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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL O'NEAL, SR., Defendant and Appellant.	B289422 (Los Angeles County Super. Ct. No. YA063443)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Brandlin, Judge. Affirmed.

Richard Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Michael O'Neal, Sr. (O'Neal) was convicted of first degree residential robbery, first degree burglary, elder abuse, false imprisonment of an elder, attempted theft of access card information, unauthorized use of personal identifying information (identity theft), and possession of an assault weapon, with enhancements for firearm use and infliction of great bodily injury to victims over 70.

During a resentencing hearing, the trial court refused to designate the identity theft charge as a misdemeanor under Proposition 47, the Safe Neighborhoods and Schools Act, Penal Code section 1170.18,[1] or to strike the firearm use enhancement imposed pursuant to section 12022.53, subdivision (b). O'Neal was resentenced to 22 years and 4 months in the state prison.

O'Neal appeals the judgment. We affirm.

FACTUAL BACKGROUND

We take the relevant facts from *People v. O'Neal*, (Feb. 29, 2008, B194332) [nonpub. opn.].)[2]

1. *The robbery of Josephine Hill*

On the afternoon of August 6, 2005, 77-year-old Hill returned home from the grocery store. Hill lived alone at New Horizons, a condominium complex for seniors. As she finished unloading her groceries, a man's voice behind Hill said, "Freeze." The man, later identified as O'Neal, pushed her into

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

[2] Following his conviction in 2006, O'Neal appealed the judgment of conviction in 2008. The judgment was affirmed.

the bedroom, made her kneel on the floor, and put her head on the bed. He threw a sweater over her head. Using plastic zip ties, he tied Hill's hands behind her back and bound her ankles. Hill felt what seemed to be a gun pressed against her neck. O'Neal threatened to kill her if she disobeyed his orders. He took rings from her fingers, jewelry, cash, and a credit card from her purse. He asked if she had a personal identification number (PIN) and Hill said she did not have one.

That same day, Hill's credit card was used at a Shell gas station. A few days later, O'Neal twice attempted to use Hill's credit card at a Target store, but failed because the PIN was incorrect.[3]

Hill could not free herself from the plastic zip ties binding her hands and ankles. She became dehydrated and delirious before being discovered by her granddaughter more than 24 hours later.

2. *The robbery of Mary Gilliland*

On November 18, 2005, 74-year-old Gilliland was living at the New Horizons senior complex. She went outside to get her mail. When she returned to her condominium, she closed, but did

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[3] Facts from the direct appeal suggest surveillance video captured O'Neal's attempt to use Hill's credit card at a Target store. (*People v. O'Neal*, *supra*, B194332.) Although there was evidence that Hill's credit card was used at a gas station on the same day as the robbery, there was no indication that it was O'Neal who used it. (*Ibid.*) This is consistent with O'Neal's statement that "his conviction was premised on his use of the victim's credit card to obtain goods at a store." We therefore assume the identity theft charge was based upon the incident at Target.

not lock, the sliding glass door and went into the bathroom. As she was sitting on the toilet, the bathroom door was suddenly opened by O'Neal, who stuck a gun in her face and asked for her gold and jewels. O'Neal was wearing a baseball cap with a postal logo, a long-sleeved "postman's shirt" with a "postman's emblem," and gray-blue pants that looked like "postal pants."

O'Neal ordered Gilliland into her bedroom, where he told her to lie down on the bed. Using plastic zip ties, he tied her hands behind her and bound her feet. He took jewelry and put it into a black bag. He wrapped pajamas around her face. O'Neal dumped the contents of Gilliland's purse onto the bed. He shoved her credit card in front of her face and asked for her PIN. When Gilliland said she did not have one, he asked for her ATM card number. Gilliland said she did not have an ATM card. O'Neal pulled the plastic zip ties as tight as he could, pulled a ring off Gilliland's finger and a diamond charm from her neck, and left the condominium.

A gardener at New Horizons saw a "[s]uspicious looking car with a mailman in it." What he found suspicious was that he had never seen a mailman in a private car before. O'Neal was identified as the driver.

O'Neal had worked at a local post office from 1994 to 2000 as a letter carrier. One of O'Neal's routes included the New Horizons senior complex.

