

*State of Michigan  
In the Supreme Court*

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Appeal from the Michigan Court of Appeals  
Shapiro, P.J., and Whitbeck and Gleicher, J.J.

**PEOPLE OF THE STATE OF MICHIGAN,**

**Plaintiff-Appellant,**

**v**

**CHANDRA VALENCIA SMITH-ANTHONY,**

**Defendant-Appellee.**

**Supreme Court  
Docket No. 145371**

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Court of Appeals No. 300480  
Oakland Circuit Court No. 2010-232465-FH

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*Brief on Appeal—Appellant*

*Oral Argument Requested*

JESSICA R. COOPER  
Prosecuting Attorney  
Oakland County

THOMAS R. GRDEN  
Chief, Appellate Division

MATTHEW A. FILLMORE (P59025)  
Attorney for Plaintiff-Appellant  
Assistant Prosecuting Attorney  
Oakland County Prosecutor's Office  
1200 North Telegraph Road  
Pontiac, Michigan 48341  
(248) 452-9178



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## JURISDICTIONAL STATEMENT

Plaintiff-Appellant filed a timely application in this Court for leave to appeal the May 3, 2012, published opinion of the Court of Appeals reversing defendant's jury trial conviction of larceny from a person, MCL 750.357. *People v Smith-Anthony*, 296 Mich App 413; 821 NW2d 172 (2012) (90a). In an order dated October 31, 2012, this Court granted the application and instructed the parties to address the following issues:

(1) whether the evidence was sufficient to prove beyond a reasonable doubt that the crime of larceny from a person, MCL 750.357, was committed within the "immediate area of control or immediate presence" of the loss prevention officer who witnessed the theft; (2) whether the 2004 amendment of the robbery statute, 2004 PA 128 (amending MCL 750.530), altered the definition of "presence" with respect to the larceny from a person statute; and, if not (3) whether the common-law definition of the phrase "from the person" remains consistent with the common-law definition of "presence." [*People v Smith-Anthony*, \_\_\_ Mich \_\_\_; 821 NW2d 787 (Docket No. 145371, entered 10/31/12) (104a).]

This Court has jurisdiction over this appeal under MCR 7.301(A)(2) and MCR 7.302(H)(3).

## STATEMENT OF QUESTION PRESENTED

I. At common law, an individual steals “from the person of another” with respect to larceny from a person and robbery when he takes property from the person’s body or the person’s “presence,” which this Court has defined as the person’s area of protection or control. In this case, the Court of Appeals adopted for purposes of the larceny from a person statute a narrower definition of “presence” that encompasses only the person’s “personal space” or “arm’s length.” The Court of Appeals’ definition of “presence” is contrary to both the well-established common law definition and this Court’s decisions that larceny from a person is a necessarily included lesser offense of robbery. Applying the proper definition of “presence,” was the evidence sufficient to support defendant’s larceny from a person conviction?

The people contend the answer is: “Yes.”

The circuit court answered: “Yes.”

The Court of Appeals answered: “No.”

## STATEMENT OF FACTS

On the morning of May 31, 2010, Khai Krumbhaar was working as a plain clothes loss-prevention officer at Macy's department store in Northland Mall (18a-19a). She was the only loss-prevention officer on duty at the time (21a-22a, 43a). As Krumbhaar was turning on the monitors in the loss-prevention office, she saw defendant on one of the closed-circuit televisions (19a-20a). Defendant was carrying a large tote bag that appeared to be full and a brown transparent plastic grocery shopping bag (20a). She was walking through the men's department and appeared extremely nervous (20a). She was holding her arms very close and was darting her eyes from side to side, looking at sales associates and customers (20a). Defendant walked to the men's fragrance counter and talked to one of the associates for several minutes (21a). From Krumbhaar's television monitor, she observed defendant walk into the women's fragrance department (21a-22a). Defendant approached a White Diamonds fragrance display and selected a large White Diamonds box that contained a bottle of fragrance and three containers of scented cream (22a). The perfume gift set was worth \$58 (70a).

At this point, Krumbhaar walked to the floor of the store to observe defendant in person (22a). Krumbhaar's office was right around the corner from the women's fragrance department, so it took her only 15 to 20 seconds to get within visual range of defendant (22a-23a). Defendant was still holding the White Diamonds box in her hand (23a). Krumbhaar "was able to stay fairly close to [defendant] in the fragrance department . . . ." (23a.) Two different sales associates approached defendant and offered her assistance (23a). Krumbhaar heard defendant say both times that she did not need assistance (23a-24a). Defendant then walked to the women's shoe department and sat down (24a). Krumbhaar heard defendant ask one of the sales associates for a pair of shoes (24a). Defendant tried on a pair of shoes (24a). She was still acting nervous,

moving jerkily and pulling the White Diamonds box close to her (24a). She then stood up, picked up her bags and the White Diamonds box, and walked to the optical department (24a). Krumbhaar observed defendant push the White Diamonds box down into her grocery bag (24a-25a). The box was larger than the bag, so it was protruding from the top of the bag (25a). Krumbhaar followed defendant as she walked into the fashion jewelry department (25a). Krumbhaar had not observed defendant passing any money or credit cards (25a). She stopped to confirm that defendant had not purchased the White Diamonds gift set in the shoe department (25a). Krumbhaar then followed defendant around the fashion jewelry department (25a). Defendant stood there for a minute, so Krumbhaar stayed back to give her some space (25a). There were several open registers nearby, but defendant walked past the registers and quickly out of the store without paying for the White Diamonds gift set (25a-26a, 28a).

After defendant left the store and walked into the mall, Krumbhaar approached her (28a). Krumbhaar said, “[H]ello, I’m with Macy’s security, I need to talk to you about . . . .” (29a.) At this point, Krumbhaar was unable to continue with her script because defendant became extremely agitated, began shouting, pulled away from Krumbhaar, and started to turn and run (29a-30a, 51a). Krumbhaar took hold of defendant’s arm and the back of her shirt (29a, 51a-52a). When defendant could not immediately break free, she turned on Krumbhaar and began scratching at her with her hands like claws (30a-31a, 60a-61a, 76a). Defendant’s hand got tangled in Krumbhaar’s hair (30a-31a, 47a). Defendant was yelling, “No, stop. Get away from me, I didn’t take anything.” (30a.) Defendant dragged Krumbhaar about 200 feet towards a store called Manic Shoes (30a-31a, 53a, 67a). Meanwhile, Krumbhaar was trying to secure defendant in a bear hug (32a). When Krumbhaar was finally able to untangle her hair from defendant’s hand, defendant tried to scratch her again (32a, 77a). Defendant also snapped her

teeth at Krumbhaar and tried to bite her (32a, 60a-61a, 76a-78a). Krumbhaar was able to evade defendant's attacks and restrain her in a bear hug against the wall in front of Manic Shoes (32a, 53a, 55a-56a). Defendant continued to yell and struggle (33a). She still had her bags on her arms (55a, 77a). Northland Mall security arrived on the scene and yelled to stop (33a, 74a-75a). Krumbhaar turned to identify herself (34a, 75a). Defendant slipped out of Krumbhaar's hold, threw her bags down, and began to run away (34a). Northland security and Krumbhaar were able to catch defendant and restrain her (34a). Even after defendant was handcuffed, she continued to struggle (78a). Krumbhaar then realized that her arm was bleeding from scratches and bites (34a-38a, 60a-65a, 67a, 79a).

