IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GABRIEL IBARRA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69617

ORDER VACATING JUDGMENT AND REMANDING

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of one count of larceny from the person. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

The parties do not dispute the basic facts underlying this appeal. The victim was sitting at a bus stop, texting on her cell phone, when appellant Gabriel Ibarra approached her and asked if he could use her phone to make a call. The victim agreed, and the two conversed for a few minutes while the victim typed in the phone number Ibarra provided her. She then handed Ibarra her phone. Ibarra, who was sitting to the right of the victim, accepted the phone and placed it to his left ear, then switched the phone to his right ear, further away from the victim, stood up, and started to walk away. The victim stood to follow Ibarra, who then ran away. The victim chased Ibarra into an apartment complex, where she lost visual sight of Ibarra. Using an iPhone-tracking application, the victim discovered her phone's location. Officers located Ibarra and found the iPhone in nearby bushes. The State charged Ibarra with larceny from the person, a felony. A jury convicted him following a two-day trial.

On appeal, Ibarra contends that his conviction should be vacated because insufficient evidence was adduced at trial to support the

16-901339

jury's verdict for larceny from the person. Ibarra argues that because the victim deliberately handed her phone to him before he ran away, he did not take the phone from the victim's person without her consent.[1] The State counters that Ibarra did not obtain the victim's consent because he used a ruse to take the phone from the victim's hand. We agree with Ibarra that the evidence was insufficient to support the jury's verdict of guilt for larceny from the person.[2]

In reviewing a challenge to the sufficiency of the evidence supporting a criminal conviction, we consider "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

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[1]Ibarra also contends that there was insufficient evidence showing that he had the intent to steal or appropriate the phone *at the moment the victim handed it to him*. Thus, he argues that "he stole [the phone] from the 'presence' of [the victim], not [from] her person." However, whether Ibarra had the requisite intent when the victim handed him the phone is a question of fact, and we will not disturb the jury's finding because there is sufficient evidence in the record supporting it. *See Harvey v. State*, 78 Nev. 417, 420, 375 P.2d 225, 226 (1962) ("[T]he 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."). We also reject the dissent's baseless and counterfactual assertion that we have somehow concluded that Ibarra did not develop the intent to steal or appropriate the phone until *after* the victim handed it to him.

[2]In light of our disposition, we do not resolve the remaining issues raised on appeal.

To prove that a defendant is guilty of larceny from the person, the State must show that the defendant 1) took property from the person of another, 2) without the person's consent, and 3) with the intent to steal or appropriate the property for his own use. NRS 205.270(1). Larceny from the person "was meant to cover the common crime of pickpocketing, and from the beginning required an actual taking from the person[.]" *Terral v. State*, 84 Nev. 412, 413-14, 442 P.2d 465, 465 (1968) (quoting *State v. Chambers*, 22 W. Va. 779 (1883)) (internal quotation marks omitted). "The gravaman [sic] of [this] offense is that the person of another has been violated and his privacy directly invaded." *Id.* at 414, 442 P.2d at 466. Thus, "[i]t 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." *Id.*

Even when viewed in the light most favorable to the prosecution, the evidence adduced at Ibarra's trial does not support his conviction for larceny from the person. Critically, it is undisputed that the victim gave Ibarra permission to use her phone and deliberately handed her iPhone to Ibarra before he ran away with it. Although the evidence supports Ibarra's intent to steal the phone, it does not show that he initially took the phone from the victim's person without her consent, as required by NRS 205.270.[3] Accordingly, Ibarra plainly did not "violate[]"

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[3]The State contends that Ibarra did not obtain consent from the victim because, "[a]lthough [the victim] provided consent for Ibarra to *temporarily* borrow her phone, there was no evidence presented that [the victim] provided consent for Ibarra to steal or appropriate her phone for his own use." This argument ignores the text of the statute, which criminalizes "*tak[ing]* property from the person of another, *without the*

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person's consent[,]" and not the *stealing* or *appropriation* of property *without the person's consent*. *See* NRS 205.270(1) (emphasis added) ("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: . . . If the value of the property taken is less than $3,500, a category C felony[.]").

The State also asserts that "us[ing] a ruse to obtain initial control over" property negates a victim's "consent" under NRS 205.270 because "the statute's purpose 'was to protect persons and property against the approach of the pickpocket, the jewel abstracter, and other thieves *of like character who obtain property by similar means of stealth or fraud*.") (Quoting *People v. Stofer*, 86 P. 734, 735 (Cal. Ct. App. 1906)). However, much like the comparable quotation from *Terral* discussed *supra*, this quotation from *Stofer* establishes only that larceny from the person targets those who use "means of stealth or fraud" that are "similar" to that employed by pickpockets and jewel abstracters. It does not suggest that *any and all* forms of fraud or deception will vitiate consent. *Cf. Phelps v. State Farm Mut. Auto. Ins. Co.*, 112 Nev. 675, 682, 917 P.2d 944, 949 (1996) (quoting *Zgombic v. State*, 106 Nev. 571, 574, 798 P.2d 548, 550 (1990)) (internal quotation marks omitted) (applying the rule of ejusdem generis, which provides that when a general term follows a list of specific items, that general term includes only items "of the same kind, class or nature" as the specific items).

