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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Appellant,

v.

RUDY ANDRES REYES,

Defendant and Respondent.

E064617

(Super.Ct.No. RIF1302970)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge.

Affirmed.

Michael A. Hestrin, District Attorney, and Emily R. Hanks, Deputy District Attorney for Plaintiff and Appellant.

Christopher Love, under appointment by the Court of Appeal, for Defendant and Repondent.

I

INTRODUCTION

The superior court granted the Proposition 47 petition of defendant and respondent, Rudy Andres Reyes, to be resentenced on his 2013 felony commercial burglary conviction (Pen. Code, § 459)¹ as if he had been convicted of misdemeanor shoplifting (§§ 459.5, 1170.18, subd. (a)). The People appeal, claiming the petition was erroneously granted because defendant “remained guilty of second degree burglary post-Proposition 47.”

Specifically, the People claim defendant’s commercial burglary conviction would not be a misdemeanor shoplifting conviction had his crime been committed following the voters’ November 2014 enactment of Proposition 47, because (1) the burglary conviction was based on defendant’s entry into a bank, which is not a commercial establishment, within the meaning of section 459.5, and (2) defendant entered the bank with the intent to commit *identity theft* (§ 530.5), not larceny, as section 459.5 requires.

We affirm. Defendant’s burglary conviction was based on his entry into a retail bank branch with the intent to cash a \$200 forged check written to himself, and his act of cashing the check. As this court has recently held, a bank is a commercial establishment for purposes of Proposition 47, including section 459.5. (*People v. Abarca* (2016) 2 Cal.App.5th 475 (*Abarca*)). Additionally, defendant was not charged with and did not plead guilty to identity theft. (§ 530.5.) Instead, he was charged with commercial

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

burglary and forgery and pled guilty to commercial burglary only. His petition was properly granted because his commercial burglary *conviction* would now be a misdemeanor shoplifting conviction—even if he could have been (though he was not) charged with and convicted of identity theft based on the same facts underlying his commercial burglary conviction.

II

FACTS AND PROCEDURAL BACKGROUND

A. *The Felony Complaint*

On August 22, 2013, a felony complaint was filed charging defendant in two counts with burglary (§ 459; count 1) and forgery (§ 475; count 2). The burglary count alleged that on or about December 24, 2012, defendant entered “a certain building” at 260 West Foothill Parkway in Corona “with intent to commit theft and a felony.” The forgery count alleged that, on the same date, defendant possessed “and receive[d] from another person a CHECK, with the intent to pass the same and to permit, cause, and procure the same to be uttered and passed with the intent to defraud SALVADOR S., knowing the [check] to be forged” The complaint also alleged defendant had one prison prior (§ 667.5, subd. (b)) and one strike prior (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)).

B. *Defendant’s Guilty Plea*

There was no preliminary hearing. On August 11, 2014, defendant and the People entered into a plea agreement. Defendant pled guilty to the burglary charge and admitted

the strike prior, and the forgery charge and prison prior allegation were dismissed. When the court accepted his plea, defendant answered “yes” when the court asked him whether he had “entered some store with the idea of taking some of their property.” Defendant was sentenced to eight months in prison for the burglary conviction, doubled to 16 months based on the strike prior.

C. Defendant’s Petition for Resentencing

On January 6, 2015, defendant petitioned the superior court to recall his 16-month sentence and resentence him as a misdemeanor. (§ 1170.18, subd. (a).) The People filed a response stating defendant was “not entitled to the relief requested” because a “report” indicated he entered a bank and cashed a fraudulent check.

D. The Arrest Warrant Declaration

The “report” referred to in the People’s response is a declaration in support of an arrest warrant for defendant, signed by a Corona police detective on August 1, 2013, and received by the superior court on August 22, 2013. The declaration includes hearsay statements indicating that defendant’s grandfather, Salvador Sanchez, reported to another officer that Sanchez had been allowing defendant to visit Sanchez’s home between April and December 2012, “mostly so [defendant] would visit his father Rudy Reyes Sr. who was living with Sanchez.” According to Sanchez, defendant had “a difficult life mostly because he ha[d] been involved in drugs and alcohol since he was a teenager.”