Defendant was charged with unarmed robbery, MCL 750.530, second-degree retail fraud (second or subsequent offense), MCL 750.356d, and possession of marijuana, MCL 333.7403(2)(d) (8a). Before trial, the prosecution dismissed the charges of second-degree retail fraud and possession of marijuana with the trial court's permission (15a-17a).

A jury trial on the remaining unarmed robbery charge was conducted before Oakland Circuit Court Judge Michael D. Warren on August 19, 2010, and August 23, 2010 (11a-14a). Krumbhaar was the only witness to testify for the prosecution (14a). Defendant did not call any witnesses (14a). At the close of proofs, defendant moved for a directed verdict (81a-82a). Defense counsel argued that the evidence was insufficient to support the unarmed robbery charge because there was no evidence that defendant used force, violence, or an assault to take the White Diamonds box (81a-82a). Defense counsel asked the court to dismiss the unarmed robbery charge and amend the lesser charge to second-degree retail fraud (81a-82a). The trial court denied defendant's motion for the following reasons:

Before the court is a motion to dismiss the charge of unarmed robbery.

According to the standard jury instructions, 18.02, the following elements need to be shown: that the defendant used force and violence against someone, and that really I think is the issue that has been presented by [defense counsel].

In viewing the evidence in the light most favorable to the People there was testimony about scratching, biting, snapping of teeth, a big scene with yelling, I think that although there's certainly much more egregious or circumstances that this court has seen, that the People have, in viewing the evidence in the light most favorable to them, have met that element.

Second element is the defendant did so while in the course of committing a larceny. The testimony clearly reveals that there was a—if you view it truthfully, that an item, piece of merchandise for sale was taken by the defendant and this encounter occurred when she was trying to remove the item during—from the store without paying for it.

And the third element is that the victim was present while defendant was in the course of committing the larceny. Of course the testimony in viewing the evidence in the light most favorable to the People reveals that the victim was very much present at that time.

In light of the foregoing I find that it is appropriate to deny the motion for a directed verdict. [83a-84a.]

Defense counsel argued during closing arguments that defendant stole a box of perfume from Macy's, but neither used force to take the perfume nor took the perfume "from a person." The trial court instructed the jury on unarmed robbery and the necessarily included lesser offense larceny of a person (85a-87a). The jury found defendant not guilty of the unarmed robbery charge, but guilty of larceny from a person (88a). The trial court sentenced defendant as a third habitual offender to 4 to 20 years in prison for her larceny from a person conviction (88a).

Defendant appealed, arguing that the evidence was insufficient to support her conviction. The Court of Appeals agreed and reversed defendant's conviction in a split published opinion authored by Judge Gleicher (90a). The majority (Judges Gleicher and Shapiro) held that "the larceny from the person statute punishes pickpockets, purse and wallet-snatchers, and others who invade the person or 'immediate presence' of the victim to accomplish the theft." (92a.) The

majority then concluded that the prosecution presented no evidence that defendant committed larceny from Krumbhaar's "immediate area of control or immediate presence" when she stole the fragrance box from Macy's (92a). The majority stated that there was no evidence that Krumbhaar ever possessed the White Diamonds box or that defendant came close enough to Krumbhaar during the larceny that she was within arm's length of Krumbhaar or in Krumbhaar's "personal space." (92a-93a.) The majority rejected the dissent's proposition that a defendant may accomplish a larceny from a person by being within sight or hearing of the victim when committing the larceny (93a). The majority held that the dissent's definition of "immediate presence" was too broad (93a). Finally, the majority clarified that defendant's conduct potentially constituted unarmed robbery or at a minimum retail fraud, but defendant was acquitted of unarmed robbery and was not charged with retail fraud (94a). The Court concluded that because defendant's actions did not fall within the larceny from a person statute, her conviction must be reversed.

Judge Whitbeck dissented, opining that the prosecution provided sufficient evidence for a jury to conclude beyond a reasonable doubt that defendant was within Krumbhaar's "immediate area of control or immediate presence" when she completed the larceny by placing the White Diamonds box in her bag (96a). Judge Whitbeck quoted Krumbhaar's testimony and highlighted the following undisputed facts: (1) defendant was in Krumbhaar's line of sight when she put the White Diamonds box in her bag, (2) Krumbhaar got "fairly close" to defendant while in the women's fragrance department, (3) Krumbhaar was close enough to defendant that she could hear what she was saying to the sales associates, (4) Krumbhaar was close enough to defendant when defendant completed the larceny to observe that about half of the White Diamonds box was sticking out of the bag, and (5) Krumbhaar followed defendant through the store and was

close enough to observe that defendant did not pass any money or credit cards (100a). Judge Whitbeck clarified that Krumbhaar, as a Macy's loss-prevention detective, had a right to possess the White Diamonds box that was superior to defendant's right to possess the merchandise before paying for it (101a-102a). Judge Whitbeck then emphasized the deferential standard in reviewing claims of insufficient evidence (102a). He concluded that the evidence in this case was sufficient to support defendant's conviction:

Here, Krumbhaar's testimony established that she was "fairly close" to Smith-Anthony. In fact, she was close enough not only to *see* Smith-Anthony but also to *hear* her twice decline assistance from salespersons in Macy's women's fragrance department and to *hear* Smith-Anthony when she asked for a pair of shoes in the women's shoes department. Viewing this testimony in a light most favorable to the prosecution, I conclude that there was sufficient evidence from which a jury could find that the prosecution proved that Smith-Anthony was in Krumbhaar's "immediate area of control or immediate presence" beyond a reasonable doubt.

In my view, when a loss prevention detective, whose job it is to protect her employer's property, is close enough to a defendant to *see* that defendant commit the crime of larceny from a person and to actually *hear* that defendant speak to other employees in the store, the defendant is as a matter of law within the loss prevention detective's immediate area of control or immediate presence. Thus, given that both of these criteria are satisfied here, there was sufficient evidence to support the jury's verdict. [102a.]

