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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. BOYAN SAMI SALHA, Defendant and Appellant.	B285432 Los Angeles County Super. Ct. No. KA092676

APPEAL from an order of the Superior Court of Los Angeles County, Wade D. Olson, Commissioner. Affirmed in part, reversed in part, and remanded with instructions.

Patrick Morgan Ford 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 David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Boyan Sami Salha appeals from the trial court's order denying his application under Proposition 47, the Safe Neighborhoods and Schools Act, Penal Code section 1170.18,[1] for resentencing on his seven felony convictions. We affirm in part, reverse in part, and remand for an evidentiary hearing on Salha's application for reduction of his felony conviction for theft of access card account information.

BACKGROUND

1. *The People charge Salha with seven felonies and he pleads to all counts*

In March 2011, the People filed a felony information against Salha and his co-defendant Stoyan Nikolov Georgiev. The People alleged six counts of felony identity theft by both defendants in violation of Penal Code section 530.5, subdivision (a) (section 530.5(a)), all committed on November 30, 2010. The victim named in each count was Chase Bank. The People also alleged one count of theft of access card account information by both defendants in violation of Penal Code section 484e, subdivision (d) (section 484e(d)).

Salha was arraigned on April 13, 2011.[2] The court (Commissioner Wade D. Olson) apparently gave Salha an "indicated sentence" of 16 months on an open plea to the court.[3] The People objected. Salha pleaded no contest to each of the

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[1] Undesignated statutory references are to the Penal Code.

[2] The record on appeal does not reflect what happened to Georgiev and he is not a party to this appeal.

[3] The reporter's transcript does not include a transcript of the arraignment and plea.

seven counts[4] and his counsel "stipulate[d] to a factual basis [for the plea] based on the information contained in the arrest report and preliminary hearing transcript."[5] The court sentenced Salha to the low term of 16 months on each count, all to run concurrently with one another.

2. *Salha's three applications for resentencing*

After the voters passed Proposition 47, Salha apparently applied[6] to have all seven felony convictions reduced to misdemeanors.[7] In a minute order dated September 12, 2016, the court (Judge Jack P. Hunt) denied the application. According to the minute order, neither Salha nor his counsel was present at the hearing on the application. The order states, "Defense application is denied. The court finds that Counts 1 through 6, each a felony conviction of Penal Code section 530.5(a), are not eligible for relief pursuant to Penal Code section 1170.18(b) and (g). The court further finds that the defendant has not shown

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[4] In both his opening and reply briefs, Salha states he pleaded to only two felony counts. Salha is mistaken.

[5] The clerk's transcript does not include the preliminary hearing transcript.

[6] A defendant who has completed his sentence may apply for resentencing. (§ 1170.18(f)-(i).) A defendant who is still serving his sentence may petition to recall his sentence. (§ 1170.18(a)-(e).) Here, Salha's application stated he had completed his 16-month sentence.

[7] The Clerk's Transcript does not contain Salha's first application.

proof that the value of the property involved in Count 7 is less than $950.00 [*sic*]."[8]

On March 13, 2017, Salha's attorney filed, on his behalf, another application for resentencing on the Los Angeles Superior Court's form. Counsel checked the box stating, "The amount in question is not more than $950." Counsel attached a copy of an Incident Report from the Glendora Police Department.

On April 3, 2017, the court (Commissioner Wade D. Olson) denied Salha's second application.[9] Salha was not present. The public defender appeared on his behalf; the privately-retained counsel who had filed the application apparently did not appear.[10] The minute order states, "The court is in receipt of the defendant's application for resentencing and [the] People's response . . . under Proposition 47.[11] The court finds the defendant is not eligible for reduction of Counts 1 through 6, each a felony conviction of Penal Code section 530.5(a), and Count 7, a felony conviction of Penal Code section 484e(d) . . . . The court notes the defendant's application was previously denied on September 12, 2016 by Judge Jack P. Hunt."

