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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN THOMAS,

Defendant and Appellant.

B268555

(Los Angeles County
Super. Ct. No. LA072641)

APPEAL from an order of the Superior Court of Los Angeles County, Michael K. Kellogg, Judge. Reversed and remanded.

Tanya Dellaca, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler and Lance E. Winters, Assistant Attorneys General, Chung L. Mar and Ilana Herscovitz, Deputy Attorneys General, for Plaintiff and Respondent.

Kevin Thomas appeals from the order denying his petition for resentencing under Proposition 47. (Pen. Code, § 1170.18.)¹ Appellant argues that his second-degree burglary conviction, based on his entry into a law office, meets the definition of the new crime of misdemeanor shoplifting in section 459.5. We conclude that a law office is a “commercial establishment” under section 459.5. We reverse the order and remand the matter for further determination on the two other requirements of section 459.5: that appellant entered the law office while it was open during regular business hours and that the value of the property taken did not exceed \$950.

FACTUAL AND PROCEDURAL SUMMARY

In November 2012, appellant was charged with seven counts of commercial burglary (§ 459), committed on separate occasions against separate businesses. There were additional charges of grand theft, attempted grand theft, and petty theft with priors, all stemming from the alleged burglaries. A number of prior felony convictions, including a prior strike conviction, also were alleged.

Appellant pled no contest to count 1, burglary of the Law Offices of Gennady Lebedev, admitted a prior strike conviction, and was sentenced to six years in prison. The court dismissed the remaining counts after appellant gave a *Harvey* waiver, allowing for victim restitution on the dismissed counts.² In

¹ All subsequent statutory references are to the Penal Code.

² “A *Harvey* waiver permits the sentencing court to consider the facts underlying dismissed counts . . . when determining the appropriate disposition for the offense . . . of which the defendant stands convicted.” (*People v. Munoz* (2007) 155 Cal.App.4th 160,

March 2013, the court ordered restitution in stipulated amounts: \$1,500 to Justin Trugman, \$4,133.35 to Wild Woods, Inc., and \$3,104.98 to Matthew Hebard.³

In November 2014, appellant petitioned for resentencing under Proposition 47. In considering whether appellant's conviction on count 1 satisfied the elements of section 459.5, the court reasoned that a law office offers services for sale. It assumed that the office had been open for business, based on the representation of appellant's Proposition 47 counsel, who had spoken to appellant's counsel in the underlying case. The court found that the value of the property taken from the law office exceeded \$950, citing "the stipulation to the amount of damage to that one count." Because it believed itself bound by appellant's stipulation to the amount of loss on count 1, the court declined to consider his argument that there was conflicting evidence of the value of the lost property: the probation report listed the value of the computer taken from the law office at \$1,500,⁴ but the victim signed a restitution request for \$500.

167, citing *People v. Harvey* (1979) 25 Cal.3d 754.) In *People v. Hoffman* (2015) 241 Cal.App.4th 1304, 1310–1311, the court held that a *Harvey* waiver does not allow consideration of dismissed counts for purposes of determining eligibility under Proposition 47. Respondent does not argue otherwise.

³ Trugman Music was identified in counts 3 and 4; Wildwoods Studio in counts 9 and 10. It is unclear from the record under which count restitution was awarded to Matthew Hebard, whose name appears in neither the information nor the probation report.

⁴ In addition to the computer valued at \$1,500, the probation report lists the law office property loss as including a

This appeal followed the denial of appellant’s petition.

DISCUSSION

I

Entry into an uninhabited building with intent to commit larceny or another felony is second-degree burglary, a wobbler offense that may be punished as either a felony or a misdemeanor. (§§ 459, 460, 461.) Section 459.5, added by Proposition 47, creates the misdemeanor crime of shoplifting, which it defines as “entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950).” (§ 459.5, subd. (a).) Proposition 47 also added section 1170.18, which allows persons previously convicted of felonies that would be misdemeanors under the voter initiative to petition for resentencing. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 878–879.)

Respondent argues that burglarizing a law office is not shoplifting because a law office, unlike a bank, is not a commercial establishment. We do not agree.

