately. Zulaica started asking around and learned the purse belonged to Williams. Zulaica offered to retrieve it as soon as the bathroom was not in use.

Zulaica kept an eye on the bathroom, as he wanted to make sure he got in there right away. Nobody went in or out until Vinson exited after about five to 10 minutes. Zulaica then went in and looked for the purse. He eventually found it underneath the

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1 All statutory references are to the Penal Code unless otherwise stated.

***** See footnote, *ante*, page 1.

trash bag inside the trash can. He took it to Williams, and she identified it as hers. Upon opening it, she discovered that her two lipsticks were still inside, but everything else was missing: two credit cards, an I.D., a cell phone, and around $150 in cash that was predominantly folded together.[2] Williams never gave anyone permission to take her purse or to take anything out of it. During the time she was racking the pool balls and Vinson was walking to the men's bathroom, nobody else came behind Williams or got near the table with the purse. Had anybody gone into the bathroom area, Williams would have been able to see their path. Nobody traveled that path other than Vinson and, later, Zulaica.

Williams, Zulaica, and some friends went outside to confront Vinson, who was in the alley by the exit. Words were exchanged, and someone called the police. When the police arrived, Vinson quickly tried to leave the scene by going down the alley. Upon arriving at the Buckhorn, Bakersfield Police Officer Cooper and another officer saw a group of females standing outside. As soon as the officers walked up, one of the women said, "There he is. There he is. He's getting away." She pointed out a male walking westbound on 34th toward Jewett Avenue. Cooper quickly ascertained that some items had been stolen inside the bar and, within a minute, went in the direction that had been pointed out to him. Upon reaching Jewett, he did not see anyone in the area. Knowing what the missing items were, he started looking in the only trash can in the area. In it were Williams's driver's license and credit cards.

Cooper and the other officer continued walking and located Vinson, the same person pointed out to them upon their arrival at the Buckhorn. Vinson was standing in a lit carport. When Vinson was searched, a wallet was pulled out of his pocket. Cooper

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[2] Williams had withdrawn $160 in $20 bills from an ATM, and had purchased a beer with one of those bills. The beer was not very expensive, and she put the change in her purse with the rest of the money.

saw currency taken out of the wallet by the other officer; there was $150 in neatly placed bills, and a small amount that was crumpled up. There was no foot traffic in the area, and Cooper did not see anyone other than Vinson on the entire path Cooper traveled.

The police returned to Williams 20 to 30 minutes later with her driver's license and what she recalled as being one of her credit cards.[3] They also had cash that Williams recognized. It was the same denominations – twenties and possibly a ten – and folded the same way as she remembered from her purse.

The defense presented photographs of the exterior and interior of the Buckhorn.

DISCUSSION

I.*

EVIDENTIARY RULINGS

Vinson contends the trial court committed prejudicial error by making certain evidentiary rulings concerning the conduct of, and report written by, the second officer present at the scene with Officer Cooper. We find no cause for reversal.

A. Background

Former Bakersfield Police Officer Luff was the officer present with Cooper. Luff's name was never provided to the jury.

Luff was the subject of dueling motions in limine. Vinson sought exclusion of any use of or reference to the report written by Luff in this case. Vinson represented that Luff had recently been forced to resign from the police force as a condition of the dismissal of sexual assault charges against him. Vinson further represented that the district attorney's office had refused to provide investigative reports concerning the charges against Luff,

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[3] Williams remembered saying she was missing another credit card, and the officers looking for it again and finding it somewhere around the outside of the bar. Her cell phone was never found.

* See footnote, *ante*, page 1.

on the basis that since Luff would not be called as a witness in Vinson's case, the prosecution was not required to provide impeachment material, even though Luff authored the report on which other officers might rely for their testimony in this case.

The People, by contrast, moved to exclude as irrelevant and prejudicial any evidence regarding criminal charges against Luff. The People argued that since the prosecution would not be calling him as a witness, it would prejudice the jury against the People's case and confuse the issues to allow the defense to impeach Luff in abstentia.

At the hearing on the motions, the trial court's tentative position was that if Luff did not testify, then the charges against him could not be used to impeach him. Furthermore, any material could be used to refresh a witness's recollection, and that material did not come into evidence and need not even be truthful. In response, defense counsel represented that Luff submitted a false report about his alleged sexual misconduct. Defense counsel argued that even if Luff's report in the present matter was used only for refreshing memory, the jury needed to know that it was from a person who was known in the past to have made false statements in his reports. The court responded that defense counsel would not be allowed to impeach the report, which would not be admitted into evidence. Moreover, although the defense could impeach a witness's testimony, to ask the witness whether he or she was relying on a report that was authored by a discredited officer would not be proper impeachment of the witness.

