

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

YEVGENIY IVAKHOV,

Defendant and Appellant.

C075457

(Super. Ct. No. 62-123186)

A jury convicted defendant Yevgeniy Ivakhov of second degree commercial burglary (Pen. Code, § 459; count 1)¹ and false personation (§ 529; count 2). The trial court thereafter found true that defendant had sustained a prior strike. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)

Sentenced to six years in state prison (three years, the upper term, on count 1, doubled for the strike, with a two-year midterm concurrent term, also doubled for the strike, on count 2), defendant contends that there is insufficient evidence to sustain his

¹ Undesignated section references are to the Penal Code.

conviction on count 2 because there is no showing that he committed any “additional act” beyond the false personation itself, as required by section 529. The Attorney General agrees, and so do we. We shall reverse with directions to strike defendant’s conviction and sentence on count 2. In all other respects, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 1, 2013, a loss prevention officer at the Target store in Roseville saw defendant and a woman trying to steal DVD’s from the store. Defendant’s method, which he had been observed using in 15 to 20 similar incidents at other Target stores in the area, was to secrete the items to be stolen under clothing in a shopping cart, leave the cart near the entrance, exit the store, then return soon afterward and remove the items from underneath the clothing. This time he left a cart with DVD’s under clothing near the store entrance and exited the store, but the loss prevention officer notified the police and a Roseville police officer arrested defendant in the parking lot before he could complete his scheme.

On arrest, defendant identified himself as Vladimir Ivakhov. At the jail, the booking officer used that name to put together defendant’s booking packet. Before completing the packet, the booking officer ran defendant’s fingerprints using the Live Scan system. The results came back to a person other than Vladimir Ivakhov. When interviewed at the jail, defendant at first continued to maintain he was Vladimir, but after being told of the discrepancy with the fingerprints he admitted that when arrested he had falsely identified himself as his brother and presented his brother’s identification card.

DISCUSSION

Section 529 provides in part:

“(a) Every person who falsely personates another in either his or her private or official capacity, and in that assumed character does any of the following, is punishable [either as a felony or a misdemeanor].

“(1) Becomes bail or surety for any party in any proceeding whatever, before any court or officer authorized to take that bail or surety.

“(2) Verifies, publishes, acknowledges, or proves, in the name of another person, any written instrument, with intent that the same may be recorded, delivered, or used as true.

“(3) Does any other act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person.”

To commit the offense described in subdivision (3) of this provision, the only one that could apply here, it is not enough for the defendant merely to identify himself falsely to a police officer. This is so because section 148.9 makes that act punishable as a misdemeanor.² Therefore, to expose the defendant to punishment for a felony under section 529, there must be some “additional act” to distinguish the offense charged under that statute from the offense charged under section 148.9. (*People v. Casarez* (2012) 203 Cal.App.4th 1173, 1179-1180 (*Casarez*), citing *People v. Cole* (1994) 23 Cal.App.4th 1672, 1676 (*Cole*); accord, *People v. Guion* (2013) 213 Cal.App.4th 1426, 1431-1434 (*Guion*).)³ If the defendant does nothing more than give a false name and present false identification upon arrest, he has not done the additional act required to

² Section 148.9 provides in part: “(a) Any person who falsely represents or identifies himself or herself as another person or as a fictitious person to any peace officer . . . upon a lawful detention or arrest of the person, either to evade the process of the court, or to evade the proper identification of the person by the investigating officer is guilty of a misdemeanor.”

³ *Casarez* and *Guion* construe a former version of section 529, but the current version is substantively identical as to the definition of the offense. (Compare Stats. 2011, ch. 15, § 381, eff. Apr. 4, 2011, operative Oct. 1, 2011, with Stats. 1983, ch. 1092, § 296, p. 4050, eff. Sept. 27, 1983, operative Jan. 1, 1984.)

distinguish a felony under section 529 from a misdemeanor under section 148.9. (*Casarez, supra*, 203 Cal.App.4th at p. 1180, citing *Cole, supra*, 23 Cal.App.4th at pp. 1674, 1676-1677, 1679; accord, *Guion, supra*, 213 Cal.App.4th at p. 1435.) Here, as the parties agree, defendant did not perform any such additional act.

The parties also agree that the remedy for defendant's erroneous conviction under section 529 is to reverse that conviction. We agree with the parties.

This court has the authority to modify a judgment of conviction to reflect conviction of a lesser included offense where the evidence shows that the defendant was guilty only of that offense. (§ 1181, subd. (6).) But section 148.9 does not describe a lesser included offense to section 529, subdivision (3), because it is possible to violate section 148.9, which requires misidentifying oneself to a police officer, without violating section 529, subdivision (3), which does not. And in this case the information, which was pleaded in the language of section 529, subdivision (3), does not allege all the elements of section 148.9. (*Guion, supra*, 213 Cal.App.4th at p. 1436.) Therefore, we cannot modify defendant's conviction on count 2, but must simply reverse it. (*Ibid.*)

DISPOSITION

Defendant's conviction on count 2 is reversed. In all other respects, the judgment is affirmed.

BLEASE, Acting P. J.

We concur:

ROBIE, J.

MAURO, J.