On December 28, 2012, Sanchez learned that his son Rudy Reyes, Sr. had received a letter from Bank of America indicating “some suspicious banking activity on

his BOFA account.” Rudy Reyes, Sr.’s debit card had been stolen and was used to make several purchases without his permission. Sanchez then discovered that nine checks were missing from his checkbook and the checks had been written and cashed without his permission. Three of the checks were in the amount of \$200 and were cashed in Corona; the other checks were in the amounts of \$160 and \$200 and were cashed in Riverside. “The total overall lost was \$1760.00,” indicating that eight of the checks were written for \$200 and one was written for \$160. Surveillance photographs taken on December 24, 2012, at the Bank of America branch at 260 West Foothill Parkway in Corona, and a time and date stamp on one of Sanchez’s missing checks, show defendant cashed the check using his California driver’s license.

E. The Order Granting the Petition

By a written order, the superior court granted the petition and reclassified defendant’s burglary conviction as misdemeanor shoplifting. Based on the arrest warrant declaration adduced by the People in their opposition, the court ruled that the bank where the crime occurred was a commercial establishment and noted that defendant pled guilty to one count of commercial burglary based on a forged check he cashed inside the bank in an amount “under \$200.”² The court vacated defendant’s 16-month sentence and set a new sentencing hearing. The People timely appealed.

² The court also noted no *Harvey* waiver was taken when defendant entered his guilty plea, which would have allowed the court to consider that defendant forged checks totaling \$1,760 in resentencing him. (*People v. Harvey* (1979) 25 Cal.3d 754, 758 [when, as part of a plea agreement, charges are dismissed or are not filed, the court may not consider the dismissed counts or unfiled charges in exercising its sentencing discretion

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III

DISCUSSION

A. Proposition 47 Overview

Proposition 47, a voter initiative, went into effect on November 5, 2014. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Section 1170.18, added by Proposition 47, allows “[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47] had [it] been in effect at the time of the offense” to “petition for a recall of sentence” and request resentencing as a misdemeanor. (§ 1170.18, subd. (a).)

Proposition 47 also added section 459.5, which defines misdemeanor shoplifting as “entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950).” (§ 459.5, subd. (a).)

In ruling on a resentencing petition, if the court determines the petitioner’s felony conviction would be a misdemeanor under Proposition 47, the felony sentence must be recalled and the petitioner must be resentenced as if convicted of a misdemeanor, unless the court, in its discretion, determines the petitioner would pose an unreasonable risk of

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unless the defendant waives his or her right not to have the court consider the dismissed counts and unfiled charges].)

danger to public safety if resentenced. (§ 1170.18, subds. (a), (b); *T. W. v. Superior Court* (2015) 236 Cal.App.4th 646, 649, fn. 2.) The petitioner has the initial burden of making a prima facie evidentiary showing that his or her felony conviction would be a misdemeanor under Proposition 47. (§ 1170.18, subd. (a); *People v. Sherow* (2015) 239 Cal.App.4th 875, 878; *People v. Perkins* (2016) 244 Cal.App.4th 129, 136-137.)

B. A Bank Is a “Commercial Establishment” for Purposes of Section 459.5

The People first claim that defendant’s Proposition 47 petition was erroneously granted because, contrary to the trial court’s ruling, a bank is not a “commercial establishment” as that term is used in section 459.5. We disagree.

As noted, Proposition 47 added section 459.5, which provides: “Notwithstanding Section 459 [burglary], shoplifting 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). Any other entry into a commercial establishment with intent to commit larceny is burglary.”

We review de novo a superior court’s interpretation of a statute. (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) Neither section 459.5, Proposition 47, nor any other Penal Code provision defines the term “commercial establishment.” As the People concede, we must therefore adopt the “plain, commonsense meaning” of the term. (See *Title Ins. & Trust Co. v. County of Riverside* (1989) 48 Cal.3d 84, 91.) Only if the language in an initiative statute is ambiguous may courts consider ballot summaries and arguments in

determining the voters' intent. (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.)

Recently, in *Abarca, supra*, 2 Cal.App.5th 475 this court concluded that a bank branch is a commercial establishment for purposes of section 459.5. (*Abarca, supra*, at pp. 481-482.) We reaffirm that holding here.

As explained in *Abarca*: “‘When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word.’ [Citation.] Black’s Law Dictionary defines ‘establishment’ as ‘[a]n institution or place of business.’ (Black’s Law Dict. (7th ed. 1999) p. 566, col. 2.) It defines ‘commerce’ to mean: ‘The exchange of goods *and services*.’ (*Id.* at p. 263, col. 1, italics added.) Other sources are in accord. (Merriam-Webster Dict. Online (2016) <Merriam-Webster.com> [as of Aug. 18, 2013] [defining ‘commerce’ as ‘activities that relate to the buying and selling of goods and services’]; <Business Dict. Online (2016) BusinessDictionary.com> [as of Aug. 18, 2013] [defining ‘commerce’ as the ‘[e]xchange of goods or services for money or in kind’].) Thus, we interpret the term ‘commercial establishment’ as it appears in section 459.5, subdivision (a) to mean a place of business established for the purpose of exchanging goods or services. [Citation.]” (*Abarca, supra*, 2 Cal.App.5th at p. 481, italics added; accord, *In re J.L.* (2015) 242 Cal.App.4th 1108, 1114.)

