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9-13-2018

### Ibarra vs. State, 134 Nev. Adv. Op. 70 (Sept. 13, 2018) (en banc)

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#### Recommended Citation

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CRIMINAL LAW: LARCENY FROM THE PERSON

**Summary**

The Court determined a defendant can be convicted of larceny from the person when a defendant fraudulently persuades a person to temporarily hand over their property, when in fact the defendant intends to permanently take the person's property without the person's consent for purposes of NRS 205.270(1).

**Background**

I.

Around 3 a.m, appellant Gabriel Ibarra approached the victim, E.M., at a Las Vegas bus stop. Ibarra asked E.M. where she was from and what type of cell phone she had. After E.M. responded, Ibarra asked if he could use E.M.'s phone to make a call. E.M. hesitated but offered her phone to Ibarra. Ibarra grabbed E.M.'s phone and stood up to walk away. When E.M. stood up to continue to be close to her phone, Ibarra ran.

The phone was later tracked down and Ibarra was arrested. E.M. valued her iPhone at \$500. Stealing property worth less than \$650 is petit larceny, a misdemeanor.<sup>2</sup> Stealing property worth less than \$3,500 under circumstances amounting to larceny from the person, by contrast, is a category C felony.<sup>3</sup> The State charged Ibarra with larceny from the person.

At trial, Ibarra defended the charge on the ground that he may have committed larceny, but he did not commit larceny from the person because E.M. voluntarily handed Ibarra her phone, thus Ibarra did not take the phone without her consent or by an invasion of her privacy. The verdict form provided the jury the choice of finding Ibarra not guilty, guilty of petit larceny, or guilty of larceny from the person. The jury found Ibarra guilty of larceny from the person. Ibarra timely appealed. In a split decision, the court of appeals vacated Ibarra's conviction because the evidence did not establish the elements required for the crime of larceny from the person. The State petitioned for review, which the Court granted.

**Discussion**

II.

A.

In Nevada, the crime of larceny from the person is defined as follows:

(1) A person who, under the 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:

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<sup>1</sup> By Whitney Jones.

<sup>2</sup> Nev. Rev. Stat. § 205.240 (2017).

<sup>3</sup> Nev. Rev. Stat. § 205.270(1)(a) (2017)

(a) If the value of the property taken is less than \$35,000, a category C felony and shall be punished as provided in NRS 193.130[.]<sup>4</sup>

On appeal, Ibarra maintained he did not take the phone from the person of another, without her consent so the State failed to prove its case. First, Ibarra argued that since E.M. gave him permission to use her phone and handed the phone to him, Ibarra did not take the phone without her consent. Second, Ibarra argued that he did not take the phone from E.M.'s person in accordance to how the Court has interpreted the elements of the crime in *Terral v. State*.<sup>5</sup> The Court held that the evidence supported Ibarra's conviction and affirmed the district court's decision.

## B.

Ibarra first argued that because E.M. voluntarily handed over her phone, he did not take it from E.M.'s person, without her consent. The Court disagreed. NRS 205.270 does not define what it means to take a person's property "without the persons consent."<sup>6</sup> Thus, to define "without the other person's consent," the Court looked to how the common law approached lack of consent in the context of larceny.

At common law, "larceny is committed only when the aim of the thief is to divest the owner of his ownership, in distention from the mere use or temporary possession; so that a consent which comes short of this necessary intent does not cover the whole ground of the taking, and avails nothing."<sup>7</sup> The Court concluded that E.M. agreed to let Ibarra use her phone to make a call. E.M. did not agree to Ibarra taking her phone permanently. This mismatch of intentions renders the taking to have occurred without E.M.'s consent.

Also, Ibarra's fraud in telling E.M. he only wanted to use the phone briefly when in fact he intended to steal the phone, is another reason the Court concluded that the common law would deem the taking not to be consented to by E.M. By 1860, the principle that fraudulently obtaining permission to-use does not equal consent-to-take for purposes of larceny was well established.<sup>8</sup> This principle still is in use today through larceny by trick. Larceny by trick occurs "when a defendant, with the intent permanently to deprive, obtained the personal property of another by fraudulently inducing such other person to part with its possession."<sup>9</sup> In Nevada, larceny by trick is not a separate and distinct statutory offense. Instead, the larceny offenses Nevada does recognize, encompasses larceny by trick.<sup>10</sup> Therefore, Ibarra fraudulently obtaining permission to use E.M.'s phone did not give Ibarra consent-to-take for purpose of larceny in Nevada.