Furthermore, the State's position conflates common law larceny with the statutorily-created offense of larceny from the person. *See Terral*, 84 Nev. at 413, 442 P.2d at 465 (emphasis added) (noting that "[l]arceny from the person was first recognized *as a crime distinct from simple larceny by the Statute of 8 Elizabeth* in the 16th century"); *see also* 52B C.J.S. Larceny § 3 (2016) (footnote omitted) ("'Larceny' is a generic term within the broad outlines of which there are many different offenses."). The expansive common law definition of larceny includes the "*fraudulent* taking of another's property[,]" and the severity of the punishment for such conduct often turns on the value of the property stolen. *See* 52B C.J.S. Larceny § 1 (2016) (emphasis added); *Terral*, 84 Nev. at 413-14, 442 P.2d at 465-66 (noting that stealing "an item of little value . . . would

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the victim's person and "directly invade[]" her privacy. *Terral*, 84 Nev. at 414, 422 P.2d at 466. Therefore, no rational trier of fact could have found Ibarra guilty of the offense of larceny from the person.[4]

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constitute the misdemeanor of petty larceny"). In contrast, "the statutory crime of larceny from the person" is a crime that "will subject the offender to punishment as a felon" regardless of the value of the property because "[t]he gravaman [sic] of the offense is that the person of another has been violated and his privacy directly invaded." *See Terral*, 84 Nev. at 413-14, 442 P.2d at 465-66; 52B C.J.S. Larceny § 3 (footnotes omitted) (emphasis added) ("Larceny is termed 'simple larceny' when its commission constitutes an invasion of the right of property only. Larceny is termed 'compound' or 'aggravated' larceny when it is committed under circumstances that also *make it an invasion of the right of personal security* as when *the stealing is from the person* . . . ."). Unlike pickpocketing, tricking someone into handing over property does not violate the victim's person or invade that individual's privacy. Therefore, for the purposes of NRS 205.270, using fraud to obtain property does not invalidate the victim's consent.

[4]Other courts have found that deceiving a victim into handing over property does not constitute a taking from the person of another. *See Willis v. State*, 480 So. 2d 56, 57-58 (Ala. Crim. App. 1985) (holding that the defendant's cashing a check for which he had requested a stop payment was not a taking from the person); *People v. Warner*, 801 P.2d 1187, 1188, 1191-92 (Colo. 1990) (holding that deliberately shortchanging a cashier through a rapid series of money transactions did not constitute "theft from the person"); *State v. Harrison*, 373 A.2d 680, 682-84 (N.J. Super. Ct. App. Div. 1977) (indicating that tricking a victim into giving the defendant a handkerchief filled with money would not constitute a taking from the person); *People v. Washington*, 548 N.Y.S. 2d 48, 49 (App. Div. 1989) (emphasis added) (holding that using deceit to obtain the victim's money did not constitute a taking from the person because the victim "*voluntarily handed* $20 to the defendant hoping to receive two 'dimes' of cocaine in return"); *Commonwealth v. Monroe*, 678 A.2d 1208, 1210-14 (Pa. Super. Ct. 1996) (holding that a handkerchief scheme similar to that discussed in *Harrison* did not constitute a taking from the person),
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These facts and *Terral*'s holding compel us to vacate the judgment of conviction.[5] To affirm would effectively read the element of

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overruled in part on other grounds by Commonwealth v. Lord, 719 A.2d 306, 308 (Pa. 1998). NRS 205.270(1) presents an even stronger basis for vacating the instant judgment than do the statutes from these other jurisdictions because it *explicitly* contains a standalone element requiring that the property was taken "without the other person's consent." *See* NRS 205.270(1).

[5]The vast majority of the dissenting opinion discusses issues that were never raised by the parties to this case. Nonetheless, we will address some of them in this footnote.

First, we note that much of the dissent apparently challenges our supreme court's decision in *Terral*. However, we are constrained to follow that decision despite our dissenting colleague's insinuation that *Terral* may no longer be viable. Additionally, we observe that *Terral* did not state that its discussion of "privacy" applies to only the "from the person" element. Rather, *Terral* stated broadly that "[t]he *gravaman* [sic] of the offense is that the person of another has been violated and his privacy directly invaded." *See Terral*, 84 Nev. at 414, 442 P.2d at 466 (emphasis added).

Second, the dissent claims that NRS 205.270 has become unmoored from the historical scope of the statute, which *Terral* explained is limited 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." *See Terral*, 84 Nev. at 414, 442 P.2d at 466. In support of this argument, our dissenting colleague asserts that our reliance on *Terral*'s historical interpretation of the statute implies that the amendments made to NRS 205.270 after the *Terral* decision had no effect. He fails to mention that none of these amendments made any changes relevant to the instant case. He also asserts that most purse-snatchings are now defined as robberies if the victim resists even the slightest bit or if the tiniest force was used to escape the scene. Nonetheless, he fails to acknowledge that purse snatching, pickpocketing, and similar crimes can be accomplished by stealth, and therefore, still constitute a larceny from the person.