In interpreting a voter initiative, “we apply the same principles that govern statutory construction. [Citation.]” (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) We construe the language in the context of the overall statutory scheme. (*Ibid.*)

camera valued at \$200, a briefcase valued at \$50, a USB drive valued at \$30, and an iPod valued at \$40. Appellant relied on records turned over to him by his attorney in the underlying case. Those records were not received by the court, and are not part of the record on appeal.

Words are given their ordinary meanings unless special definitions are provided. (*People v. Love* (2008) 166 Cal.App.4th 1292, 1297.) If the language is ambiguous, we may consult ballot materials to aid us in determining the voters' intent. (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.)

While shoplifting is ordinarily understood to mean theft of merchandise from a store (*In re J.L.* (2015) 242 Cal.App.4th 1108, 1115), section 459.9 provides its own special definition of that term, using the words "commercial establishment" and "property." The phrase "commercial establishment" is undefined, but courts consistently have recognized that it ordinarily means an establishment "that is primarily engaged in commerce, that is, the buying and selling of goods or services." (*In re J.L.*, at p. 1114 [school is not commercial establishment]; *People v. Stylz* (2016) 2 Cal.App.5th 530, 534 [locked storage unit is not commercial establishment]; compare *People v. Franske* (2016) 6 Cal.App.5th 1057, 1060 [motor home sales office is commercial establishment]; *People v. Holm* (2016) 3 Cal.App.5th 141, 147 [golf and country club is commercial establishment]; *People v. Hudson* (2016) 2 Cal.App.5th 575, 581–582, review granted October 26, 2016, S237340 [bank is commercial establishment]; *People v. Abarca* (2016) 2 Cal.App.5th 475, 481–482, review granted October 19, 2016, S237106 [same]; *People v. Smith* (2016) 1 Cal.App.5th 266, 273, review granted September 14, 2016, S236112 [check cashing business is commercial establishment].)

Respondent argues that a law office is not primarily engaged in commerce, but in securing its clients' legal rights, and that the confidential fiduciary nature of the attorney-client relationship distinguishes a law office from a bank that offers financial services or a club that offers recreational services. But

even the rules of professional conduct, on which respondent relies, recognize that lawyers generally provide legal services for a fee. (See e.g. *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240, citing Cal. Rules of Prof. Conduct, rule 3–700 [fee refund upon termination of employment]; *Margolin v. Shemaria* (2000) 85 Cal.App.4th 891, 894, citing rule 2-200 [fee sharing].) Exchanging legal services for a fee qualifies as selling those services. Nor is respondent correct in suggesting that financial transactions do not implicate the right to privacy and confidentiality. (*Fortunato v. Superior Court* (2003) 114 Cal.App.4th 475, 481 [right to privacy embraces “confidential financial information in *whatever* form it takes, whether that form be tax returns, checks, statements, or other account information”].)

Respondent also argues that Proposition 47 does not apply to the theft of items not offered for sale, such as a lawyer’s computer containing confidential information. As many courts have recognized, on its face, the definition of shoplifting in section 459.5 is not limited to taking merchandise offered for sale. (See e.g. *People v. Franske*, *supra*, 6 Cal.App.5th at p. 1060; *People v. Hallam* (2016) 3 Cal.App.5th 905, 912; *People v. Holm*, *supra*, 3 Cal.App.5th at p. 147; *People v. Hudson*, *supra*, 2 Cal.App.5th at p. 582; *People v. Fusting* (2016) 1 Cal.App.5th 404, 411; but see *People v. Colbert* (2016) 5 Cal.App.5th 385, 391.)

The problem with reclassifying theft offenses as misdemeanors where private information is stolen is not limited to cases implicating attorney-client confidentiality, contrary to what respondent appears to suggest. The issue is currently pending before the California Supreme Court in cases involving financial transactions. (See e.g. *People v. Gonzales* (2015) 242

Cal.App.4th 35, review granted Feb. 17, 2016, S231171 [whether entering bank to cash forged checks is shoplifting]; *People v. Cuen* (2015) 241 Cal.App.4th 1227, review granted Jan. 20, 2016, S231107 [whether conviction for possession of access card account information under § 484e, subd. (d) is eligible for section 1170.18 resentencing]; *People v. Romanowski* (2015) 242 Cal.App.4th 151, review granted Jan. 20, 2016, S231405 [same].) Thus, respondent's premise that the burglary of a law office raises fundamentally different confidentiality concerns than the burglary of a financial institution is flawed.