The people applied to this Court for leave to appeal. This Court granted the people's application and ordered the parties to brief the following issues:

(1) whether the evidence was sufficient to prove beyond a reasonable doubt that the crime of larceny from a person, MCL 750.357, was committed within the "immediate area of control or immediate presence" of the loss prevention officer who witnessed the theft; (2) whether the 2004 amendment of the robbery statute, 2004 PA 128 (amending MCL 750.530), altered the definition of "presence" with respect to the larceny from a person statute; and, if not (3) whether the common-law definition of the phrase "from the person" remains consistent with the common-law definition of "presence." [104a.]

Additional facts, where pertinent to the issue raised on appeal, may be set forth in the argument section of this brief.

## ARGUMENT

I. At common law, an individual steals “from the person of another” with respect to larceny from a person or robbery when he takes property from the person’s body or the person’s “presence,” which this Court has defined as the person’s area of protection or control. In this case, the Court of Appeals adopted for purposes of the larceny from a person statute a narrower definition of “presence” that encompasses only the person’s “personal space” or “arm’s length.” The Court of Appeals’ definition of “presence” is contrary to both the well-established common law definition and this Court’s decisions that larceny from a person is a necessarily included lesser offense of robbery. Applying the proper definition of “presence,” the evidence was sufficient to support defendant’s larceny from a person conviction.

### ***ISSUE PRESERVATION:***

Defendant moved for a directed verdict at trial, arguing that the evidence was insufficient to support a conviction on the unarmed robbery charge because there was no evidence that defendant used force or violence (81a-82a). Defendant asked the trial court to reduce the charge from unarmed robbery to retail fraud (81a-82a). In denying defendant’s motion, the trial court, in holding that there was evidence supporting all of the elements of robbery, held that Krumbhaar “was very much present” while defendant was committing the larceny (83a-84a). But because defendant did not argue that the evidence was insufficient to prove that defendant committed a larceny “from the person” or that the evidence did not support a larceny from a person conviction, this issue was not preserved for appeal. In any case, the failure to move for a directed verdict on the specific issue does not preclude appellate review of the question whether sufficient evidence was presented to support the conviction. *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987).

### ***STANDARD OF REVIEW:***

Challenges to the sufficiency of the evidence are reviewed de novo. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). Similarly, this Court reviews de novo

“questions of law such as the proper interpretation of criminal statutes in the context of traditional common-law principles.” *People v Dupree*, 284 Mich App 89, 97; 771 NW2d 470 (2009), *aff’d* 486 Mich 693; 788 NW2d 399 (2010).

***SUMMARY OF THE ARGUMENT:***

At common law, it is well established that the phrase “from the person of another” with respect to both larceny from a person and robbery includes not only takings from the person’s actual body, but also takings from his presence. This Court has held that a taking is from the presence of the victim when it is taken from his area of protection and control, which is the area over which his presence holds sway. Because this Court has ruled that larceny from a person is a necessarily included lesser offense of robbery, this definition of “presence” applies equally to both crimes. Although the Legislature amended the robbery statutes in 2004, nothing in this amendment signified an intent to modify the meaning of “presence” with respect to larceny from a person.

In this case, the Court of Appeals created an unprecedentedly narrow and rigid definition of “presence” by holding that it includes only the area within the victim’s “personal space” or “arm’s length.” The Court of Appeals’ holding is contrary to both the well-established common-law definition of “presence” and this Court’s holdings that “presence” is defined the same for both larceny from a person and robbery. Applying the proper definition of “presence,” the evidence was sufficient to support defendant’s larceny from a person conviction. When defendant completed the larceny by putting the merchandise in her bag, the loss-prevention officer who was observing defendant was “fairly close” and could see defendant’s mannerisms and hear defendant’s conversations. Viewing this evidence in the light most favorable to the

prosecution, reasonable jurors could conclude that the merchandise was within the loss-prevention officer's area of protection and control at the time of the larceny.

**DISCUSSION:**

The people appeal the Court of Appeals judgment reversing defendant's conviction of larceny from a person, MCL 750.357. *People v Smith-Anthony*, 296 Mich App 413; 821 NW2d 172 (2012) (90a). The Court of Appeals held that the evidence was insufficient to prove that defendant took the White Diamonds box "from the person" of loss-prevention officer Krumbhaar because there was no testimony that defendant invaded Krumbhaar's "personal space" or came within arm's length of her. *Id.* at 419 (92a-93a).<sup>1</sup> In order to determine whether the Court of Appeals erred in holding that the evidence was insufficient to sustain defendant's larceny from a person conviction, it is first necessary to determine the proper interpretation of the phrase "from the person of another" in MCL 750.357. A review of the common-law history and legislative treatment of this phrase with respect to the larceny from a person and robbery statutes reveals that the Court of Appeals' interpretation of the phrase is unduly narrow and conflicts with well-established precedent. Under the proper interpretation of the phrase "from the person of another," the evidence was sufficient to sustain defendant's larceny from a person conviction.

**A. The Meaning of "From the Person" in the Larceny from a Person Statute**

The larceny from a person statute provides:

Any person who shall commit the offense of larceny by stealing from the person of another shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years. [MCL 750.357.]

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<sup>1</sup> Because defendant's conviction was reversed based on insufficient evidence, a retrial is barred under the Double Jeopardy Clause. *People v Watson*, 245 Mich App 572, 597; 629 NW2d 411 (2001), citing *Burks v United States*, 437 US 1, 18; 98 S Ct 2141; 57 L Ed 2d 1 (1978), and *People v Murphy*, 416 Mich 453, 467; 331 NW2d 152 (1982) ("Clear authority from both the United States Supreme Court and the Michigan Supreme Court holds that the double jeopardy prohibition bars retrial on a charge for which a reviewing court concludes that the associated conviction was not supported by legally sufficient evidence.").

The statute does not define the phrase “from the person.” But because the phrase has a settled and definite meaning at common law, we turn to the common law for guidance:

A well[-]recognized rule for construction of statutes is that when words are adopted having a settled, definite and well known meaning at common law it is to be assumed they are used with the sense and meaning which they had at common law unless a contrary intent is plainly shown. [*People v Covelesky*, 217 Mich 90, 100; 185 NW 770 (1921).]

The phrase “from the person” has been an element of the crimes of both larceny from a person and robbery since these offenses were codified in Michigan in 1838. Because the phrase applies equally to both larceny from a person and robbery, it is necessary to examine the development of the common-law definition of the phrase as it applies to both offenses.