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Third, our colleague selects a dictionary definition of "consent" that does not resolve the dispute before us. Specifically, he chooses to rely on the following definition of consent: "A voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose, esp. given voluntarily by a competent person; legally effective assent." *Consent*, Black's Law Dictionary (10th ed. 2014). Our colleague emphasizes that this definition includes the term "legally effective assent[,]" thereby assuming the answer to the very question that we have been called upon to decide. Further, the fact that there are multiple other plausible dictionary definitions of "consent" illustrates that they are not determinative in this case. *See, e.g.*, *Consent*, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/consent (last visited Nov. 1, 2016) (defining "consent" as "to agree to do or allow something" and "to give permission for something to happen or be done"). Moreover, our colleague relies upon caselaw defining the term in the Fourth Amendment, marriage, and common law larceny contexts, but he does not bother to explain why they would be applicable to a statute defining larceny from the person. Furthermore, the court previously explained why the common law larceny definition of "consent" should not be applied to NRS 205.270. *See supra* note 3. We further observe that our colleague relies upon Jury Instruction No. 15, which provides that "[a] larceny victim's consent to a taking is valid only if that consent is freely and unconditionally given[,] [and] [c]onsent obtained by force, duress, or fraud is ineffective[,]" but he conspicuously omits the fact that this instruction may have applied to the petty larceny charge for which the jury was also instructed.

Fourth, the dissent declares that our court has written a new word, privacy, into the statute, and that even in that situation, Ibarra invaded the victim's privacy by stealing a phone that contained confidential personal information. Yet, this issue was never addressed by the parties, and there is no indication in the record that there was confidential information in the phone, or that it could be accessed without a password, or that the appellant even attempted to do so, as the phone was quickly discarded by appellant. Furthermore, we note that *Terral* used the term "privacy" when referring to the victim's *person*, and not to the victim's *information*. *See Terral*, 84 Nev. at 414, 442 P.2d at 466 (emphasis added)

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consent out of the statute. This we cannot do. Further, because we vacate the judgment and do not order a new trial, the district court shall direct the appropriate officials to discharge Ibarra from custody on this judgment of conviction. *See* NRS 177.275. Accordingly, we

ORDER the judgment of the district court VACATED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Gibbons

SILVER, J., concurring:

I agree with the majority's reasoning and therefore join its order resolving this case. I write separately to simply emphasize that no

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("The gravaman [sic] of the offense is that *the person of another has been violated* and his privacy directly invaded.").

Lastly, we observe that in the course of criticizing our reasoning, our dissenting colleague inconsistently defines the "takes" element. He avers that the victim did not consent to the taking because she intended to allow Ibarra to have only temporary use of the phone, and not permanent possession. Yet, earlier in the dissenting opinion, our colleague relies upon dictionary definitions of the word "takes" that do not draw any distinction between temporary and permanent possession. *See, e.g.*, *Take*, Black's Law Dictionary (10th ed. 2014) (defining "take" in part as "[t]o obtain possession or control, whether legally or illegally").

rational finder of fact could have found Ibarra guilty of larceny from the person.

Terral v. State is directly on point and is controlling authority in this case. 84 Nev. 412, 442 P.2d 465 (1968). The Nevada Supreme Court in *Terral* held that larceny from the person does not occur where, as here, "the person of another has [not] been violated and his privacy [has not been] directly invaded." *See id.* at 414, 442 P.2d at 466. Although Ibarra deceived the victim into relinquishing possession of the iPhone, because the victim had knowledge of the taking and deliberately handed the iPhone to Ibarra, Ibarra plainly did not "violate[]" the victim's person and "directly invade[]" her privacy. *Id.* at 414, 422 P.2d at 466; *see also State v. Harrison*, 373 A.2d 680, 682-84 (N.J. Super. Ct. App. Div. 1977) (indicating that tricking a victim into giving the defendant a handkerchief filled with money would not constitute a taking from the person); *People v. Washington*, 548 N.Y.S.2d 48, 49 (App. Div. 1989) (emphasis added) (holding that using deceit to obtain the victim's money did not constitute a taking from the person because the victim "*voluntarily handed* $20 to the defendant hoping to receive two 'dimes' of cocaine in return"); *Commonwealth v. Monroe*, 678 A.2d 1208, 1210-14 (Pa. Super. Ct. 1996) (holding that a handkerchief scheme similar to that discussed in *Harrison* did not constitute a taking from the person), *overruled in part on other grounds by Commonwealth v. Lord*, 719 A.2d 306, 308 (Pa. 1998).

If this court did not follow *Terral's* holding by vacating the judgment of conviction, then an absurd result would occur. In fact, anytime someone "handed" an item to another person, and that person intended to convert that item (committing a theft), it would constitute "larceny from the person." This is absurd. For example, if an impecunious

perpetrator walked into a jewelry store, tried on a ring that was *handed* to him by the jeweler intending to steal it, and then walked out of the store while still wearing the ring, under the State's logic, the State could prosecute the charge as a larceny from the person instead of as a larceny or a theft merely because the item stolen was taken from the hand of the jeweler after the offender falsely represented he was considering buying an expensive ring. Further, a defendant who deliberately shortchanged a cashier would also be guilty of larceny from the person,[6] as would a person who knowingly presented a bad check,[7] so long as these defendants took the cash or property from their victims' hands. Yet, no victim's privacy is invaded in any of these scenarios, and these offenders are in no way akin to "pickpockets, purse snatchers, jewel abstracters and the like[.]" *Terral*, 84 Nev. at 414, 442 P.2d at 466.

Here, there is no question that Ibarra committed a larceny or theft. The only question to be resolved in this case is whether the act of taking the item out of the victim's hand under these facts constitutes the crime of larceny from the person. I believe that under these facts, as a matter of law, pursuant to the holding in *Terral,* the crime of larceny from

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[6]*See, e.g., People v. Warner*, 801 P.2d 1187, 1188, 1191-92 (Colo. 1990) (holding that such conduct did not constitute "theft from the person").

