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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERT OCHOA,

Defendant and Appellant.

B265361

(Los Angeles County  
Super. Ct. No. GA095685)

APPEAL from an order of the Superior Court of Los Angeles County. Dorothy L. Shubin, Judge. Affirmed.

Janet Uson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Gilbert Ochoa appeals from an order denying his motion to recall his sentence under Penal Code section 1170, subdivision (d).<sup>1</sup> Ochoa contends the court erred in denying resentencing because his section 484e, subdivision (d) felony offense for unlawful acquisition and possession of access card account information fell under the recall provisions of Proposition 47, the Safe Neighborhoods and Schools Act (§ 1170.18, subds. (a)–(e)). We disagree and affirm.

### **BACKGROUND**

On March 10, 2015, the Los Angeles County District Attorney filed a one-count information against Ochoa charging him with felony theft in violation of section 484e, subdivision (d) for presenting an officer with a credit card not belonging to him as a form of identification. On April 24, 2015, Ochoa filed a motion to set aside the information under section 995, arguing the district attorney had introduced insufficient evidence at the preliminary hearing to charge him with a felony. The court denied Ochoa’s motion. Following the denial, Ochoa pleaded no contest and the court sentenced him to 16 months in state prison. On June 9, 2015, Ochoa filed a motion to recall his sentence under section 1170, subdivision (d). The court denied his motion. Ochoa appealed.

### **DISCUSSION**

The question whether a felony conviction for grand theft under section 484e, subdivision (d) is eligible for reduction to a misdemeanor under Proposition 47 has divided many of our sister courts in the state, and our Supreme Court has granted review in

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

several of these cases. (See *People v. Grayson* (2015) 241 Cal.App.4th 454, review granted Jan. 20, 2016, S231757 (*Grayson*); *People v. Cuen* (2015) 241 Cal.App.4th 1227, review granted Jan. 20, 2016, S231107 (*Cuen*); *People v. Romanowski* (2015) 242 Cal.App.4th 151, review granted Jan. 20, 2016, S231405 (*Romanowski*); *People v. King* (2015) 242 Cal.App.4th 1312, review granted Feb. 24, 2016, S231888 (*King*); *People v. Thompson* (2015) 243 Cal.App.4th 413, review granted Mar. 9, 2016, S232212 (*Thompson*).) We agree with the reasoning of three of those courts—*Grayson*, *Cuen*, and *King*—in concluding that section 484e, subdivision (d) offenses are not eligible for reduction to misdemeanors under Proposition 47.

Proposition 47 requires that nonserious, nonviolent crimes like petty theft and drug possession be charged and punished as misdemeanors rather than felonies. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, p. 70.) Among other amendments to the Penal Code, the initiative added section 490.2, subdivision (a), which states, “Notwithstanding Section 487<sup>2</sup> or any other provision of law defining grand theft, obtaining any property by theft where the value of money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor.” (§ 490.2, subd. (a) [inapplicable exceptions not quoted].)

Section 484e is “part of a comprehensive statutory scheme which punishes a variety of fraudulent practices involving access

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<sup>2</sup> With exceptions not relevant here, section 487 defines grand theft as occurring “[w]hen the money, labor, or real or personal property taken is of a value exceeding nine hundred fifty dollars (\$950).”

cards.” (*People v. Molina* (2004) 120 Cal.App.4th 507, 512; see §§ 484d–484j.) Section 484e, subdivision (d) focuses specifically on the unauthorized acquisition or possession of access card account information with the intent to use it fraudulently, not on the theft of “money, labor, real or personal property” valued less than \$950, which is the crux of the section 490.2, subdivision (a) offense. (Couzens et al., Cal. Practice Guide: Sentencing Cal. Crimes (The Rutter Group 2015) Reduction of Penalties, § 25:4.) Subdivision (d) thus provides, “Every person who acquires or retains possession of access card account information with respect to an access card validly issued to another person, without the cardholder’s or issuer’s consent, with the intent to use it fraudulently, is guilty of grand theft.”

Did Proposition 47, through section 490.2, reduce every grand theft offense under section 484e, subdivision (d) to a misdemeanor if the value involved can be shown to be less than \$950?

