IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. MARK ANTHONY COLBERT Defendant and Appellant.	No. S238954 (Sixth District Court of Appeal Case No. H042499)

APPELLANT'S OPENING BRIEF ON THE MERITS

ON APPEAL FROM AN ORDER AFTER JUDGMENT OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA
THE HONORABLE LINDA CLARK, JUDGE
CASE NO. 206805

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By appointment of the California Supreme Court
Under the Sixth District Appellate Program

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	)	
Plaintiff and Respondent,	)	
	)	
vs.	)	
	)	(Sixth District
MARK ANTHONY COLBERT	)	Court of Appeal
	)	Case No.
Defendant and Appellant.	)	H042499)
	)	

APPELLANT'S OPENING BRIEF ON THE MERITS

ISSUE PRESENTED

This court granted review in the present case to consider the following issue:

> Does entry into a separate office area of a commercial establishment that is off-limits to the general public constitute an "exit" from the commercial part of the establishment that precludes the reduction of a second degree burglary conviction to misdemeanor shoplifting under Penal Code section 459.5?

STATEMENT OF THE CASE

Following his felony convictions for four counts of second degree burglary (Pen. Code §§ 459, 460, subd. (b))[1] in 1998, appellant was sentenced to two years and eight months in prison. (CT 1-2.)

On November 4, 2014, the voters enacted Proposition 47, "the Safe

[1] All further unspecified statutory references are to the Penal Code.

Neighborhoods and Schools Act," which went into effect the next day. Proposition 47 created a new resentencing provision under section 1170.18 and added section 459.5, defining the crime of "shoplifting" and designating the crime as a misdemeanor.

On May 6, 2015, appellant, acting in propria persona, filed a "Petition to Redesignate Felony Conviction As Misdemeanor" pursuant to section 1170.18, subdivision (f), alleging his felony second degree burglary convictions in case No. 206805 should be redesignated as misdemeanor shoplifting convictions. (CT 7.)

On May 12, 2015, a denial order, authored by the Honorable Linda Clark, Judge of the Superior Court, was filed. (CT 12-13.) The order denied appellant's petition on the ground that the offenses—four counts of second degree burglary (§§ 459, 460, subd. (b))—were ineligible for redesignation under section 1170.18, subdivisions (a)-(b) because they did not constitute "shoplifting" under section 459.5. (*Ibid.*) The order reasoned that the offenses were based upon entries into "private . . . office areas" rather than entries into commercial establishments that were open during business hours.[2] (CT 13.)

On June 12, 2015, appellant filed a timely notice of appeal

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[2] The order also reasoned the value taken in one of the counts exceeded $950, and, because the counts involved the same modus operandi, the value taken in that case "strongly suggested" that appellant intended to take over $950 in each case. (CT 13.)

challenging the denial of his redesignation petition. (CT 15.) On November 9, 2016, the appellate court issued a published decision, wherein the majority of the court held appellant's conduct did not constitute misdemeanor shoplifting, and Presiding Justice Rushing disagreed with the majority's reasoning in a dissenting opinion. (Slip opn. at pp. 1-8; diss. opn. at pp. 1-3.)[3] On November 18, 2016, the court of appeal modified the opinion with no change in judgment.

STATEMENT OF THE FACTS[4]

Facts Relating to Count 1[5]

On December 26, 1996, appellant and his accomplice entered a convenience store of a Shell gas station in Campbell. (Slip opn. at p. 2.)

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[3] The dissent noted its conclusion that appellant's conduct constituted misdemeanor shoplifting presumed the property taken or intended to be taken did not exceed $950. (Diss. opn. at p. 3.) Specifically, the dissent concluded counts 1 and 2 constituted misdemeanor shoplifting because the value taken in each of those counts did not exceed $950. (*Ibid.*) As to count 4, the dissent stated that remand for further proceedings was necessary to determine whether the amount intended to be taken exceeded $950. (*Ibid.*) The dissent also noted that further proceedings were required to determine whether appellant posed a risk of danger to society. (*Ibid.*)

[4] On November 4, 2015, the Court of Appeal denied appellant's request for judicial notice of the trial record in Santa Clara County Superior Court case No. 206805. (See slip opn. at p. 1, fn. 2.) Instead, on its own motion, the appellate court took judicial notice of its unpublished opinion on the direct appeal from that case. (*Ibid.*) It also derived the amounts taken in each burglary from the trial court's order denying appellant's petition for redesignation. (Slip opn. at p. 2, fn. 3.)

[5] Since count 3 involved a taking over $950, count 3 does not constitute shoplifting under section 459.5. Thus, the facts relating to that count are not discussed.