[7]*See, e.g., Willis v. State*, 480 So. 2d 56, 57-58 (Ala. Crim. App. 1985) (holding that such conduct was not a taking from the person).

the person did not occur.

I, therefore, concur.

Silver, J.

TAO, J., dissenting:

The words "invasion of privacy" appear nowhere in the text of NRS 205.270, which defines the crime of "larceny from the person." This appeal should have been treated as a straightforward case of statutory interpretation involving an unambiguous statute whose plain language supports the jury's verdict.

I.

Here is the crux of my disagreement: my colleagues would limit the scope and reach of NRS 205.270 only to the specific common-law crimes ("pickpockets, purse-snatchers, jewel abstracters, and the like") that drove its enactment regardless of what the words of the statute literally say. I'm not sure we can do that to any statute, but I certainly don't agree that we can do it here.

How far courts can go to modify, limit, or expand the otherwise plain words of any statute is a question that has vexed judges and divided appellate panels, including panels of the Nevada Supreme Court, for decades. *Contrast State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) ("when a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent") *with Tate v. State Bd. of Medical Examiners*, 131 Nev. ___, ___, 356 P.3d 506, 508 (2015) ("Words in a statute should be accorded their plain meaning unless doing

so would be contrary to the spirit of the statute"); *see also United States v. Kirby*, 74 U.S. 482 (1869) (holding that statute making it a crime to "knowingly and willfully to obstruct the passage of the mail" includes an "implied exception" permitting police to arrest mail carriers pursuant to lawful warrants even though doing so literally obstructs the mail). *See generally* Wayne R. LaFave & Austin W. Scott, *Criminal Law*, § 2.2(c) at pp. 76-77 (2d ed. West 1986).

But even if one accepts as a general proposition that we can sometimes put the plain words of a statute aside and read something of its common-law history into the statute itself, NRS 205.270 is not the statute to do it with.

Even when it's appropriate to go beyond plain statutory text, the goal in doing so is to identify and give effect to the Legislature's intent when it expressed itself poorly, not to re-write the statute into what we think is a better policy than the one the Legislature intended. *See Beazer Homes Nevada Inc. v. District Court*, 120 Nev. 575, 580, 97 P.3d 1132, 1135 (2004) ("In construing an ambiguous statute, we must give the statute the interpretation that reason and public policy would indicate the legislature intended." (internal quotation marks and citation omitted)); *Freeman v. Davidson,* 105 Nev. 13, 16, 768 P.2d 885, 887 (1989) (when interpreting statutes, "[t]he legislature's intent should be given full effect."). Consequently, if we're going to ignore the plain words that the Legislature wrote, the Legislature's intent had better be very clear or else we're just writing our own statutes according to our own policy preferences.

But here, the history of the crime of "larceny from the person" is considerably murkier than my colleagues acknowledge. Moreover, their

method of restricting the statute—focusing it on whether an "invasion of privacy" occurred—is a meaningless one that makes the statute dangerously vague. In a case like this, there's no basis for us to depart from the words that the Legislature enacted, especially when those words aren't ambiguous and don't produce truly "absurd" results.[8] I would limit our analysis to the words of the statute, and when we do so, Ibarra's conviction must stand.

II.

No doubt the crime of "larceny from the person" is an odd one. For one thing, it's written as an inverse to the crime of robbery, a point I'll address shortly. For another, the statute originated from a class of old

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[8]"Absurd" refers to results that the Legislature clearly did not intend, not results that judges don't happen to like. *See Mitchell v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 131 Nev. ___, ___ n.7, 359 P.3d 1096, 1103 n.7 (2015) (citing *Jaskolski v. Daniels*, 427 F.3d 456, 461 (7th Cir. 2005)) (the anti-absurdity doctrine "aides interpretation but 'does not license courts to improve statutes (or rules) substantively, so that their outcomes accord more closely with judicial beliefs about how matters ought to be resolved.'") *reh'g denied* (July 23, 2015); *In re Sunterra Corp.*, 361 F.3d 257, 268 (4th Cir. 2004) ("In assessing whether a plain reading of a statute implicates the absurdity exception, however, the issue is not whether the result would be 'unreasonable,' or even 'quite unreasonable,' but whether the result would be *absurd* . . . if it is plausible that [the legislature] intended the result compelled by the Plain Meaning Rule, we must reject an assertion that such an application is absurd").

This is where my concurring colleague errs—she misunderstands the "absurdity" doctrine as a license to rewrite statutes that produce results we don't agree with or that we wouldn't have voted for as legislators, even though the Legislature purposely wrote the words to be as broad as they are and therefore might have intended those exact results.

common-law crimes but it's literally written much more broadly than those crimes. And therein lies the rub.

Historically, the crime was designed to target a certain particular class of thieves, and in 1968 the Nevada Supreme Court remarked that "[i]t is important to restrict the coverage of NRS 205.270 to pickpockets, purse snatchers, jewel abstracters and the like." *Terral v. State*, 84 Nev. 412, 414, 442 P.2d 465, 466 (1968). From these half-century-old words, my colleagues insist the statute must be limited to those crimes, and those crimes only.