The trial court denied the defense motion to exclude use of Luff's report, except to refresh a witness's recollection, but granted the People's motion to exclude any evidence concerning the criminal charges against Luff. The court suggested, however, that the subject might be revisited after it heard Cooper's testimony.

At trial, Cooper testified on direct examination that when a wallet was pulled out of Vinson's pocket by the other officer, Cooper saw currency taken out by the other officer. When asked how much, Cooper responded, "There was $150 in neatly placed bills inside of the wallet and also an unknown amount to me taken out that was crumpled

and placed in the wallet." The crumpled amount was small. On cross-examination, defense counsel established that Cooper had a report of the incident in front of him. When asked whether he was relying on his memory to testify, Cooper responded, "My memory and some of the report that I have preread." Defense counsel elicited that Cooper did not personally write the report, but the trial court sustained a relevancy objection as to the author. Cooper testified that he was also present at the time in question, and that the report did indeed refresh his memory. Cooper testified that everything in the report was correct, but that he did not do anything to verify the portion of the report that he read, such as speaking to Williams.

Specifically with respect to the currency, defense counsel elicited on cross-examination that Cooper and the other officer were under a lit carport when the money was pulled out of the wallet. When asked how much currency was found, Cooper replied that he was not sure of the exact amount. Asked the denominations of the money, Cooper said he could refer to the report written by the other officer. Asked if that would refresh his memory, Cooper responded, "I don't have any memory of it. [¶] … [¶] I was there as far as when he counted it and everything."

Defense counsel further elicited that it was the police department's standard procedure not to book currency or other such items into evidence, but rather, if "the loss" was located, to immediately release it back to whom it belonged. The report was the record of it; everything was approved by the sergeant who was listed on the report. When the other officer returned the property to Williams, Cooper was not with Williams, but instead was standing next to the patrol car in which Vinson was seated. The prosecutor's relevancy objections were sustained when defense counsel attempted to ask whether the behavior of the females and the other officer was friendly, and whether someone was taking pictures of the officer posing with some of the females.

Defense counsel then asked Cooper if he was saying that, other than the sergeant telling him it was all right to release the items to Williams, there was no other reason for

the return of those items to her that night. Cooper responded that the credit cards and driver's license were in her name, and she told the other officer the exact denomination of the money taken and found on Vinson. Defense counsel elicited that Cooper did not hear that conversation, but was told by the other officer. Defense counsel's motion to strike as hearsay was overruled.

At the conclusion of the prosecution's case, defense counsel asked the court to reconsider its ruling on the defense in limine motion concerning Luff's report. Counsel argued that the court had foreclosed his attempts to establish that Williams and the others were dressed in skimpy, sexy outfits. Counsel represented that he believed Luff was behaving in a manner that was inconsistent with police department procedures, and that this was corroborated by the fact there was no evidence in the report that a sergeant gave the okay to release the currency and other items. Counsel suggested Luff "was trying to put his fingers back inside a cookie jar" (by giving the cash to Williams to curry favor), making the report about Luff's sexual misconduct case relevant. Counsel also argued that Luff gave information to Cooper; hence, impeachment of Luff was relevant. Defense counsel asserted that precluding him from going into that area would violate Vinson's due process rights and deny him a fair trial.

Finding no logical connection between any misconduct by Luff and the evidence presented in this case, the court reaffirmed its previous rulings. The court noted that Cooper testified to his recollection, refreshed in part by a report authored by Luff, and that the report was just a document Cooper used to refresh his recollection. As to the hearsay objection at the conclusion of cross-examination, the court explained that it had allowed evidence of what Cooper was told by the other officer because it was in response to a question posed by defense counsel that essentially asked Cooper's state of mind as to why the money could be released.

B. Analysis

Vinson now contends the trial court should not have allowed Cooper to recite evidence (specifically, the amount of money found in the wallet seized from Vinson), of which he had no independent recollection, from a report written by an officer who did not testify and who had not been made available for cross-examination. Vinson says the error violated his right to confrontation under the Sixth and Fourteenth Amendments to the United States Constitution, as set forth in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) and its progeny.[4]

Crawford holds that admission of testimonial hearsay statements against a defendant violates the Sixth Amendment's confrontation clause when the declarant is not, and has not previously been, subject to cross-examination. (*Crawford*, *supra*, 541 U.S. at pp. 51-54, 68.) Although the United States Supreme Court has yet to classify all types of statements as either testimonial or nontestimonial, it has held that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington* (2006) 547 U.S. 813, 822, fn.

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[4] We question whether Vinson adequately preserved his Sixth Amendment claim for review. (See *People v. Waidla* (2000) 22 Cal.4th 690, 726, fn. 8 [bare reference to confrontation rule or inability to cross-examine insufficient]; but see *People v. Partida* (2005) 37 Cal.4th 428, 435, 438-439 [defendant may not assert different theory for exclusion than asserted at trial, but may argue that asserted error had additional legal consequence].) As the People expressly do not claim forfeiture, however, we need not make this determination or discuss Vinson's alternative claim that if the issue was forfeited on appeal, then he received ineffective assistance from trial counsel.

omitted.)[5] "Testimonial" has also been described as "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' [citation]." (*Crawford, supra,* at p. 52.)