Appellant spoke with the clerk about lottery tickets while his accomplice took about $300 from the store's back office. (*Ibid.*)

Facts Relating to Count 2

On December 30, 1996, appellant and his accomplice entered a 7-Eleven store in Sunnyvale during business hours. (Slip opn. at p. 2.) While appellant scratched lottery tickets, his accomplice went into a hallway that led to a back office and took roughly $318. (*Ibid.*)

Facts Relating to Count 4

On January 27, 1997, appellant and his accomplice entered a 7-Eleven store in Los Gatos during business hours. (Slip opn. at p. 3.) While appellant asked for lottery tickets, his accomplice went to the back office. (*Ibid.*) An employee discovered the accomplice inside the office, before the accomplice took anything. (*Ibid.*)

STATEMENT OF THE ARGUMENT

The present case focuses on whether entry into an area within a commercial establishment that is off-limits to the general public constitutes an "exit" from the commercial part of the establishment that precludes the reduction of a second degree burglary conviction to misdemeanor shoplifting under section 459.5.

The majority of the appellate court erred in holding appellant's conduct did not constitute misdemeanor shoplifting. As explained by

dissenting Presiding Justice Rushing, appellant was not precluded from having his second degree burglary convictions reduced to misdemeanor shoplifting convictions merely because the thefts occurred in areas of the commercial establishments that were off-limits to the public.

Since three of appellant's second degree burglary convictions constituted misdemeanor shoplifting under section 459.5, those convictions must be reduced accordingly.

ARGUMENT

ENTRY INTO A SEPARATE OFFICE AREA OF A COMMERCIAL ESTABLISHMENT THAT IS OFF-LIMITS TO THE GENERAL PUBLIC DOES NOT PRECLUDE THE REDUCTION OF A SECOND DEGREE BURGLARY CONVICTION TO MISDEMEANOR SHOPLIFTING UNDER SECTION 459.5, AND THUS, APPELLANT'S CONVICTIONS FOR SECOND DEGREE BURGLARY MUST BE REDUCED TO MISDEMEANOR SHOPLIFTING.

A. Introduction

Here, the majority of the appellate court erred in upholding the trial court's denial of appellant's petition to redesignate his felony convictions as misdemeanors pursuant to Proposition 47. This is so because the second degree burglary convictions at issue constituted misdemeanor shoplifting under section 459.5 as the convictions were based on entries into commercial establishments that were open during business hours and involved thefts of property valued at $950 or less. The fact that the thefts ultimately occurred in areas that were off-limits to the public does not

change the result: the convictions were based on entries into commercial establishments, not on discrete entries into separate areas within the commercial establishments. Even if this Court holds the convictions were based on discrete entries into non-commercial areas of the commercial establishments, appellant's conduct still met the definition of misdemeanor shoplifting because these "non-commercial" areas were *part of* the commercial establishments.

B. Basic Legal Principles

The basic rules for statutory construction are well settled. "As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose." (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) "We begin with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent." (*People v. Watson* (2007) 42 Cal.4th 822, 828; accord *Catlin v. Superior Court* (2011) 51 Cal.4th 300, 304.) The plain meaning controls if there is no ambiguity in the statutory language. (*People v. King* (2006) 38 Cal.4th 617, 622.) If, however, "the statutory language may reasonably be given more than one interpretation, ' " 'courts may consider various extrinsic aids, including the purpose of the

statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute.' " ' " (*Ibid.*; see also *People v. Cornett* (2012) 53 Cal.4th 1261, 1265.) " 'In interpreting a voter initiative . . . we apply the same principles that govern statutory construction. [Citation.]' " (*People v. Briceno* (2004) 34 Cal.4th 451, 459.)

" 'On November 4, 2014, the voters enacted Proposition 47, "the Safe Neighborhoods and Schools Act" (hereafter Proposition 47), which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).)' " (*People v. Contreras* (2015) 237 Cal.App.4th 868, 889, citation omitted.) Proposition 47 created a new resentencing provision under section 1170.18. (*Id.* at p. 891.) Under section 1170.18, subdivision (f), "[a] person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors."

In addition, Proposition 47 added section 459.5 to the Penal Code. (*Contreras, supra,* 237 Cal.App.4th at p. 890.) Section 459.5 defines the crime of "shoplifting" and designates the crime as a misdemeanor. Section

459.5 states in relevant part: " . . . shoplifting is defined as entering a commercial establishment with intent to commit larceny while the establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with the intent to commit larceny is burglary."

Because this claim raises an issue of statutory interpretation, the de novo standard of review applies. (*Doe v. Brown* (2009) 177 Cal.App.4th 408, 417 [de novo standard of review applied to a claim based on an issue of statutory interpretation].)