But there are a few problems with this. First, reading the common-law history of the statute over its text means that the crime can quite literally never be redefined by the Legislature. The past can't be changed, but statutory text can, and that's why we're supposed to read a statute by its words and not its historical origins. Limiting this statute to its origins means that the crime will always be the same no matter how many times, or how extensively, the Legislature amends or rewrites the statute. Since 1968, NRS 205.270 has been amended five times (in 1979, 1985, 1995, 1997, and 2011); but according to the majority, these amendments accomplished nothing—nor would any future amendments, no matter how far-reaching—because the words don't matter and the statute can never encompass more than it did a century ago.

Second, I don't know what "and the like" is supposed to mean: what crimes are "like" pick-pocketing or purse-snatching without actually being pick-pocketing or purse-snatching? And what's the legal principle for making that decision? Is burglarizing a home "like" pick-pocketing because they're both property crimes? Is battery "like" a purse-snatching because they both involve bodily contact between the victim and the

assailant? "Like" isn't a word of precise legal analysis, it's an "eye of the beholder" word capable of supporting any conclusion anyone might want to reach.

Third, I don't know what the common-law crime of "jewel abstracting" would be nowadays; you can't even find a definition through Google, and as far as I can tell nobody has been charged or convicted of such a crime in Nevada in nearly a century. So I certainly don't know what crimes are "like" it or not "like" it, and I have no idea how a juror could possibly know either. Was Ibarra's conduct "like" that of an old-fashioned jewel abstracter? That depends entirely on how you define what "jewel abstracting" is and what kinds of crimes are "like" other crimes.

There's another oddity in the statute: it contains an unusual negative element expressly defining the crime in contrast to another crime ("under circumstances not amounting to a robbery") whose own definition exists outside of NRS 205.270. The crime therefore exists only as a counterpart to the crime of robbery, and one has to know what a robbery is, or isn't, before one can know what the crime of "larceny from the person" is, or isn't. But, just as NRS 205.270 has been amended since *Terral*, much has happened with the crime of robbery in Nevada since 1968. Since 1992, most purse-snatchings are now defined as robberies if the victim resists even the slightest bit or if the tiniest force was used to escape from the scene. This wasn't true a century ago. *See* Assembly Bill 59 (enacted 1993 to amend NRS 200.380 to add use of force during escape to the crime); *Jefferson v. State*, 108 Nev. 953, 955, 840 P.2d 1234, 1236 (1992) (when defendant snatched victim's purse against her resistance, "the jury could reasonably infer from the evidence that [defendant] obtained the victim's purse by using force" sufficient to support robbery

conviction). Indeed, the Nevada Supreme Court has expressly noted that robberies are now considered the same type of crimes as purse-snatchings. *Cf. Sheriff v. Hawkins*, 104 Nev. 70, 74, 752 P.2d 769, 771 (1988) (citing *State v. Holiday*, 431 So.2d 309, 310-11 (Fla.App. 1983)) (describing police decoy operation as designed to ensnare a particular "type" of crime, namely "robberies and purse-snatchings"). So there isn't even a need for a statute that separately criminalizes purse-snatching anymore, and saying that the crime of larceny from the person must be limited to crimes that are "like" purse-snatching, but do not "amount" to robberies, isn't saying much at all; it's more of a self-contradiction than a useful analogy. It certainly doesn't say enough to support making the history of the crime the central focus of the statute over its plain text.

So what does "larceny from the person" mean in the year 2016? I'm stating the obvious by observing that it's become untied from its historical roots in purse-snatching and jewel abstracting. But the Legislature hasn't abolished it—to the contrary, the Legislature updated it as recently as 2011, per Assembly Bill 142. So it must still mean something.

I would say the crime is defined by its statutory elements, because those express elements are what the Legislature wrote, debated, adopted, and updated as recently as 2011. The majority's solution is to ignore those elements and instead make the crime about an "invasion of privacy." But that makes things worse, not better.

III.

In its effort to restrict the text of NRS 205.270, the majority borrows the word "privacy" from *Terral*; but it doesn't use the word in the same way that *Terral* does.

Terral employed the word to determine whether the statutory element of "from the person" was met: the issue was whether stealing chips from a table meant they were taken "from the person." *Id.* at 414, 442 P.2d at 466. The *Terral* court reasoned that since the original goal of the statute was to protect the victim's privacy, the statute must be read to mean "precisely" what it says, and "from the person" means that property must be taken "directly" from the victim's person and not merely from a table in his presence. *Id.* at 414, 442 P.2d at 466 (in the court's words, the statute is not violated if property is "taken from [the victim's] presence, and not from his person.").

Thus, *Terral* expressly linked the word "privacy" to the statutory element of "from the person"; it's an effort to explain the meaning of the express words of the statute—which, by the way, is exactly how the word was used at Ibarra's trial, in Jury Instruction No. 10. But both of my colleagues detach the word "privacy" from the element of "from the person," and use it to mean something else entirely that isn't defined and isn't tethered to the actual words of the statute.[9]

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[9]The majority partly justifies its conclusion by citing to cases from other states that it characterizes as holding "that deceiving a victim into handing over property does not even constitute a 'taking from the person of another.'" Whether those cases actually stand for that proposition is debatable (I'll leave that to the reader to decide), but even if so, we can't seek guidance from other states whose statutes do not intentionally separate out the element of "taking" from the element of "consent" when Nevada's statute clearly does—and we must presume this to have been a wholly deliberate decision to diverge from other states. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (Thomson/West 2012) ("a material variation in terms suggests a variation in meaning."). In interpreting statutes, it's the Nevada Legislature's preference that matters, not that of other state governments who chose to

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The larger problem here isn't solely that the majority uses the word differently than *Terral* does; it's that the word "privacy" has no clear meaning at all and, when unmoored from the statute, confuses more than explains.