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[8] Proposition 47 permits resentencing on eligible crimes if the amount of the theft or property loss was $950 or less. (*People v. Brown* (2017) 7 Cal.App.5th 1214, 1217; see also Pen. Code, § 490.2, subd. (a).)

[9] The Reporter's Transcript does not include a transcript of the April 3, 2017 proceeding.

[10] At a later court proceeding, private counsel told the court he had not been notified of the hearing.

[11] The People's response does not appear in the record on appeal.

The minute order does not reflect whether Commissioner Olson was aware Salha had submitted the police report with the second application, or whether the court had read and considered it. Nor does the minute order indicate whether the court denied the application solely on the "$950 or less" issue or whether the court also ruled that Count 7, a violation of section 484e(d), was not subject to Proposition 47. As discussed below, about a week before the April 2017 hearing, our Supreme Court had held, in *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*), that a felony conviction for violating section 484e(d) is one of the crimes eligible for reduction under Proposition 47.

On July 10, 2017, Salha's privately-retained counsel filed a third application for resentencing. Again, counsel checked the box for "amount in question is not more than $950." Counsel filed a memorandum of points and authorities with the form application, together with his own declaration under penalty of perjury and another copy of the Glendora Police Department Incident Report. Counsel wrote, "Petitioner has previously applied for resentencing before this Court. Those petitions were denied without argument. Petitioner is once again seeking a resentencing and respectfully asks that the Court entertain oral argument on the Petition and conduct an evidentiary hearing on the issue of whether the theft in this case is less than $950 [*sic*]."[12] Counsel declared, "[T]he attached police reports demonstrate that the amount of the property involved in the incident is less than $950."

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[12] Proposition 47 states, "Unless the applicant requests a hearing, a hearing is not necessary to grant or deny an application filed under subdivision (f) [authorizing resentencing of a person who has completed his sentence for a crime that would have been a misdemeanor had Proposition 47 been in effect at the time of his offense]." (§ 1170.18, subd. (h).)

Counsel cited *People v. Garrett* (2016) 248 Cal.App.4th 82 (*Garrett*) for the proposition that section 530.5(a) convictions "come[ ] within the provisions of Proposition 47." Counsel noted, "In some cases, an evidentiary hearing is required if the underlying charges, the charging document[,] and the petition for resentencing do not resolve the issue of whether the amount of the theft is less than $950." Counsel added that Salha did not pose "an unreasonable risk of danger to public safety." (§ 1170.18(b)(3).)

On August 1, 2017, Salha's private counsel appeared before the court (Judge Hunt). Salha did not appear. When the court called the case, the deputy district attorney said, "None of those charges apply, Your Honor." The court stated, "Petition is denied." Salha's counsel asked, "May I be heard on that?" The court said, "Sure." Counsel inquired, "Did the court read my memorandum, points and authorities on the two charges?" The court responded, "They don't qualify." Counsel said, "Well, the [section] 484e(d) qualifies under *Romanowski*.[13] And the [section] 530.5(a) qualifies under *People versus Garrett*." The court, apparently addressing the prosecutor, said, "People." The deputy district attorney said, "I don't believe that's correct, Your Honor. I believe that none of those charges apply [*sic*] as Prop. 47 was first enacted." Defense counsel stated, "Well, I've read the cases. I mean, the courts hold that . . . ." The court interrupted, instructing Salha's counsel, "Make copies of them and come back and submit them to the court." The prosecutor

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13 Our Supreme Court decided *Romanowski* on March 27, 2017. The court unanimously held "Proposition 47 reduces the punishment for theft of access card information in violation of [Penal Code] section 484e, subdivision (d)." (*Romanowski*, *supra*, 2 Cal.5th at p. 917.)

asked to continue the matter for two weeks and Salha's lawyer agreed.

On August 14, 2017, Salha's counsel appeared again (before Commissioner Olson) on the application. A different deputy district attorney appeared. Salha was not present; his lawyer told the court he lives in Chicago. The prosecutor stated, "It appears that this would not apply. Prop. 47 would not apply to these charges because it was not a retail establishment. The charges are identity theft and the identity theft was occurring at a bank ATM machine."