Abarca further explained that “banks satisfy” this ordinary and commonsense meaning of the term “commercial establishment” because “[b]ank customers use banks to deposit and withdraw funds in exchange for fees. In the context of approving banks’

ability to collect fees from non-depositors who use their automatic teller machines, the U.S. Court of Appeals for the Ninth Circuit noted ‘[t]he depositing of funds and the withdrawal of cash are services provided by banks since the days of their creation. Indeed, such activities define the business of banking.’ (*Bank of America v. City & County of San Francisco* (9th Cir. 2002) 309 F.3d 551, 563.) Thus, a business like [a retail bank branch] provides financial services in exchange for fees, and is therefore a commercial establishment within the ordinary [and commonsense] meaning of that term.” (*Abarca, supra*, 2 Cal.App.5th at pp. 481-482.) Here, too, the Bank of America branch in Corona where defendant committed the 2013 commercial burglary is a commercial establishment, because the record shows it is a place of business established for the purpose of exchanging goods *or services*, specifically financial services.

The People urge us to adopt a narrower view of the ordinary meaning of “commercial establishment,” by limiting it to a place of business established solely for the purpose of buying or selling “goods or merchandise,” but not services. We decline to do so for the reasons explained in *Abarca*: “Some definitions of ‘commerce’ and ‘commercial’ are in accord with this argument. (E.g., American Heritage Dict. (New College ed. 1976) p. 267 [defining commerce as ‘the buying and selling of *goods*’ (italics added)].) Under that definition, banks would not be commercial establishments because they offer services, not goods or merchandise. At best, this alternative definition creates an ambiguity in the statute. However, as the initiative directs, we construe the act ‘broadly . . . to accomplish its purposes.’ (Voter Information Guide, Gen. Elec. (Nov. 4,

2014) text of Prop. 47, p. 74, § 15 at <http://vig.cdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf>; see also *id.* at p. 74, § 18 [act shall be ‘liberally construed to effectuate its purposes’].) The stated purposes of the electorate include ‘[r]equir[ing] misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession.’ (*Id.* at p. 70, § 3, subs. (3) & (4).) Adopting the limited definition of ‘commercial establishment’ will frustrate those purposes and result in the continued incarceration of persons who committed petty theft crimes. Accordingly, we construe section 459.5, subdivision (a) to include as shoplifting thefts from commercial ventures, such as banks, which sell services.” (*Abarca, supra*, 2 Cal.App.4th at p. 482.)

C. *Identity Theft*

The People claim that, even if a bank is a commercial establishment for purposes of section 459.5, the petition was erroneously granted because the record shows defendant entered the Bank of America branch with the intent to commit *identity theft* (§ 530.5), not “theft and a felony” as charged in the felony complaint. Stated another way, the People argue *identity theft* is the predicate act underlying defendant’s burglary conviction, because the record shows his burglary conviction was predicated on his intent to commit identity theft specifically, not just theft and any felony. We disagree that the petition was erroneously granted on this basis.

Proposition 47 allows certain felony offenders to seek resentencing on existing felony *convictions* by showing Proposition 47 reclassified the crime of conviction as a misdemeanor. (§ 1170.18, subd. (a).) If a petitioner qualifies, the remedy in subdivision

(b) is for “the petitioner’s felony sentence [to] be recalled and the petitioner resentenced to a misdemeanor.” (§ 1170.18, subd. (b).) The statutory language is focused on resentencing offenders for existing, but reclassified, *convictions*. It does not require a petitioner to examine the Penal Code for other offenses his conduct *would have supported* and prove he would not have been convicted of those additional offenses. (§ 1170.18, subd. (a).) Nor does it suggest the superior court must examine the Penal Code to assure itself before granting a petition that an offender could not have been convicted of a different felony for the same underlying conduct. (§ 1170.18, subd. (b).) We therefore decline to reverse the order granting the petition on the basis that the People could have prosecuted defendant for identity theft, or felony commercial burglary based on his entry into the bank with the intent to commit identity theft.

IV

DISPOSITION

The order granting defendant’s resentencing petition is affirmed.

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CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.