IV.

Words matter, more so in criminal law than in most other fields of law. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). A criminal statute violates the Due Process Clause of the Fifth and Fourteenth Amendment to the U.S. Constitution when it is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

But "privacy" is "an elastic concept, one not susceptible to precise definition. Lacking a commonly accepted definition, notions of privacy are potentially subject to the shifting sands of public mores, and to the personal predilections of the judicial mind." *Adams v. Drew*, 906 F. Supp. 1050, 1057 (E.D.Va. 1995) (citing *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (Black, J., dissenting).

...continued
define the crime differently. *See Freeman v. Davidson,* 105 Nev. 13, 16, 768 P.2d 885, 887 (1989) (when interpreting statutes, "[t]he legislature's intent should be given full effect."). Therefore, in Nevada, the question of whether any consent was validly obtained has nothing to do with whether the property was taken "from the person" or not; under our statute they are separate elements and a phone can be "taken from the person" either with or without consent.

In other words, "privacy" is exactly the kind of word that makes criminal statutes unconstitutional, so using it as a measure of NRS 205.270 makes the statute less clear and less precise than if we don't use the word at all. *See Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 639-40 (4th Cir. 2005) ("the word privacy carries different meanings in different contexts"); *American States Ins. Co. v. Capital Associates of Jackson County, Inc.*, 392 F.3d 939, 941 (7th Cir. 2004) ("Privacy is a word with many connotations").

As used in the law, the phrase "invasion of privacy" doesn't refer to a single element, or even to a single legal concept, but rather to an entire class of loosely related concepts comprising "at least four types of invasion of four different interests in privacy," W. Prosser, *Handbook of the Law of Torts* § 117 (4th ed. 1971), that are "tied together by the common name, but otherwise have almost nothing in common."[10] William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 389 (1960). The phrase "invasion of privacy" isn't generally considered clear enough to support a proper contract. *See Hooters of Augusta, Inc. v. Am. Global Ins. Co.*, 157 Fed. Appx. 201 (11th Cir. 2005) (holding that the use of "privacy" in a contract was ambiguous); *Lineberry v. State Farm Fire & Casualty Co.*, 885 F.

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[10]The four types are: (1) appropriation of the plaintiff's name or likeness; (2) intrusion upon the plaintiff's seclusion or solitude or into his private affairs; (3) public disclosure of private facts about the plaintiff; and (4) publicity which places the plaintiff in a false light in the public eye. W. Prosser, *Handbook of the Law of Torts* § 117 (4th ed. 1971). To this list, the U.S. Supreme Court has added such things as the right to use contraceptives and obtain an abortion. *See Roe v. Wade*, 410 U.S. 113 (1973). The majority doesn't explain how the facts of this case fit any of these, or, if they don't, why we're inventing a new variation of the phrase for this case.

Supp. 1095, 1099 (M.D.Tenn. 1995) (holding that insurance policy that purported to cover "invasion of privacy" was ambiguous and illusory); *Adams v. Drew*, 906 F. Supp. 1050, 1057 (E.D.Va. 1995) (holding that phrase "invasion of privacy" in insurance contract was ambiguous).

Within criminal law, the validity of police searches often turns on the scope of a defendant's "reasonable expectation of privacy," a test often criticized as "circular" and "unpredictable." *See Kyllo v. United States*, 533 U.S. 27, 34 (2001) ("The [reasonable expectation of privacy] test . . . has often been criticized as circular, and hence subjective and unpredictable."); *see also Minnesota v. Carter*, 525 U.S. 83, 97–98 (1998) (Scalia, J., concurring) ("In my view, the only thing the past three decades have established about the [ ] test . . . is that, unsurprisingly, those 'actual (subjective) expectation[s] of privacy' 'that society is prepared to recognize as "reasonable,"'. . . bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable." (internal citations omitted)).

Consequently, the word "privacy" is intrinsically vague. The word might have been all the rage in 1968 when the Nevada Supreme Court wrote *Terral*; after all, that was three years after *Griswold v. Connecticut*, 381 U.S. 479 (1965), first recognized a constitutional "right to privacy" that included the right to use birth control, and a few years before the right to privacy was expanded to include abortion in *Roe v. Wade*, 410 U.S. 113 (1973).

But using it in a criminal statute the way the majority does only serves to blur the definition of the crime and makes the statute mean whatever a judge (or prosecutor) arbitrarily wants it to mean, so long as some definition of the word "privacy" can be found—from among the many definitions that exist somewhere in the law—that plausibly fits the

evidence at hand. *See Haight v. Thompson*, 763 F.3d 554, 569 (6th Cir. 2014) (courts should "avoid treating statutes like chameleons that turn green in some settings but not others"). As a practical matter, I can't envision a set of jury instructions using the word "privacy" that would help the jury understand the crime as my colleagues have now defined it.