The Court thus notes that because larceny from the person is the crime of larceny with an additional element of taking from the victim's person, it follows that what negates consent for ordinary larceny also negates consent for larceny from the person. The Court therefore held Ibarra, who through fraud, persuaded E.M. to let him use her property temporarily while intending to steal her property permanently, took E.M.'s property without her consent for purposes of NRS 205.270(1).

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<sup>4</sup> *Id.* § 205.270.

<sup>5</sup> *Terral v. State*, 84 Nev. 412, 442 P.2d 465 (1968).

<sup>6</sup> *See* Nev. Rev. Stat. § 205.270.

<sup>7</sup> 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 813, at 451 (6th ed. 1877) (footnote omitted).

<sup>8</sup> *State v. Humphry*, 32 Vt. 569, 571–72 (1860).

<sup>9</sup> 3 Charles E. Torcia, *Wharton's Criminal Law* § 342, at 350 (15th ed. 1995).

<sup>10</sup> *See* NRS 205.0833 (titled "theft constitutes single offense embracing certain separate offenses..."); NRS 205.220 (grand larceny); NRS 205.240 (petit larceny).

### C.

Second, Ibarra argued that because E.M. handed him her phone, the taking did not occur until he ran off with her phone, so he did not take the phone from the person of another according to the Court's holding in *Terral*.<sup>11</sup> The Court disagreed. In *Terral*, the Court held that the property taken from the victim's presence did satisfy the elements of larceny from the person.<sup>12</sup> However, here, unlike in *Terral*, where the victim elected to set his tokens on a craps table instead of keeping them on his person, Ibarra separated E.M.'s phone from her person wrongfully. The Court determined that the circumstances here posed a threat of a violent confrontation and injury to the victim as – and perhaps more than – other cases sustaining a larceny from a person charge.<sup>13</sup> Additionally, the Court reviewed the current majority view that “from the person” includes the area within a victim's immediate presence.<sup>14</sup> The Court determined that Ibarra secured the dominion over the phone when he grabbed it from E.M.'s hand intending to steal it, not later, when he ran off with the phone.

### D.

Last, Ibarra argued that *Terral* interpreted NRS 205.270 as requiring an additional element not articulated in the statute's plain language: invasion of privacy.<sup>15</sup> The Court disagreed. Ibarra claimed that he did not invade E.M.'s privacy when he tricked E.M. into giving him her phone; thus, the State did not prove all of the elements of larceny from a person. The Court determined that *Terral* did not impose an additional element of invasion of privacy to the crime of larceny from the person. Instead, *Terral* identified what distinguishes larceny from the person from ordinary larceny and justifies its felony status is that the act of taking from the person of another violates and directly invades that person's privacy. Thus, the Court concluded that *Terral* did not impose an additional element as Ibarra argues.

## Conclusion

The Court held there was sufficient evidence to support Ibarra's conviction. Accordingly, the Court affirmed the district court's decision.

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<sup>11</sup> *Terral v. State*, 84 Nev. 412, 442 P.2d 465 (1968).

<sup>12</sup> *Id.*

<sup>13</sup> *See Odom v. Sheriff Clark County*, 88 Nev. 315, 316, 497 P.2d 906, 906–07(1972) (affirming the sufficiency of the evidence to charge a defendant with larceny from the person for taking money in a sting operation involving a police officer pretending to be drunk); *In re George B.*, 279 Cal. Rptr. 388, 390–91 (Ct. App. 1991) (upholding charge of grand theft "from the person" where the juvenile stole groceries from a shopping cart the victim was pushing toward her car in the parking lot). *See also*, *In re Jesus O.*, 152 P.3d 1100, 1101 (Cal. 2007) (upholding charge requiring theft to be "from the person of another" where, intending to steal something from the victim, the juvenile assaulted him, causing the victim to drop his cell phone, which the juvenile picked up and kept: "When someone, intending to steal, causes property to become separated from the victim's person, then gains possession of the property, the theft is from the person.").

<sup>14</sup> 3 Wayne R. LaFare, *Substantive Criminal Law* § 19.1(a), at 69 (3d ed. 2017) (footnote omitted).

<sup>15</sup> *Terral*, 84 Nev. 412, 442 P.2d 465 (1968).