Salha's counsel responded that, under *Romanowski*, Proposition 47 applied to the section 484e(d) charge regardless of what "type of establishment" was involved. Counsel also argued *Garrett*—although a commercial burglary case—was "the closest this court has to go on at this point" on the six identity theft counts. Addressing the "dollar amount" of the thefts, Salha's attorney began to cite the police report. The court interrupted, "$953. Cash. In twenties. Brand new twenties. His wallet, his car bag. The bag in the car. It is $953. That's not even thinking about the $900 in gift cards that there's there. So, that's a problem."

Counsel asked, "May I be heard on that?" The court answered, "Quickly." Counsel argued there was "no discussion in the police report of where that money came from." The court interrupted, "You have—come on. You have $618 in his wallet. Then in the car in the bag with other information concerning this you have another $335. This is all cash. New twenties. It's in the report you submitted."

Counsel argued the police report did not attribute all the cash found in the car to Salha. Counsel noted there was another man in the car with Salha. Counsel also noted that in a box on the police report entitled, "Total Loss," an officer had typed in

"$0.00." Counsel added the police did not "attribute" "a bag in the trunk that's got some stuff in it" to either Salha or his companion. Counsel began to talk about the gift cards.

The court interrupted: "Counsel, I'm not going to argue the case with you. You submitted those papers. I went over all the papers." Counsel responded, "It's my burden. I'm just trying to make my record." The court said, "Okay. Make your record."

Counsel argued only one of the gift cards "had been recoded." So, he said, "they . . . can't prove any of those gift cards were stolen." He concluded, "So, even if we concede all of that, it's still less than $950 as to Mr. Salha that they can attribute to him directly." The prosecutor responded that, putting aside the amount of the taking, "Prop. 47 as it applies to theft applies to retail establishments open for business. This was a bank. It was not a retail establishment."

The court ruled: "Application is denied at this time. Number one, it is not a retail commercial establishment. It is a bank. ATM's. And the court in the review of the material, even if that is not sufficient, finds that there's $953 in cash between those two defendants, of which the majority is in the defendant's wallet. . . . And that's not even thinking about the $900 worth of gift cards. But $335 in the trunk of the vehicle in a bag. And co-defendant has $23 in his wallet. Find that it's over $950, find that it's not a retail commercial establishment, and denying the application."

3. *The Glendora Police Department Incident Report*

As noted, Salha's attorney submitted, in support of his application, a police report prepared by the Glendora Police Department. The report described an "incident" on November 30, 2010. It listed the victim as Bank of America on Route 66 in Glendora, California. The report listed Salha and Georgiev as suspects.

In the narrative of the report, Officer Luke Kovach wrote he and his partner were called to a "stand alone" ATM. They found Salha in the driver seat and Georgiev in the passenger seat of a Nissan Altima parked in a lot next to the ATM. Someone had reported the two men "continuously walking back and forth [to the ATM] when customers arrived." Kovach discovered the ATM had been altered to permit a process commonly known as "skimming." A clear plastic cover was attached to the ATM with gray double-sided tape. Kovach and his partner also found a tiny "intricately manufactured" camera attached to the ATM. Skimmers use these to record customers' personal identification numbers when they input them to use the ATM.

Kovach asked Salha if he could search the Nissan and Salha replied, "Of course." Kovach found two box cutters, a roll of gray double-sided tape that matched the tape on the ATM, and an empty box for a portable hard drive. In Salha's wallet Kovach found $618 in cash including "29 crisp twenty dollar bills." Salha also had eight $100 gift cards in his wallet. Officers later "scanned" the cards and only one "returned with a magnetic strip that did not match the account number embossed on the card."

In the trunk of the Nissan Kovach found a gray duffle bag with $335 in cash, $320 of which was in twenty dollar bills. A day planner in the bag contained six handwritten addresses. Kovach discovered all six addresses were for Chase bank branches. Kovach also found heat-shrink wire tubes, a putty knife, a USB cable, binoculars, and bits of red plastic that had been peeled off the double-sided tape.

Video from the tiny hidden camera showed the hands and feet of two people. Kovach recognized Salha's left hand from a bandage on his index finger and his feet from his distinctive tennis shoes.

DISCUSSION

1. *Proposition 47,* Gonzales, *and* Romanowski

"In 2014, Proposition 47 created the new crime of 'shoplifting,' defined as entering an open commercial establishment during regular business hours with the intent to commit 'larceny' of property worth $950 or less. (Pen. Code, § 459.5, subd. (a).)" (*People v. Gonzales* (2017) 2 Cal.5th 858, 862 (*Gonzales*).) Since Proposition 47's passage, courts have considered which crimes—previously felonies—fall within this new crime of shoplifting and therefore qualify for resentencing as misdemeanors.

In *Gonzales*, decided 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." (*Gonzales*, *supra*, 2 Cal.5th at p. 862.) 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. (*Ibid.*)

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 pp. 868-869.) The court stated, "[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." (*Id.* at p. 871.)

The 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(a). (*Gonzales*, *supra*, 2 Cal.5th at p. 876.) The court 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." (*Ibid*.) The court noted "[a]t least one Court of Appeal has agreed with this position," citing *Garrett, supra,* 248 Cal.App.4th 82, the same case Salha's counsel cited to the trial court here. The court concluded, "A defendant must be charged only with shoplifting when the statute applies." (*Gonzales*, at p. 876.)

Four days after issuing its decision in *Gonzales*, our Supreme Court decided *Romanowski.* The high court held that theft of access card account information in violation of section 484e(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*, *supra*, 2 Cal.5th at pp. 905-906.) The court noted "the Legislature chose to place section 484e in a chapter of the Penal Code titled 'Theft.' " (*Id*. at p. 912.) The court stated, "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." (*Id*. at p. 906.)

The court next considered the "valuation" issue: "[W]hile Proposition 47 does not specify a particular valuation test for this $950 threshold, the Penal Code section that defines theft says that 'the reasonable and fair market value shall be the test' for determining the value of stolen property." (*Romanowski*, *supra*,

2 Cal.5th at p. 906.) The court continued, "What we hold in light of this provision and Proposition 47 is that section 490.2's value threshold must be applied using this 'reasonable and fair market value' test. Moreover, courts may consider evidence related to the possibility of illicit sales when determining the market value of stolen access card information." (*Ibid*.)

2. *On the facts here, Salha's identity theft convictions do not constitute shoplifting and therefore do not qualify for resentencing*

Neither *Gonzales* nor *Romanowski* answered the question presented here by Salha's application for resentencing on his six felony counts for identity theft: whether a violation of section 530.5(a) qualifies as shoplifting within the meaning of section 459.5. As noted, *Gonzales* stated that, where a defendant's conduct constitutes both commercial burglary (entering a bank to cash a stolen and forged check) and identity theft, he "must be charged only with shoplifting when the statute applies." (*Gonzales*, *supra*, 2 Cal.5th at p. 876.) But here—according to the incident report Salha submitted—his "skimming" activity did not constitute shoplifting.

The issue of whether identity theft in violation of section 530.5 is eligible for resentencing under Proposition 47 is currently before our Supreme Court. (See *People v. Jimenez*, review granted July 25, 2018, S249397; *People v. Sanders*, review granted July 25, 2018, S248775; *People v. Brayton*, review granted Oct. 10, 2018, S251122.) The court identified the issue presented in *Jimenez* as whether "a felony conviction for the unauthorized use of personal identifying information of another (Pen. Code, § 530.5, subd. (a)) [may] be reclassified as a misdemeanor under Proposition 47 on the ground that the offense amounted to Penal Code section 459.5 shoplifting." The court

deferred briefing in *Sanders* and *Brayton* pending a decision in *Jimenez*.

Appellate courts have reached different conclusions on the issue. In a decision issued April 17, 2018, *People v. Sanders* (2018) 22 Cal.App.5th 397, review granted July 25, 2018, S248775 (*Sanders*), the Fourth District Court of Appeal held "violations of section 530.5, subdivision (a) are not theft offenses." (*Id*. at p. 400.) The defendant Sanders had found someone's credit card on the ground. 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. (*Ibid*.)

The court of appeal affirmed the trial court's denial of Sanders's petition for resentencing on two counts of identity theft.[14] The court stated, "[W]e 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." Accordingly, the court said, *Romanowski* was distinguishable. (*Sanders*, *supra*, 22 Cal.App.5th at pp. 480-481.)

By contrast, on May 8 of this year, 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 *People v. Jimenez* (2018) 22 Cal.App.5th 1282, review granted July 25, 2018, S249397 (*Jimenez*), the defendant had cashed two apparently forged checks at a check-cashing business. The amounts of the checks were roughly $632 and $597. (*Id*. at p. 1285.) The appellate court noted that "Jimenez's conduct [was]

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[14] Sanders also was convicted of two counts of commercial burglary. The trial court granted her petition for resentencing under Proposition 47 on those counts. (*Sanders*, *supra*, 22 Cal.App.5th at p. 399.)

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." Citing *Gonzales*, the court said, "Both defendants committed 'theft by false pretenses,' which 'now constitutes shoplifting under [section 459.5, subdivision (a)].' " (*Jimenez*, at p. 1289.) The court found both *Sanders* and *People v. Liu* (2018) 21 Cal.App.5th 143, review granted June 13, 2018, S248130 (*Liu*), discussed below, unpersuasive: "Not only are the cases distinguishable, but they also do not address *Gonzales*." (*Jimenez*, at p. 1291.)

And, on May 25 of this year, in *People v. Washington* (2018) 23 Cal.App.5th 948 (*Washington*), Division Eight of this court stated identity theft could constitute shoplifting under *Gonzales*. In that case, defendant Washington "used another person's identity without permission to secure credit and thereby purchase items at a Nordstrom's store." (*Id*. at p. 952.) He was convicted of identity theft in violation of section 530.5(a), burglary, and possession of a forged driver's license. Washington petitioned for resentencing on his burglary conviction only. The trial court denied the petition, stating, "The theft from Nordstrom was accomplished by identity theft. This [is] not a shop-lifting type of crime." (*Washington,* at p. 952.)

Division Eight stated, "Petitioner contends that the trial court's stated reason for denying his petition—that 'shoplifting' under section 459.5 does not include identity theft—was rejected by the Supreme Court in *People v. Gonzales* [(2017)] 2 Cal.5th 858. Respondent [the Attorney General] concedes this point, and we agree." (*Washington*, *supra*, 23 Cal.App.5th at p. 954.) The remainder of the decision focused on whether Washington had met his prima facie burden of showing the value of the stolen goods in question. (*Id*. at pp. 954-957.)

Finally, in *People v. Brayton* (2018) 25 Cal.App.5th 734, review granted Oct. 10, 2018, S251122 (a decision issued July 31 and modified August 10), 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. The court 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 $107.07 store credit. She obtained the credit by the false representation that she was the person named in that driver's license." The appellate court remanded the case for the trial court to determine " 'the amount of the loss.' " (*Brayton*, at pp. 739-740.)

The case that may be most similar to Salha's is *People v. Liu*, *supra*, 21 Cal.App.5th 143. In *Liu*, Division Eight of this court held that identity theft in violation of section 530.5 is not eligible for resentencing under Proposition 47. Liu had been convicted of 22 theft-related counts arising from her scam of offering loan services to immigrants. (*Id*. at p. 146.) On the one count relevant to our inquiry, the jury had convicted Liu of violating section 530.5, subdivision (c)(3), the fraudulent acquisition and retention of the personal identifying information of 10 or more people. The trial court denied Liu's petition for resentencing on that count. (*Liu*, at p. 146.)

The court of appeal affirmed. (*Liu*, *supra*, 21 Cal.App.5th at p. 146.) The court 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)." (*Id*. at p. 150.) The court distinguished *Romanowski*, noting "section 484e explicitly defines theft of

access card information as *grand theft*." The court continued, "In contrast, section 530.5 does not define its crimes as grand theft, but describes them as 'public offense[s].' " (*Liu*, at p. 151.) The court observed, "[S]ection 530.5 addresses harms much broader than theft." (*Id*. at p. 152.) The court 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." (*Id*. at p. 153.)[15]

Pending further guidance from our Supreme Court, we must do our best to decide whether Salha's conduct here amounted to "shoplifting" within the meaning of section 459.5, subdivision (a). While commonly referred to as "identity theft," a violation of section 530.5(a) is more accurately termed "unauthorized use of personal identifying information." (CALCRIM No. 2040; see *People v. Truong* (2017) 10 Cal.App.5th 551, 561 (*Truong*) [violation of section 530.5 "is not a theft offense"].) 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

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[15] As noted, the Supreme Court granted review of *Liu* in June 2018 (S248130). The court stated the issue presented as this: "For the purpose of determining whether a conviction for theft of access card information in violation of Penal Code section 484e, subdivision (d), is eligible to be reduced to a misdemeanor under Proposition 47 when the information has been used to obtain property, is the value of the access card information limited to the fair market value of the information itself on the black market or can the value of the property obtained by the use of the information be considered? (See *People v. Romanowski* (2017) 2 Cal.5th 903, 914.)"

information without the consent of the person whose identifying information [he] was using." (CALCRIM No. 2040.)

Our Supreme Court has held that some conduct in violation of a particular statute may qualify for resentencing while other conduct may not. For example, in *People v. Page* (2017) 3 Cal.5th 1175, the court held that *taking* a vehicle in violation of Vehicle Code section 10851 is reducible while *driving* a vehicle in violation of that same statute is not. Similarly, there are a variety of acts that can constitute a violation of Penal Code section 530.5(a). As the *Gonzales* court held, where a defendant steals, forges, and cashes checks (for $950 or less), that conduct amounts to shoplifting. (*Gonzales*, *supra*, 2 Cal.5th at p. 862.)

What Salha did here is very different. He perpetrated a sophisticated skimming scheme that went far beyond entering a bank to cash a forged check or using someone's credit card to get merchandise from a store. As the *Liu* court noted, "[S]ection 530.5 addresses harms much broader than theft." (*Liu*, *supra*, 21 Cal.App.5th at p. 152.) The Legislature put section 530.5 in the chapter of the Penal Code defining "False Personation and Cheats." (*Truong*, *supra*, 10 Cal.App.5th at p. 561.) The statute is 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.) Indeed, the drafters of Proposition 47 and the voters who approved it were sufficiently concerned about identity theft in violation of section 530.5(a) that the proposition contains an express provision that a person convicted of both forgery and identity theft shall not be entitled to resentencing on the forgery count. (See *People v. Gonzales* (2018) 6 Cal.5th 44, 46 [quoting section 473(b)].)

In short, Salha's elaborate fraud is not the sort of "nonserious" crime the voters had in mind when they passed Proposition 47. (Cf. *People v. Martin* (2018) 26 Cal.App.5th 825, 828 ["It is difficult, if not impossible, to believe that the electorate intended that a person, such as [respondent Martin] . . . who joined an international conspiracy to commit petty theft, would deserve misdemeanor treatment."].)

3. *A felony conviction for a violation of Penal Code section 484e(d) qualifies for resentencing if the applicant carries his burden of proving the market value of the stolen access card information was $950 or less*

As noted, Salha pleaded to and was convicted of one count of violating section 484e(d), theft of access card account information. Under *Romanowski*, Salha is entitled to a reduction of that conviction to a misdemeanor if he carries his burden of proving the value of the stolen access card information was $950 or less. (*Romanowski*, *supra*, 2 Cal.5th at pp. 916-917.)

