IN THE SUPREME COURT OF THE STATE OF NEVADA

GABRIEL IBARRA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 69617

STATE'S SUPPLEMENTAL BRIEF

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STATE'S SUPPLEMENTAL BRIEF

On February 28, 2017, this Court filed an Order Granting Petition for Review and directed supplemental briefing on two issues, specifically, 1) whether Ibarra's deceit in asking to borrow the cellular phone while intending to steal it rendered the taking "without the other person's consent," as NRS 205.270 requires for conviction, and 2) whether Terral v. State, 84 Nev. 412, 442 P.2d 465 (1968), imposes an invasion-of-privacy element contrary to the plain language of NRS 205.270. The State's Supplemental Brief now follows.

Fraud Vitiates Consent

In the Order under review from the Court of Appeals, the majority held that, "for the purposes of NRS 205.270, using fraud to obtain property does not invalidate the victim's consent." Ibarra v. State, 2016 Nev. App. Unpub. LEXIS 433, *4-8 (Nev. Ct. App. Nov. 8, 2016). This is an incorrect statement of law. Lack of consent

is not unique to Larceny from the Person, but is an element inherent in the common law definition of larceny itself: "First came Larceny, a common-law crime (invented by the English judges rather than by Parliament) committed when one person misappropriated another's property by means of taking it from his possession *without his consent*." LaFave, Wayne, *Substantive Criminal Law 2nd ed.*, §19.1(a).[1] This lack of consent is referred to as a "trespass," such that at common law the crime of larceny requires a "trespass in the taking." Id. Such a "trespass in the taking" exists in several situations including when "[a] wrongdoer obtains possession of (but not title to) another's property by telling him lies, intending to misappropriate the property and, at the earliest opportunity, doing so. . . . The expression 'larceny by trick' is often used to identify this type of larceny, but it is the crime of larceny and not a separate crime." Id.; see also 50 Am.Jur.2d §26 ("Lack of consent as an element of larceny has several recognized exceptions. Lack of consent is not required where the owner did not know at the time of relinquishing possession of the property that the taker had an intent to appropriate the property, as where the consent is obtained by fraud or deception, or where the consent was obtained by coercion"); 50 Am.Jur.2d §33 ("If fraud or deception is used to obtain the owner's consent to the taking of property, the taker may be found to have committed larceny").

[1] Per NRS 1.030, "the common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the Constitution and laws of this State, shall be the rule of decision in all the courts of this State."

Numerous cases from various jurisdictions all recognize that fraud vitiates consent and the crime is one of larceny if the victim was induced to part with possession of his property by deceit or trick; the State's research turns up no cases which hold that consent obtained fraudulently may still constitute legally valid consent. See e.g., People v. Martin, 6 Cal. App. 5th 666, 684, 211 Cal. Rptr. 3d 559, 571 (2016) ("Where only a transfer of possession is fraudulently induced, the fraud does, indeed, invalidate the voluntary transfer of possession and one remains guilty of larceny (albeit by trick or device) if one obtains the property with the intent to convert it to their own purposes"); People v. Williams, 57 Cal. 4th 776, 783-84, 161 Cal. Rptr. 3d 81, 86, 305 P.3d 1241, 1245 (2013) ("Although a trespassory taking is not immediately evident when larceny occurs 'by trick' because of the crime's fraudulent nature, English courts held that a property owner who is fraudulently induced to transfer possession of the property to another does not do so with free and genuine consent, so 'the one who thus fraudulently obtains possession commits a trespass … .' "); People v. Davis, 19 Cal. 4th 301, 305 n.3, 79 Cal. Rptr. 2d 295, 297, 965 P.2d 1165, 1167 (1998) ("When the consent is procured by fraud it is invalid and the resulting offense is commonly called larceny by trick and device"); Farmers' Loan & Tr. Co. v. S. Sur. Co., 285 Mo. 621, 641-42, 226 S.W. 926, 931 (1920) ("If a person, with a preconceived design to appropriate property to his own use, obtain possession of it by means of fraud or trickery, the taking amounts to