**1. At common law, “from the person” means from the person’s body or in his presence, which includes his area of protection or control.**

The origin of the crime of larceny from a person can be traced to the Roman and Athenian legal systems, where “saccularii,” or cutpurses, were punished more severely than ordinary thieves. *State v Brennan*, 172 Vt 277, 280; 775 A2d 919 (2001), citing 4 Blackstone, Commentaries 241 (4th ed, 1771). Following these ancient legal traditions, the English Statutes at Large incorporated enhanced penalties for similar acts. *Id.*, citing Blackstone, *supra*. The first statute providing a greater penalty for larceny from a person than for simple larceny originated in England with the Statute of 8 Elizabeth, 8 Eliz. c. 4, §2 (1565), enacted in the sixteenth century. Pearson, Anno: *What Constitutes Larceny “From a Person”*, 74 ALR3d 271, §2b; Perkins, Criminal Law (3d ed), p 341-342. This statute prohibited the “felonious taking of any money, or goods, or chattels, from the person of any other, privily without his knowledge.” *Brennan, supra* at 280, quoting 8 Eliz. c. 4, §2 (1565). The offense was a compound crime, made up of the simple theft, but aggravated by an invasion of the victim’s person. *Brennan, supra* at 280, citing Blackstone, *supra* at 229. Courts and legal scholars have a long history of analyzing the

meaning of the phrase “from the person,” which is an element of the crime. Professor Perkins explains that at common law, “Property is stolen ‘from the person,’ if it was under the protection of the person at the time.” Perkins, *supra* at 342. Thus, “property may be under the protection of the person although not actually ‘attached’ to him.” *Id.*; see also *People v Randolph*, 466 Mich 532, 539 n 6; 648 NW2d 164 (2002), quoting Rapalje, *Larceny & Kindred Offenses* (1892), §445, p 633 (explaining that at common law, a taking with respect to a robbery may be “either directly from the person or in the presence of the party robbed . . .”).<sup>2</sup> Perkins explains that the larceny from a person statutes borrowed the phrase “from the person” and its meaning from the crime of robbery:

[T]he [larceny from a person] statute made use of a phrase [“from the person”] long used in connection with robbery, and regularly understood to include property taken from one’s presence and control. As said by [Sir Edward] Coke in the 1600’s: “for that which is taken in his presence, is in law taken from his person.” [Perkins, *supra* at 342-343.]

In William Hawkins’ 1724 treatise, he explained the difference between robbery and larceny from a person: “Larceny from the Person of a Man either puts him in Fear, and then it is called Robbery; or does not put him in Fear, and then it is called barely, Larceny from the Person.” *Spencer v State*, 422 Md 422, 428; 30 A3d 891 (Md App, 2011), quoting William Hawkins, *Treatise of the Pleas of the Crown*.

At common law in Michigan, the offense of larceny from a person included “the stealing and taking of property from the person.” *People v Calvin*, 60 Mich 113, 121; 26 NW 851 (1886). The related offense of robbery was defined at common law as “the felonious taking of money or goods of value from the person of another or in his presence, against his will, by

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<sup>2</sup> Jurisdictions are split with regard to whether larceny from a person requires a taking directly from the body of the victim or merely from the victim’s presence. See Pearson, *supra* (listing jurisdictions). But “the majority of

violence or putting him in fear.’ ‘To constitute robbery, it [was] essential that there be a “taking from the person.”’” *People v Williams*, 491 Mich 164, 169; 814 NW2d 270 (2012), quoting *Covelesky*, *supra* at 96-97. This Court has explained that both larceny from a person and robbery require a taking from the person, but for the taking to be a robbery, it must be “by force and violence,” whereas force or violence is not required for a larceny from a person (which “may be by stealth”). *Calvin*, *supra* at 121.

The crimes of larceny from a person and robbery were first codified in Michigan in 1838. 1838 RS, pt 4, tit I, ch 4, §16 (larceny from a person); 1838 RS, pt 4, tit I, ch 3, §§10 (armed robbery) & 12 (unarmed robbery). These statutes codified the common law. See *Randolph*, *supra* at 537 n 4. This Court has explained the Legislature’s purpose in enacting a larceny from a person statute separate from simple larceny:

“The ‘Legislature decided that larceny from a person presents a social problem separate and apart from simple larceny.’ Specifically, ‘the invasion of the person or immediate presence of the victim.’ Because a person whose property is stolen from his presence may take steps to retain possession, and the offender may react violently, we conclude that the offense of larceny from a person, ‘by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.’” [*People v Perkins*, 473 Mich 626, 633-634; 703 NW2d 448 (2005), quoting *People v Perkins*, 262 Mich App 267, 272; 686 NW2d 237 (2004).]

This first version of the larceny from a person statute provided:

Every person who shall commit the offense of larceny, by stealing from the person of another, shall be punished by imprisonment in the state prison not more than five years, or in the county jail not more than one year. [1838 RS, pt 4, tit I, ch 4, §16.<sup>3</sup>]

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decisions from other jurisdictions have held that direct physical contact is not required.” *Garland v Commonwealth*, 18 Va App 706, 708; 446 SE2d 628 (Va App, 1994), citing *Pearson*, *supra*.

<sup>3</sup> The 1838 unarmed robbery statute also required a taking “from the person of another,” and the armed robbery statute required a taking “from his person.” 1838 RS, pt 4, tit I, ch 3, §§10, 12.

The statute borrowed the phrase “from the person of another” from common law. Perkins, *supra* at 342-343. “Where a statute employs the general terms of the common law to describe an offense, courts will construe the statutory crime by looking to common-law definitions.” *People v Gillis*, 474 Mich 105, 118; 712 NW2d 419 (2006), quoting *People v Riddle*, 467 Mich 116, 125; 649 NW2d 30 (2002). In the absence of a clear legislative intent to change the common law, this Court has applied the common law as it was understood when the crime was codified. *Gillis, supra* at 118.<sup>4</sup> By using the common-law phrase “from the person” in the 1838 larceny from a person statute, the Legislature indicated an intent to adopt the definition of that phrase that existed at common law at the time.

In 1886, this Court held that the elements of larceny from a person and robbery were the same except that robbery added the additional element of force and violence. *Calvin, supra* at 121. Thus, the requirements of both crimes that there be a taking “from the person of another” were necessarily identical. *Id.*

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<sup>4</sup> The phrase “from the person” has had a particular meaning in the law for so long that it may be considered a term of art.

All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning. [MCL 8.3a.]