C. Entry Into An Area of A Commercial Establishment that Is Off-Limits To the General Public Does Not Constitute An "Exit" From the "Commercial" Part of the Establishment Such that Reduction of A Second Degree Burglary Conviction to Misdemeanor Shoplifting Is Precluded.

In this case, appellant's conduct constituted misdemeanor shoplifting under the plain language of section 459.5 since the offenses at issue were based on appellant's entries into commercial establishments during business hours and involved takings or the intended taking of property not exceeding $950. This is so even though the thefts ultimately occurred in areas of the commercial establishments that were off-limits to the public.

First, when appellant entered the commercial establishments with the requisite intent, the shoplifting offenses were complete. (See *People v.*

Ravenscroft (1988) 198 Cal.App.3d 639, 643 ["a burglary is complete upon the slightest partial entry of any kind, with the requisite intent, even if the intended larceny is neither committed nor even attempted"]; diss. opn. at p. 2 [shoplifting offenses were complete upon entry into each establishment, and appellant and his accomplice's subsequent actions were only relevant to prove their preexisting intent to commit larceny].) This is so because shoplifting requires nothing more than entry into a commercial establishment during business hours with the intent to take property valued at less than $950. In other words, the offenses were not based on appellant's accomplice's entries into the office areas of the commercial establishment. There was no "exiting" the commercial part of the establishment by entering an interior, non-commercial part of the establishment. Instead, the commission of the thefts in interior office areas merely evidenced appellant's larcenous intent when he made his initial entries into the commercial establishments. Thus, it is irrelevant that the thefts ultimately occurred in interior office areas.

Even if this Court determines the convictions were based upon the entries into the interior office areas within the establishments rather than the initial entries into the commercial establishments, the entries into these discrete areas still constituted misdemeanor shoplifting because the areas were part of the commercial establishment. The stores were indisputably

commercial establishments. The *entire* store facility—including each room within the establishment—was a commercial establishment. (*People v. Hallam* (2016) 3 Cal.App.5th 905, 912-913 [recognizing that "commercial establishment" does not apply to a single room or area within a venue, but to an entire facility]; see also *In re J.L.* (2015) 242 Cal.App.4th 1108, 1115-1116 [applying a commonsense interpretation of "commercial establishment," not to a single room or area within a commercial venue, but to an entire school facility, and holding a high school was not a commercial establishment as required for shoplifting under section 459.5].) Therefore, the office areas, though off-limits to the general public, remained part of the commercial establishments. Thus, entries into these areas of the commercial establishments did not preclude reduction of appellant's second degree burglary convictions to misdemeanor shoplifting.

Furthermore, the language of section 459.5 gives "no indication that shoplifting can occur only in specific areas of a commercial establishment," nor "any requirement that the business's commercial activity must be taking place in the area from which the theft occurs in order to qualify the offense as shoplifting." (*Hallam, supra,* 3 Cal.App.5th at p. 912 [appellant's conduct constituted misdemeanor shoplifting where the appellant entered a store through the back entrance and committed theft of an air compressor in an employee rest room].) Neither section 459.5 nor

any other authority excludes nonpublic areas from the definition of a commercial establishment. By holding a "theft would qualify as shoplifting only if it occurred in an area of the commercial establishment open to the public where merchandise is sold[,]" this Court would effectively add "an element to the offense that is absent from the plain language of the statute itself[.]" (*Hallam, supra,* 3 Cal.App.5th at p. 912.) This addition of an element to the offense would violate a "bedrock" rule of statutory construction that, where " 'the law-maker gives us an express definition, we must take it as we find it . . . .' " (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 804, quoting *Bird v. Dennison* (1857) 7 Cal. 297, 307.) Thus, the offenses constituted misdemeanor shoplifting even if they were based upon the entries into the interior office areas since the offenses are still based on entries into commercial establishments.

Moreover, the directive that courts must "not adopt a strained or absurd interpretation in order to create an ambiguity where none exists" also compels this holding. (*Reserve Ins. Co. v. Pisciotta* (1982) 30 Cal.3d 800, 807.) Should this Court hold a theft based on an entry into a non-commercial part of a commercial establishment does not constitute misdemeanor shoplifting, a theft based on the entry into a commercial part of a non-commercial establishment should constitute misdemeanor shoplifting. For example, the taking or intended taking of goods valued at

less than $950 from a cafeteria of a hospital or a school would constitute shoplifting, even though hospitals and schools are not commercial establishments, because the theft occurred in a commercial area of a non-commercial establishment. This sectioning off of establishments into their commercial and non-commercial parts would constitute a strained interpretation of the term "commercial establishment" and could be characterized as an absurd result. (*People v. McGraw* (1983) 141 Cal.App.3d 618, 622 ["Statutes must be given a reasonable and common sense construction that leads to a wise policy and avoids absurd results."].) Therefore, sound policy demands that appellant's conduct met the definition of misdemeanor shoplifting under section 459.5 as it involved the entry into a commercial establishment.

Furthermore, the electorate expressly directed that Proposition 47 be construed "broadly . . . to accomplish its purposes." (Cal. Voter Information Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, p. 74, § 15, at <http://vig.cdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf> [as of March 30, 2017]; see also *id.* at p. 74, § 18 [act shall be "liberally construed to effectuate its purposes"].) Section 3 of the initiative specifies it was the "purpose and intent of the people of the State of California to: . . . [r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession," and "[a]uthorize

consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors." (*Id.* at p. 70, § 3, subds. (3) & (4).) Adopting a definition of "commercial establishment" that arbitrarily limits the areas of the commercial establishment to the "commercial" areas would frustrate the electorate's stated purposes and result in the continued incarceration of individuals who committed petty theft crimes. Accordingly, this Court should construe section 459.5 broadly to include as shoplifting thefts from "non-commercial" areas of commercial establishments.

Finally, there were no specific characteristics of these office areas that indicated they shared the same level of privacy as a non-commercial, stand-alone structure "such that the offense should be deemed burglary rather than shoplifting." (*Hallam, supra,* 3 Cal.App.4th at p. 914 [finding guidance in *People v. Garcia* (2016) 62 Cal.4th 1116, which held a burglar "may be charged with multiple burglaries [where the burglar enters a structure with the requisite intent and subsequently enters a room within that structure with such intent] only if the subsequently entered room provides a separate and objectively reasonable expectation from intrusion relative to the larger structure."].) The separate office areas here remained part of the commercial establishment since there was no expectation of privacy distinct from the commercial establishment that rendered the areas

entirely separable from the commercial establishment. (See *Garcia, supra,* 62 Cal.4th at pp. 1119-1120 ["Such a separate expectation of privacy and safety may exist where . . . the internal space is owned, leased, occupied, or otherwise possessed by a distinct entity; or that the room or space is secured against the rest of the space within the structure, making the room similar in nature to . . . stand-alone structures"].) Therefore, even if the offenses were based on distinct entries into the separate office areas, appellant's conduct occurred within the commercial establishments.

In contrast, *People v. Stylz* (2016) 2 Cal.App.5th 530 concerned when a discrete area within a commercial establishment becomes *separate from* the commercial establishment. In that case, the appellate court held the defendant was properly convicted of second degree burglary based on his forced entry into a private locked storage unit, located within a public storage facility. (*Id.* at p. 534.) The *Stylz* court reasoned that the storage unit was leased by an individual who was separate from the commercial entity that owned the storage facility, there was no evidence suggesting the individual "rented the storage unit to engage in commerce[,]" and no indication that the locked storage unit was open to the public during business hours. (*Id.* at pp. 534-535.)

Here, on the other hand, the separate office areas were *part of* the commercial establishments even though they were off-limits to the public.

The office areas were not leased out to private individuals who were separate from the commercial establishment. Instead, the office areas were designated for persons involved in the operation of the commercial establishment to advance the operation of the commercial establishment. Thus, the office areas in this case, although discrete areas within the commercial establishment, were integrally part of the commercial establishments and not separate from the greater commercial establishment. Therefore, the offenses constituted misdemeanor shoplifting even if the offenses were based upon the entries into areas within the commercial establishments that were off-limits to the general public.

In sum, since appellant's second degree burglary convictions were based on entries into commercial establishments during business hours and involved less than $950, the offenses at issue constituted shoplifting under section 459.5. Therefore, the trial court erred in denying appellant's petition to redesignate these convictions as misdemeanor shoplifting convictions.

CONCLUSION

For the aforementioned reasons, this Court should reverse the trial court's denial of appellant's petition for redesignation because his conduct constituted misdemeanor shoplifting offenses under section 459.5.

DATED: March 30, 2017

Respectfully submitted,

By: _____
Kimberly Taylor
Attorney for Appellant
Mark Anthony Colbert

CERTIFICATE OF WORD COUNT

I certify that, according to my word processing software, this petition contains 3,294 words excluding the cover page, tables and the case caption on page 1.

I declare under penalty under the laws of the state of California that this declaration is true and correct. Executed at Alameda, California on March 30, 2017.

KIMBERLY TAYLOR
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PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 1600 Broadway, Suite 300, Oakland, CA 94612. On the date shown below, I served the within ***APPELLANT'S BRIEF ON THE MERITS*** to the following parties hereinafter named by:

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I declare under penalty of perjury the foregoing is true and correct.
Executed this ___ day of April, 2017, at Alameda, California.

JONATHAN TAYLOR