larceny, because the fraud vitiates the transaction and the possession of the wrongdoer is still presumed to be the possession of the owner [internal citations omitted], or, as is sometimes said, the fraud or trick is equivalent to a trespass"); Cedar Rapids Nat'l Bank v. Am. Sur. Co., 197 Iowa 878, 891, 195 N.W. 253, 258 (1924) ("If, by trick or artifice, the owner of property is induced to part with the custody or naked possession of it to one who received the property *animo furandi*, the owner still meaning to retain the right of property, the taking will be larceny"); State v. Jesser, 95 Idaho 43, 52 n.29, 501 P.2d 727, 736 (1972) ("It has long been settled that fraud vitiates the consent of the victim to the taking of his property by agreement, and that, consequently, the taking is a constructive trespass upon possession sufficient for larceny if the other elements of the crime are present"); Hufstetler v. State, 37 Ala.App. 71, 63 So.2d 730 (1953) (defendant, after getting gasoline station owner to fill the tank of his car, suddenly drove off without paying; conviction of larceny by trick held affirmed; defendant got possession but not title; the fraud vitiated the owner's consent); Dobberke v. State, 40 P.3d 1244 (Alaska App. 2002) (although defendant obtained possession of rental vehicle by consent of franchise owner, still sufficient evidence of trespassory taking, as evidence indicated defendant "fraudulently obtained" that consent).

Nevada has also recognized, albeit in other contexts, that fraud vitiates consent and the scope of consent may not be exceeded.[2] For example, when a physician succeeds in the penile penetration of a patient under the guise of performing a medical examination, a sexual assault is committed by fraud and deceit and without the victim's consent. McNair v. State, 108 Nev. 53, 57-58, 825 P.2d 571, 574 (1992) ("In such cases the unlawful intercourse is rape for the very sufficient reason that it was without the woman's consent. 'She consented to one thing, he did another materially different . . . .' "). Likewise, in a Fourth Amendment analysis, "Police may not threaten to obtain a search warrant when there are no grounds for a valid warrant, but 'when the expressed intention to obtain a warrant is genuine . . . and not merely a pretext to induce submission, it does not vitiate consent.' " McMorran v. State, 118 Nev. 379, 383, 46 P.3d 81, 84 (2002). False representations by police may also vitiate consent. Id.; see also State v. Johnson, 116 Nev. 78, 993 P.2d 44 (2000) ("dismantling" a vehicle exceeded the scope of general consent to search and was therefore unreasonable). Finally, in the context of a commercial burglary, the authority to enter a building open to the public extends only to those who enter with a purpose consistent with the reason the building is

[2] Nevada also has cases which hold that one does not consent to a taking of property by acquiescing or failing to resist the taking, even though he may know that another intends to steal it. Odom v. Sheriff, 88 Nev. 315, 497 P.2d 906 (1972); State v. Smith, 33 Nev. 438, 450-51, 117 P. 19, 21 (1910).

open. State v. Adams, 94 Nev. 503, 505, 581 P.2d 868, 869 (1978). An entry with intent to commit larceny cannot be said to be within the authority granted customers of a business establishment. Id. Likewise, a taking with intent to commit larceny cannot be said to be within the consent of one who temporarily loans property for a specific purpose. See also 50 AmJur.2d §29 ("Larceny can be committed despite the consent of the owner or authorized person to the taker's possession when the taking exceeds the scope of the consent given").

In the present case, the defendant fraudulently asked to borrow the victim's phone as a ruse to ultimately steal the phone. The victim's consent, obtained by fraud, pertained only to possession of the phone, not the transfer of title. Such is not valid or legal consent and the crime is one of larceny. This resolves the question of consent and the only question remaining is whether the taking was "from the person." Because the trespassory taking of the phone occurred when the Defendant took the phone directly from the victim's hand rather than when he subsequently turned and ran away with it as the majority believes, the taking was from the victim's person and not from her mere presence. A trespassory taking without the victim's consent is an essential element of all larceny related crimes both in statutory and common law. There is no reason to treat Larceny from the Person different and somehow exempt it from the established legal maxim that controls all other larceny offenses, namely that fraud vitiates consent.

Larceny from the Person Does Not Require an Invasion of Privacy

A majority of the Court of Appeals relied upon this Court's opinion in Terral in holding that, "Unlike pickpocketing, tricking someone into handing over property does not violate the victim's person or invade that individual's privacy." Ibarra v. State, 2016 Nev. App. Unpub. LEXIS 433, *4 (Nev. Ct. App. Nov. 8, 2016) ("Ibarra plainly did not 'violate' the victim's person and 'directly invade her privacy' "). The operative language from Terral states that, "It is important to restrict the coverage of NRS 205.270 to pickpockets, purse snatchers, jewel abstracters and the like," where "the person of another has been violated and his privacy directly invaded." Terral v. State, 84 Nev. 412, 413-14, 442 P.2d 465, 465 (1968). The majority felt constrained to follow this language from Terral while the dissent found it violated rules of statutory interpretation and strayed from the plain and unambiguous language of the statute.

