2013 WL 8293518 (Mass.) (Appellate Brief)
Supreme Judicial Court of Massachusetts.

COMMONWEALTH OF MASSACHUSETTS, Appellee,
v.
David ST. HILAIRE, Appellant.

No. 13-P-324.
September 10, 2013.

On Appeal from a Judgment of the Middlesex Superior Court

Brief and Supplemental Record Appendix for the Commonwealth

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*1 ISSUE PRESENTED

Did the judge properly deny the defendant's motion for a required finding of not guilty of larceny by stealing, where the Commonwealth adduced sufficient evidence that the victim was mentally incapable of consenting to deeding away her home to the defendant, and that the defendant should have been well aware of the victim's incapacity?

*2 STATEMENT OF THE CASE

Prior Proceedings

On January 18, 2011, a Middlesex grand jury returned two indictments charging the defendant with 1) larceny of property valued at over $250 from an **elderly** person in violation of G.L. c. 266, § 30(5), and 2) obtaining a signature under false pretenses in violation of G.L. c. 266, § 31 (No. MICR2011-21/001-002). (R.1-3.) [1] The defendant waived his right to a jury trial and was tried before Justice Mitchell H. Kaplan from May 14 to May 18, 2012. (R.6-7; Tr.I/12.)

On May 18, 2012, Justice Kaplan found the defendant guilty of larceny from an **elderly** person and not guilty of obtaining a signature by false pretence. (R.7; Tr.V/2.) The same day, Justice Kaplan sentenced the defendant to a two-year term of unsupervised probation and a $25,000 fine, and ordered the defendant to convey the stolen property back to the estate of the victim. (R.8; Tr.V/14-16.) The defendant's sentence was stayed pending appeal. (R.8; Tr.V/16-17.)

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***3** The defendant filed a timely notice of appeal on June 11, 2012. (R.8.) The case was docketed in the Appeals Court on February 21, 2013.

Statement of Facts

The Commonwealth's case

Erika Magill was an eighty-six year-old widow who lived alone at 205 Billerica Street in Lowell, a home which she and her deceased husband, Glen, had owned for nearly fifty years. (Tr.II/10,27,34,81; III/8.) Across the street from Erika lived her best friend, Lucille Christman. (Tr.II/10,104-105.) Erika and Lucille would spend the holidays together and, since Erika did not drive, Lucille would often take Erika to do errands. (Tr.II/10,106.)

In July of 2001, Erika contacted her attorney, Eileen Donoghue, to request that her will be drafted so as to leave her entire estate to her best friend Lucille upon her death, since Erika had no family of her own. (Tr.II/8,11.) Erika's estate contained virtually no assets aside from her home on Billerica Street. (Tr.11/32,35.) Attorney Donoghue prepared Erika's will naming Lucille as the sole beneficiary. (Tr.I1/9-10,22-23,130; S.R.3-5.)

***4** When Lucille's health began to fail in 2007, Lucille's daughter, Lisa Miele, began to lend a hand by driving Erika to the market, to the bank, and to all of her doctor's appointments. (Tr.II/104,106-107,110,145.) Lisa would also stop by Erika's house once a week to clean and vacuum for her. (Tr.II/107.) Ultimately, Lisa and Erika opened a joint savings account from which Lisa would pay Erika's bills. (Tr.II/145-147.) In 2008, when Lucille's condition deteriorated, Lisa took her mother's place as Erika's health care proxy.[2] (Tr.II/107-108,127,153; S.R.6-7.) Lucille passed away in 2009. (Tr.II/127.)

Meanwhile, the defendant, who was the building inspector for the City of Lowell, expressed an interest in Erika's house, which was adjacent to his own. (Tr.II/22,114-115; 111/49.) The defendant and Erika's husband had a history of discord over the boundary line between their respective properties. (Tr.II/7-8,13.) Once Erika's husband passed away, however, the defendant began to pester Erika about buying the property from her. (Tr.III/9-10,15.)

***5** Erika was resolute that she did not want to sell her property to the defendant, and did not want it developed into condominiums; she said as much to her attorney, Eileen Donoghue. (Tr.II/30.) A "colorful" character who was not afraid to speak her mind (Tr.II/34,39-40,43,53; III/9,11,120), Erika told Lisa Miele, "that son of a bitch wants my house, and he's not getting it," referring to the defendant. (Tr.II/116.) Erika also advised another neighbor, Raymond Goyette, on several occasions that there was "no way in hell" the defendant would ever get her property, fearing that her deceased husband would "flip over in his grave." (Tr.III/10-11,14.)

During the early morning hours of July 13, 2010, Erika fell and broke her hip at her house. (Tr.II/10,27-28,112.) She was transported to Saints Medical Center in Lowell. (Tr.II/10,112,128.) Lisa rushed to the hospital at 3:15 A.M. to see her. (Tr.II/112,129.) Later that morning, when Erika learned that she would need surgery to repair her broken hip, she asked Lisa to contact her attorney. (Tr.II/112-113,130.)

Lisa called Attorney Donoghue and told her that Erika was in the hospital and wanted to see her. ***6** (Tr.II/10,24,113,130.) When the attorney arrived later that day, Lisa left the room; Erika then expressed concern to Attorney Donoghue that she had to undergo surgery the next day, and wanted to make sure that her paperwork was in order. (Tr.II/11,24,27,31,112-113,130.) She advised her attorney that the sole beneficiary named in her will, Lucille, had already passed away, and Lucille's daughter Lisa had been taking care of her ever since, as well as serving as her health care proxy. (Tr.II/11,19,31; S.R.6-7,8-9.) Erika wanted to make sure that Lisa would receive whatever Lucille would have been entitled to under her will. (Tr.II/11.)

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When Attorney Donoghue informed Erika that they would have to draft a new will or codicil naming Lisa as the beneficiary, Erika asked if she could prepare that for her. (Tr.II/12-13.) During the time that she spent conversing with Erika, Attorney Donoghue noted that Erika seemed anxious about the impeding surgery, but very aware of what she was doing. (Tr.II/11,15-16.) Erika said nothing to the attorney about selling her property to the defendant, nor did she mention any proposed deed of her Billerica Street property to the *7 defendant in exchange for a life estate. (Tr.II/16-17,29-30.)

Attorney Donoghue left the hospital, went back to her office, and revised Erika's will to reflect the change in beneficiary from Lucille Christman to her daughter, Lisa Miele. (Tr.II/12-13,25,152.) The new will expressly bequeathed Erika's property at 205 Billerica Street to Lisa. (S.R.10.) About one hour later, Attorney Donoghue returned to the hospital with the revised will, along with two witnesses and a notary; after the attorney went over the revisions with Erika, Erika and the witnesses signed the will and the document was notarized. (Tr.II/12-15,24-27; S.R.10-12.)

Erika underwent surgery the next day, July 14, 2010, and on July 17th she was transferred to Wingate nursing home for short-term rehabilitation. (Tr.II/28,39,81,88.) Upon Erika's arrival at Wingate, a nursing supervisor administered a "Mini Mental Status Exam" to ascertain if Erika was competent to sign paperwork. (Tr.II/72,74-75; S.R.13-14.) Erika scored a 19 out of a possible score of 30, with 24 or more considered to be a passing score. (Tr.I1/79-80; S.R.13-14.) The supervisor concluded that Erika was not competent to sign any further paperwork, and she *8 notified Erika's health care proxy, Lisa, that she would have to sign any documents on Erika's behalf. (Tr.11/80.)

During the course of the next ten days, Erika developed an infection in her hip, and her condition steadily deteriorated. (Tr.II/43,99-100,117; 111/18-19.) The medical personnel at Wingate observed that she was in a tremendous amount of pain, and was at times incoherent and unable to respond appropriately to questions. (Tr.11/18,20,23.) When she was incapable of expressing herself verbally, Erika would cry or moan in pain. (Tr.III/19-20.) While at Wingate, Erika was regularly administered antibiotics, antidepressants, as well as ten milligrams of oxycodone, a potent narcotic pain reliever, which can cause confusion and sedation. (Tr.II/88-89,95; III/21.)

Lisa Miele visited Erika at Wingate every day for one to two hours. (Tr.II/40,116.) The defendant would also stop by Erika's room for a few minutes and, at one point, asked Lisa why she was there all the time. (Tr.II/41,45,53-54,117-118,132.) The defendant also mentioned to Lisa about building a ramp for Erika when she returned home or putting a new boiler system in her *9 house; Lisa assured him that neither was needed. (Tr.II/117-118.)

While at Wingate, Erika shared a room with Carmen Cormier, with whom she would converse when she was able. (Tr.II/39-40,53.) Erika told Carmen that the defendant was only nice to her because he wanted her land, and that she did not trust him. (Tr.I1/42,56-57.)

Meanwhile, Erika's condition continued to worsen. (Tr.11/19,29.) Erika began to wake up at night, in pain, and call out for Lisa. (Tr.II/135.) Lisa gave Carmen Cormier her telephone number and told Carmen that she would come right over. (Tr.II/62-63,119,135.)

At about the same time, Erika, Carmen, and the nursing staff at Wingate all mentioned to Lisa that the defendant wanted Erika to sign some paperwork; Erika and Carmen seemed to believe that it had something to do with building a ramp for Erika's house. (Tr.II/47,133-135.) Carmen assured Lisa that she would call her if the defendant came by again with the paperwork, and would signal Lisa to "bring her food," so that Lisa would know the defendant was there. (Tr.II/135-136.) On July 21, 2010, Lisa called Attorney Donoghue and expressed concern that the defendant was *10 trying to get Erika to sign a document, but she did not know what it was. (Tr.I1/133-134.)

On the evening of July 26, 2010, Lisa had arrived to visit Erika as usual. (Tr.II/47.) Erika was barely awake, and Lisa told Erika that she was going home to make supper, but that she would be back later. (Tr.I1/47,62,119-120.) Within ten to fifteen minutes, the defendant entered Erika's room with a colleague of his, Kimberly Hackett-Hayes, and another man, Nick Rabias, who was

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apparently a notary. (Tr.II/44-47,58; III/53.) Rabias remained at the doorway while Hackett-Hayes stood next to Erika's bed. (Tr.II/46,58.) The defendant came around Erika's bed with a document in his hand, turning his back to Carmen in the adjacent bed. (Tr.I1/44-45,47,58-59.)

Erika was visibly "out of it" and in pain. (Tr.II/61.) The defendant nonetheless said to Erika, "See this little line there? Why don't you sign that. If you can't sign it, put your initials or an X or something, because I have to have permission to do something." (Tr.II/47,60.) The defendant did not explain to Erika what the document was, nor did Erika ask. (Tr.II/48.)

***11** Carmen called out to Erika to get her attention; she pleaded with Erika not to sign anything until Lisa returned. (Tr.II/48,60.) The notary, Rabias, demanded of Carmen, "Who are you?" (Tr.II/48.) Erika ignored Carmen's pleas and, without reading the document, signed it. (Tr.II/48,61.) The defendant and Rabias then promptly left the room, while Hackett-Hayes stayed next to Erika's bed. (Tr.II/49,59,61-62.)

Carmen then telephoned Lisa and told her to "bring her food," their signal that the defendant was there. (Tr.II/48,62,120,136.) When Lisa arrived, Hackett-Hayes immediately got up and left. (Tr.II/65,120-121,136-137.) Carmen told Lisa that Erika had signed some kind of document. (Tr.II/48,121.) Lisa turned to Erika and asked if she had had company, to which Erika responded, "Dave," meaning the defendant. (Tr.II/122.) Lisa then asked her what she had signed for Dave; Erika answered, "I don't know." (Tr.II/122.) There were no copies of any documents left with her in the room. (Tr.II/122.)

Erika then drifted back to sleep. (Tr.II/122.) At no point had Erika ever mentioned to Lisa about wanting to give her house to the defendant. (Tr.II/119.)

The next day, July 27th, 2010, Lisa called Attorney Donoghue and informed her that Erika's roommate, ***12** Carmen, had told her that Lisa had signed a document that the defendant had presented to her. (Tr.II/18,31,122,137.) Later that day, Wingate contacted Lisa because Erika's condition was becoming increasingly grave; when Lisa arrived at the nursing home, she could not wake Erika up. (Tr.II/28,66,99-100,123,150-151.) Erika was transported back to Saints Medical Center, where she fell into a coma and never regained consciousness. (Tr.II/29,66,99-100,123,150-151.) Erika passed away on XX/XX/2010, just weeks shy of her 87th birthday. (Tr.II/32,112,124; 111/29; S.R.15.)

Meanwhile, the document that the defendant had Erika sign the evening before she was found unresponsive and transported back to the hospital turned out to be a quitclaim deed granting Erika's property on Billerica Street to the defendant. (S.R.16.) According to the Registry of Deeds, the defendant became the title owner of Erica's house on July 26, 2010. (Tr.II/124-125; III/53-5,62.)

The defendant immediately changed the locks on Erika's home; according to the defendant, he was concerned about break-ins at the house, even though Lisa had ensured that it was locked while Erika was at ***13** Wingate, and there were no reported break-ins at the residence. (Tr.II/33,125; III/46-47,63.) As a result, upon Erika's death on August 12th, neither her attorney nor Lisa could not access Erika's personal property, most significantly her deceased husband's ashes. (Tr.II/33,125.) Upon request from the city manager, the defendant delivered the ashes to the funeral home. (Tr.II/33.)

The defendant's interview with Lowell Detective Thomas Hultgren

On August 31, 2010, Lowell Det. Thomas Hultgren stopped by the defendant's office at Lowell City Hall and asked him to come to the police station to talk about the transaction involving Erika Magill's property. (Tr.III/30,54.) The defendant agreed, and the two walked over to the police station, where Det. Hultgren interviewed the defendant. (Tr.III/31; S.R.25-90.)

At the outset of the interview, the defendant admitted that, when he first moved in next to Erika and her husband, they "did not get along at all" for roughly five or six years; then, about fifteen years ago, Erika's lawnmower broke and he decided to cut her ***14** lawn for her. (S.R.26-27.) According to the defendant, ever since then, he has helped Erika maintain the property.

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(S.R.27.) He also recalled that about four years ago, he offered to buy Erika's property for $100,000 and a "life estate," but Erika declined on the advice of her attorney, whom the defendant knew was Eileen Donoghue. (S.R.27.)

In his interview, the defendant claimed that in late May of 2010, Erika called him and asked if he could come over. (S.R.29-30.) He went over to her house and, according to the defendant, Erika was suicidal; she purportedly told him that she wanted to give him her house outright. (S.R.30-31,33-34,54,70.) The defendant alleged that he refused to accept the house for nothing; rather, he supposedly insisted on buying the house from her. (S.R.31,70,83.) The defendant maintained that, in spite of Erika's will dictating the contrary, she did not want the Christmans to have her property "[b]ecause they're parasites." (S.R.69.)

Then, in June of 2010, the defendant apparently consulted an attorney, Phil Nyman, to figure out a transaction whereby if Erika were to end up in a nursing home, the facility would not be able to place a lien on her property; the attorney supposedly advised ***15** him not to do anything in his name. (S.R.31,35-36,88.) At about the same time the defendant also contacted a notary, Gerry Largay, that he was planning a "deal" involving Erika's house. (S.R.36.)

According to the defendant, he went back to Erika on July 1, 2010, and proposed a deal whereby he offered to buy her property for $100,000; the transaction would purportedly be comprised of two mortgages, one for $50,000 and the other for $42,000, as well as the payment of about $8,000 in municipal liens. (S.R.31- 33,46,58.) Only the $50,000 mortgage, however, would be recorded. (S.R.32-33,51,54,58.) According to the defendant, the $42,000 mortgage would not be recorded as a "protective" measure if Erika were to end up in a nursing home. (S.R.33-34,52,88.) Significantly, both mortgages were dischargeable after fifteen years - a length of time which the defendant conceded Erika would not likely outlive -- or immediately upon the eighty-six year-old's death. (S.R. 32-33, 51, 54, 58.)

The defendant showed the detective a copy of the notarized "Quitclaim Deed" that was signed by Erika on July 26, 2010, as well as the two notarized mortgages, also dated July 26, 2010, but neither of which was signed by Erika. (Tr.III/37-39; S.R.16,21-22.) The ***16** first mortgage in the amount of $50,000 was recorded with the Registry of Deeds, and was payable monthly beginning August 1, 2010 and ending August 1, 2025, dischargeable upon Erika's death. (S.R.21.) The second mortgage in the amount of $42,000 had identical terms as the first, but was apparently not recorded. (S.R. 22.) Monthly payments at 6% interest amounted to $421.93 for the first mortgage and $354.42 for the second, none of which the defendant ever paid since the mortgages were discharged upon Erika's death less than one month later. (S.R.21,22,33,58.)

The defendant also produced a paper entitled "Life Estate," dated July 1, 2010, which purportedly allowed Erika to live on the property until her death; the document, however, was signed only by the defendant, and was not notarized nor recorded with the deed. (Tr.III/36; S.R.20,34-35,46,88.) According to the defendant, he went over the "numbers" with Erica, and she agreed to the deal.[3] (S.R.35,46.) The defendant admitted that he drafted all of the paperwork himself, ***17** without the assistance of an attorney (though he knew that Erika herself had retained Eileen Donoghue, who had advised her not to sell the property); evidently, in addition to his duties as building inspector, the defendant operated a business with Kimberly Hackett-Hayes involving out-of-state real estate deals and legal assistance, though neither was an attorney. (S.R.35,52,86.)

Later in the interview, the defendant maintained that he recorded just the first mortgage because the property would have been only appraised at $50,000. (S.R.88.) According to the defendant, the property was "a dump," unable to be rented out or mortgaged, yet he purportedly agreed to pay $100,000 for it because he "like[d] the area," and might possibly use it for his office. (S.R.32,52,84,86-87.) The defendant also produced a document indicating that the assessed value of the property was $128,300, substantially higher than what he had purportedly believed it was worth or "agreed" to pay; he had apparently obtained it from the assessor's database on August 6, 2010, claiming that he had "never looked" before that. (Tr.I11/42,53; S.R.17-18,63.)

