IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 73048

HELEN NATKO,

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

District Court Case No. G-13-038863-A

Appellant's Opening Brief

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RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

HELEN NATKO is an individual and is not affiliated with any corporation.

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STATEMENT OF JURISDICTION

This is an appeal from a Jury verdict of conviction of two Class B Felonies under NRS 200.5092, 200,5099 –NOC50304 and NRS 205,0832, 205,0835.4 – NOC 55991, in Department XIX of the Eighth Judicial District Court, Clark County, Nevada

The Supreme Court and Court of Appeals have jurisdiction of this appeal pursuant to NRAP Rule 3B, NRS 177.015(1)(b), NRS 177.015(3), and NRS 177.025.

The Jury Verdict in this case was handed down on April 11, 2017. Appellant's Notice of Appeal was filed on May 5, 2017.

Counsel certifies that this appeal is from a final verdict in this case.

ROUTING STATEMENT

This is an appeal from the conviction of two class B felonies. The Court of Appeals should be assigned this case because this is is not a death penalty case that would automatically be assigned to the Supreme Court under NRAP 17(a)(2) nor is this a Class A felony as referenced in the first sentence of NRAP 17(b)(1). The last sentence of NRAP 17(b)(1) is confusing and inconsistent with the two sections referenced above.

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The sole issue on appeal is the Trial Court's Jury Instruction Number 18, which Appellant contends was a misstatement of law that led directly to the conviction of the Appellant.

II. STATEMENT OF THE CASE

Two criminal charges were filed against Appellant Helen Natko for her withdrawal of funds from her joint bank account with Delford Mencarelli on July 5, 2013. AA00001 – 00002, AA00033, AA00083, and AA00193. Appellant redeposited all of the funds twenty-six (26) days later into the same joint bank account on July 31, 2013. AA00033 and AA00193. The State charged Appellant with two class B felonies of Exploitation of a Vulnerable Person and Theft based entirely on the July 5, 2013 withdrawal from the Joint Account. AA00001 – 00002, AA00003, and AA00083 – 00084. The result in District Court was a jury verdict of guilty against Appellant on both criminal charges. AA00166 – 00168.

Appellant was sentenced to 24 months to 96 months in prison on Count 1, 12 months to 48 months on count 2, and both sentences were suspended. Appellant was placed on probation for up to five years, ordered to pay a $10,000 fine, ordered to pay $25 administration fee, ordered to pay $3.00 DNA collection fee, and ordered to pay $150 DNA Analysis fee. AA00160 – 00162.

Appellant specifically and timely objected to Jury Instruction No. 18. AA00077 – 00096. Appellant also verbally moved the Court for a directed verdict

after the State's case was completed, which was denied. Appellant also filed a post-trial Motion to Set Aside the Verdict and Enter Judgment of Acquittal, which was denied. AA00102 – 00144, AA00150 – 00156, and AA00157.

III. STATEMENT OF THE FACTS

Appellant is 79 years old. AA00102. Appellant and Delford Mencarelli ("Mr. Mencarelli") began an exclusive romantic relationship in Pennsylvania on July 5, 1982 that lasted for thirty-three (33) years until Mr. Mencarelli's death on July 3, 2015. AA00102 - 00103, AA00033, and AA00038. Appellant's and Mr. Mencarelli's spouses both died in 1981. AA00102 - 00103 and AA00033. Mr. Mencarelli was 84 years old when he died on July 3, 2015. AA00102 - 00103, AA00033, and AA00038. After dating Mr. Mencarelli for ten years, Appellant moved to Las Vegas by herself in 1992, leaving Mr. Mencarelli behind in Pennsylvania. AA00102 - 00103 and AA00033. Mr. Mencarelli eventually moved to Las Vegas in 2002, ten years later, for the sole reason of being with Appellant. AA00102 - 00103 and AA00034. Mr. Mencarelli moved into Appellant's house, which she purchased herself and paid off on her own in 1994, and they resided there together until Mr. Mencarelli's death on July 3, 2015. AA00102 - 00103, AA00033, and AA00038.

On July 19, 2012, ten years after Mr. Mencarelli moved in with Appellant in Las Vegas, Mr. Mencarelli and Appellant both executed durable powers of attorney for health care purposes, naming each other as their respective Power of

Attorney. AA00196 – 00199 and AA00200 – 00204. Four days later, on July 23, 2012, Mr. Mencarelli added Appellant as a joint owner of his bank account at the IBEW Plus Credit Union ("the Bank"). AA00169 – 00194 and AA00195. The account numbered XXXX4389 is hereinafter referred to as "the Joint Account." A copy of the Bank's signature page/contract executed by Mr. Mencarelli and Appellant was admitted at trial as both State's Exhibit 10 and Defendant's Exhibit "A". AA00195. The Bank's signature page/contract specifically states:

> The Credit Union is hereby authorized to recognize any of the signatures below in the payment of funds or the transaction of any business for this account. **The Joint owners of this account hereby agree with each other** and with the Credit union **that all sums, now, heretofore, or hereafter paid in on shares by any or all said joint owners and shall be owned by them jointly, and be subject to the withdrawal or receipt of any of them.** (emphasis added) AA00195

One year after Mr. Mencarelli made Appellant a joint owner of the Joint Account, on July 5, 2013, Appellant withdrew $195,000 from the Joint Account and deposited the $195,000 into her own account. AA00001 – 00003, AA00033, and A00193. Twenty-six days later on July 31, 2013, Appellant re-deposited the $195,000 to the Joint Account. AA00033 and A00193.

Cross Petitions for the appointment of Guardian for Mr. Mencarelli were filed by Appellant and Mr. Mencarelli's daughter, Terri Black, in July 2013. AA00037. Appellant ultimately prevailed and was appointed as Mr. Mencarelli's guardian in August 2014. AA00037.

Prior to Appellant being appointed as Mr. Mencarelli's Guardian in August 2014, Ms. Denise Comastro, a professional guardian, was appointed temporary guardian. AA00010. The $195,000 from the Joint Account was deposited into the Temporary Guardian's account. $229,000 held in a Pennsylvania joint account owned by Mr. Mencarelli and his daughter were also deposited into the temporary guardian's account. AA00010.

The Trial Court in the subject criminal case, over Appellant's counsel's objections, gave contrary and inconsistent Jury Instructions regarding the ownership of the Joint Bank account. AA00097 – 00100. On the one hand, the Trial Court instructed the jury that each joint owner of a joint bank account owned all the money in a joint account. AA00098 and AA00099. On the other hand, the Trial Court instructed the jury that despite joint ownership of all the money in a joint account, a joint owner of a joint account did not necessarily own the money in the joint account. AA00100.

The Trial Court gave Jury Instruction Number 16, which provided: "When a deposit has been made in the name of the depositor and one or more other persons, and in a form intended to be paid or delivered to any one of them, or the survivor or survivors of them, the deposit is the property of the persons as joint tenants." AA00098.

The Trial Court also gave Jury Instruction Number 18, which provided: "A person's status as a joint account holder does not by itself provide lawful

authority to use or transfer another's assets for their own benefit." AA00100.

Jury Instruction Number 18 is a misstatement of the law.

Appellant was convicted of Class B felonies of financial exploitation and theft for having withdrawn $195,000 from her Joint Account for 26 days in July 2013. AA00166 – 00168.

Appellant filed a Motion To Set Aside Verdict and Enter a Judgment of Acquittal, which was also denied. AA00102 – 00144, AA00150 - 00156, and AA00157.

IV. SUMMARY OF THE ARGUMENT

The Trial Court gave conflicting Jury Instructions to the Jury regarding the ownership and entitlement to funds in "joint bank account". The Trial Court instructed the jury that each joint owner of a joint bank account owned all the money in a joint account which is the law pursuant to NRS 100.085. At the same time, the Trial Court instructed the jury that each joint owner of a joint account did not necessarily own the money in the joint account. In giving the second instruction that conflicted with NRS 100.085, the Trial Court relied on the case of *Walch v. State*, 112 Nev. 25, 909 P.2d 1184 (1996), which was effectively over ruled by the Nevada Legislature's amendment of 100.085 in 1995.

The Appellant was ultimately convicted of withdrawing funds from her own joint bank account, which never could have happened had the jury been

properly instructed.

V. ARGUMENT

A. Standard Of Review

This Court's review of the propriety of the Trial Court giving Jury Instruction Number 18 is a *de novo* review. This Court has repeatedly held that it reviews *de novo* whether a jury instruction is a correct statement of the law. *Clancy v. State*, 129 Nev. 840, 845, 313 P.3d 226, 229 (2013); *Berry v. State*, 125 Nev. 265, 273, 212 P.3d 1085, 1091 (2009); *Cook v. Sunrise Hospital & Medical Center LLC*, 124 Nev. 997, 1003, 194 P.3d 1214, 1217 (2008); *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007).

B. Jury Instruction Number 18 Is In Direct Contradiction Of NRS 100.085, As Well As Jury Instruction Numbers 16 And 17, Which Are Quotes From NRS 100.085

The Trial Court gave Appellant's proposed Jury Instruction Numbers 16 and 17 without objection from the State. Jury Instruction Numbers 16 and 17 are direct quotes from NRS 100.085.

Jury Instruction Number 16 provided: "When a deposit has been made in the name of the depositor and one or more other persons, and in a form intended to be paid or delivered to any one of them, or the survivor or survivors of them, the deposit is the property of the persons as joint tenants." AA00098.

NRS 100.085(1) provides in pertinent part: "When a deposit has been made in the name of the depositor and one or more other persons, and in a form

intended to be paid or delivered to any one of them, or the survivor or survivors of them, the deposit is the property of the persons as joint tenants.

Jury Instruction Number 17 provided:

> The use by a depositor of any of the following words or terms in designating the ownership of an account indicates the intent of the depositor that the account be held in joint tenancy:
> (a) Joint;
> (b) Joint account;
> (c) Jointly held;
> (d) Joint tenants;
> (e) Joint tenancy; or
> (f) Joint tenants with right of survivorship. AA0099.

NRS 100.085(4) provides in pertinent part:

> [T]he use by the depositor of any of the following words or terms in designating the ownership of an account indicates the intent of the depositor that the account be held in joint tenancy:
> (a) Joint;
> (b) Joint account;
> (c) Jointly held;
> (d) Joint tenants;
> (e) Joint tenancy; or
> (f) Joint tenants with right of survivorship

Again, it is undisputed that Jury Instruction Numbers 16 and 17 are accurate statements of the law as they are direct quotes from NRS 100.085.

The State offered and the Trial Court gave Jury Instruction Number 18, which provided: "A person's status as a joint account holder does not by itself provide lawful authority to use or transfer another's assets for their own benefit." AA00100. The State's only support for this instruction was this Court's decision in *Walch v. State*, 112 Nev. 25, 909 P.2d 1184 (1996). The Trial Court relied on

Walch v. State in deciding to give Jury Instruction numbered 18. AA00077 - 00096.

A word by word analysis of the three Jury Instructions is not necessary. What the Trial Court did is instruct that a joint account owner owns all of the funds in a joint account regardless of who deposited the funds (Numbers 16 and 17), and at the same time, instructed that a joint account owner does not necessarily own all of the funds in a joint account. There is no question that Instruction 18 is contrary to Instructions 16 and 17, and therefore contrary to NRS 100.085. The Trial Court did not give any kind of instruction regarding how one would determine when a joint account is or is not an NRS 100.085 joint account. The reason, of course, is that there can be no such additional information or indicia under NRS 100.085.

The Trial Court's Instruction Number 18 was a clear misstatement of the law that is set forth in NRS 100.085 and should not have been given to the Jury. The Appellant was an undisputed owner of the subject Joint Account, and by statute and contract, had the right to remove all funds from the Joint Account.

C. As A Joint Owner Of The Subject Bank Account, Appellant Owned The Contents Of The Account And Could Not Be Convicted For Withdrawing The Same

The Joint Account signature page/contract includes the word "joint" 6 different times, including "joint owners," "joint member," and "joint share agreement." AA00195. The Appellant is specifically listed as the "Joint

Member" both on the information block and on Appellant's signature block on the Joint Account signature page/contract. AA00195. Accordingly, under NRS 100.085(4), the multiple uses of the word "Joint" "indicates the intent of the depositor (Mr. Mencarelli) that the account be held in joint tenancy". Under NRS 100.085(1), "the deposit is the property of the persons as joint tenants," and "the account or proceeds from the account are owned by the persons named, and may be paid or delivered to any of them during the lifetime of all."

Unfortunately, the Trial Court was persuaded by the State's citation to this Court's opinion in *Walch v. State*, 112 Nev. 25, 909 P.2d 1184 (1996). However, the portions of *Walch v. State* that were relied upon by the Trial Court and its sister case *Starr v. Rousselet*, 110 Nev. 706, 877 P.2d 525 (1994), were legislatively overruled by the Nevada Legislature's amendment to NRS 100.085 in 1995, following this Court's ruling in *Starr v. Rousselet*.

Walch v. State was decided by this Court in 1996, after the amendment to NRS 100.085. Perhaps the Trial Court believed that because *Walch v. State* was decided after the 1995 amendment of NRS 100.085 that this Court in *Walch v. State* was interpreting the amended statute. However, that is not the case. The facts of *Walch v. State* occurred in December 1991 and 1992 when the joint account in that case was created and the funds were withdrawn. *Walch v. State* was decided by the district court and this Court under the old statute. Accordingly, the language in *Walch v. State* relied upon by the Trial Court in this

case, specifically “mere status as a party to the joint accounts did not provide her with lawful authority to use Nell's assets for her own benefit,” is a misstatement of law under NRS 100.085 as amended in 1995.

This Court in the recent case of *Pedroli Ranches Partnership v. Pedroli*, 2017 Nev. App. Unpub. LEXIS 299, 2017 WL 2119474, , docket number 67469 (May 9, 2017)(unpublished decision), specifically discussed the 1995 amendment to NRS 100.085 following this Court’s decision in *Starr v. Rousselet*, and held that all one needed to do to create an NRS 100.085 joint account was use the word “joint” on the bank signature card as prescribed by NRS 100.085(4). This Court in *Pedroli* held:

> In denying Barbara's motion for a new trial, the district court relied on *Starr v. Rousselet*, which held that "a simple reference to a 'joint' account and to joint access or control on a bank signature card will not suffice for purposes of establishing a joint tenancy under NRS 100.085[(1)]." 110 Nev. 706, 712, 877 P.2d 525, 530 (1994) (footnote omitted). The district court reasoned that labeling an account "JT-OR" was insufficient to invoke the presumption of joint tenancy under NRS 100.085(1), and thus it was unnecessary to give the clear and convincing instruction.
>
> The district court, however, failed to recognize that *Starr* was explicitly rejected by the Nevada Legislature in 1995. *See* Legislative Counsel's Digest, 68th Leg., S.B. 424 (1995) (noting the Legislature found *Starr* to be "contrary to the traditional creation of a joint tenancy [account]"). **In response to the *Starr* decision, the Legislature added NRS 100.085(4) which holds that labeling an account a joint account indicates that the depositor(s) intended the account be held in joint tenancy. *See* NRS 100.085(4).** (emphasis added). *Id.*
>
> This Court in *Pedroli* went on to state that once it is determined that an

account was created using the word "joint," that a rebuttable presumption is created that requires the party objecting to the joint account to prove by clear and convincing evidence that there was a different intent. *Id.* This shifting of the burden of proof is irrelevant in this case as the State never contested the existence of the Joint Account. In its argument opposing the Appellant's Objection to Jury Instruction 18, the State made it clear that it had not even attempted to characterize, nevertheless prove, that the establishment of the Joint Account was a crime or was in any way improper. The State admitted that its case was based solely on the Appellant's withdrawal of funds from her Joint Account on July 5, 2013 and the *Walch v. State* quote which was legislatively overruled in 1995:

> Mr. Raman: The taking was when Helen took the $195,000 of Del's money from the joint account and put it into her own sole account. That's why we've charged July 5th, 2013 as being the crime. For us to backwards prove, well, what was her criminal intent at the time a joint account was created, well, now you have circumstances where two people create a joint account years ago, that account's never funded. Then somebody loses capacity, as they have in this case. The person who's taking advantage, transfers money from another account of theirs and then takes it. Now we have to prove all of a sudden 20 years ago that that account was made for this purpose? That's totally contrary to all common decency.
> That would allow theft to reign supreme. Now, obviously, Walch does not stand for what the defense is purporting it to stand for and I believe Your Honor is correct that the Instructions as they're written is how they should stand. AA00083 - 00084.

Further, the final holding in *Walch v. State* showed that the primary issue in that case involved Ms. Walch stealing money from the sole account of the victim, Ms. Laird, and then seeking to save herself by depositing stolen funds

into a separate joint account that Ms. Walch had with Ms. Laird. This Court held that "Walch's status as joint holder of the two accounts did not preclude the jury from finding that she stole funds which passed through the accounts." *Id*. 112 Nev. at 34, 909 P.2d at 1189.

In the case at bar, the Appellant was never charged with nor accused of depositing stolen funds into the Joint Account. Instead Appellant was accused and convicted of withdrawing funds from her uncontested Joint Account, which she had full access to for over a year before she removed the funds on July 5. 2013. As an owner of the Joint Account, Appellant could not have committed any crime by withdrawing funds from her own bank account.

VI. CONCLUSION

Appellant simply withdrew funds from her own Joint Account, which she was lawfully entitled to do under NRS 100.085 and the Bank's signature page/contract executed by Mr. Mencarelli and Appellant. Appellant respectfully maintains that Jury Instruction Number 18 is a misstatement of law that allowed the Jury to ignore NRS 100.085. But for the Trial Court giving Jury Instruction Number 18 and its and reliance on *Walch v. State*, the State's case against

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Appellant would had to have been dismissed after the State completed its case, or at least after the verdict when Appellant moved the Court to do so.

DATED this 14th day of December, 2017.

FOLEY & OAKES, PC

By:**/s/ Daniel T. Foley**
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32 (a)(4), the typeface requirements of NRAP 32 (a)(5) and the type style requirements of NRAP 32 (a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14pt font and using Times New Roman.

I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because excluding the parts of the brief exempted by NRAP 32(a)(7), it is proportionately spaced, has a typeface of 14 points or more and contains 3,519 words.

Finally, I hereby certify that I have read this Appellant Brief and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all

applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 14th day of December, 2017.

FOLEY & OAKES, PC

/s/ Daniel T. Foley
Daniel T. Foley, Esq.

CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26, I hereby certify that I am an employee of Foley & Oakes, PC, and that on the 14th day of November, 2017, I served the following document(s):

APPELLANT'S OPENING BRIEF

I served the above-named document(s) by the following means to the person s as listed below:

[x] **By Electronic Transmission through the ECF System**:

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[ ] **By United States Mail**, postage fully prepaid to person(s) and addresses as follows:

[ ] **By Direct Email**:

[ ] **By Facsimile Transmission:**

I declare under the penalty of perjury that the foregoing is true and correct.

_/s/ Liz Gould____
An employee of FOLEY & OAKES, PC