In context, the Terral Court was concerned with distinguishing Larceny from the Person from other related crimes such as Robbery and misdemeanor Petty Larceny:

> 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. If we were to confuse the statutory language and rule that "from the person of another" also means "from the presence of another," an accused in some instances could be charged with either a felony or a misdemeanor -- a

> possibility which the legislature did not intend and has carefully precluded by clear language.

Terral v. State, 84 Nev. 412, 414, 442 P.2d 465, 466 (1968). Holding to the plain language of the statute, Terral limited Larceny from the Person to takings literally "from the person" and not merely in the person's "presence" as other jurisdictions have interpreted their statutes. Terral should have stopped there and gone no further. This "in the presence" language found in the Robbery statute is conspicuously absent from the Larceny from the Person statute, signifying a different and more narrow legislative intent. The State does not seek to change or overrule this holding of Terral which is based on the plain language of the statute. Instead, the problem lies in Terral's use of "gravamen" language to artificially narrow the statute even further to require an invasion of privacy.

Such a limitation is wholly unnecessary and inconsistent with specific language the legislature has already expressed to adequately distinguish the various larceny related crimes it has enacted. The crime of Larceny from the Person is defined as occurring when, "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." NRS 205.270. The crime of Robbery is expressly distinguished as alternatively occurring "in the person's presence," and necessarily "by means of force or violence or fear of injury." NRS 200.380. Thus, the use of force in Robbery warrants a higher degree of felony.

In contrast, the crimes of Grand Larceny (felony) NRS 205.220, and Petit Larceny (misdemeanor) NRS 205.240 are larceny offenses that depend solely upon the value of the property taken. The greater value of loss warrants felony instead of misdemeanor treatment. There is no need to add a judicially constructed "privacy" element to further separate or distinguish these crimes. Larceny from the Person is a felony, regardless of the value of the property taken, because it involves a taking literally "from the person" which misdemeanor Petty Larceny does not contemplate.

Since its publication, Terral has been seldom cited or relied upon in Nevada, but has received attention in other jurisdictions as representative of a minority view. See e.g., People v. Anthony, 494 Mich. 669, 678-79, 837 N.W.2d 415, 420 (2013). Other jurisdictions perceive Larceny from the Person not as protecting a right of privacy, but of protecting against the risk of violence or physical injury to the person, which does not exist with simple misdemeanor larceny:

> We concede that a Nevada case lists a somewhat different reason, namely the protection of the victim's " privacy." See Terral v. State, 84 Nev. 412, 442 P.2d 465, 466 (1968). But we do not believe the Nevada court has listed all the reasons why "larceny from the person" is a serious crime. We also concede, as [Defendant] points out, that "larceny from the person," unlike robbery, typically involves no threat of violence. But, even without threats of violence, the risk of physical injury seems serious. The fact that the pickpocket's victim on occasion is unaware of the crime no more obviates the risk of violence than does the occasional meek compliance of the bank teller in the case of robbery.

United States v. McVicar, 907 F.2d 1, 2 (1st Cir. 1990); see also State v. Tramble, 144 Ariz. 48, 52 (1985) (The purpose of enhancing punishment for the taking of

property having little monetary value is obviously to punish more severely those crimes which create a threat of violent confrontation. Such a threat is present whether the taking of property is from the victim's body or from his immediate possession or control); State v Blow, 132 NJ Super 487, 334 A2d 341 (1975) (Explaining that a danger of confrontation between thief and victim had been present and the victim's person and privacy had been invaded, the court expressly rejected the authority of other jurisdictions which distinguished between a taking from the person and a taking from the immediate presence of a person.). It is this risk of physical harm to another, not a "privacy" violation, that Larceny from the Person is designed to protect against, regardless of whether the crime is limited to takings "from the person" or is interpreted to extend to takings "from the person's presence." In either situation, the harm sought to be avoided is the same and justifies a more severe penalty than misdemeanor Petty Larceny which is concerned not with physical safety, but only with the minor value of the property taken. Because the taking of property in the instant case was from the victim's person, there was an increased risk of physical confrontation and violence fully satisfying the purpose behind the Larceny from the Person statute, regardless of any perceived invasion of privacy.

WHEREFORE, the State respectfully requests that this Court reverse the Court of Appeals and affirm the conviction.

/ / /

Dated this 20th day of March, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **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 2003 in 14 point font of the Times New Roman style.
2. **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)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 2,615 words and 10 pages.
3. **Finally, I hereby certify** that I have read this appellate 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 20th day of March, 2017.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 20th day of March, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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