See also *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003) (holding that the phrase “substantial and compelling” found in MCL 769.34[3] is a term of art). In *People v Couch*, 436 Mich 414, 419; 461 NW2d 683 (1990), this Court held:

“[W]here [a legislature] borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.” [*Id.*, quoting *Morissette v United States*, 342 US 246, 263; 96 L Ed 288; 72 S Ct 240 (1952).]

In *Covelesky, supra* at 96-97 (1921), this Court, analyzing the phrase “from the person” in the context of a robbery case,<sup>5</sup> explained that a taking is “from the person” of another if it is accomplished in the presence of another: “To constitute robbery, it is essential that there be a “taking from the person.” To satisfy this requirement, it is sufficient that property be taken “in the owner’s presence.”” *Id.* at 97, quoting 34 Cyc. p. 1798. This Court emphasized that “taking in his presence is in law a taking from the person.” *Id.* at 100, quoting Tiffany’s Criminal Law (5<sup>th</sup> ed), p 1063 *et seq.* This Court explained that a taking is “from the person” or in the presence of a person if the stolen property was under the person’s protection and control:

“It is often stated that an essential and distinguishing characteristic of robbery is the fact that the felonious taking must be from the person of another, but by the great weight of authority, the words ‘taking from the person of another,’ as used in connection with the common-law definition of robbery, are not restricted in application to those cases in which the property taken is in actual contact with the person of the one from whom it is taken, but include within their meaning the taking by violence or intimidation from the person wronged, in his presence, of property which either belongs to him or which is *under his personal protection and control.*” [*Id.* at 97, quoting 23 RCL. pp. 1142-1143 (emphasis added).]

The *Covelesky* Court held that in light of the common law, this interpretation of the statute was proper even though the robbery statutes used only the phrase “from the person of another” and not the phrase “in the presence.” *Id.* at 98-99. This Court explained the scope of the phrase “from the person” as follows:

“1. The doctrine is, that since robbery is an offense as well against the person as the property, the taking must be from what the law terms the person.  
But—

“2. The meaning is, not that the taking must necessarily be from the actual contact of the body, but *it suffices when only from under the personal protection,*  
And—

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<sup>5</sup> At the time this Court decided *Covelesky, supra* (1921), the armed robbery statute provided, in pertinent part, “If any person shall assault another, and shall feloniously rob, steal and take *from the person* any money or other property . . . .” *Id.* at 100, quoting 1915 CL 15206 (emphasis added).

“3. The personal protection is interpreted to cover all one’s effects *within a not easily defined distance over which his presence may be deemed to have sway*; as, says Hale, ‘if a thief come into the presence of A, and with violence and putting A in fear drives away his horse, cattle, or sheep,’ he commits robbery. The better expression is that—

“4. Employing this word in the meaning just explained, a taking in the presence of an individual put in fear, is, in law, a taking from his person. Thus—

“5. One who binds another in one room of his house, and compels him to tell where valuables may be found in another room; or confines another in his smoke-house fifteen steps from the dwelling house, commits robbery by feloniously taking the sought-for things from the other room or building.” [Covelesky, *supra* at 97-98, quoting 2 Bishop’s New Crim Law, §§1177-1178 (emphasis added).]

Quoting *State v Calhoun*, 72 Iowa 432, 436; 34 NW 194 (Iowa, 1887), this Court explained that a taking can be “from the person” even when the person is in another room:

“The preposition ‘from’ does not convey the idea of contact or propinquity of the person and property. It does not imply that the property is in the presence of the person. The thought of the statute, as expressed in the language, is that the property must be so in the possession or under the control of the individual robbed, that violence or putting in fear was the means used by the robber to take it. If it be away from the owner, yet under his control, in another room of the house, as in this case, it is nevertheless in his personal possession; and if he is deprived thereof, it may well be said it is taken from his person. Goods are called personal property in the law, and presumed to accompany the person.” [Covelesky, *supra* at 99, quoting *Calhoun, supra* at 436.<sup>6</sup>]

Although *Covelesky* was a robbery case, its interpretation of the phrase “from the person” with respect to the robbery statutes is instructive regarding the proper meaning of that phrase with respect to the larceny from a person statute, which uses the identical phrase and is a necessarily included offense of robbery.

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<sup>6</sup> This Court later quoted the above language from *Calhoun* for a second time in *People v Cabassa*, 249 Mich 543, 547; 229 NW2d 442 (1930), another robbery case.

In 1931, ten years after *Covelesky*, the Legislature recodified the penal law with the adoption of the Michigan Penal Code. 1931 PA 328. The language of the larceny from a person statute remained substantively identical to that of its predecessors:

Any person who shall commit the offense of larceny by stealing from the person of another shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years. [1931 PA 328, §357.]

Notably, the Legislature continued to use the phrase “from the person of another” in the statute. “[W]here the basic provisions of a statute have been construed by the courts and these provisions are subsequently reenacted by the legislature, it may be assumed that the legislature acted with knowledge of the Court’s decisions and that the legislature intended the reenacted statute to carry the Court’s interpretation with it.” *Smith v Detroit*, 388 Mich 637, 650-651; 202 NW2d 300 (1972) (citation omitted).

The common law remains in force unless it is modified. We must presume that the Legislature “know[s] of the existence of the common law when it acts.” Accordingly, this Court has explained that “[t]he abrogative effect of a statutory scheme is a question of legislative intent” and that “legislative amendment of the common law is not lightly presumed.” While the Legislature has the authority to modify the common law, it must do so by speaking in “no uncertain terms.” Moreover, this Court has held that “statutes in derogation of the common law must be strictly construed” and shall “not be extended by implication to abrogate established rules of common law.” [*People v Moreno*, 491 Mich 38, 46; 814 NW2d 624 (2012).]

If there is any doubt regarding whether a statute is inconsistent with the common law, the statute is to be given the effect that makes the least change in the common law. *Velez v Tuma*, 492 Mich 1, 17; 821 NW2d 432 (2012). Because the Legislature used the same statutory language in 1931 that was used previously and gave no indication in its recodification of the statute that it intended to alter in any way the common-law meaning of the phrase “from the person,” this language should be given the same meaning as the courts had previously given it. *People v Gahan*, 456 Mich 264, 272; 571 NW2d 503 (1997) (“This phrase having acquired a unique meaning at

common law, the meaning is carried over to the interpretation of the subsequent statute dealing with the same subject matter absent any direction to the contrary by the Legislature.”). In *Covelesky*, *supra* at 98, this Court employed this method of statutory construction in interpreting the phrase “from the person”:

“[T]he best rule of construction is to construe a statute as close to the reason of the common law as may be consistent with the terms employed. The words ‘from the person of another,’ found in our statutory definition of robbery, must be held to have been used in the same sense and with the same meaning that these terms had acquired at common law at the time the statute was enacted . . . .” [Id., quoting *O’Donnell v People*, 224 Ill 218, 226-227; 79 NE 639 (1906).]