Crawford error is assessed under the harmless-beyond-a-reasonable-doubt standard of *Chapman* v. *California* (1967) 386 U.S. 18, 24 (*Chapman*). (*People v. Archer* (2000) 82 Cal.App.4th 1380, 1394; see also *People v. Harrison* (2005) 35 Cal.4th 208, 239.) "Harmless-error review looks … to the basis on which 'the jury *actually rested* its verdict.' [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

Insofar as the admission of nontestimonial hearsay is concerned, error is assessed under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Davis* (2005) 36 Cal.4th 510, 538; *People v. Garcia* (2008) 168 Cal.App.4th 261, 292.) The same is true of an abuse of the trial court's "'wide discretion'" in determining relevance. (*People v. Sanders* (1995) 11 Cal.4th 475, 512; see *People v. Panah* (2005) 35 Cal.4th 395, 477.) Under the *Watson* standard, the erroneous admission of evidence constitutes reversible error "only if a reasonable probability exists that the jury would have reached a different result had [the] evidence been excluded. [Citations.]" (*People v. Whitson* (1998) 17 Cal.4th 229, 251.)

Vinson also contends the trial court committed errors under state law. First, he says that even if Luff's report merely refreshed Cooper's recollection so that there was no

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5 "Interrogation" is used "in its colloquial, rather than any technical legal, sense. [Citation.]" (*Crawford, supra,* 541 U.S. at p. 53, fn. 4.)

confrontation clause violation, the trial court erred by denying Vinson his right, under Evidence Code section 771, to cross-examine Cooper about that report.

Anything may be used to refresh a witness's recollection, but it must revive memory, not supplant or supply it. If a writing is used to refresh memory, it must, at the adverse party's request, be produced at the hearing. (Evid. Code, § 771, subd. (a).) The adverse party may inspect the writing, cross-examine the witness concerning it, and introduce into evidence such portions as may be pertinent to the witness's testimony. (Evid. Code, § 771, subd. (b).) When a writing is used to refresh recollection, "the writing itself has no independent evidentiary value for the party calling the witness and is not admissible into evidence at that party's instance. [Citation.]" (*In re Berman* (1989) 48 Cal.3d 517, 525, fn. omitted; see Evid. Code, § 771, subd. (b).) Thus, the writing or other statement may not be read to the jury under the guise of refreshing recollection. (*People v. Parks* (1971) 4 Cal.3d 955, 960-961.) Error under Evidence Code section 771 is assessed pursuant to the *Watson* standard. (*People v. Kaurish* (1990) 52 Cal.3d 648, 687.)

Second, Vinson claims the trial court erred by overruling his objection to Cooper's testimony about the conversation between Luff and Williams, where Williams told Luff the exact amount of the money taken. This evidence, he says, was inadmissible hearsay.

Hearsay "is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Except as otherwise provided by law, hearsay is inadmissible. (Evid. Code, § 1200, subd. (b).) Pursuant to Evidence Code section 1250, subdivision (a)(1) and (2), "evidence of a statement of the declarant's then existing state of mind" is not made inadmissible by the hearsay rule when the evidence is offered to prove the declarant's state of mind "at that time or at any other time when it is itself an issue in the action," or when the evidence "is offered to prove or explain acts or conduct of the declarant." However, Evidence Code section 1250 "does not make admissible evidence

of a statement of memory or belief to prove the fact remembered or believed." (Evid. Code, § 1250, subd. (b).) As the trial court found, Cooper's statement that Williams told Luff the exact amount of the money taken was in response to a question by defense counsel as to why the money was released.

In the present case, we need not decide whether the trial court committed any of the errors Vinson now claims, because any such errors, individually or cumulatively, were clearly harmless under any standard, *Watson* or *Chapman*. There was overwhelming circumstantial evidence that Vinson was the person who took the contents of Williams's purse, including Williams's identification of the money. On the record before us, we can confidently say that the guilty verdict rendered in this case was "surely unattributable" to any such errors. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.) It follows that there is no reasonable probability the jury would have reached a different verdict had the challenged evidence been excluded. (*People v. Whitson, supra,* 17 Cal.4th at p. 251.)

II.

SECTION 666 AMENDMENT

At the time Vinson committed the present offense, section 666 provided:

> "Every person who, having been convicted of petty theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petty theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison."