In interpreting a voter initiative like Proposition 47, “we apply the same principles that govern statutory construction.” (*People v. Rizo* (2000) 22 Cal.4th 681, 685 (*Rizo*); *People v. Canty* (2004) 32 Cal.4th 1266, 1276 (*Canty*).) “ ‘ “Our role in construing a statute is to ascertain the Legislature’s intent so as to effectuate the purpose of the law.” ’ ” (*Canty*, at p. 1276.) We begin by examining “the language of the statute enacted as an initiative, giving the words their usual, ordinary meaning.” (*Ibid.*) We construe the statutory language in the context of the statute as a whole as well as the overall statutory scheme (*Rizo*, *supra*, at p. 685), while also giving “ ‘significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.’ ” (*Canty*, *supra*, at p. 1276.) “If the language

is clear and unambiguous, we follow the plain meaning of the measure.” (*Ibid.*) However, “the ‘plain meaning’ rule does not prohibit a court from determining whether the literal meaning of a measure comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute.” (*Ibid.*) Finally, “[w]e do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous.” (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22.) And we must avoid any construction that renders related statutes a nullity. (*People v. Le* (2000) 82 Cal.App.4th 1352, 1359; see *People v. Tanner* (1979) 24 Cal.3d 514, 520.)

In *Romanowski*, Division Eight of this district declared that theft of access card account information under section 484e, subdivision (d) falls within the initiative and is to be treated no differently than other theft offenses eligible for reduction to misdemeanors under Proposition 47. (*Romanowski, supra*, 242 Cal.App.4th at p. 154, review granted.) The court reasoned that because “grand theft involving property valued at less than \$950 is a misdemeanor, and acquiring or retaining possession of access card information is defined as grand theft, then acquiring or retaining possession of access card information valued at less than \$950 is a misdemeanor.” (*Romanowski*, at p. 156.) In *Thompson*, Division Four of this district agreed with *Romanowski* that “[t]he plain language of section 490.2, subdivision (a) unequivocally expresses an intention that Proposition 47 apply to all Penal Code sections defining ‘grand theft,’” including section 484e, subdivision (d). (*Thompson, supra*, 243 Cal.App.4th at pp. 418–419, review granted.)

The key to the *Romanowski* court’s analysis is its implicit assumption that the value of the access card information is less than \$950, even as it acknowledged that “section 484e, subdivision (d) requires no proof of actual loss and valuing the mere acquisition and possession of access card information may be difficult.”<sup>3</sup> (*Romanowski, supra*, 242 Cal.App.4th at p. 159, review granted.) *Thompson* made the presumption explicit by holding “that the value of access card account information is necessarily less than \$950 because the intrinsic value of acquiring and retaining access card account information is minimal, unless used.” (*Thompson, supra*, 243 Cal.App.4th at p. 423, review granted.)

Our colleagues in Division Six of this district took a different approach in *Grayson*, finding that sections 490.2 and 487 presume a quantifiable monetary loss, which is not contemplated or even relevant to an offense under section 484e, subdivision (d). (*Grayson, supra*, 241 Cal.App.4th at p. 459, review granted.) Describing the elements of a section 484e, subdivision (d) offense, *Grayson* observed, “It is not necessary ‘that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant’s acts.’ [Citations.] Section 484e(d) ‘punishes the theft of an access card [or information] with the intent to use it.’ [Citation.] It does not punish the use of the card to acquire ‘money, goods, services, or any other thing of value.’” (*Ibid.*) The court noted the absence of

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<sup>3</sup> *Romanowski* dismissed the access card valuation problem with the suggestion that the black market price of the access card information might be used to determine whether a section 484e offense should be a felony or a misdemeanor. (*Romanowski, supra*, 242 Cal.App.4th at p. 158, review granted.)

any “authority suggesting the electorate intended to value the risk of [access card theft] at \$950 or less,” and concluded: “the essence of a section 484e(d) violation is the acquisition or retention of access card information with the intent to use it fraudulently. [Citation.] Section 490.2 does not incorporate the ‘acquisition’ or ‘retention’ language of section 484e(d). Nor does it refer specifically to section 484e(d) or any part of the ‘comprehensive statutory scheme which punishes a variety of fraudulent practices involving access cards.’ ” (*Ibid.*)