The statutory language of MCL 750.357 has not been amended and remains the same today as it was in 1931. Thus, the phrase “from the person” in the current statute should be interpreted to mean what it meant at the time the statute was recodified, as interpreted by this Court in *Covelesky* and *Cabassa*.

When the Michigan Penal Code was adopted in 1931, the Legislature also retained the language “from the person of another” in the robbery statutes. 1931 PA 328, §§529-530. The only substantive modification to the robbery statutes was the addition of the phrase “or in his presence.” 1931 PA 328, §§529-530.<sup>7</sup> As this Court noted in *Randolph*, *supra* at 537 n 5, “[t]his modification is itself consistent with the common-law definition of robbery.” *Id.*, citing 4 Blackstone, Commentaries, Public Wrongs, ch 17, p 242. Professor Perkins has explained that the addition of such language does not add anything to the substance of a robbery statute:

To emphasize this point some of the statutes define robbery in terms of larceny from the person “or immediate presence” of another. This adds nothing other than emphasis because, as pointed out by Coke, where deprivation is accomplished by violence or intimidation, “that which is taken in his presence, is in law taken from his person.” One of the illustrations of robbery, given by the

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<sup>7</sup> The language of these iterations of the robbery statutes is quoted in §A(4) of the “Discussion” section of this brief.

early writers, is the wrongful driving off of another's horse or sheep while he, although present, is by violence or intimidation prevented from interfering. And the modern decisions reach a similar result whether the statute has this additional phrase or not. [Perkins, *supra* at 346.]

Changes in statutory language can “reflect an attempt to clarify the meaning of a provision rather than change it.” *Meyer Jewelry Co v Johnson*, 229 Mich App 177, 183; 581 NW2d 734 (1998). This Court has explained that there are instances ““when amendments are adopted for the purpose of making plain what the legislative intent had been all along from the time of the statute’s original enactment.”” *Production Credit Ass’n of Lansing v Dep’t of Treasury*, 404 Mich 301, 319; 273 NW2d 10 (1978), quoting *Detroit Edison Co v Janosz*, 350 Mich 606, 614; 87 NW2d 126 (1957). The 1931 modification of the robbery statutes appears to be a clarification of the meaning of “from the person” to make it consistent with common law, rather than an attempt to change the substance of the statute or distinguish it from larceny from a person. Although the Legislature did not make a similar modification to the larceny from a person statute, there is no clear indication that the Legislature intended to abrogate the common-law definition of “from a person” and create a new narrower definition than had previously been used. There was simply no need to add the “presence” language to MCL 750.357 when the common-law definition of “from the person” clearly included “or in his presence.” As this Court stated in *Covelesky, supra* at 98-99, the phrase “from the person” in the robbery statutes meant also “or in his presence” even before the “presence” language was added to the statutes. In *In the Matter of the Welfare of DDS*, 396 NW2d 831 (Minn, 1986), the Minnesota Supreme Court explained why its legislature’s decision to include the phrase “or in his presence” in the robbery statute but not the larceny from a person statute did not mean that the larceny from a person statute no longer included takings from the victim’s presence:

While the legislature added the phrase “or in the presence” in the robbery statute in order to make it clear that a robbery was committed if property was taken by the use or threat of force from the person of another or in his presence, the legislature’s failure to use the phrase “or in his presence” in section 609.52, subd. 3(3)(a), does not mean that the legislature intended to exclude theft of property under the immediate control of the victim from the offense of theft from the person. There was simply no need to add the phrase “or in his presence” in the theft statute because this court had already ruled that theft “from the person” extended “to every case of stealing, where the property stolen is on the person, or in the immediate charge and custody of the person from whom the theft is made.” *State v Eno*, 8 Minn 220, 223, 8 Gil. 190, 193 (1863). [*In the Matter of the Welfare of DDS*, *supra* at 832-833.<sup>8</sup>]

This Court should reach the same conclusion with regard to MCL 750.357—because it is well-established that the phrase “from the person” also means “or in his presence” at common law, the addition of the phrase “or in his presence” in one statute and not another does not change the meaning of the phrase with respect to either statute.

After the recodification of the penal law in 1931, the next chance this Court had to apply the larceny from a person statute was in *People v Gadson*, 348 Mich 307; 83 NW2d 227 (1957), where this Court held that the evidence was insufficient to sustain the defendant’s larceny from a person conviction when the conviction was based on the complainant’s testimony that he was missing money from his pocket after a bedroom encounter with the defendant. But in so holding, the *Gadson* Court did not explain the basis for its conclusion or analyze the meaning of “from the person.”<sup>9</sup>

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<sup>8</sup> Similarly in *People v Pierce*, 226 Ill 2d 470, 481-482; 877 NE2d 408 (Ill, 2007), the Illinois Supreme Court held that although the legislature amended the robbery statute to add the phrase “or presence” but did not similarly amend the larceny from a person statute, this amendment did not change the common-law meaning of “from the person,” which included “or presence.” The Court explained, “While our legislature could have included the phrase ‘or presence’ in the theft statute, it was not necessary to do so because, in Illinois, the well-defined meaning of ‘from the person’ includes a taking from the presence of another.” *Id.* at 483. The Rhode Island Supreme Court reached a similar conclusion in *State v Shepard*, 726 A2d 1138 (RI, 1999). But see *State v Lucero*, 28 Utah 2d 61, 63; 498 P2d 350 (Utah, 1972), where the Utah Supreme Court reached the opposite conclusion.

<sup>9</sup> The facts and holding of *Gadson* will be discussed further in §B(2) of the “Discussion” section of this brief.

In *People v Stevens*, 9 Mich App 531; 157 NW2d 495 (1968), our Court of Appeals held that the evidence did not support a jury instruction on the lesser included offense of larceny from a person where the defendants entered a store, threatened the owner with a gun, and took money from a safe and under a desk. Although the Court held that the evidence did not show a taking from the person, the Court did not discuss the meaning of “from the person.” *Id.* at 534.

