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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RESAN BINGHAM,

Defendant and Appellant.

E064784

(Super.Ct.No. RIF1401433)

OPINION

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

Affirmed.

Jason L. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant Resan Bingham appeals from the trial court's order denying his Proposition 47¹ resentencing petition as to count 1, second degree burglary (Pen. Code, § 459).² Defendant entered a tax preparation office and stole two unattended cell phones belonging to two employees. Defendant contends the trial court erred in denying his resentencing petition based on the determination a tax preparation office, which provides tax return preparation services, is not a "commercial establishment" under Proposition 47.

We conclude a tax preparation office is a commercial establishment under Proposition 47. However, because defendant has not met his burden of proving the value of the stolen property did not exceed \$950, we affirm the order denying defendant's resentencing petition, without prejudice to defendant filing a new resentencing petition supported by evidence sufficient to meet his burden of proof of eligibility for resentencing on count 1.

II

FACTUAL AND PROCEDURAL BACKGROUND

In March 2014, the defendant was charged with burglary (§ 459; count 1) and receipt of stolen property (§ 496, subd. (a); counts 2 and 3). The amended felony

¹ The Safe Neighborhoods and Schools Act, approved by the electorate on November 4, 2014 (Pen. Code, § 1170.18).

² Unless otherwise noted, all statutory references are to the Penal Code.

complaint (complaint) alleges defendant committed the burglary on March 9, 2014, by entering a “certain building,” with intent to commit theft and a felony. Defendant committed the crimes of receipt of stolen property by receiving cell phones, which he knew had been stolen.

On September 3, 2014, defendant pled guilty to second degree burglary (count 1) and both counts of receiving stolen property (counts 2 and 3). Defendant admitted during the plea hearing that he committed the burglary when he “entered a store with the intent to steal stuff” and that he had in his possession cell phones he knew were stolen. The trial court sentenced defendant to two years on count 1, and stayed the two-year terms on counts 2 and 3 under section 654.

On December 31, 2014, defendant filed a form petition for resentencing under Proposition 47 as to counts 1, 2, and 3. Defendant checked the box stating that the stolen property did not exceed \$950, and defendant was currently serving a sentence for the offenses. The People filed a form response, stating that defendant was not entitled to resentencing because the crime occurred at a tax preparation office. The trial court ordered a hearing on the petition for resentencing. The court’s written order noted that the issue was “whether building is a commercial establishment and value of 496PC charges.” The trial court continued the hearing on the petition at defendant’s request, to allow defense counsel an opportunity to research the issue and file supplemental briefing. Thereafter defendant filed points and authorities arguing that a tax preparation office is a “commercial establishment” under Proposition 47.

During the resentencing hearing on the petition on October 30, 2015, defendant's attorney, Valerie Navarro, stated that the crimes occurred at a tax preparation office where people had their taxes done. Navarro further informed the court that the stolen items consisted of two cell phones from employees who worked at the tax preparation office. Defendant walked into the office and took the employees' phones when the employees left to use the bathroom. The prosecutor argued defendant was not eligible for resentencing because a tax preparation office is not a commercial establishment under Proposition 47. The prosecutor stated that, as to the receipt of stolen property offenses, the property at issue consisted of the two cell phones, which were individually less than \$950 in value, but in the aggregate, exceeded \$950. Navarro said, according to her investigation, the iPhone was worth \$649 and Galaxy was worth \$299.99, at most.

The trial court concluded that a tax preparation office is not a commercial establishment because the purpose of the business is to provide tax services, whereas a commercial establishment sells goods and items. The court therefore denied defendant's resentencing petition as to count 1 for burglary but granted the petition as to counts 2 and 3.

III

COMMERCIAL ESTABLISHMENT

Defendant contends the trial court erred in denying his resentencing petition on the ground a tax preparation office is not a "commercial establishment" under Proposition 47. We hold a tax preparation office is a commercial establishment under Proposition 47.

Proposition 47 added section 459.5 to the Penal Code. This new statute, which adds the crime of “shoplifting,” 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.” (§ 459.5, subd. (a).)

The issue here is whether a “commercial establishment,” within the meaning of section 459.5, encompasses a tax return preparation business that provides services, rather than goods. We review de novo the trial court’s interpretation of this provision. (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) Neither Proposition 47 nor the Penal Code defines commercial establishment. We therefore look to its meaning in ordinary usage. (See *Title Ins. & Trust Co. v. County of Riverside* (1989) 48 Cal.3d 84, 91.) If language in an initiative is ambiguous, we may consider extrinsic materials, such as ballot summaries, to aid in determining the voters’ intent. (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.)

In our recent decision, *People v. Abarca* (2016) 2 Cal.App.5th 475, 481-482 (*Abarca*), we considered the meaning of the term, “commercial establishment,” under Proposition 47. As stated 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*.” (*Abarca*, at p. 481, italics added; accord, *In re J.L.* (2015) 242 Cal.App.4th 1108, 1114 (*J.L.*)). In *Abarca*, we held that a bank is a commercial establishment under section 459.5 and Proposition 47. (*Abarca*, at pp. 481-482.)

Likewise, the court in *J.L.* concluded that giving the term, “commercial establishment,” its commonsense meaning, “a commercial establishment is one that is primarily engaged in commerce, that is, the buying and selling of goods or services. That commonsense understanding accords with dictionary definitions and other legal sources.” We conclude the term “commercial establishment” thus encompasses, not only businesses that buy and sell goods, but also businesses that provide services in exchange for fees. (*J.L.*, *supra*, 242 Cal.App.4th at p. 1114.) Just as a bank is a commercial establishment under Proposition 47, so too is a business that provides tax return preparation services in exchange for fees. The tax preparation office where defendant committed the burglary therefore qualifies under Proposition 47 as a commercial establishment within the ordinary meaning of that term.

The People argue we should take a narrower view of the ordinary meaning of “commercial establishment,” limiting it to a place of business established solely for the purpose of buying or selling goods or merchandise. We disagree. Under this narrower definition, a tax preparation office would not qualify as a commercial establishment because it offers services, not goods or merchandise. Because Proposition 47 does not provide a clear, unambiguous definition of the term, “commercial establishment,” we must construe such language in Proposition 47 “broadly . . . to accomplish its purposes.” (Cal. Voter Information Pamp., 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 *id.* at p. 74, § 18 [act shall be “liberally construed to effectuate its purposes”].) The stated purposes of the electorate in enacting Proposition 47 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).) We conclude, as we did in *Abarca, supra*, 2 Cal.App.5th at p. 482, “Adopting the limited definition of ‘commercial establishment’ will frustrate those purposes and result in the continued incarceration of persons who committed petty theft crimes.” (*Ibid.*) Accordingly, we construe section 459.5, subdivision (a), to include as shoplifting thefts from commercial businesses that provide services, such as a tax preparation office. (*Ibid.*)

IV

DEFENDANT’S FAILURE TO MEET HIS BURDEN OF PROOF

The People argue that, regardless of whether a tax preparation office qualifies as a commercial establishment, the trial court properly denied defendant’s resentencing

petition as to count 1 because defendant did not meet his burden of proving eligibility for sentencing. We agree. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 878, 880.)

Defendant has not made an evidentiary showing sufficient to allow the court to find that his burglary conviction (count 1) was based on conduct that now constitutes shoplifting under section 459.5. Defendant did not present any evidence supporting his resentencing petition. His petition is “completely ‘devoid of any information about the [felony commercial burglary] offense[]’” he sought to reduce to misdemeanor shoplifting under Proposition 47. (*People v. Rivas-Colon, supra*, 241 Cal.App.4th at p. 449; *People v. Sherow, supra*, 239 Cal.App.4th at p. 878; *People v. Perkins* (2016) 244 Cal.App.4th 129, 137.)

Shoplifting under section 459.5 has three elements: “(1) entry into a commercial establishment, (2) while the establishment is open during regular business hours, and (3) with intent to commit larceny of property valued at \$950 or less.” (*J.L., supra*, 242 Cal.App.4th at p. 1114.) Defendant has not provided any evidence of the second or third elements; that the value of the property at issue does not exceed \$950 or that the burglary occurred during regular business hours. Defendant thus has not made an evidentiary showing sufficient to support a finding that defendant’s commercial burglary conviction was based on conduct that now constitutes shoplifting under Proposition 47. Accordingly, denial of defendant’s resentencing petition was proper.

V

DISPOSITION

The order denying defendant's Proposition 47 resentencing petition is affirmed, without prejudice to defendant filing a new petition for resentencing on count 1, supported by evidence sufficient to meet his burden of proof of eligibility.

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CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.