***18** According to the defendant, he was supposed to go to Erika's house to notarize all of the paperwork with Gerry Largay in mid-July of 2010, but he learned that Erica had fallen and was in the hospital. (S.R.37-38.) The defendant told the detective that, when he went to visit Erika on July 26, 2010 in the nursing home, she supposedly "looked good." (S.R.38.) In his words,

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"she looked better on the 26th than she looked in months." (S.R.82.) The defendant purportedly asked Erika if she still wanted to do the deal and, according to the defendant, she said that she did, so he told her he would return later with the paperwork. (S.R.38,51.)

The defendant claimed that he could not find Gerry Largay, but bumped into another notary, Nick Rabias, at a coffee shop, who offered to notarize the deed. (S.R.39.) He then returned to the nursing home with Rabias, where Hayes-Hackett and Erika signed the quitclaim deed to Erika's house, after which Rabias notarized it out in the hallway. (Tr.III/56; S.R.39-40.) According to the defendant, Erika "knew what was going on" and had asked him to give Lisa's brother money to buy bread to feed the ducks on the property. (S.R.39-41.)

***19** The defendant told the detective that the next day when he visited Erika in the nursing home (the same day Erika was observed to be unresponsive and transferred back to the hospital), she was "doing well." (S.R.47-48.) The defendant claimed that he had gone and changed the locks on Erika's house (even though she purportedly retained a life estate in the property) because he believed that Lisa Miele and her brother were removing items from the home. (S.R.57.)

The defendant also produced copies of two receipts he drafted, apparently dated July 27, 2010, for checks which he claimed that he supposedly mailed to Erika's home while she was in the hospital. (Tr.III/23; S.R.47,48.) The checks were never cashed. (S.R.48,53.) The defendant conceded that, to this day, he has not paid Erika any money for title to her property. (S.R.53.)

The defendant's case

Attorney Philip Nyman and Gerard Largay, a notary, testified on behalf of the defendant. According to Attorney Nyman, he had a "general discussion" with the defendant in the late spring or early summer of 2010 about purchasing property from an **elderly** woman named ***20** Erika who lived alone. (Tr.III/12-15.) The defendant seemed particularly concerned about how he could protect himself against Medicare or Medicaid liens should Erika end up in a nursing home. (Tr.III/14.) Attorney Nyman testified that he is familiar with life estates, and that in his experience they are typically recorded as part of the deed; further, he would normally give a copy of the life estate to the other party to the transaction. (Tr.III/17-18.)

Gerard Largay recalled that in the late spring or early summer of 2010, the defendant had contacted him and asked if he could do some notary work for him regarding a transaction with Erika Magill. (Tr.III/20-21.) According to Largay, the defendant called him at some point later in the summer and advised him that Erika had broken her hip and that he would have to postpone the transaction. (Tr.III/21.) Largay then received yet another call from the defendant, who informed him that he no longer needed his services; he had bumped into another notary who happened to have his stamp with him, and the work was completed. (Tr.III/22-23.)

Largay agreed that it is incumbent upon the notary to verify the identity of the signing parties with some ***21** form of identification; he also confirmed that a notary should not notarize if the person whose signature is to be notarized has a demeanor that causes the notary to have a compelling doubt about whether she knows the consequences of the transaction. (Tr.III/26.)

ARGUMENT

THE JUDGE PROPERLY DENIED THE DEFENDANT'S MOTION FOR A REQUIRED FINDING OF NOT GUILTY OF LARCENY BECAUSE ANY RATIONAL TRIER OF FACT COULD HAVE FOUND THAT THE VICTIM LACKED THE CAPACITY TO CONSENT TO DEEDING HER HOME TO THE DEFENDANT, RENDERING THE TAKING UNLAWFUL.

The defendant claims that the elements of larceny by stealing do not include proof of the victim's lack of consent to the taking, and thus the judge's finding that Erika lacked the capacity to consent to the transaction in which she deeded her house over to the defendant has no bearing on the crime charged. Further, the defendant argues that because the purported terms of the

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"agreement" allowed the Erika to live on the property for the remainder of her life, he did not permanently deprive her of the "use" of the property, which he contends is required by the larceny statute. The defendant's arguments are without merit.

In reviewing the denial of a motion for a required finding of not guilty, an appellate court assesses ***22** whether, "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." *Commonwealth v. Latimore,* 378 Mass. 671, 677 (1979), quoting *Jackson v. Virginia,* 443 U.S. 307, 318-319 (1979). The court appraises the sufficiency of the evidence, "keep[ing] in mind that the evidence relied on to establish a defendant's guilt may be entirely circumstantial...and that the inferences a jury may draw from the evidence 'need only be reasonable and possible and need not be necessary or inescapable.'" *Commonwealth v. Emeny,* 463 Mass. 138, 151 (2012), quoting *Commonwealth v. Linton,* 456 Mass. 534, 544 (2010) (internal quotations omitted).

Here, the trial judge found the defendant guilty of larceny by stealing. [4] G.L. c. 266, § 30(1) reads, in pertinent part:

Whoever steals, or with intent to defraud obtains by a false pretence, or whoever unlawfully, and with intent to steal or embezzle, ***23** converts, or secretes with intent to convert, the property of another as defined in this section, [5] whether such property is or is not in his possession at the time of such conversion or secreting, shall be guilty of larceny...

As the judge correctly acknowledged, larceny by stealing is the wrongful taking of the property of another person with the intent to deprive that person of such property permanently. (Tr.V/3.) See *Commonwealth* v. *Mills,* 436 Mass. 387, 394 (2002). The court therefore properly instructed itself on the elements of larceny by stealing as follows, unchallenged by the defendant:

> The first element is that the defendant took and carried away property unlawfully. The second, that the property was owned by someone other than the defendant. And the third element is that the defendant did so with the intent to deprive the person of that property permanently.

(Tr.V/3.) The defendant, however, takes issue with the court's further instruction, prompted by the particular circumstances of this case:

> ...it may find that the defendant unlawfully took property owned by Erika M [a]gill if the Commonwealth had proven beyond a reasonable doubt, one, that on July 26, 2010, when the defendant presented Ms. M [a] gill with a quit claim deed conveying Two [Hundred] and Five Billerica Road to himself [] for her signature, Ms. M[a]gill was so ***24** mentally impaired that she could not understand the transaction that the defendant was asking her to enter into, including that she was selling her home to the defendant. And, two, that at that time the defendant knew or reasonably should have known that Ms. M[a]gill was that incapable of understanding the transaction that the defendant was asking her to enter into.

(Tr.V/7-8.) The judge's instruction was entirely correct. First, though phrases such as "against the owner's will" or "without the owner's permission" do not expressly appear in the statute, the requirement that the taking be "wrongful" or done "unlawfully" presumes that it be accomplished without the owner's consent. [6] "One who takes property *without the authority of the owner* and so uses it or disposes of it as to show indifference whether the owner recovers possession may be found to intend to deprive the owner of it permanently." *Commonwealth v. Salerno,* 356 Mass. 642, 648 (1970) (emphasis added). Conversely, if the owner consents freely and unconditionally to the defendant's ***25** receipt of the property, such authority renders the taking nontrespassory. See *People v. Brock,* 143 Cal. App. 4th 1266, 1274 (2006) ("theft by larceny is a trespassory offense that is not committed when the property is taken with the owner's consent").

Thus, while the "lack of authority is not an essential element" of larceny, *Commonwealth v. O'Connell,* 438 Mass. 658, 664 (2003), the owner's consent to the taking of the property is a defense, *Brock,* 143 Cal. App. 4th at 1275 n.4. Cf. *Commonwealth v. White,* 5 Mass. App. Ct. 483, 488 (1977) (defense to stealing where defendant honestly and reasonably believes property he

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took belongs to him). In that instance, the Commonwealth "bears the burden of proving beyond a reasonable doubt the absence" of such consent. O'Connell, 438 Mass. at 664-665.

Under certain circumstances, however, the owner's apparent consent to the taking of his or her property is invalid if he or she is incapacitated by, for example, intoxication or mental incompetency. See Brock, 143 Cal. App. 4th at 1275-1276 (no valid consent to taking of property if "the victim is unable to make a reasonable judgment as to the nature or harmfulness of the conduct in question," whether due to "infancy, ***26** insanity, or intoxication" or force, fear, duress, or fraud). See also *Commonwealth v. Urban,* 450 Mass. 608, 613 (2008) (to prove incapacity to consent, Commonwealth must establish beyond a reasonable doubt that "because of the consumption of drugs or alcohol or for some other reason (for example, sleep, unconsciousness, mental retardation, or helplessness), the complainant was so impaired as to be incapable of consenting to intercourse"). It follows that, if the absence of consent to the taking of property is due to the donor's lack of mental capacity, the Commonwealth must show that the defendant knew, or should have known, of such incapacity. See *State v. Calonico,* 256 Conn. 135, 155-156 (2001) (state has burden to prove that victim was not of sound mind thus incapable of consenting to transfer of her property, and that victim's mental incapacity would have been apparent to defendant). See also *Commonwealth v. Blache,* 450 Mass. 583, 595 n.19 (2008) (in rape cases where Commonwealth alleges constructive force against victim so impaired by drugs and alcohol as to be incapable of consenting to intercourse, Commonwealth must prove both victim's inability to consent and that Defendant knew, or should have known, of victim's inability to consent).

***27** Here, the defendant insinuated in his interview with Lowell Police that Erika not only consented to the transfer of her property, but that she did so knowingly and voluntarily from her bed in the nursing home. Thus, the court correctly recognized in its instruction that, under the circumstances of this case, it was incumbent upon the Commonwealth to prove not only that such consent was ineffective by virtue of the fact that Erika did not -- or could not -- consent to the taking of her property, but that the defendant should have known about her incapacity, thereby rendering the transfer unlawful.

Indeed, the role of a victim's lack of mental capacity to consent to a transfer of property has already been acknowledged with regard to the coexistent theory of larceny by false pretence. See *Commonwealth* v. *Reske,* 43 Mass. App. Ct. 522, 524-527 (1997) (fact finder may infer false statement as to value of six trucks defendant sold to victim for inordinate profit, where victim's impaired cognitive capabilities was key necessary to defendant being able to relieve victim of his money). Like larceny by stealing, larceny by false pretence necessarily involves the absence of free and voluntary consent on the part of the owner; the only ***28** distinction is that, while stealing generally implicates the owner's nonconsent to the taking regardless of the defendant's attempts to defraud him or her, with false pretence the owner consents to the taking of property, but the defendant obtains such consent by fraud - specifically, the defendant induces it by a false statement. See *id.* at 524 (larceny by false pretence requires proof that victim relied on false statement made by defendant and, as a result, parted with his property). With regard to larceny by stealing, the owner's incapacity can operate to wholly invalidate his or her consent to the taking of property, just as it can bear on the owner's susceptibility to consent by fraud as in *Reske.* Thus, where circumstances so dictate, the fact finder may consider whether the victim lacked the capacity to consent to the taking of the property under the larceny statute.

Further, the trial judge properly relied on persuasive authority from other jurisdictions for the proposition that a donative victim's inability to consent to a taking is a fact properly considered in a larceny prosecution, notwithstanding that lack of consent - or mental incapacity as proof thereof -- may ***29** not be prescribed in the statute. Similar to G.L. c. 266, § 30, Connecticut's larceny statute does not expressly identify the property owner's "lack of consent" as an element of the crime, nor does it reference the donor's mental capacity. [7] Nonetheless, the Connecticut Supreme Court has recognized that, in the context of a "traditional understanding" of the larceny statute, a donative victim's inability to consent to a taking may properly be considered. *State* v. *Calonico,* 256 Conn. 135, 154 (2001). In particular, a "victim's deteriorating mental state [may] render[] her incapable of understanding the nature of the transactions being facilitated by the defendant, and...consequently, the victim's inability to consent renders the defendant's taking of the victim's assets wrongful." *Id.* at 155 (sufficient evidence of larceny where **elderly** victim lacked capacity to understand nature of $800,000 in bank transactions facilitated by ***30** defendant and thus her inability to consent rendered defendant's taking of assets wrongful).

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Likewise, New York's larceny statute is nearly identical to Connecticut's in that it contains no reference to the victim's consent or, for that matter, his or her mental capacity. [8] The Appellate Division of New York has nonetheless acknowledged that, under a theory of trespassory taking, the jury "could evaluate [the victim's] capacity under the circumstances of th[e] case in determining whether a trespass ha[s] occurred or whether, as defendant contend[s], he [] acted with her knowledge and consent." *People* v. *Camiola,* 225 A.D.2d 380, 380 (N.Y. App. Div. 1996) (memorandum decision). In *Camiola,* the Appellate Division observed that "the People proved beyond a reasonable doubt that the victim was incapable of consenting to defendant's actions and that defendant was cognizant of her diminished mental capacity, yet continued to deplete her assets." *Id.* at 381 (sufficient evidence of second-degree grand larceny ***31** where defendant maintained pattern of thefts from **elderly** and increasingly senile victim over two-year period, in which he transferred by her signature significant assets to himself). Similarly, in Georgia, notwithstanding that the theft statute does not refer to the victim's will or consent, "the gravamen of the offense is the taking of the property of another against the will of such other." *Stull v. State,* 230 Ga. 99, 100 (1973). See Ga. Code Ann. § 16-8-2. [9] See *Lucas v. State,* 183 Ga. App. 637, 638 (1987) (sufficient evidence of "theft by taking" where defendant assumed **financial** control over $40,000 of **elderly**, senile victim's money and purchased two parcels of real estate from victim for roughly half of their market value).

***32** Further, in Florida, where the theft statute indirectly references the owner's consent, [10] courts have recognized that a victim's nonconsent to a transfer of property may include "evidence that the defendant knew the victim lacked the mental capacity to consent to the taking of his or her property." *Deranger* v. *State,* 652 So. 2d 400, 401 (Fla. Dist. Ct. App. 1995) (sufficient evidence of grand theft where **elderly** victim who was "exhibiting symptoms of reduced mental capacity" signed and gave defendant forty-six checks totaling almost $68,000, though defendant claimed checks were paid in exchange for her promise to take ***33** care of victim). See also *Guarscio* v. *State,* 64 So. 3d 146, 150 (Fla. Dist. Ct. App. 2011) (sufficient evidence of theft where defendant with power of attorney cashed $5,000 in checks on **elderly** victim's account after victim suffered stroke); *Starling* v. *State,* 677 So. 2d 4, 6 (Fla. Dist. Ct. App. 1996) (sufficient evidence of theft where the defendant claimed to be a co-owner of joint bank accounts because "there was sufficient evidence that [the victim] did not have the mental capacity to place [the defendant] as a signatory on her accounts") . [11]

Similarly, mental incapacity is considered as to the issue of nonconsent to the taking of property in Alabama. "[E]ven without an express statutory provision to that effect, mental deficiency on the part of the victim, which is known or should be known to the defendant, can render ineffective the apparent consent by that victim in a prosecution for theft." ***34** *Gainer* v. *State,* 553 So. 2d 673, 679 (Ala. Crim. App. 1989) (sufficient evidence of theft where defendant opened joint bank accounts with the mentally incompetent 83 year-old victim and then spent over $111,000 from these accounts on personal bills, cars, and other items without victim's authorization). Michigan likewise recognizes that a victim's mental incompetency can invalidate his or her consent to a taking, even where a contract purportedly entitles the defendant to the property. [12] In *People* v. *Cain,* 238 Mich. App. 95, 102 (1999), the **elderly** victim (who was suffering from senile dementia), the defendant, and two witnesses signed an agreement in which the victim gave the defendant "permission...to have access to and use any of my personal money for her professional and/or personal use due to her not taking payment for any of her work done for me." The court deemed the evidence of larceny sufficient, where it suggested that the victim did not have the capacity to consent to the taking, and the defendant was aware of the victim's mental deterioration before signing the agreement. *Id.* at 121-122. See also ***35** *State* v. *Thompson,* 153 Wash. App. 325, 335-336 (2009) (sufficient evidence that defendant "wrongfully obtained or exerted unauthorized control" under theft statute where he knew victim suffered from dementia and lacked capacity to sign power of attorney, yet he obtained her signature and then used it to deprive victim of proceeds of sale of her house that he knew was supposed to be conserved for her mentally retarded daughter). Cf. *State* v. *Maxon,* 32 Kan. App. 2d 67, 77 (2003) (reversing theft conviction where defendant bought home from mildly bipolar victim for fraction of its apparent value, where general theft statute lacked "specific provision that negates an individual's consent when the defendant knows or should know the donor lacks the mental capacity to give consent" and defendant convicted of separate specific crime of mistreatment of dependent adult).

The defendant nonetheless seems to insinuate that that these cases are distinguishable because the defendants there "literally plundered the victim's assets," which rendered "the taking 'wrongful' as well as nonconsensual." (D.Br.14.) This distinction is

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wholly off the mark. First, the defendant stole essentially the only asset of value in Erika's estate her home -- an asset which, less than two weeks before ***36** she deeded it to the defendant, Erika had every intention of bequeathing to Lisa Miele, her best friend's daughter who had taken care of her in her final years. Second, what made the taking "wrongful" and "nonconsensual" in the cases cited above was not the amount of assets depleted from the victim, but the fact that that victim, as here, was mentally incapable of consenting to the transactions.

Further, the defendant's attempts to carve out a distinction between a scenario whereby property was wrongfully gifted to a defendant, as in the cases cited above, and the notion that the "agreement" here was purportedly a "fair deal" (D.Br.14), are simply futile. Massachusetts has never identified a distinction between a "gift" and a "sale" in terms of the larceny statute, particularly where the terms of the "deal" are plainly unfair. See *Commonwealth* v. *Reske,* 43 Mass. App. Ct. 522, (1997) (sufficient evidence of larceny by false pretenses where defendant sold mentally-impaired victim six trucks on terms that far exceeded normal profit margins).

In any event, the judge here was not constrained to believe the defendant's version of the purported "deal." The defendant drafted all of the paperwork ***37** himself; he neither consulted an attorney nor, more significantly, contacted Erika's attorney, whom he knew had advised her not to sell her property to him. The alleged second mortgage was never signed by Erika, nor recorded with the deed as the first mortgage. Likewise, the purported "life estate" was not signed by Erika, nor recorded with the deed. None of the documents were left with Erika, her attorney, or her legal representative, Lisa; the defendant retained them in his possession. Indeed, the defendant fortuitously seized an opportunity where none of the parties who were looking after Erika's legal or medical interests in particular her attorney, health care proxy, or nursing staff - were present when the deed was signed. The trial judge would thus have been warranted in concluding that the defendant had no intention for the unrecorded mortgage or life estate to have any legal effect. At best, that left a $50,000 mortgage on the property (which was not signed by Erika but was recorded with the deed), dischargeable upon Erika's death (or when she reached 101 years old) -- this, for a nearly eighty-seven year-old woman hospitalized with an infected hip, and not to mention far below the assessed value of $128,300. As in Reske, the defendant ***38** took advantage of Erika's mental incompetence to sign off on this plainly lopsided deal. And in the end, the defendant never paid Erika a dime for the property.

Moreover, the defendant's reliance on the dissent's reasoning in *Reske,* 43 Mass. App. Ct. at 532-534, for the proposition that Erika's "lack of capacity to understand and consent to the unfair transaction[] imposed on [her] by the defendant has no bearing" on a larceny prosecution pursuant to G.L. c. 266, § 30 because the Legislature has already addressed "the **exploitation** of **elderly** and disabled persons" when it enacted subsection (5), [13] is wholly misplaced. The ***39** defendant is correct that subsection (5) merely provides for increased penalties for crimes directed at this population, leaving the elements of the substantive crime of larceny unchanged. As discussed in detail above, however, inherent in the underlying crime is that the victim did not consent to the taking, and such nonconsent may, in certain circumstances, be demonstrated by the victim's lack of capacity to consent - whether that be due to advanced age, disability, or some other reason not addressed by the sentence enhancement, such as short-term mental incapacity or intoxication. See, e.g., *Urban,* 450 Mass. at 613 (to prove incapacity to consent, Commonwealth must establish beyond a reasonable doubt that "because of the consumption of drugs or alcohol or for some other reason (for example, sleep, unconsciousness, mental retardation, or helplessness), the complainant was so impaired as to be incapable of consenting to intercourse"); *Brock,* 143 Cal. App. 4th at 1275-1276 (no valid consent if "the victim is unable to make a reasonable judgment as to the nature or harmfulness of the conduct in question," whether due to "infancy, ***40** insanity, or intoxication" or force, fear, duress, or fraud). The increased penalty of subsection (5) merely targets those victims who are sixty years or older or "a person with a permanent or long-term physical or mental impairment that prevents or restricts the individual's ability to provide for his or her own care or protection" under G.L. c. 265, § 13K. Regardless of the victim's age or impairment, in any case where the victim's apparent consent to the taking is a defense and his or her ability to consent is in question, the Commonwealth would still have to show that victim lacked the capacity to consent to the taking (and the defendant should have known the victim could not consent) to prove larceny.

Thus, the court correctly recognized that under the circumstances of this case, Erika's lack of mental capacity -- and the defendant's awareness thereof -vitiated her consent to the transaction, thereby rendering the taking unlawful. Indeed, the

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defendant does not appear to challenge the judge's factual finding that Erika was so mentally impaired that she could not comprehend that she was effectively signing her house away to the defendant, and wisely so. The defendant was the sole source of any suggestion that ***41** Erika intended to deed over to him her only asset - the home in which she and her deceased husband had resided for nearly fifty years. Erika's revised will, executed less than two weeks before the transaction at issue, evidenced otherwise, specifically bequeathing her home to Lisa Miele. Additionally, not only Lisa, but also Erika's attorney, neighbor, and nursing home roommate all recounted how Erika was adamant about not selling her home to the defendant.

Further, Erika had failed a "Mini Mental Status Exam" upon her arrival at Wingate, meaning that she was deemed incompetent to sign any paperwork. Medical personnel observed that her condition only deteriorated from there; she was in tremendous pain, heavily medicated, and at times incoherent. At the time Erika signed the deed, her roommate described her as "out of it." She could not even recall what she had signed when Lisa arrived at the nursing home soon after. Then, less than a day after Erika signed the deed, she could not be woken up and was transferred back to the hospital, where she would slip into a coma. Thus, the judge was warranted in discounting the defendant's incredulous account that Erika "looked better on the 26th than she looked in months" (S.R.82), and could have reasonably ***42** inferred that Erika's incapacity would have been readily apparent to him.

Finally, the defendant argues for the first time on appeal that the evidence was insufficient to show that he intended to deprive Erika permanently of her residence as expressed in the indictment (R.1); in particular, he claims that his purported offer of a "life estate" negates this element since, in describing the crime of larceny, G.L. c. 277, § 39 [14] employs the phrase "deprive the owner permanently *of the use of*" the property (emphasis added). The defendant's reliance on § 39 is entirely misplaced. "That statute was not ***43** enacted to change the elements of the various and distinct forms of larceny but to make clear that, as used in an indictment, the word 'steal' comprehends the various types of larceny." *Commonwealth* v. *Hildreth,* 30 Mass. App. Ct. 963, 965 (1991) (notwithstanding description of larceny in G.L. c. 277, § 39, larceny by false pretenses does not require intent to deprive owner of property permanently). See also *Commonwealth* v. *Kelley,* 184 Mass. 320, 323-324 (1903) (statute which includes embezzlement within definition of larceny thus prescribing single form of indictment is only for purpose of informing accused of charge and does not alter essentials to conviction). Interestingly, the defendant does not appear to claim now, nor at trial, that the judge improperly instructed himself that the defendant took the property "with the intent to deprive the person of that property permanently." (Tr.V/3.) And wisely so, since larceny has been consistently defined as the "unlawful taking and carrying away of the personal property of another with the specific intent to deprive the person of the property permanently." *Commonwealth* v. *Johnson,* 379 Mass. 177, 181 (1979).

In any event, the judge need not have credited the defendant's version to police that such a "life estate" ***44** - unsigned by Erika and unrecorded with the Registry of Deeds - was ever intended to have any legal effect. Cf. *Commonwealth* v. *Ellison,* 5 Mass. App. Ct. 862, 862 (1977) (judge correctly instructed jury that larceny was complete if and when the money came under defendant's control pursuant to fraudulent scheme, and no subsequent application of money for benefit of victim would exonerate defendant). Indeed, he changed the locks in short order, claiming that he feared break-ins when there was no evidence of such. Further, Erika's "use" of the property was in fact impinged; she had every intention of bequeathing it to her best friend's daughter as demonstrated by her will revised less than two weeks prior, but her wish would never be realized due to the defendant's actions.

The larceny statute has been described as "broad in scope," *Reske,* 43 Mass. App. Ct. at 526, and "its application is not 'limited to cases against which ordinary skill and diligence cannot guard;...one of the principal objects is to protect the weak and credulous from the wiles and stratagems of the artful and cunning." *Id.,* quoting *Commonwealth* v. *Drew,* 36 Mass. 179 (1837). It follows that, where the circumstances so dictate, an owner's incapacity to consent to the taking ***45** of his or her property -- and the defendant's reasonable awareness thereof -- should bear on the question of whether the defendant stole the property. Here, the defendant seized an opportunity when Erika's attorney and caretaker -- both of whom knew Erika did not want the defendant to have her house -- were not present to protect Erika's interests. As noted by medical personnel, not to mention her roommate, Erika's incapacity would have been obvious to the defendant at the time he had her sign the deed to her house. The defendant's conduct thus amounts to a calculated decision to take advantage of the eighty-six year-old victim during a time of extreme

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vulnerability. Because Erika was mentally incapable of consenting to deeding her house away to the defendant, the taking was unlawful, and the defendant's motion for a required finding of not guilty was properly denied.

*46 CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court affirm the judgment of the Middlesex Superior Court.

Appendix not available.

Footnotes

1 References in this brief shall be cited as follows: to the defendant's record appendix as (R.); to the Commonwealth's supplemental record appendix as (S.R.); to the trial transcript by volume as (Tr.I/); and to the defendant's brief as (D.Br.).

2 Another proxy was executed in 2010 because the hospital to which Erika was admitted could not locate the original. (Tr.II/107-108; S.R.8-9.)

3 The defendant produced an unsigned document apparently dated July 1, 2010, in which he outlined the liens and outstanding taxes that he would pay on the property at 205 Billerica Street. (Tr.III/34-35; S.R.19.) The document also indicated the monthly checks that he would purportedly pay to Erika. (Tr.III/35.)

4 The judge found that the Commonwealth failed to prove the defendant guilty beyond a reasonable doubt on the alternative theories of false pretence or embezzlement. (Tr.V/8.) See *Commonwealth* v. *Cheromcka,* 66 Mass. App. Ct. 771, 774 (2006) (evidence adduced at trial need only be sufficient to prove elements of any of three theories of larceny).

5 The "property" in question may consist of "a deed or writing containing a conveyance of land" or "anything which is of the realty or is annexed thereto." G.L. c. 266, § 30 (2) .

6 That these terms are not expressed in the larceny statute does not preclude the court from discerning their role in proving the offense, particularly where G.L. c. 266, § 30 is derived from common law. *Commonwealth v. Reske,* 43 Mass. App. Ct. 522, 526 (1997). See *Commonwealth v. Dellamano,* 393 Mass. 132, 139 (1984), quoting *Morissette v. United States,* 342 U.S. 246, 261-262 (1952) (concluding that criminal intent is element of conversion of property despite Congress's omission of any express prescription from statute, where larceny "already so well defined in common law").

7 Conn. Gen. Stat. § 53a-119 defines larceny as follows:
A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner.

8 N.Y. Penal Law § 155.05 defines larceny as follows:
A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

9 Ga. Code Ann § 16-8-2 defines theft by taking as follows:
A person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated.

10 Fla. Stat § 812.014 defines theft as follows:
(1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently: (a) Deprive the other person of a right to the property or a benefit from the property. (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.
"Property of another" is further defined in Fla. Stat. § 812.012(5) as "property in which a person has an interest upon which another person *is not privileged to infringe without consent,* whether or not the other person also has an interest in the property." (emphasis added)

11 In his brief, the defendant claims that the Connecticut, New York, and Florida statutes underlying the decisions on which the trial judge relied are "materially different" from G.L. c. 266, § 30, in that they use the term "appropriate the [property] to himself or a third person" in addition to "deprive another of property." (D.Br.15-16.) He fails, however, to explain how this is significant, where the issue here is the victim's nonconsent -- as demonstrated by the lack of capacity to consent -- to the taking.

12 Both Alabama and Michigan recognize nonconsent to the taking of the property as an element of theft. *Gainer* v. *State,* 553 So. 2d 673, 679 (Ala. Crim. App. 1989); *People* v. *Cain,* 238 Mich. App. 95, 120 (1999).

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13 G. L. c. 266, § 30(5), reads as follows:

Whoever steals or with intent to defraud obtains by a false pretense, or whoever unlawfully, and with intent to steal or embezzle, converts, or secretes with intent to convert, the property of another, sixty years of age or older, or of a person with a disability as defined in [G.L. c. 265, § 13K], whether such property is or is not in his possession at the time of such conversion or secreting, shall be guilty of larceny, and shall, if the value of the property exceeds two hundred and fifty dollars, be punished by imprisonment in the state prison for not more than ten years or in the house of correction for not more than two and one-half years, or by a fine of not more than fifty thousand dollars or by both such fine and imprisonment; or if the value of the property does not exceed two hundred and fifty dollars, shall be punished by imprisonment in the house of correction for not more than two and one-half years or by a fine of not more than one thousand dollars or by both such fine and imprisonment. The court may order, regardless of the value of the property, restitution to be paid to the victim commensurate with the value of the property.

14 G.L. c. 277, § 39, "Construction of words used in indictment," reads, in pertinent part:

The words used in an indictment may, except as otherwise provided in this section, be construed according to their usual acceptation in common language; but if certain words and phrases are defined by law, they shall be used according to their legal meaning.

The following words, when used in an indictment, shall be sufficient to convey the meaning herein attached to them:

Stealing. Larceny.--The criminal taking, obtaining or converting of personal property, with intent to defraud or deprive the owner permanently of the use of it; including all forms of larceny, criminal embezzlement and obtaining by criminal false pretences.

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