Effective September 9, 2010, Assembly Bill No. 1844 (2009-2010 Reg. Sess.), the Chelsea King Child Predator Prevention Act of 2010 (hereafter AB 1844 or the act), amended section 666 to provide, in pertinent part:

> "(a) Notwithstanding Section 490 [specifying the punishment for petty theft], every person who, having been convicted *three or more times* of petty theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petty theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison." (Italics added.)

Clearly, new subdivision (a) of section 666 requires proof of at least three prior convictions, not just one, for individuals who, like Vinson, have not suffered prior serious or violent felony convictions and who are not required to register as sex offenders.[6]

A. Retroactivity.

The parties agree that Vinson's conviction in the present case was not yet final when the amendment went into effect. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306 [for determining retroactive application of amendment to criminal statute, judgment is not final until time for petitioning United States Supreme Court for writ of certiorari has passed].) Accordingly, if the amendment to section 666 applies retroactively, Vinson is entitled to its benefits.

The Attorney General originally argued that the amendment did not apply retroactively. At oral argument, however, she withdrew that claim and conceded the point. We believe the concession is well founded, as we explain.

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[6] New subdivision (b) of section 666 provides for imprisonment in the county jail or state prison upon conviction of petty theft with one prior theft-related conviction and period of incarceration for persons who are required to register as sex offenders or who have suffered a prior violent or serious felony conviction under the three strikes law.

Section 3 provides: "No part of [the Penal Code] is retroactive, unless expressly so declared." The statute "'reflects the common understanding that legislative provisions are presumed to operate prospectively, and that they should be so interpreted "unless express language or clear and unavoidable implication negatives the presumption." [Citation.]' [Citation.] '[I]n the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature … must have intended a retroactive application.' [Citation.]" (*In re E.J.* (2010) 47 Cal.4th 1258, 1272; accord, *People v. Alford* (2007) 42 Cal.4th 749, 753; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208, 1209.)

However, section 3 "is not intended to be a 'straightjacket.'" (*People v. Alford, supra,* 42 Cal.4th at p. 753.) "Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent. It is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent." (*In re Estrada* (1965) 63 Cal.2d 740, 746 (*Estrada*).)[7] "Even without an express declaration, a statute may apply retroactively if there is '"a clear and compelling implication"' that the Legislature intended such a result. [Citations.]" (*People v. Alford, supra,* at p. 754.)

In *Estrada,* the California Supreme Court confronted the question, "A criminal statute is amended after the prohibited act is committed, but before final judgment, by

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[7] The same is true with respect to the saving clause contained in Government Code section 9608. (*Estrada*, *supra*, 63 Cal.2d at p. 746; see also *People v. Rossi* (1976) 18 Cal.3d 295, 299-300.) That statute provides: "The termination or suspension (by whatsoever means effected) of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so terminated or suspended, unless the intention to bar such indictment or information and punishment is expressly declared by an applicable provision of law." (Gov. Code, § 9608.)

mitigating the punishment. What statute prevails as to the punishment – the one in effect when the act was committed or the amendatory act?" (*Estrada*, *supra*, 63 Cal.2d at p. 742.) The high court observed that the problem was one of trying to ascertain the legislative intent; "Had the Legislature expressly stated which statute should apply, its determination, either way, would have been legal and constitutional." (*Id.* at p. 744.) The Legislature not having done so, it fell to the court to attempt to determine the legislative intent from other factors. The court concluded: "There is one consideration of paramount importance. It leads inevitably to the conclusion that the Legislature must have intended, and by necessary implication provided, that the amendatory statute should prevail. When the Legislature amends a statute so as to lessen the punishment, it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Id*. at pp. 744-745.)

In amending section 666, the Legislature included no express statement concerning which statute should apply. (Compare *People v. Floyd* (2003) 31 Cal.4th 179, 182, 183-185 [although Prop. 36 ameliorated punishment, it did not apply to defendant sentenced before its effective date but whose judgment was not yet final as of that date, because Legislature expressly stated that act's provisions were to be applied prospectively].) Accordingly, we must ascertain the legislative intent from other factors such as the history of the statute, committee reports, and staff bill reports. (*Evangelatos*

v. Superior Court, supra, 44 Cal.3d at p. 1210; *In re Chavez* (2004) 114 Cal.App.4th 989, 994.)

It is readily apparent that the overall intent of AB 1844 was to significantly increase punishment for various sex offenses against minors. (See, e.g., Assem. Com. on Appropriations, Analysis of Assem. Bill No. 1844 (2009-2010 Reg. Sess.) as amended Apr. 28, 2010, p. 1, at <http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1801-1850/ab_1844_cfa_20100518_162412_asm_comm.html> [as of Feb. 7, 2011].) This does not mean, however, that the Legislature did not concomitantly intend the amendment to section 666 to reduce punishment to the class of criminals covered by that particular statute. (See *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 297, 300-301 [treating different provisions within single initiative measure differently for purpose of retroactive application].)