Indeed, to illustrate how amorphous the word "privacy" is within the majority's analysis, one need only ask: why isn't it an "invasion of privacy" for Ibarra to steal a cell phone loaded with the victim's confidential personal information? *See Riley v. California*, 573 U.S. ___, ___, 134 S. Ct. 2473, 2494-95 (2014) (holding that citizens have constitutional expectation of privacy in their cell phones: "[m]odern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life'"). Clearly the majority doesn't mean to use the word this way, but that's my point—there are so many ways to use the word that it can justify virtually any result we want to reach. When we inject a word this ill-defined into a criminal statute, we make the statute less clear, not more, and possibly unconstitutionally vague as well—which seems to me to be the exact opposite of what we should be doing when we engage in "interpretation." *See State v. Kopp*, 118 Nev. 199, 203, 43 P.3d 340, 342-43 (2002) ("It is well settled that when a statute may be given conflicting interpretations, one rendering it constitutional, and the other unconstitutional, the constitutional interpretation is favored").

V.

Rather than asking such meaningless questions as what crimes are "like" others or when an "invasion of privacy" occurs, this appeal should have been resolved by just applying the plain and

unambiguous words of the statute to the evidence at hand. Here's how I would do it.

To ensure that criminal statutes are read objectively, predictably, and consistently by anyone who might venture to read them, courts require that they be construed according to established rules of interpretation,[11] the most important of which is that the statutory words must be given their plainest and most ordinary meaning unless the Legislature clearly used them differently, or the words are used in an ambiguous way. *See State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004) (citing *Firestone v. State*, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004) ("We must attribute the plain meaning to a statute that is not ambiguous."); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law:*

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[11]We review questions of statutory interpretation de novo. *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). In interpreting a statute, we begin with its plain meaning and consider the statute as a whole, awarding meaning to each word, phrase, and provision, while striving to avoid interpretations that render any words superfluous or meaningless. *Haney v. State*, 124 Nev. 408, 411-12, 185 P.3d 350, 353 (2008). If the legislature has independently defined any word or phrase contained within a statute, we must apply the definition created by the legislature because "[a] statute's express definition of a term controls the construction of that term no matter where the term appears in the statute." *Williams v. Clark Cnty. Dist. Attorney,* 118 Nev. 473, 485, 50 P.3d 536, 544 (2002); Norman J. Singer, 1A *Sutherland Statutes and Statutory Construction* § 20:8 (7th ed. 2007). Only if the statute is ambiguous do we look beyond the statute's language to legislative history or other sources to determine the intent of the statute. *Attaguile v. State*, 122 Nev. 504, 507, 134 P.3d 715, 717 (2006). An ambiguity exists when the statute's "language lends itself to two or more reasonable interpretations." *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). When a criminal statute is ambiguous, we construe the statute in favor of the accused. *Haney*, 124 Nev. at 412, 185 P.3d at 353.

The Interpretation of Legal Texts 56 (Thomson/West 2012) ("[T]he words of a governing text are of paramount concern.").

Thus, to understand the meaning of NRS 205.270, we start with its plain text, and if the words are neither ambiguous nor used in a clearly different way, we go no further and end there as well.

The crime of larceny from the person is defined in NRS 205.270, which states in pertinent part as follows:

> 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 . . . .

Thus, NRS 205.270 facially contains five elements: a defendant is guilty of larceny from the person if he: 1) takes property 2) from the person of another 3) without the person's consent 4) with the intent to steal or appropriate the property for his own use and does so 5) under circumstances not amounting to a robbery (meaning without force, threat, or intimidation). When we apply the plain unambiguous words of the statute to Ibarra's conduct, I would conclude that the conviction must stand.[12]

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[12]Though Ibarra challenges virtually every element, I agree with my colleagues that ample evidence exists that he possessed criminal intent (for example, he told the victim he needed to call someone else but gave the victim his own number to call before walking away with the phone). Moreover, the parties do not dispute that Ibarra never employed the kind of force, threat, or intimidation that would constitute the crime of robbery. Therefore, only the first three elements of NRS 205.270 need be analyzed in detail.

The first element of the crime requires that Ibarra "take" the cell phone as that word is meant to be used within NRS 205.270. The statute itself does not provide an independent definition of the word "take," so we'll have to look instead at its meaning in ordinary usage. Black's Law Dictionary (10th ed. 2014) defines "take" as follows:

> 1. To obtain possession or control, whether legally or illegally <it's a felony to take that property without the owner's consent>. 2. To seize with authority; to confiscate or apprehend <take the suspect into custody>.

The Merriam-Webster Online Dictionary (2016) defines "take" as follows:

> *1* : to obtain possession: as *a* : capture *b* : to receive property under law as one's own; *2* : to lay hold : catch, hold . . . . to get into one's hands or into one's possession, power, or control . . . . 2: Grasp, grip . . . . *6* : to transfer into one's own keeping: *a* : appropriate *<someone took my hat> b* : to obtain or secure for use (as by lease, subscription, or purchase) *<take a cottage for the summer> <I'll take the red one> <took an ad in the paper>* . . . *12* : to receive or accept whether willingly or reluctantly

Thus, as most commonly used, to "take" something means to obtain or acquire possession of it, such as by holding or grasping it in one's hand. In this case the victim handed her cell phone to Ibarra and he removed it from her hand with his hand, and therefore I would conclude that Ibarra plainly "took" the phone from the victim within the meaning of NRS 205.270.

