IN THE SUPREME COURT OF THE STATE OF NEVADA

GABRIEL IBARRA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

CASE NO: 69617

FAST TRACK RESPONSE

1. Name of party filing this fast track response: The State of Nevada

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

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3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

Same as (2) above.

4. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal: None.

5. Procedural history.

On August 18, 2015, Gabriel Ibarra was charged by way of Information with one count of Larceny From the Person (Category C Felony – NRS 205.270 – NOC 56019). I Appellant's Appendix ("AA") 13-15.

On September 18, 2015, Ibarra filed a Petition for Writ of Habeas Corpus challenging the sufficiency of the evidence as to the charge of Larceny From the Person. I AA 16-32. On October 2, 2015, the State filed a Return to Writ of Habeas Corpus. I AA 56-62. On October 8, 2015, Ibarra's Petition was denied. I AA 162.

Ibarra's jury trial commenced on October 19, 2015. I AA 170. On October 20, 2015, Ibarra was found guilty of one count of Larceny From the Person. I AA 119. On December 10, 2015, Ibarra was sentenced to the Nevada Department of Corrections for a maximum of 36 months and a minimum of 14 months. I AA 135-136. Ibarra received 133 days credit for time served. I AA 136. A Judgment of Conviction was filed December 18, 2015. I AA 135-136.

On January 15, 2016, Ibarra filed a Notice of Appeal. I AA 137-139. Ibarra filed the instant Fast Track Statement ("FTS") on March 1, 2016. The State responds as follows.

6. Statement of Facts.

At approximately 2:00 am on the morning of July 31, 2015, Evangelia Mantikas was waiting for the bus near Boulder Highway and Flamingo. II AA 299. Ibarra approached the bus stop and sat down next to Mantikas, who was texting with her iPhone. II AA 299-300. Ibarra asked to borrow Mantikas' phone. II AA 299-301, 305. Mantikas dialed the number for Ibarra and handed him her phone. II AA 301-303. Ibarra initially put the phone up to his ear, while holding the phone in the

hand closest to Mantikas, however within seconds Ibarra switched the phone to his other hand, mumbled something and got up to walk away. II AA 303-304, 306, 308. When Mantikas got up to follow Ibarra, he took off running away from her. II AA 303-304.

Mantikas lost sight of Ibarra once he began running. II AA 305. Mantikas asked a couple standing nearby for help. II AA 308. Together with the couple and Mantikas' girlfriend, whom she had called from the couple's phone, Mantikas began tracking the location of her phone using the "Find My iPhone" app. II AA 309-310, 339340. Mantikas also called police and was able to provide them with updated information about the phone's location based on the app. II AA 309-313, 349-350, 393-398.

Eventually, police located Ibarra and subsequently found Mantikas' phone in a bush a short distance from his location. II AA 404. Later, police informed Mantikas they had located her phone, and Ibarra. II AA 312-314, 403. Police subsequently conducted a show up where Mantikas positively identified Ibarra as the person who had stolen her phone. II AA 314, 383-385.

Mantikas' phone was eventually returned to her, at which time she noticed the number on her phone had been changed to the same number Ibarra initially had her dial. II AA 317-318.

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7. Issue(s) on appeal.

I. WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT IBARRA'S CONVICTION FOR LARCENY FROM THE PERSON

8. Legal Argument, including authorities:

I. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT IBARRA'S CONVICTION FOR LARCENY FROM THE PERSON

Ibarra argues there was insufficient evidence presented at trial to sustain his conviction for larceny from the person.[1] "In reviewing evidence supporting a jury's verdict, this court must determine whether the jury, acting reasonably, could have been convinced beyond a reasonable doubt of the defendant's guilt by the competent evidence. Where conflicting testimony is presented, the jury determines what weight and credibility to give it." Braunstein v. State, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002). "On appeal, the issue is not whether the Supreme Court would have found defendant guilty, but whether the jury properly could." Anstedt v. State, 89 Nev. 163, 165, 509 P.2d 968, 969 (1973).

"When reviewing a criminal conviction for sufficiency of the evidence, this [C]ourt determines whether *any* rational trier of fact could have found the essential

[1] Notably, Ibarra does not dispute the facts underlying his conviction and in fact concedes he committed a crime. FTS 8. However, Ibarra appears to argue the crime *charged* was improper as there was not a taking "from the person" pursuant to NRS 205.270, therefore there was insufficient evidence to support his conviction. FTS 5, 8. As such, the State will solely address this issue.

elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution." Brass v. State, 128 Nev. Adv. Op. 68, ____, 291 P.3d 145, 149-50 (2012) (internal citations omitted) (emphasis added). Moreover, this Court has held it will not disturb a jury verdict on appeal where there is substantial evidence that reasonably supports a finding of guilt beyond a reasonable doubt. Furbay v. State, 116 Nev. 481, 485, 998 P.2d 553, 556 (2000). In rendering its verdict, a jury is free to rely on circumstantial evidence. Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980).

This Court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). In the instant case, substantial evidence was presented by the State at trial as to identification and the jury was wholly justified in reaching its verdict beyond a reasonable doubt.

Ibarra was found guilty of one count of larceny from the person. NRS 205.270 provides:

1. A person who, under circumstances not amounting to robbery, with the intent to steal or appropriate to his or her own use, takes property from the person of another, without the other person's consent, is guilty of:
    a. If the value of the property taken is less than $3,500, a category C felony and shall be punished as provided in NRS 193.130; or
    b. If the value of the property taken is $3,500 or more, a category B felony and shall be punished by imprisonment in the state prison for a

> minimum term of not less than 1 year and a maximum term of not more than 10 years, and by a fine of not more than $10,000.

Here, substantial evidence existed to convict Ibarra of larceny from the person. Mantikas testified that on the morning of July 31, 2015, she was waiting for the bus near Boulder Highway and Flamingo. II AA 299. Ibarra approached the bus stop she was at and sat down next to Mantikas, who was texting with her iPhone. II AA 299-300. Ibarra asked to borrow Mantikas' phone. II AA 299-301, 305. Mantikas testified that she dialed the number for Ibarra and handed him her phone. II AA 301-303. Ibarra initially put the phone up to his ear, while holding the phone in the hand closest to Mantikas, however within seconds Ibarra switched the phone to this other hand, mumbled something and got up to walk away. II AA 303-304, 306, 308. Mantikas testified that she got up to the follow Ibarra, however he ran away from her at which point Mantikas lost sight of him. II AA 303-304.[2] Thus, based on the testimony at trial there was sufficient evidence for the jury to make the determination beyond a reasonable doubt that Ibarra committed the crime of larceny from the person.

[2] Notably, Mantikas further testified that after her phone was returned to her, the number on her phone had been changed to the same number Ibarra initially had her dial. II AA 317-318.

Ibarra cites to Terral v. State, 84 Nev. 412, 414, 442 P.2d 465, 466 (1968), for the proposition that the taking in this case does not constitute a larceny from the person. Terral states:

> It is important to restrict the coverage of NRS 205.270 to pickpockets, purse snatchers, jewel abstracters and the like, since larceny from the person is a felony, and the value of the property taken is immaterial so long as it has some value. The gravaman of the offense is that the person of another has been violated and his privacy directly invaded. Thus, an item of little value, $ 100 or less, if snatched from the person of another will subject the offender to punishment as a felon, whereas the same item, if taken from his "presence," and not from his person, would constitute the misdemeanor of petty larceny.

Id. at 414, 442 P.2d at 466. Although Terral used the term "snatched" to describe taking of property from another, the State notes that most snatching would require the use of some force and as such, would rise to the level of a robbery. In contrast, most larcenies from the person rely on stealth, distraction or deceit. In Terral, the defendant stole several gaming chips from a rack on a craps table, while the victim, who was gambling at the table, was in the immediate vicinity. Id. at 413, 442 P.2d at 465. This Court determined that the taking in Terral did not constitute a larceny from the person because the property was taken from the immediate presence of the victim, and his constructive possession of the chips was insufficient to satisfy the "from the person" language of the statute.[3] Id.

[3] Notably, Terral has been criticized by several other jurisdictions due to a split in the interpretation of common law. States such as Nevada strictly interpret the

Here, Ibarra's reliance on Terral is misplaced. Unlike the victim in Terral, Mantikas' phone *started on her person akin to a purse snatching or pickpocket*, rather than merely within her constructive possession, at the time she was approached by Ibarra. I AA 299-301, 305. Ibarra, using a ruse, subsequently took Mantikas' phone *from her hand*. II AA 301-303. Thus, this was clearly a taking pursuant to NRS 205.270.

Ibarra argues a taking did not occur from Mantikas' "person" because he did not intend to deprive Mantikas of the phone until after she relinquished possession, as Mantikas had initially handed her phone to Ibarra consensually. FTS 8. First, to the extent Ibarra alleges Mantikas' consented to him permanently taking her phone, such claim is without merit. Although Mantikas' provided consent for Ibarra to *temporarily* borrow her phone, there was no evidence presented that she provided consent for Ibarra to steal or appropriate her phone for his own use. Instead, the evidence demonstrated Ibarra used a ruse to obtain initial control over Mantikas' phone and subsequently ran away from her in order to maintain control over the property. See, People v. Stofer, 3 Cal. App. 416, 418-19 (Dist. Ct. App. 1906), citing

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meaning of "from the person" while other jurisdictions interpret larceny from the person as a lesser-included offense of robbery and include property taken from the immediate vicinity of the victim within the meaning of "from the person." See, e.g., People v. Pierce, 266 III 2d 470, 477, 315 III. Dec. 656, 659, 877 N.E. 2d 408, 411 (2007).

People v. McElroy, 116 Cal. 583, (48 Pac. 718) (finding the statute's purpose "was to protect persons and property against the approach of the pickpocket, the purse-snatcher, the jewel abstracter, and other thieves *of like character who obtain property by similar means of stealth or fraud*."). Moreover, whether Ibarra had the intent to steal or appropriate Mantikas' phone to his own use prior to her relinquishing possession of the property, was a question left to the trier of fact at the time of trial. See, e.g, Harvey v. State, 78 Nev. 417, 420, 375 P.2d 225, 226 (1962)(recognizing that, "the question of whether the property was originally taken with [felonious] intent is one of fact, the determination of which is to be made from a consideration of all the circumstances preceding, attending and following the taking of the property"). Based on the evidence, it was reasonable for the jury to conclude beyond a reasonable doubt that Ibarra used a ruse to obtain initial control over Mantikas' phone, therefore finding he had the intent to steal or appropriate Mantikas' phone for his own use prior to her relinquishing possession. Accordingly, there was sufficient evidence to support Ibarra's conviction of larceny from the person.

9. Preservation of the Issue.

This issue was properly preserved.

VERIFICATION

1. I hereby certify that this Fast Track Response 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 Fast Track Response has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point and Times New Roman style.
2. I further certify that this Fast Track Response complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is proportionately spaced, has a typeface of 14 points or more, contains 2,048 words and 9 pages.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 28th day of March, 2016.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Steven S. Owens*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 28th day of March, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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