As originally conceived, the act made no change to section 666. (Assem. Amend. to Assem. Bill No. 1844 (2009-2010 Reg. Sess.) Apr. 13, 2010, at <http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1801-1850/ab_1844_bill_20100413_amended_asm_v98.html> [as of Feb. 7, 2011].)[8] The Legislative Analyst's Office conservatively estimated, however, that AB 1844 would create annual general fund costs in the tens of millions of dollars within the decade, and hundreds of millions of dollars in the longer term. (Assem. Com. on Appropriations, Analysis of Assem. Bill No. 1844 (2009-2010 Reg. Sess.) as amended Apr. 28, 2010, pp. 1-2, at <http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1801-1850/ab_1844_cfa_20100518_162412_asm_comm.html> [as of Feb. 4, 2011].) Concerns were also raised about the effect of the act on California's severe prison

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8 As introduced, AB 1844 had to do with inmate labor and the maintenance of prison grounds. (Assem. Bill No. 1844 (2009-2010 Reg. Sess.) as introduced Feb. 12, 2010, at <http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1801-1850/ab_1844_bill_20100212_introduced.html> [as of Feb. 7, 2011].)

overcrowding problem. (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1844 (2009-2010 Reg. Sess.) as amended June 2, 2010, pp. Y-Z, at <http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1801-1850/ab_1844_cfa_20100628_141315_sen_comm.html> [as of Feb. 4, 2011].)

In an apparent effort to alleviate these concerns, AB 1844 was amended to include changes to section 666. (Sen. Amend. to Assem. Bill No. 1844 (2009-2010 Reg. Sess.) Jul. 15, 1020, at <http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1801-1850/ab_1844_bill_20100715_amended_sen_v95.html> [as of Feb. 4, 2011].) These changes, which became, in pertinent part, current section 666, subdivision (a), were intended to allow the California Department of Corrections and Rehabilitation to offset the new costs created by AB 1844 by avoiding the costs of imprisonment associated with a particular class of offenders – those with fewer than three prior convictions for qualifying offenses. (Sen. Appropriations Com., Fiscal Summary, Analysis of Assem. Bill No. 1844 (2009-2010 Reg. Sess.) Aug. 2, 2010, p. 6, at <http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1801-1850/ab_1844_cfa_20100809_111934_sen_comm.html> [as of Feb. 4, 2011].)

It is true that the punishment for violating the statute is the same under subdivision (a) of current section 666, as it was under former section 666, i.e., imprisonment in the county jail not exceeding one year or in state prison. In other words, both versions of the statute describe a "wobbler" – an offense that is punishable either as a misdemeanor or as a felony. To be eligible for felony sentencing under section 666 as amended, however, it is no longer enough that the defendant previously have been convicted of a single specified theft-related conviction. Instead, three or more such qualifying convictions are now required. This change to section 666's sentencing factor (see *People v. Bouzas* (1991) 53 Cal.3d 467, 480) is akin to adding an element to a crime or an enhancement, and benefits a defendant by making it less likely that he or she will qualify for felony-

level punishment. Accordingly, *Estrada*'s reasoning applies. (See *People v. Flores* (1995) 37 Cal.App.4th 1566, 1571.)

People v. Nasalga (1996) 12 Cal.4th 784 (*Nasalga*), which dealt with retroactive application of a changed threshold for imposition of a sentence enhancement, is instructive. As described in *Nasalga*, effective June 30, 1992, the Legislature amended section 12022.6, subdivisions (a) and (b), to increase the property loss required for a one-year enhancement from $25,000 to $50,000, and to increase the loss required for a two-year enhancement from $100,000 to $150,000. The defendant in that case stole $124,000 before the amendment of section 12022.6, but her conviction was not final when the amendment became operative. The question before the court was whether the defendant was entitled to the benefit of the 1992 amendment, making her eligible only for the one-year enhancement. Relying on *Estrada* and a case decided the same day, *In re Kirk* (1965) 63 Cal.2d 761, the California Supreme Court answered the question in the affirmative. (*Nasalga*, *supra*, at p. 787.)

The court noted that the rule stated in *Estrada* has been applied to statutes governing penalty enhancements as well as statutes governing substantive offenses. (*Nasalga*, *supra*, 12 Cal.4th at p. 792.) "Of particular relevance," the court observed, "courts have held that amendments, such as the one at issue here, that mitigate punishment by increasing the dollar amount for certain crimes or enhancements, should be applied retroactively, in the absence of a saving clause or other indicia of a contrary legislative intent. [Citations.]" (*Id*. at p. 793.) As section 12022.6 contained no express saving clause, the court turned to the legislative history in an effort to ascertain the Legislature's intent, and determined that the increase in the threshold loss requirements was intended to account for the effects of inflation. (*Nasalga*, *supra*, at p. 794.) The court rejected the Attorney General's argument that this meant the Legislature intended to make the new tiers prospective only, and instead found nothing in the legislative history that demonstrated an intent to punish persons whose theft occurred before the

amendments more harshly than others whose thefts of the same amounts occurred after the amendments. (*Id*. at p. 795.)

The court also rejected the Attorney General's further argument that, because the Legislature added subdivisions to punish more harshly certain white collar criminals at the same time it reduced punishment for persons such as the defendant, this contradicted the presumption of retroactive application of the ameliorative provisions of the statute. (*Nasalga*, *supra*, 12 Cal.4th at p. 796.) The high court stated: "Different amendments to the same statute may reduce penalties for one class of defendants while simultaneously increasing penalties for another class. Such differences in treatment, in the absence of discernible legislative intent to the contrary, do not alter the principle of *Estrada*. Thus, provisions of a statute that have an ameliorative effect must be given retroactive effect, even where other provisions of the same statute clearly do not have such an effect. [Citations.]" (*Nasalga*, *supra*, at p. 796.) The court concluded by adhering to *Estrada*'s "well-established principle that 'where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed.' [Citations.]" (*Nasalga*, *supra*, at pp. 797-798.)

People v. Figueroa (1993) 20 Cal.App.4th 65 (*Figueroa*) is to the same effect. There, the defendant received a three-year enhancement for selling drugs within 1,000 feet of a school. While his appeal was pending, the enhancement statute was amended to require that school be in session or that minors be using the facility when the offense occurred. The change was made to conform the enhancement statute to existing language in another statute. (*Id*. at p. 69 & fn. 1.) Applying *Estrada* and its progeny, including *Tapia v. Superior Court*, *supra*, 53 Cal.3d at page 301, the appellate court held that the defendant must be given the benefit of the amended statute, despite the fact the result was a lack of evidence at trial with respect to the new requirements. (*Figueroa*, *supra*, at pp. 69-71.) In *People v. Todd* (1994) 30 Cal.App.4th 1724, 1728-1729, the court followed *Figueroa* despite the fact the amendment to the school-zone enhancement

statute expanded the list of offenses subject to enhancement, thereby in part increasing punishment.

AB 1844's amendment of section 666 had the effect of mitigating punishment by raising the level of recidivism required before a defendant can be sentenced to state prison. The Legislature's clear purpose was to save money and space in order to partially offset the higher costs and inmate population occasioned by increasing sentences for sexual predators. In light of the concerns expressed in the legislative history about prison overcrowding and the costs associated with the act, and the fact the cost-avoidance achieved by shifting some nonviolent, non-sex-offender recidivists to the county correctional level will not completely offset the new costs (see Sen. Appropriations Com., Fiscal Summary, Analysis of Assem. Bill No. 1844 (2009-2010 Reg. Sess.) Aug. 2, 2010, p. 6, at <http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1801-1850/ab_1844_cfa_20100809_111934_sen_comm.html> [as of Feb. 4, 2011]), it would make no sense to conclude the section 666 amendment should apply only concurrently with the remaining provisions of the act, i.e., prospectively. We hold that, under *Estrada* and its progeny, Vinson is entitled to the benefit of the amendment to section 666.

B. Number of Qualifying Prior Convictions and Periods of Incarceration

Not surprisingly, Vinson claims that the elements of a violation of section 666, as amended – specifically, three prior theft-related convictions and three periods of incarceration – were never pled or proven at trial. Hence, he concludes, he is entitled to have his conviction reduced to misdemeanor petty theft.

"'When construing a statute, we must "ascertain the intent of the Legislature so as to effectuate the purpose of the law."' [Citations.] '[W]e begin with the words of a statute and give these words their ordinary meaning.' [Citation.] 'If the statutory language is clear and unambiguous, then we need go no further.' [Citation.]" (*People v. Sinohui* (2002) 28 Cal.4th 205, 211.)

Section 666, subdivision (a)'s requirement with respect to prior convictions is clear and unambiguous, at least for our purposes: To fall within the statute's purview, a defendant must previously have been convicted at least three times of a specified (qualifying) offense.[9] What is not clear and unambiguous is the number of prior periods of incarceration the defendant must have served. Stripped of everything not essential to this issue, the statute reads: "[E]very person who, having been convicted three or more times … and having served a term therefor … or having been imprisoned … for that offense …." (*Ibid.*) The language can be read to mean a single term of incarceration is sufficient (the People's position) or that a term of incarceration must have been served for each prior conviction (Vinson's position).

In light of Vinson's concession that the section 667.5, subdivision (b) enhancements established two prior convictions and periods of incarceration and our conclusion that the attorneys' stipulation at trial established a third prior conviction and period of incarceration (each discussed in the unpublished portion of our opinion, *post*), we need not determine the number of periods of incarceration required under current section 666, subdivision (a). However, the statute is plainly ambiguous in this regard, and there is no mention in the legislative history of the number of periods of incarceration. (See, e.g., Assem. Concurrence in Sen. Amendments, analysis of Assem. Bill No. 1844 (2009-2010 Reg. Sess.) as amended Aug. 20, 2010, p. 2, at <http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1801-1850/ab_1844_cfa_20100824_203753_asm_floor.html> [as of Feb. 8, 2011]; Sen. Rules Com., Off of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1844 (2009-2010 Reg. Sess.) as amended Aug. 20, 2010, p. 6, at <http://www.leginfo.ca.gov/pub/09-

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9 It is conceivable that the statute's requirement of "three or more times" might be considered ambiguous if, for example, a defendant were convicted of more than one qualifying offense on a single occasion. That situation is not presented in this case, and we express no opinion thereon.

10/bill/asm/ab_1801-1850/ab_1844_cfa_20100823_102058_sen_floor.html> [as of Feb. 8, 2011]; Sen. Appropriations Com., Fiscal Summary, Analysis of Assem. Bill No. 1844 (2009-2010 Reg. Sess.) Aug. 2, 2010, p. 6, at <http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1801-1850/ab_1844_cfa_20100809_111934_sen_comm.html> [as of Feb. 4, 2011].) Accordingly, we urge the Legislature to clarify the statute on this point.

III.*

PROOF OF PRIOR CONVICTIONS

Vinson argues that the prosecution failed to meet its burden in his case, because three distinct prior convictions for theft offenses were not proven. We disagree. Vinson was convicted by a jury of committing petty theft after suffering a prior conviction for a theft-related offense. Two prior prison term enhancements were also alleged and, in the second phase of the bifurcated proceeding, the trial court found these enhancements to be true: that Vinson was previously convicted of, and served prison terms for, (1) petty theft in violation of former section 666 in 2006 and (2) violating section 487, subdivision (c) in 2000. The section 667.5, subdivision (b) enhancement allegations contained in the information adequately placed Vinson on notice of two of the three requisite prior convictions. (See § 969.) Although Vinson had the right to have a jury determine the truth of the two enhancement allegations, he waived that right and submitted those issues to the court for determination. Even so, since the right to a jury trial on prior conviction allegations is statutory only and does not derive from either the state or federal Constitution (*People v. Epps* (2001) 25 Cal.4th 19, 23; accord, *People v. Mosby* (2004) 33 Cal.4th 353, 360; see §§ 1025, 1158), we see no problem with the fact these two prior convictions and prison term enhancements were proven to the court and not the jury. Nor is use of the same prior convictions for purposes of both section 666 and section 667.5, subdivision (b) impermissible. (See *People v. Darwin* (1993) 12 Cal.App.4th 1101,

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* See footnote, *ante*, page 1.

1104.) Therefore, we find, and Vinson concedes in his supplemental letter brief, that the two section 667.5 subdivision (b) enhancements alleged and found true can be considered as proof of prior theft-related convictions and terms of incarceration for purposes of sentencing enhancement under section 666.

While accepting the foregoing, however, Vinson says a third prior qualifying conviction was never proved. Again, we disagree, and we decline to accept the concession made by the Attorney General on this point at oral argument. The California Supreme Court has held that section 666 "is a sentence-enhancing statute, not a substantive 'offense' statute." (*People v. Bouzas, supra,* 53 Cal.3d at p. 479.) Thus, "the prior conviction and incarceration requirement of section 666 is a sentencing factor for the trial court and not an 'element' of the section 666 'offense' that must be determined by a jury." (*Id.* at p. 480.)

The information here alleged in count 1 that Vinson was previously convicted of violating section 496, subdivision (a), on or about December 3, 2008, in Kern County Superior Court case No. BF123918A. Count 1 further alleged that Vinson had "served a term therefore in a penal institution" or had "been imprisoned therein as a condition of probation for said offense …." Outside the presence of the jury, the prosecutor told the court that the parties had stipulated that Vinson "was previously convicted of a violation of Penal Code Section 496(a) on or about December 3rd, 2008, in Kern County, Case No. BF123918A." Defense counsel added, "Which brings him under the language of Penal Code Section 666." The court informed counsel of its practice of reading portions of the information to the jury to inform them of the charges they would hear, and it proposed to read, in conjunction with count 1, the prior conviction, albeit without any specific reference to service of a term of incarceration. Defense counsel then asked if the actual prior offense had to be part of the stipulation. The prosecutor responded that it did in order to prove the prior, but suggested that if defense counsel approved, the court could just inform the jury that Vinson had been previously convicted of a theft offense.

The court agreed to use the phrase "[t]heft-related offense," and noted that it did not have any impact on the stipulation.

At the conclusion of the People's case, the jury was informed of the stipulation, to wit, "the defendant has been previously convicted of a theft-related offense, which places him under the language of Penal Code Section 666." The court instructed jurors that they must accept the stipulation as true, and that it provided a fact necessary for a particular element of the charge. They were subsequently instructed, in pertinent part, to find only the elements of the current theft charge.

We conclude the stipulation sufficiently established the requisite third prior conviction, namely, a violation of section 496, subdivision (a). Vinson says the stipulation cannot prove a third theft conviction distinct from those contained in the section 667.5, subdivision (b) enhancement allegations, or a third period of incarceration, because it contains no detail about what conviction it describes.[10] It is clear, however, that the stipulation covered the prior conviction alleged in count 1, distinct from those alleged as enhancements. The jury was never made aware of the enhancements and so they could not have been confused by the stipulation that was presented to them, and the court and parties clearly knew there was a distinction between the prior theft-related allegation (§ 496, subd. (a)) and the enhancement allegations (former § 666, and § 487, subd. (c)). It was only Vinson's own request that kept the specific information regarding the prior offense outlined in count 1 from the jury. He cannot now be heard to complain about the lack of detail. Moreover, by stipulating that his prior conviction placed him under the language of section 666, Vinson stipulated that his third prior conviction met all the requirements of that statute, including service of a period of incarceration.[11]

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10 Vinson makes no other challenge to the sufficiency of the stipulation.

11 We note that if we were to find the evidence insufficient with respect to the prior conviction/period of incarceration sentencing factor, retrial would not be barred. (*Monge v. California* (1998) 524 U.S. 721, 724, 727-728; *People v. Barragan* (2004) 32 Cal.4th

IV.*

REMAINING SENTENCING ISSUES

A. Victim Restitution

At the sentencing hearing of December 1, 2009, the trial court initially ordered Vinson to pay restitution to the victim in the amount of $540. Vinson disputed the amount of the loss and requested a hearing on the matter. (*People v. Cervantes* (1984) 154 Cal.App.3d 353.) In response, the court reserved the order on restitution and calendared a hearing on the issue for January 6, 2010. The abstract of judgment filed December 1, 2009, shows, under number 5 ("FINANCIAL OBLIGATIONS") restitution in the amount of $540.00. Under number 8 ("Other orders"), however, it states that "restitution per PC 1202.4(f) is stayed pending Cervantes hearing on 1/6/2010 at 10:00 a.m. in Dept. CC."

Vinson now contends the abstract of judgment must be corrected, and the restitution amount stricken, because the abstract of judgment refers to a restitution order that was not actually imposed by the trial court. The People respond that it is Vinson's burden to demonstrate error by showing that the hearing on restitution took place or that the outcome of that hearing was to strike the victim restitution order.

It appears both parties have overlooked the notation in number 8. In light of this notation, the abstract of judgment is correct.

B. Section 4019

Although acknowledging that this court has held to the contrary, Vinson contends the amendment to section 4019 that became effective on January 25, 2010 (Stats. 2009-

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236, 239; *People v. Monge* (1997) 16 Cal.4th 826, 845 (lead opn. of Chin, J.); *Figueroa, supra,* 20 Cal.App.4th at pp. 70-72.)

* See footnote, *ante,* page 1.

2010, 3d Ex. Sess. 2009, ch. 28, § 50), must be applied retroactively, thus providing him 96 additional days of "good time" credit.[12]

We have discussed the law with respect to retroactive application of a statutory amendment, *ante*. Because the Legislature neither expressly declared, nor does it appear by "'clear and compelling implication'" from any other factor(s), that it intended the amendment to operate retroactively (*People v. Alford, supra,* 42 Cal.4th at p. 753), the amendment applies prospectively only (§ 3). The factors upon which the court in *Estrada, supra,* 63 Cal.2d 740 based its conclusion that section 3's presumption was rebutted do not apply to the section 4019 amendment.

Moreover, prospective-only application of the amendment does not violate Vinson's equal protection rights. Because (1) the amendment evinces a legislative intent to increase the incentive for good conduct during presentence confinement, and (2) it is impossible for such an incentive to affect behavior that has already occurred, prospective-only application is reasonably related to a legitimate public purpose. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 [legislative classification not touching on suspect class or fundamental right does not violate equal protection guarantee if it bears a rational relationship to a legitimate public purpose].)

(The issue of whether the amendment applies retroactively is currently before the California Supreme Court in *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808, and *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963, as well as other cases.)

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12 Section 4019 was further amended effective September 28, 2010. (Stats. 2010, ch. 426, § 2.) We address only the amendment made by Statutes 2009-2010, 3d Extraordinary Session 2009, chapter 28, section 50.

DISPOSITION

The judgment is affirmed.

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Franson, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Cornell, J.