PROCEDURAL BACKGROUND

1. *Charges*

A jury found O'Neal guilty of the following crimes: two counts of first degree residential robbery, counts 1 and 8 (§ 211); two counts of first degree burglary, counts 2 and 9 (§ 459); two

counts of elder abuse, counts 3 and 10 (§ 368, subd. (b)(1)); false imprisonment, count 4 (§ 368, subd. (f)); attempted theft, count 5 (§ 484e, subd. (d)); identity theft, count 6 (§ 530.5, subd. (a)); and two counts of possession of an assault weapon, counts 11 and 12 (former § 12280, subd. (b)). As to the residential robbery in count 8, the jury found true a firearm use enhancement (§ 12022.53, subd. (b)), and as to count 1, a great bodily injury enhancement (§ 12022.7, subd. (c)). The jury found O'Neal not guilty of count 7, criminal threats (§ 422).

2. *Procedural History*

This is the third time O'Neal has been before this court. He was originally sentenced in 2006. In 2008, we affirmed the judgment of conviction following his direct appeal. (*People v. O'Neal*, *supra*, B194332.) O'Neal later filed a petition for writ of habeas corpus challenging his sentence as unlawful because the trial court purported to amend his sentence by means of a *nunc pro tunc* order. In 2017, we granted relief and ordered the trial court to conduct a new sentencing hearing at which O'Neal and his counsel had the right to be present. (*In re O'Neal, Sr.* (Nov. 21, 2017, B270878) [nonpub. opn.].)

O'Neal was resentenced on March 20, 2018. During the hearing, he asked the trial court to strike the firearm use enhancement pursuant to Senate Bill No. 620 (Sen. Bill 620).[4]

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[4] Effective January 1, 2018, Sen. Bill 620 amended section 12022.53 by vesting trial courts with the authority to strike or dismiss firearm use enhancements in the interest of justice pursuant to section 1385. (§ 12022.53, subd. (h).) Appellate courts have held that Sen. Bill 620 applies retroactively to cases not yet final as of January 1, 2018. (See, e.g., *People v. Watts* (2018) 22 Cal.App.5th 102, 119; *People v. Woods* (2018) 19

Despite the trial court's consideration of mitigating circumstances—O'Neal's performance as a "model prisoner," his advanced age, hearing and walking disabilities, and his attempts to reform himself—the trial court denied the request. The trial court found O'Neal had used his position as a former United States Postal Service worker to conceal his "true intent" to commit armed residential robbery of particularly vulnerable victims. The trial court imposed 10 years in state prison for the firearm use enhancement.

For the identity theft conviction in count 6, on its own motion, the trial court considered whether to redesignate the charge as a misdemeanor under Proposition 47. Relying on *People v. Liu* (2018) 21 Cal.App.5th 143, review granted June 13, 2018, S248130 (*Liu*), the trial court found that identity theft is not subject to Proposition 47 analysis or treatment. The trial court thus sentenced O'Neal consecutively to eight months (one-third the mid-term of two years) for the identity theft charge. The trial court reduced the charge in count 5, attempted theft (§ 484e, subd. (d)), to a misdemeanor pursuant to Proposition 47.

Cal.App.5th 1080, 1090.) Furthermore, section 12022.53, subdivision (h) "applies to any resentencing that may occur pursuant to any other law."

DISCUSSION

1. *O'Neal's Identity Theft Charge*

O'Neal first contends that because the conviction for identity theft was premised on his use of Hill's credit card to obtain goods at a store, the act may be prosecuted only as misdemeanor.

Recognizing a split of authority on the question of whether identity theft must be reclassified as misdemeanor shoplifting pursuant to Proposition 47, O'Neal broadly asserts that Proposition 47 provides that "all forms of shoplift [are] misdemeanors and [have] to be charged as shoplifts rather than burglaries, forgeries, or access card violations." He further argues that "[t]his rule encompasses identity theft under section 530.5 if the crime was in essence a shoplift, that is, if appellant used the card to obtain goods."

As we point out, the decisions O'Neal relies upon hold that when defendants are charged with both shoplifting and burglary of the same property, they may be charged only with the lesser crime of shoplifting if the statute applies. (*People v. Jimenez* (2018) 22 Cal.App.5th 1282, 1289, review granted July 25, 2018, S249397 (*Jimenez*), citing *People v. Gonzales* (2017) 2 Cal.5th 858, 876 (*Gonzales*).)[5]

Conversely, other decisions have held that applying Proposition 47 to section 530.5 is inconsistent with that act's purpose. That is, section 530.5 is not a theft offense, protects victims whose identity has been misused rather than the commercial establishment whose property may have been taken,

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[5] See also *People v. Brayton* (2018) 25 Cal.App.5th 734 (*Brayton*); *People v. Garrett* (2016) 248 Cal.App.4th 82 (*Garrett*).

and protects against harms broader than theft. (*Liu*, *supra*, 21 Cal.App.5th at pp.152–153, rev.gr.) In considering the broader harms, those appellate courts conclude that Proposition 47 did not intend to roll back the law's protection on the unauthorized use of personal identifying information by redesignating the crime as a theft offense. (See *Liu*, *supra*, 21 Cal.App.5th 143, rev.gr.; *People v. Sanders* (2018) 22 Cal.App.5th 397, review granted July 25, 2018, S248775 (*Sanders*); *People v. Weir* (2019) 33 Cal.App.5th 868, 873 (*Weir*).)

As we will describe, we find the latter analysis persuasive and conclude that O'Neal's misuse of Hill's personal identifying information falls outside the scope of Proposition 47.

A. *Sections 459.5 and 530.5*

"Approved by the voters in 2014, Proposition 47, the Safe Neighborhoods and Schools Act, reduced the punishment for certain theft-and drug-related offenses, making them punishable as misdemeanors rather than felonies." (*People v. Page* (2017) 3 Cal.5th 1175, 1179.) It "created the new crime of 'shoplifting,' " defined as entering an open commercial establishment during regular business hours with the intent to commit a larceny of property worth $950 or less. (*Gonzales*, *supra*, 2 Cal.5th at p. 862.) It also stated " '[a]ny other entry into a commercial establishment with intent to commit larceny is burglary.' " (*Id.* at p. 863; § 459.5, subd. (b).) Since Proposition 47's passage, courts have considered which crimes—previously designated as felonies—fall within this new crime of shoplifting and therefore qualify for resentencing as misdemeanors.

One such felony is the unauthorized use of personal identifying information. (§ 530.5, subd. (a).) While "commonly referred to as identity theft, the plain language of the statute

designates a violation of this section a nontheft offense." (*Weir*, *supra*, 33 Cal.App.5th, at pp. 873–874.) Furthermore, a violation of section 530.5, subdivision (a) is more accurately termed "unauthorized use of someone else's personal identifying information." (CALCRIM No. 2040; see *People v. Truong* (2017) 10 Cal.App.5th 551, 561.) The elements of the crime are these: "1. The defendant willfully obtained someone else's personal identifying information; [¶] 2. The defendant willfully used that information for an unlawful purpose; [¶] and [¶] 3. The defendant used the information without the consent of the person whose identifying information [he] was using." (CALCRIM No. 2040, capitalization omitted.)

In *Gonzales*, *supra*, 2 Cal.5th at page 862, filed March 23, 2017, our Supreme Court held a "defendant's act of entering a bank to cash a stolen check for less than $950, traditionally regarded as a theft by false pretenses rather than larceny, now constitutes shoplifting under the statute." In that case, the defendant Gonzales had stolen his grandmother's checkbook. He then went, twice, into banks and cashed checks for $125, each made out to himself. The People charged him with second degree commercial burglary and forgery. Gonzales pleaded to the burglary count, and the prosecution dismissed the forgery count. He later petitioned for resentencing under Proposition 47. (*Gonzales*, at p. 862.)

The Supreme Court rejected the Attorney General's contention that the electorate intended to limit the offense of " 'shoplifting' " to " 'the common understanding' . . . [of] taking goods from a store." (*Gonzales*, *supra*, 2 Cal.5th at p. 869.) "[S]ection 459.5 provides a specific definition of the term 'shoplifting.' . . . [B]y defining shoplifting as an *entry* into a

business with an intent to steal, rather than as the taking itself, section 459.5 already deviates from the colloquial understanding of that term." (*Gonzales*, at p. 871.)

The high court also addressed the Attorney General's argument that, "even if defendant engaged in shoplifting, he is still not eligible for resentencing because he also entered the bank intending to commit identity theft" under section 530.5, subdivision (a). (*Gonzales*, *supra*, 2 Cal.5th at p. 876.) It found Gonzales's counterargument to be "the better view": Even if he "entered the bank with an intent to commit identity theft, section 459.5, subdivision (b) would have precluded a felony burglary charge because his conduct *also* constituted shoplifting." (*Gonzales*, at p. 876.) *Gonzales* concluded, "A defendant must be charged only with shoplifting when the statute applies." (*Ibid.*)

Four days after issuing its decision in *Gonzales*, our Supreme Court filed *People v. Romanowski* (2017) 2 Cal.5th 903, (*Romanowski*). The high court held that theft of access card account information in violation of section 484e, subdivision (d)—"an offense that includes theft of credit and debit card information—is one of the crimes eligible for reduced punishment" under Proposition 47. (*Romanowski*, at pp. 905–906.) The *Romanowski* court noted "the Legislature chose to place section 484e in a chapter of the Penal Code titled 'Theft.' " (*Romanowski*, at p. 912.) "Although theft of access card information differs in some ways from other forms of theft, Proposition 47 broadly reduced punishment for 'obtaining any property by theft' where the value of the stolen information is less than $950." (*Romanowski*, at p. 906.)

B. *The Split of Authority*

Neither *Gonzales* nor *Romanowski* answered the question presented here: whether a violation of section 530.5, subdivision (a) categorically qualifies as shoplifting within the meaning of section 459.5. As noted, *Gonzales*, *supra*, 2 Cal.5th at page 876, stated that, where a defendant's conduct constitutes *both* commercial burglary (entering a commercial establishment to commit a theft or *any felony*)[6] and shoplifting (entering with intent to commit a theft),[7] he "must be charged only with shoplifting when the statute applies."

This would be true even if the requisite *intent to commit a felony* in the second element of burglary was premised upon something other than theft, such as felony identity theft. (*Gonzales*, *supra*, 2 Cal.5th at p. 876, ["even assuming he entered the bank with an intent to commit identity theft, section 459.5, subdivision (b) would have precluded a felony burglary charge (§ 459) because his conduct [burglary] also constituted shoplifting (§ 459.5)",] italics omitted.) Unlike *Gonzales*, the prosecution here did not rely upon any theory of theft for the attempted property crime against the commercial establishment. The

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[6] The elements of second degree commercial burglary include: (1) the defendant entered a building; and (2) when he entered, he intended to commit theft or one or more felonies. (CALCRIM No. 1700.)

[7] The elements of shoplifting include: (1) The defendant entered a commercial establishment; (2) when the defendant entered the commercial establishment, it was open during regular business hours; and (3) when he entered the commercial establishment, he intended to commit theft. (CALCRIM No. 1703.)

People only sought a remedy for the harm perpetrated against the owner of the personal identifying information.

Whether identity theft in violation of section 530.5 is itself eligible for resentencing under Proposition 47 is currently before our Supreme Court. (See *Jimenez*, *supra*, 22 Cal.App.5th 1282, rev.gr.; *Sanders*, *supra*, 22 Cal.App.5th 397, rev.gr.) The court identified the issue presented as whether a felony conviction for the unauthorized use of personal identifying information of another section 530.5, subdivision (a) may be reclassified as a misdemeanor under Proposition 47 on the ground that the offense amounted to shoplifting.

Appellate courts have reached different conclusions on the issue. In a decision filed April 17, 2018, *Sanders*, *supra*, 22 Cal.App.5th at page 400, review granted, the Fourth District Court of Appeal held "violations of section 530.5, subdivision (a) are not theft offenses." In *Sanders*, the defendant found someone's credit card. She used it to buy cigarettes and a drink at a 7-Eleven, and to get cash at a Burger King. The total charges Sanders made on the card were $174.61. (*Sanders*, at p. 400.)

Sanders stated, "we are satisfied that section 530.5, subdivision (a) is not a theft based offense. Theft is not an element of the offense. It is the use of the victim's identity that supports the application of the statute." (*Sanders*, *supra*, 22 Cal.App.5th at p. 403, rev.gr.) *Sanders* also identified the value of a victim's privacy by recognizing that the crime "seeks to protect the victim from the misuse of his or her identity." (*Id.* at p. 405.) Accordingly, *Sanders* found *Romanowski* to be distinguishable. (*Sanders*, at pp. 480–481.)

Similarly, Division Eight of this court held that a defendant convicted of identity theft in violation of section 530.5 is not eligible for resentencing under Proposition 47. (*Liu*, *supra*, 21 Cal.App.5th 143, rev.gr.) Liu had been convicted of 22 theft-related counts arising from her scam of offering loan services to immigrants. (*Liu*, at p. 146.) On the one count relevant to our inquiry, the jury had convicted Liu of violating section 530.5, subdivision (c), the fraudulent acquisition and retention of the personal identifying information of 10 or more people. Liu's petition for resentencing was denied on that count.

Liu first framed the issue: "We must decide whether section 530.5 constitutes 'grand theft' or 'obtaining any property by theft' within the meaning of section 490.2, subdivision (a)." (*Liu*, *supra*, 21 Cal.App.5th at p. 150, rev.gr.) *Liu* distinguished *Romanowski*, noting "section 484e explicitly defines theft of access card information as *grand theft*." (*Liu*, at p.151.) *Liu* continued, "In contrast, section 530.5 does not define its crimes as grand theft, but describes them as 'public offense[s]' . . . placed in the chapter of the Penal Code defining 'False Personation and Cheats,' which includes crimes such as marriage by false pretenses (§ 528), and falsifying birth certifications and licenses (§§ 529a, 529.5)." (*Liu*, at p. 151.)

The court in *Liu* observed that section 530.5 addresses harms other than theft, such as using information in "obtaining false driver's licenses, birth certificates, and passports," which could be used "for a multitude of reasons unrelated to pecuniary gain, such as avoiding warrants, no fly lists, and protective orders." (*Liu*, *supra*, 21 Cal.App.5th at p. 151, rev.gr.) The court in *Liu* concluded, "We are not persuaded that section 530.5 defines a 'nonserious' crime within the meaning of Proposition 47,

given the far-reaching effects of the misuse of a victim's personal identifying information." (*Liu*, at p. 153.)

Most recently, in *Weir*, *supra*, 33 Cal.App.5th at page 871, the Fourth District Court of Appeal held that identity theft in violation of section 530.5 is not eligible for resentencing under Proposition 47 because it is not a theft offense. Weir had been convicted of four counts of obtaining personal identifying information, with intent to defraud after he was found in possession of the identifying information of four people. (*Weir*, at p. 871.) The court in *Weir* reasoned that the distinction between the crimes of having or using personal identifying information and the separate crime of stealing property under some other provision proscribing theft, "convinces us that the offense in section 530.5(c) is punishable because of the particular nature and effect of the crime—potential harm that far exceeds the value of any property obtained by the subsequent misuse of the information, rather than the comparatively isolated consequences associated with petty theft." (*Weir*, at p. 876.)

The *Weir* court observed that the purpose of the identity theft statute is to "remedy harm to the victim whose identity has been misused rather than to punish the theft of the property." (*Weir*, *supra*, 33 Cal.App.5th at pp. 874–875.) It noted that "existing law does not provide any remedy for the real victim: the person whose credit has been damaged or ruined." (*Id.* at pp. 874–875, fn. 6, citing Sen. Com. on Public Safety, Analysis of Assem. Bill No. 156 (1997–1998 Reg. Sess.) as amended July 3, 1997.) "[P]ossession of another person's identifying information is a 'greater evil' than petty theft." (*Weir*, at pp. 876–877.)