The trial court's denial of Salha's petition to reduce his section 484e(d) conviction on the ground that the bank ATM was "not a retail commercial establishment" was error. Section 459.5 refers to "a commercial establishment . . . open during regular business hours," not a *retail* commercial establishment. (§ 459.5, subd. (a).)[16] As we have discussed, *Gonzales* involved a bank. (*Gonzales*, *supra*, 2 Cal.5th at p. 862.) In *Gonzales*, the Supreme

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[16] Courts have held a variety of businesses to be "commercial establishments" under Proposition 47. (See, e.g., *People v. Franske* (2018) 28 Cal.App.5th 955 [transportation company that sold motor homes]; *People v. Holm* (2016) 3 Cal.App.5th 141 [private golf and country club]; *People v. Vargas* (Jan. 19, 2016, B262129) [nonpub. opn.] [check-cashing business].

Court rejected the Attorney General's argument that "shoplifting" under Proposition 47 refers to "larceny of openly displayed merchandise." (*Id.* at p. 873, italics omitted.) The court stated, "This argument is little more than a restatement of the rejected claim that the electorate intended to use 'shoplifting' in the colloquial sense. Further, if the electorate had intended to limit the shoplifting statute to an entry with intent to steal retail merchandise, it could have done so by using language similar to that in section 490.5." (*Id.* at pp. 873-874. See also *People v. Abarca* (2016) 2 Cal.App.5th 475, 481-483 [bank is "commercial establishment" under Proposition 47]; *People v. Osotonu* (2018) 26 Cal.App.5th 973, review granted Dec. 12, 2018, S251817 [24-hour ATM outside of bank building is an "open" "commercial establishment"].)

The trial court denied Salha's application on the additional ground that, in the court's view, Salha had taken more than $950. If the record supported this conclusion, we would affirm. But on the limited and spotty record before us, the facts are quite unclear. The police report lists the victim as Bank of America in Glendora. But the information filed against Salha lists the victim as Chase Bank in the section 530.5 counts. As we have said, those counts are not eligible for resentencing. In the one count (Count 7) that is eligible, the People have not listed any victim. Moreover, the police report lists the amount of the loss as "$0.00."

As noted, the police report says officers found $618 in cash in Salha's wallet and another $335 in a gray duffel bag in the trunk of the Nissan. The report does not mention whether police found any identifying information in the duffel bag for either Salha or his passenger and co-arrestee Georgiev. Officers also found eight $100 gift cards in Salha's wallet; only one had a "magnetic strip that did not match the account number embossed

on the card." Police found a day planner in the duffel bag with addresses for six Chase bank branches. Are we to conclude all of the "crisp" 20 dollar bills found in Salha's wallet and in the duffel bag came from Chase branches that Salha and Georgiev already had hit up? We have only the December 1, 2010 incident report—no preliminary hearing transcript, no follow-up police reports. (At the end of the December 1 police report, Officer Kovach wrote, "Detective Barrett conducted the interviews and follow-up investigation. See his report for further." Salha did not submit Barrett's report.) Nor did Salha submit a declaration swearing to the source of the cash found in his wallet and in the car he was driving.

By filing his application for resentencing on the Los Angeles Superior Court form, stating the "amount in question" was not more than $950, and submitting the police report, Salha made out a prima facie case entitling him to an evidentiary hearing. (*Washington*, *supra*, 23 Cal.App.5th at p. 957.) We remand for that hearing. Salha bears the burden of proving that the value of the access card account information he took in violation of section 484e(d) did not exceed $950. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 878; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444; *People v. Sweeney* (2016) 4 Cal.App.5th 295, 302. Cf. *Caretto v. Superior Court* (2018) 28 Cal.App.5th 909 [remanded to give defendant opportunity to prove value of stolen debit cards was $950 or less].)

DISPOSITION

We affirm the trial court's denial of Boyan Sami Salha's application for resentencing on Counts 1 through 6, felony violations of Penal Code section 530.5(a). As to Count 7, Salha's felony violation of section 484e(d), we reverse the trial court's order denying resentencing and remand the matter for an evidentiary hearing.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J