Even assuming that the definition of shoplifting in section 459.5 lends itself to the narrower construction advocated by respondent, that would only render it ambiguous. The ballot materials do not support such a construction as they direct that the act be construed "broadly . . . to accomplish its purposes." (Cal. Voter Information Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, p. 74, § 15; see also *id.* at p. 74, § 18 [act shall be "liberally construed to effectuate its purposes"].) The voters intended "nonserious, nonviolent crimes like petty theft and drug possession" to be "misdemeanors instead of felonies." (*Id.* at p. 70, § 3, subds. (3) & (4).) We see no indication that the voters intended the theft of personal property that incidentally contained private confidential information to fall outside the scope of Proposition 47. For example, the initiative made check forgery a misdemeanor where the value of the check does not exceed \$950, unless the defendant is convicted of forgery and identity theft, as defined in section 530.5. (§ 473.) If the potential for identity theft, without an actual conviction, is insufficient to preclude reclassifying check forgery as a misdemeanor, then stealing a lawyer's computer that happens to

contain confidential client information should not preclude reclassification either.

We are not convinced that burglary of a law office that involves taking a computer which happens to contain confidential information is outside the scope of Proposition 47.

II

Section 459.5, subdivision (a) also requires that (1) the burglarized commercial establishment be “open during regular business hours,” and (2) the value of the property taken or intended to be taken not exceed \$950.

The trial court assumed appellant entered the law office during regular business hours based on the following statement by appellant’s Proposition 47 counsel: “From speaking to [appellant’s counsel in the underlying case], she indicated to me that the—Well, there was various offices in—that were involved in the case originally and in the original counts. I think all of them were open for business. I don’t think they were involved in the sales of anything, but they were all open for business.” Appellant argues that respondent forfeited the challenge that his counsel’s representation was not evidence by failing to object. But the contention that a judgment or order is not supported by evidence generally does not require an objection in the trial court. (See *People v. Butler* (2003) 31 Cal.4th 1119, 1126.)

As to the second requirement, respondent concedes the trial court mistakenly believed that, in the underlying case, appellant had stipulated to the value of the property taken in count 1. The record on appeal does not show a stipulation as to that count. At the hearing on his Proposition 47 petition, appellant brought the court’s attention to discrepancies in the valuations of that property in the probation report and in a victim’s request for

reimbursement. The court rejected appellant's argument on the mistaken belief that appellant had stipulated to the value of the loss in count 1 and did not consider the evidence on which appellant relied.

The trial court must make factual findings about appellant's eligibility for resentencing in the first instance. (*People v. Contreras* (2015) 237 Cal.App.4th 868, 892.) The court's findings that appellant entered the law office during business hours and that he stipulated that the value of the property he took exceeded \$950 are unsupported by the record on appeal. Representations made by appellant and his counsel at the hearing indicate that the factual record may be developed further. The trial court has "substantial flexibility to devise practical procedures to implement Proposition 47, so long as those procedures are consistent with the proposition and any applicable statutory or constitutional requirements. [Citation.]" (*People v. Fedalizo* (2016) 246 Cal.App.4th 98, 108.) On remand, the court may exercise its discretion whether determining appellant's eligibility requires augmentation of the factual record either by allowing the parties to submit additional evidence or by holding a hearing.⁵

⁵ We do not accept appellant's alternative argument that he is eligible for resentencing under section 490.2, which increased the value requirement for petty theft to \$950. Appellant was convicted of burglary, not grand theft. Section 459.5, subdivision (a) specifically provides that an entry into a commercial establishment with intent to commit larceny that does not satisfy the definition of shoplifting is burglary. Reading section 490.2 as implicitly amending the definition of burglary in section 459 would render section 459.5 superfluous because it would reduce any burglary conviction based on theft not exceeding \$950 to a

DISPOSITION

The order is reversed and the matter is remanded for further proceedings consistent with this opinion.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.

misdemeanor, regardless of the type of building entered. We do not construe Proposition 47 in a manner that would render an entire statutory provision superfluous. (See *People v. Hall* (2016) 247 Cal.App.4th 1255, 1266.)