By contrast, Division Six of this court affirmed a trial court order granting a defendant's motion to reduce his convictions for

identity theft to misdemeanors. In *Jimenez*, *supra*, 22 Cal.App.5th 1282, review granted, the defendant had cashed two apparently forged checks at a check-cashing business. The amounts of the checks were roughly $632 and $597. The appellate court noted that "Jimenez's conduct [was] identical to Gonzales's conduct[:] [t]hey both entered a commercial establishment during business hours for the purpose of cashing stolen checks valued at less than $950 each." (*Jimenez*, at p. 1289.) Citing *Gonzales*, the *Jimenez* court said, "Both defendants committed 'theft by false pretenses,' which 'now constitutes shoplifting under [section 459.5, subdivision (a)].' " (*Jimenez*, at p. 1289.) *Jimenez* found both *Sanders* and *Liu* unpersuasive: "Not only are the cases distinguishable, but they also do not address *Gonzales*." (*Jimenez*, at p. 1291.)

Furthermore, in *Brayton*, *supra*, 25 Cal.App.5th 734, a decision issued August 10, 2018, Division Six of this court reversed the denial of a request for resentencing on a felony identity theft conviction. There, the defendant Brayton removed price tags from two items for sale in a department store, then returned the items for a refund, using a stolen driver's license as identification. *Brayton* stated, "[T]he facts of Brayton's identity theft crime are similar to *Gonzales*, *Garrett* and *Jimenez*. Brayton used a stolen driver's license belonging to another person to obtain a $107.07 store credit. She obtained the credit by the false representation that she was the person named in that driver's license." (*Brayton*, at p. 739) The appellate court remanded the case for the trial court to determine " 'the amount of the loss.' " (*Id.* at pp. 739–740.)

C. *O'Neal's unauthorized use of Hill's personal identifying information is not theft*

Pending further guidance from our Supreme Court, we must decide whether O'Neal's violation of section 530.5, subdivision (a) amounted to "shoplifting" within the meaning of section 459.5, subdivision (a).

Section 530.5 was intended "to protect the victims of identity fraud, who cannot protect themselves from fraudulent use of their identifying information once it is in the possession of another, because they cannot easily change their name, date of birth, Social Security number, or address." (*People v. Valenzuela* (2012) 205 Cal.App.4th 800, 807.) The statute seeks to remedy harm inflicted upon the person whose identity was misused. (*Weir*, *supra*, 33 Cal.App.5th at p. 875.) It protects the person whose credit has been damaged or ruined rather than the commercial establishment from which property was taken. (*Id.* at p. 876, fn. 6.)

Indeed, the drafters of Proposition 47 and the voters who approved it were sufficiently concerned about identity theft in violation of section 530.5, subdivision (a) that the proposition contained an express provision that a person convicted of both forgery and identity theft would not be entitled to resentencing on the forgery count. (See *Gonzales*, *supra*, 2 Cal.5th at p. 870.)[8]

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[8] The elements of forgery pursuant to section 473, subdivision (b) include: (1) the defendant possessed or used a false or altered check, bill, note or other legal writing for the payment of money or property; (2) the defendant knew that the document was false or altered; and (3) when the defendant possessed, made, or passed the document, he intended to defraud. (CALCRIM No. 1935.)

It is noteworthy that neither forgery nor identity theft requires entry with an intent to commit a larceny or felony as is required of both burglary and shoplifting.

Furthermore, "[a] key purpose of Proposition 47 is to '[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like . . . drug possession.' " (*People v. Martinez* (2018) 4 Cal.5th 647, 656, citing Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, p. 70.) At a time when personal identifying information is valuable and can be used for countless unlawful purposes, we are not persuaded that section 530.5, subdivision (a) is the sort of "nonserious" crime the voters had in mind when they passed Proposition 47.

Here, O'Neal was not charged with burglary or shoplifting for entering a commercial establishment with an intent to misuse Hill's personal identifying information. By failing to charge him, the state did not seek to protect Target with those theories of theft.

To the contrary, O'Neal was charged only for the crime he committed against Hill, specifically, willfully obtaining and using her personal identifying information without her consent. This crime began when he obtained the information from her home. O'Neal's frustrated attempt to later steal from Target evinces only his intent to use her information for an unlawful purpose. While this latter conduct may also have supported a charge for both burglary and shoplifting, we agree with the People that the court in *Gonzales* did not expand the definition of shoplifting to include acts committed before or after entry.

Moreover, *Gonzales* did not extend the act of shoplifting to reach additional nontheft crimes. Proposition 47 would have permitted only the lesser charge of shoplifting as to two crimes—

burglary and shoplifting. (*Gonzales*, *supra*, 2 Cal.5th at p. 876.) This is true even if the second element of burglary contemplated identity theft as the felony the defendant intended to commit upon his entry. Nothing in *Gonzales* suggests that Proposition 47 applies to separate nontheft crimes.

We thus adopt the view of *Liu*, *Sanders*, and *Weir* and conclude that section 530.5 is not a theft offense. Furthermore, because the crime of identity theft is not proscribed by *Gonzales*, it does not fall within the ambit of section 459.5. The trial court correctly imposed a felony sentence for O'Neal's conviction of the unauthorized use of Hill's personal identifying information.

2. *The Trial Court Did Not Abuse Its Discretion in Refusing to Strike the Firearm Use Enhancement*

O'Neal next contends that the trial court abused its discretion in refusing to strike the firearm use enhancement by failing to consider his post-judgment behavior, and by misinterpreting the applicable legal standard. These contentions lack merit.

Section 12022.53, subdivision (h), provides that "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss any enhancement otherwise required to be imposed by this section." A trial court's discretionary decision to dismiss or to strike a sentencing allegation under section 1385 is reviewable for abuse of discretion. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 531.)

Under section 1385, subdivision (a), a "judge. . . may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice order an action to be dismissed." The trial court does not abuse its

discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) Furthermore, the burden is on the defendant to show that the sentencing decision was irrational or arbitrary. (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977.) In resentencing a defendant, the trial court must consider his post-judgment behavior. (*People v. Warren* (1986) 179 Cal.App.3d 676, 687.)

The trial court read and considered the prosecution's sentencing brief, the probation officer's report, a sentencing memorandum, a transcript of the preliminary hearing, a transcript of the original sentencing hearing, and the remittitur. The probation report from 2005 listed five aggravating and no mitigating factors: (1) the victims were particularly vulnerable; (2) the crime was premeditated in the current crime; (3) defendant took items of great monetary value; (4) defendant was armed; (5) the crimes involved great violence, bodily harm, or acts of cruelty, viciousness or callousness.

At the hearing, O'Neal's counsel acknowledged the serious nature of his offenses, and argued that O'Neal had learned many lessons during his 13-year prison commitment and believed he had been adequately punished for his crimes. Counsel urged the trial court to strike the firearm use enhancement because O'Neal was 41 years old at the time of the crime, had no criminal history of serious or violent offenses, and had been "discipline-free while in the Department of Corrections."

After hearing counsel's argument, and before pronouncing judgment, the trial court stated: "I also recognize and respect the fact that Mr. O'Neal has not been a difficult prisoner since he has been incarcerated. He appears to be a model prisoner. I also

recognize that he is more advanced in age; that he appears to have other disabilities, including his hearing disability. He now walks with a walker. I recognize that there [have] been attempts by Mr. O'Neal to reform himself, and to that extent, he is certainly entitled to the respect and any mitigating impact it has on the court's sentencing discretion." Thus, the trial court considered O'Neal's post-judgment behavior as a mitigating circumstance. O'Neal's claim to the contrary is without merit.

O'Neal next contends that the trial court misinterpreted the applicable legal standard by requiring "highly unusual or 'significant' mitigation" before exercising its discretion in the interest of justice. We do not agree. While the trial court observed that the legislative intent in enacting Sen. Bill 620 was to "provide courts with an additional tool where appropriate to avoid harsh sentences where, for instance, a firearm use enhancement may involve an unusual or significant mitigating circumstance," it nonetheless balanced the aggravating and mitigating circumstances of the crimes and considered O'Neal's post-judgment record.

Further, contrary to O'Neal's argument, the trial court identified the factors it relied upon to deny O'Neal's request. Specifically, in addition to the mitigating circumstances identified, the trial court noted that O'Neal abused his position of trust as a former United States Postal Service employee, used his former uniform to conceal his otherwise unauthorized presence in a retirement community, committed an armed residential robbery of vulnerable individuals, and when arrested, was found hiding and in possession of a firearm.

The trial court declined to exercise its discretion in circumstances where it would not be justified. The trial court

properly denied O'Neal's motion to strike the firearm use enhancement.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MURILLO, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.