The next element of the statute asks whether the taking was "from the person" of the victim. Black's Law Dictionary (10th ed. 2014) defines "larceny from the person" as larceny "in which the goods are taken directly from the person." The Nevada Supreme Court follows this

definition: "from the person" requires that property be taken "directly" from the person and not merely from his "presence." *Terral v. State*, 84 Nev. 412, 442 P.2d 465 (1968). In this case, Ibarra took the cell phone directly from the victim's hand in a hand-to-hand transfer, and I would therefore conclude that the property was taken "from the person" of the victim.

Finally, the statute requires that the taking occur without the victim's "consent." Black's Law Dictionary defines "consent" as "[a] voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose, esp. given voluntarily by a competent person; legally effective assent." Thus, in ordinary usage, consent consists not merely in the uttering of words of permission, but in a "voluntary" and "legally effective" agreement. The Nevada Supreme Court has defined legally valid consent as consent given without fraud, force, or fear. *See Sparkman v. State*, 95 Nev. 76, 79, 590 P.2d 151, 154 (1979) (consent is only valid if "voluntarily given and not the product of deceit or coercion, express or implied."); *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63, 68, 1870 WL 2407 (1870) (to enter into a marriage contract, "consent" must be "without force or fraud"). Moreover, consent is not legally valid unless the victim can withdraw, revoke, or limit the scope of the consent, or give it only conditionally. *See Byars v. State*, 130 Nev. ___, ___, 336 P.3d 939, 945 (2014) (invalidating Nevada's "implied consent" law under which defendants were not free to refuse permission to blood draw; to be valid, "consent must be freely given [and] a person must be free to withdraw or limit it"). The Nevada Supreme Court has never held

that consent obtained fraudulently constitutes legally valid consent.[13] *See generally*, Kenneth W. Simons, *The Conceptual Structure of Consent in Criminal Law*, 9 Buff. Crim. L. Rev. 577 (2006).

Here, the jury was correctly instructed that the victim's consent must be valid and must not have been obtained fraudulently in order to constitute legal consent under NRS 205.270 (and Ibarra does not contest the validity of the jury instruction on appeal). *See* Jury Instruction No. 15 ("A larceny victim's consent to a taking is valid only if that consent is freely and conditionally given. Consent obtained by force, duress, or fraud is ineffective"). There exists ample evidence in this case that the victim's so-called "consent" was procured only as a result of fraud.

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[13]Even outside of Nevada (to the very limited extent we care what other states think when our statute is not ambiguous), it appears well-settled in a majority of states that consent that was fraudulently obtained does not represent valid consent. *See People v. Williams*, 57 Cal. 4th 776, 783-84 (2013) ("the fraud vitiates the transaction, and the owner is deemed still to retain a constructive possession of the property"); *Otte v. State*, 563 P.2d 1361, 1364 (Wyo. 1977) citing *Neel v. State*, 454 P.2d 241, 242 (Wyo. 1969) ("Fraud vitiates the consent of the victim if the other elements of the crime are present." (citing *State v. Jesser*, 501 P.2d 727, 735 (Idaho App. 1995))); *Commonwealth v. Barry*, 124 Mass. 325, 327 (1878) ("If the possession is fraudulently obtained, with intent on the part of the person obtaining it, at the time he receives it, to convert the same to his own use, and the person parting with it intends to part with his possession merely, and not with his title to the property, the offence is larceny."); *see also Appropriation of Property After Obtaining Possession by Fraud as Larceny*, American Law Reports, 26 A.L.R. 381 (Originally published in 1923) ("it is well settled that where a person by trick or fraud, obtains possession of property, intending at the time of obtaining the property to convert it to his own use, and does so convert it, the fraud is the equivalent of a felonious taking, and the offense is larceny") and cases cited therein.

Factually, Ibarra told the victim that he needed to borrow a phone to call someone, gave the victim a false number (in fact, his own number) to dial, took the phone, and walked away with it. A rational jury could easily conclude that the victim only handed the phone over because of Ibarra's fraud, and on appeal we must view the facts and evidence in the light most favorable to the prosecution.[14] *See Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984).

Accordingly, I would conclude that a reasonable jury could have found that every element of the crime articulated in NRS 205.270

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[14]The majority nonetheless concludes that Ibarra did not develop the intent to steal the phone until after the victim handed it to him, and therefore that the victim initially gave valid "consent." This overlooks that, in resolving a challenge to the sufficiency of evidence in a criminal conviction, we cannot simply re-evaluate the evidence the way we would have had we been on the jury. Instead, on appeal we must accept the version of facts most favorable to supporting the conviction. *See McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (on appeal, the question is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (emphasis original)). Here, the majority's version of the facts certainly represents one conclusion that the jury could have reached, but it's not the version most favorable to the prosecution—indeed, it's not even the version most consistent with the evidence introduced at trial.

Furthermore, even if the majority is right that valid consent was initially given despite Ibarra's deceit, the victim clearly intended it to be limited to temporary use of the phone, not permanent possession, and conditioned upon the safe return of the phone; therefore Ibarra's conduct exceeded the scope of the consent. Alternatively, even if the initial consent was valid, the victim clearly revoked the consent when she saw Ibarra walking away with her phone. Either way, it's the victim who gets to decide the scope and duration of her consent, not Ibarra. *See Byars v. State*, 130 Nev. ___, ___, 336 P.3d 939, 945 (2014) ("consent must be freely given [and] a person must be free to withdraw or limit it").

was met by the evidence introduced at trial. I would therefore affirm the conviction.

_____, J.
Tao

cc: Hon. Michael Villani, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk