

1 through some trick, to voluntarily hand their telephone to another, there is no
2 “taking” as contemplated by the statute.
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4 Instead, the crime of Theft, pursuant to NRS 205.0832, may have
5 occurred. Theft is a broadly defined crime, and it covers many situations,
6 including embezzlement and the obtaining of property by false pretenses.
7 One could argue that Ibarra embezzled the telephone. He was provided the
8 phone by the owner, then he absconded with the phone. A better argument
9 can be made that Ibarra committed the crime of obtaining property by false
10 pretenses. He asked the woman if he could use her telephone to make a phone
11 call. That statement was false. Based on that “false pretense,” she handed
12 Ibarra her phone and he walked away with it. That is a classic case of
13 Obtaining Property by False Pretenses, and Section 1 of NRS 205.0832 states
14 that this crime is covered by the Theft statute.
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19 Larceny From the Person, unlike Theft, is not a broadly defined crime.
20 It requires a “taking” from the “person” of another. And the Nevada Supreme
21 Court has ruled that the “taking” must be from the person of another, not
22 merely from their “presence” of another. *Terral v. State*, 84 Nev. 412, 414,
23 442 P.2d 465, 466 (1968).
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26 The State wants to redefine the crime of Larceny From the Person to
27 include all cases where Obtaining Property by False Pretenses occurs and the
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1 property is taken from the "presence" of a person. Based on the language in
2 Terral, that was not the Legislature's intent.

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4 The conviction in this case should be vacated.

5 On July 31, 2015, at approximately 2:15 a.m., Evangelia Mantikas was
6 at a bus stop at Flamingo Road and Boulder Highway, in Las Vegas. While
7 she waited for the bus, she sat there texting on her Apple I-phone 5S. (2:
8 299). Several other people were there at the bus stop. A man, later identified
9 as Gabriel Ibarra, the Defendant-Appellant, came up and sat down beside
10 Mantikas. (2:300). He asked if he could use the phone. (2: 301). Mantikas
11 agreed to allow him to use the phone, and handed the phone to him. (2: 301-
12 02). After Mantikas voluntarily handed Ibarra the phone, he stood up and
13 walked away. (2: 304). Mantikas got up, walked behind him, following, and
14 Ibarra then ran away. (2: 304). Mantikas ran after him, but he escaped. (2:
15 305).

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20 Mantikas called the police, who responded to the scene. (2: 309).
21 Using the "Find phone" application, Mantikas and the police were able to
22 trace the whereabouts of the phone, and arrested Ibarra and retrieved the
23 phone. (3: 401, 403).

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26 At the trial of this matter, the Defense admitted that Ibarra took the
27 phone. The question at trial was: what crime occurred? The Defense
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1 contended the State proved the crime of Petty Larceny; the State claimed the
2 evidence supported a conviction for Larceny From the Person.
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4 **I. THE EVIDENCE AT TRIAL FAILED TO PROVE**
5 **BEYOND A REASONABLE DOUBT THAT GABRIEL**
6 **IBARRA COMMITTED THE CRIME OF LARCENY**
7 **FROM THE PERSON; A CONVICTION NOT**
8 **SUPPORTED BY SUFFICIENT EVIDENCE VIOLATES**
9 **FEDERAL AND STATE DUE PROCESS GUARANTEES.**

10 Federal and State Constitutions guarantee the presumption of
11 innocence. Nevada statutory law provides:

12 A defendant in a criminal action is presumed innocent until the
13 contrary is proved; and in the case of a reasonable doubt whether
14 his guilt is subsequently shown, he is entitled to be acquitted.

15 **NRS 175.191.** The standard of review for sufficiency of the evidence upon
16 appeal is whether the jury, acting reasonably, could have been convinced of
17 the defendant's guilt beyond a reasonable doubt. Kazalyn v. State, 108 Nev.
18 67, 825 P.2d 578 (1992), Ewish v. State, 110 Nev. 221, 871 P.2d 306 (1994).

19 A guilty verdict should never be upheld because some evidence
20 supported the conviction. Appellate review must focus on whether the
21 evidence at trial was sufficient to justify a rational trier of fact to find guilt
22 "beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307 (1979).
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24 The Due Process clause of the United States Constitution protects the
25 accused against conviction except on proof beyond a reasonable doubt of
26 every fact necessary to constitute the crime alleged by the State. Origel-
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1 **Candido v. State**, 114 Nev. 378, 956 P.2d 1378 (1998). If the State has failed
2 to prove, beyond a reasonable doubt, that the defendant committed the
3 charged crimes, then convictions for those charges violate Constitutional Due
4 Process guarantees and should be vacated.
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6 The crime of Larceny From the Person is defined, by statute, as
7 follows:
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- 9 1. A person who, under circumstances not amounting to
10 robbery, with the intent to steal or appropriate to his own use,
11 takes property from the person of another, without his
12 consent, is guilty of:
13 (a) If the value of the property taken is less than \$3,500, a
14 category C felony and shall be punished as provided in **NRS**
15 **193.130**;

16 **NRS 205.270.**

17 The felony conviction for Larceny From the Person fails, in this case,
18 on two points.

19 **The "Taking" Was Not From the Person of Another**

20 The Nevada Supreme Court has commented on the meaning of the
21 clause, "takes property from the person of another."
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23 It is important to restrict the coverage of **NRS 205.270** to
24 pickpockets, purse snatchers, jewel abstracters and the like, since
25 larceny from the person is a felony, and the value of the property
26 taken is immaterial so long as it has some value. The gravamen
27 of the offense is that the person of another has been violated and
28 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

1 taken from his 'presence,' and not from his person, would
2 constitute the misdemeanor of petty larceny. If we were to
3 confuse the statutory language and rule that 'from the person of
4 another' also means 'from the presence of another,' an accused in
5 some instances could be charged with either a felony or a
6 misdemeanor-a possibility which the legislature did not intend
7 and has carefully precluded by clear language.

8 **Terral v. State**, 84 Nev. 412, 414, 442 P.2d 465, 466 (1968).

9 In the present case, a crime was not committed when Evangelia
10 Mantikas handed the phone to Gabriel Ibarra. The crime was committed
11 when Gabriel Ibarra, already entrusted with the phone, stood up and walked
12 away, thereby stealing the phone. Because "[t]he gravamen of the offense is
13 that the person of another has been violated and his [or her] privacy directly
14 invaded," **Terral**, *supra*, the crime does not occur when the person of another
15 has not been violated and that person's privacy has not been invaded. When
16 Gabriel Ibarra stole the phone, he stole it from the "presence" of Evangelia
17 Mantikas, not from her person. That is precisely what the **Terral** case was all
18 about.
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21 The State made a mistake in deciding which crime to charge. Other
22 crimes could have been charged in this situation, but the State incorrectly
23 charged Larceny From the Person, which does not match the facts here.¹
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27 ¹The crime of Theft pursuant to **NRS 205.0832** is the most obvious applicable
28 crime.

1 *Mantikas Consensually Handed the Phone to Ibarra*

2 The Nevada Revised Statutes identify a crime that occurs when a
3 person agrees to loan property to another, and that other person then steals the
4 property. That is not the crime charged in this case. The State charged
5 Larceny From the Person, which requires a taking, from the person of another,
6 without consent, of property. In the present case, Mantikas consensually
7 handed her phone to Ibarra. Consent occurred. There may well have been a
8 misrepresentation by Ibarra to Mantikas, and if so, the Nevada Revised
9 Statutes address that situation in a different statute. But the gravamen of the
10 crime of Larceny From the Person is that the person's privacy be invaded and
11 the victim not give consent to the taking. These elements are not met in this
12 situation, and that is why the charged crime in this case did not occur.
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17 The conviction for Larceny From the Person should be vacated.

18 Respectfully submitted,

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VERIFICATION

1. I hereby certify that this fast track reply 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 reply has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this fast track reply complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is either:

[XX] Proportionately spaced, has a typeface of 14 points or more, and contains 1,476 words.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track reply, or failing to raise material issues or arguments in the fast track reply, 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 statement is true and complete to the best of my knowledge, information and belief.

DATED this 12th day of April, 2016.

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