Similarly, the court in *Cuen* found section 1170.18, subdivision (a) to be unambiguous in its omission of the theft of access card information from its list of several theft-related offenses. (*Cuen, supra*, 241 Cal.App.4th at p. 1231, review granted.) The court further found the application of section 490.2, subdivision (a) to theft of “money, labor, real or personal property” to be unambiguous. (*Ibid.*) Refusing to stretch the definition of “personal property” to include access card information, *Cuen* held that “[t]heft of intangible access card account information presents a qualitatively different personal violation than theft of more tangible items.” (*Ibid.*; see also *People v. Molina, supra*, 120 Cal.App.4th at pp. 518–519 [“Although access card account information is not defined in the statute, the plain and commonsense meaning of the phrase includes the name of the cardholder, the account number, the expiration date and the magnetic stripe on the back of the card”].)

Finally, in *King*, Division Two of this district found the language of section 484e, subdivision (d) to be “a clear and unambiguous expression of the Legislature’s intent to punish (as a felony) the mere unlawful acquisition or possession of an access card or account information with the intent to use it fraudulently,

with no added value or use elements.” (*King, supra*, 242 Cal.App.4th at p. 1318, review granted.) As *King* explained, sections 490.2, subdivision (a) and 484e, subdivision (d) define and punish two fundamentally different offenses: While section 490.2, subdivision (a) defines petty theft according to the *value* of the property taken (that is, less than \$950), section 484e, subdivision (d) defines grand theft with reference to the *acquisition or possession* of access card account information with fraudulent intent. (*Id.* at p. 1316.) Section 484e, subdivision (d) contains no reference to taking property or items of value; indeed, the *value* of the acquisition or possession of access card account information or of the information itself is not even an element of the offense.<sup>4</sup> (*Ibid.*) As *King* notes, however, use of an access card to obtain “money, goods, services, or anything else of value” is separately punishable under section 484g, which contains the valuation element notably missing from section 484e, subdivision (d).<sup>5</sup> (*Ibid.*) *King* concluded that to apply section

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<sup>4</sup> *King* found “no language in sections 490.2 or 1170.18 that suggests an intent to set punishment for violating section 484e, subdivision (d) according to the ‘street value’ of credit cards and account information,” thus rejecting the *Romanowski* and *Thompson* courts’ approach of placing a valuation on the card or account information itself to bring section 484e, subdivision (d) grand theft under the ambit of Proposition 47. (*King, supra*, 242 Cal.App.4th at p. 1317, review granted.)

<sup>5</sup> Section 484g provides in relevant part: “Every person who, with the intent to defraud, (a) uses, for the purpose of obtaining money, goods, services, or anything else of value, an access card or access card account information that has been altered, obtained, or retained in violation of Section 484e . . . or (b) obtains money, goods, services, or anything else of value by



490.2 to section 484e, subdivision (d) would require the court to insert an element of valuation into the latter provision, thereby effectively nullifying section 484e, subdivision (d) by decriminalizing the unauthorized acquisition or possession of access card account information with fraudulent intent. (*Id.* at p. 1317.) This our colleagues in Division Two refused to do.

We, too, decline to insert a valuation element into the definition of a section 484e, subdivision (d) offense, and we reject the *Romanowski* and *Thompson* courts' presumption that access card information is necessarily worth less than \$950 because valuation of an intangible such as information may be highly variable or impossible.

As part of a statutory scheme "intended to protect innocent consumers from the injury, expense, and inconvenience arising from the fraudulent use of their access card account information" (*People v. Molina, supra*, 120 Cal.App.4th at p. 516), section 484e describes a theft offense that does not depend on the value of the property to establish a violation. Accordingly, for all the reasons set forth in *Grayson*, *Cuen*, and *King*, we conclude that Ochoa's felony conviction for grand theft under section 484e, subdivision (d) is not eligible for resentencing as a petty theft under Proposition 47.

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representing without the consent of the cardholder that he or she is the holder of an access card and the card has not in fact been issued, is guilty of theft. If the value of all money, goods, services, and other things of value obtained in violation of this section exceeds nine hundred fifty dollars (\$950) in any consecutive six-month period, then the same shall constitute grand theft."

**DISPOSITION**

The order is affirmed.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.