In *People v Gould*, 15 Mich App 83, 87; 166 NW2d 530 (1968), rev’d 384 Mich 71; 179 NW2d 617 (1970), the issue was whether the evidence was sufficient to sustain the defendant’s larceny from a person conviction. The Court of Appeals observed that there was disagreement regarding whether the phrase “from the person of another” in MCL 750.357 required a taking from the actual person of another or just a taking in the possession and immediate presence of the owner. *Id.* at 87. The Court of Appeals held that the interpretation of the phrase “from the person” in *Cabassa, supra*, and *Calhoun, supra*, that included a taking from the presence of the victim applied only to robbery cases and not larceny from a person cases. *Gould, supra*, 15 Mich App at 89-91. The Court, citing *Gadson, supra*, and *Stevens, supra*, held that the larceny from a person statute requires a taking from the actual person of the owner. *Gould, supra*, 15 Mich App at 92. The Court stated that larceny from a person may be a lesser included offense to robbery in some cases, but not in cases where the robbery did not involve a taking from the person. *Id.*<sup>10</sup>

This Court reversed in *People v Gould*, 384 Mich 71; 179 NW2d 617 (1970), holding that the Court of Appeals’ interpretation of “from the person” was wrong. *Id.* at 79-80. This Court

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<sup>10</sup> While the people’s appeal to the Supreme Court in *Gould* was pending, the Court of Appeals decided in *People v Johnson*, 25 Mich App 258; 181 NW2d 425 (1970), that the defendant’s testimony was insufficient to provide a factual basis for his larceny from a person guilty plea. In so holding, the Court, relying on the Court of Appeals opinion in *Gould*, held, “What is required is that the property in question actually be taken from the person of another; a taking of property from the immediate presence of the owner is insufficient.” *Johnson, supra* at 264. But two months after *Johnson* was decided, this Court reversed the Court of Appeals in *Gould*, effectively undermining the basis for the Court of Appeals’ decision in *Johnson*. Thus, *Johnson* is clearly no longer good law.

quoted *Cabassa, supra* at 547, and again *Calhoun, supra*, for the proposition that a taking may be “from the person” even if the property is away from the owner, yet under his control, in another room. *Gould, supra*, 384 Mich at 79. By so holding, this Court clarified that the previous common-law definition of “from the person” from *Cabassa, supra*, and *Calhoun, supra*, remained valid and applied to larceny from a person cases. This Court also cited with approval *Commonwealth v Subilosky*, 352 Mass 153, 166; 224 NE2d 197 (1967), where the Massachusetts Supreme Court held that the evidence was sufficient to support the defendant’s larceny from a person conviction because the stolen money was under the protection of the bank manager, who was in the other room. *Gould, supra*, 384 Mich at 80. This Court held that ““[I]t is sufficient if the property be taken from the presence of the victim \* \* \* [that is] within his area of control.”” *Id.*, quoting *Subilosky, supra* at 166, quoting Anderson, Wharton’s Criminal Law & Procedure, §553. Applying this definition of “from the person” to the case, this Court held that “the taking of property in the possession and immediate presence of the waitress and customer in this case was sufficient to sustain a verdict against defendant Gould of larceny from the person.” *Gould, supra*, 384 Mich at 80. This Court also rejected the Court of Appeals’ holding that larceny from a person was not a lesser included offense of robbery under the facts of the case. *Id.* at 76.<sup>11</sup>

Five years later in *People v Chamblis*, 395 Mich 408, 425; 236 NW2d 473 (1975), overruled in part on other grounds by *People v Stephens*, 416 Mich 252, 260-261; 330 NW2d 675 (1982), and *People v Cornell*, 466 Mich 335, 357-358; 646 NW2d 127 (2002), this Court reiterated, “We are committed to the view that the crime of larceny from the person embraces the taking of property in the possession and immediate presence of the victim.” By so holding, this Court confirmed that the meaning of “from the person” for purposes of the larceny from a person

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<sup>11</sup> The facts and holding of *Gould* will be discussed further in §B(2) of the “Discussion” section of this brief.

statute remained the same even after the Legislature's addition of the phrase "or in his presence" to the robbery statutes. In other words, the Legislature's amendment of the robbery statutes in 1931 did not mean that the common-law definition of "from the person" in the larceny from a person statute no longer included the victim's presence.

One year later in *People v Smith*, 68 Mich App 551, 555-556; 243 NW2d 681 (1976), the Court of Appeals reiterated that "[a] conviction for larceny from the person also requires proof that the goods or property were removed from the actual possession or custody of the person or his immediate presence, viz., the area within his control." The same year, in *People v Beebe*, 70 Mich App 154, 159; 245 NW2d 547 (1976), the Court of Appeals adopted the following definition of "presence" with respect to robbery:

"A thing is in the presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it." [*Id.*, quoting *Commonwealth v Homer*, 235 Mass 526, 533; 127 NE 517 (1920).<sup>12</sup>]

Several prominent treatises have quoted this same definition of "presence." See Perkins, *supra* at 347; 4 Torcia, Wharton's Criminal Law (15<sup>th</sup> ed), §458, pp 15-16.<sup>13</sup> Although *Beebe* was a robbery case, its widely accepted definition of "presence" could apply equally to cases involving

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<sup>12</sup> When called on to interpret the "presence" requirement of the carjacking statute, MCL 750.529a, the Court of Appeals adopted *Beebe's* definition of "presence." See *People v Raper*, 222 Mich App 475, 482; 563 NW2d 709 (1997); *People v Green*, 228 Mich App 684, 695; 580 NW2d 444 (1998).

<sup>13</sup> Wharton's Criminal Law states:

For the purpose of robbery, property is deemed to be within a victim's "presence" when it is within his control. As one court has put it: "A thing is in the presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if not overcome with violence or prevented by fear, retain possession of it." In accordance with this test, property is deemed to be in a victim's presence even though it is located in another room of the house, in another building on the premises, or in the front yard of the home. [Torcia, *supra*, §458, pp 15-16.]

larceny from a person, which similarly require only that the taking was accomplished in the victim's presence.<sup>14</sup>

In *People v Beach*, 429 Mich 450, 484 n 17; 418 NW2d 861 (1988), this Court quoted *Chamblis, supra* at 425, for the proposition that “the crime of larceny from the person embraces the taking of property in the possession and immediate presence of the victim.” This Court held that larceny from a person is a necessarily included lesser offense of robbery because robbery is merely larceny from a person with the additional element of force or violence. *Beach, supra* at 484 n 17, citing *Chamblis, supra* at 425.

Subsequent decisions from this Court and the Court of Appeals have reiterated that the taking of property in the presence of the victim is sufficient to sustain a larceny from a person conviction. For example, in *Perkins, supra*, 262 Mich App at 271-272, the Court of Appeals articulated the elements of larceny from a person as follows:

(1) the taking of someone else's property without consent, (2) movement of the property, (3) with the intent to steal or permanently deprive the owner of the property, and (4) the property was taken from the person or from the person's immediate area of control or immediate presence.

The Court held that “the lack of force or violence distinguishes larceny from a person from the offense of robbery.” *Id.* at 272. See also *People v Wallace*, 173 Mich App 420, 426; 434 NW2d 422 (1988) (quoting Criminal Jury Instruction 23:2:01 which stated, “From the person’ means that the property must have been taken from the body of the complainant or from within his [or her] immediate area of control or immediate presence.”) In *Perkins, supra*, 473 Mich at 633-634, this Court confirmed that “immediate presence” is sufficient under the larceny from a person statute. “In order to commit a larceny from the person, the defendant must steal

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<sup>14</sup> The facts and holding of *Beebe* will be discussed further in §B(2) of the “Discussion” section of this brief.

something from a person in that person's presence. That is, the victim must be present when the defendant steals something from the victim." *Id.* at 633.

The relevant wording of the larceny from a person statute ("larceny by stealing from the person of another") is the same today as it was in Michigan's first larceny from a person statute enacted 174 years ago. In light of the well-established common-law definition of the phrase "from the person" and the Legislature's decision not to change that phrase in the statute, this Court should follow its previous decisions and hold that a taking of property is "from the person of another" when it is in his presence, meaning when the property was under his protection and control. *Covelesky, supra* at 97-99.

**2. The Court of Appeals' narrow definition of "presence" conflicts with the common law and creates an unworkable subjective standard.**

On the surface, the Court of Appeals correctly recited the elements of larceny from a person, including the "from the person" element ("[4] the property was taken *from the person or from the person's immediate area of control or immediate presence.*"). *Smith-Anthony, supra* at 417, quoting *Perkins, supra*, 262 Mich App at 271-272 [emphasis in *Smith-Anthony*]] (91a).<sup>15</sup> The Court of Appeals also correctly stated that "[i]ndirect contact with the victim may also constitute larceny from the person." *Id.* at 418 (92a). But the Court of Appeals erred in holding that the victim's "immediate area of control or immediate presence" means the victim's "personal space" that extends only the length of the victim's arms.<sup>16</sup> *Id.* at 418-419, 421 n 4

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<sup>15</sup> After the Court of Appeals decision in this case, a different Court of Appeals panel used the same language in articulating the elements of larceny from a person. *People v Brantley*, 296 Mich App 546; \_\_\_ NW2d \_\_\_ (2012), amended 296 Mich App 801 (2012), slip op at 2.

<sup>16</sup> The Court used the phrase "personal space" several times. See *Smith-Anthony, supra* at 419 (92a-93a) (emphasis added) ("Although Krumbhaar could see defendant commit the larceny, the prosecutor failed to establish that defendant ever came close enough to Krumbhaar to invade Krumbhaar's *personal space.*"); *Id.* at 421 n 4 (94a) (emphasis added) ("Unlike the statutory prohibition of larceny from the person, the armed robbery statute protects an area outside the victim's *personal space.*"); *Id.* at 418 (92a) (emphasis added) ("The statute enhances punishment in these situations precisely because violating a person's privacy or *personal space* results in a risk of violent

(92a-94a). No Michigan court has previously defined “presence” by looking to the victim’s “personal space.”<sup>17</sup> The Court of Appeals’ definition of “presence” is not only unprecedented, but it is contrary to common law because it means that an item is not within the presence of the victim even in situations when it might be within the victim’s area of protection or control.

The Court of Appeals did not explain what it meant by the phrase “personal space.” But in holding that defendant did not invade Krumbhaar’s personal space, the Court pointed out that “Krumbhaar never testified that she was even within arm’s length of defendant,” *id.* at 419 (92a), and that no testimony supported that “Krumbhaar was ever close enough to defendant to have touched her or to have snatched the box from defendant’s hands,” *id.* at 419 n 2 (93a). By so holding, the Court apparently held that the prosecution is required to prove that the defendant came within the victim’s arm’s length to show a taking from his “presence.” This holding narrowed the definition of “presence” beyond what was previously contemplated at common law. By defining “presence” by looking to the length of the victim’s arms, the Court of Appeals disrupted almost 100 years of common law in Michigan that had adopted a more flexible definition of “presence.” The flexible common-law definition had contemplated that property outside the victim’s arm’s length or “personal space” could nonetheless be in his “presence” as long as the victim had protection or control over it, *Covelesky, supra* at 97-99, or could have

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confrontation.”). In explaining why the evidence was insufficient to sustain defendant’s larceny from a person conviction, the Court pointed out defendant’s failure to get within arm’s length of Krumbhaar’s. See *id.* at 419 (92a) (emphasis added) (“But Krumbhaar never testified that she was even within an *arm’s length* of defendant or that defendant knew Krumbhaar was nearby.”).

<sup>17</sup> In *United States v Payne*, 163 F3d 371 (CA 6, 1998), the United States Court of Appeals for the Sixth Circuit used the phrase “personal space” in discussing whether larceny from a person is a “crime of violence” under the United States Sentencing Guidelines. See *id.* at 375 (“Any person falling victim to a crime involving such an invasion of personal space would likely resist or defend in a manner that could lead to immediate violence.”). But *Payne*’s use of the phrase was merely meant to explain why a victim could react violently—it did not use the phrase to describe when a taking is “from the person of another.” Other than one other case quoting *Payne* (*United States v Taylor*, 696 F3d 628, 632 [CA 6, 2012]), no other state or federal cases arising out of Michigan have used the phrase “personal space” in discussing larceny from a person.

retained possession of it but for the larceny, *Beebe, supra* at 159. The Court of Appeals, in attempting to justify a more rigid definition of “presence,” stated that “[p]roof of ‘stealing from the person of another’ requires more than vague proximity between victim and perpetrator.” *Smith-Anthony, supra* at 420 (93a). While this statement is not entirely inaccurate, it is at least partly at odds with this Court’s holding in *Covelesky* that the proximity between the victim and the perpetrator is not easily defined: “The personal protection is interpreted to cover all one’s effects within a *not easily defined distance* over which his presence may be deemed to have sway.” *Id.* at 98, quoting 2 Bishop’s New Crim Law, §§1177-1178 (emphasis added).

The flexible common-law definition described in *Covelesky* and other Michigan cases is consistent with the Legislature’s decision to codify larceny from a person for the purpose of imposing a more severe penalty for engaging in a type of larceny that creates a substantial potential for violence. See *Perkins, supra*, 473 Mich at 633-634; see also *United States v Taylor*, 696 F3d 628, 633 (CA 6, 2012) (“Where property is taken from the person or from within his immediate presence or area of control, the potential for confrontation leading to violence is plain.”). A heightened potential for violence exists when an offender takes property from the victim’s area of possession or control, even if not within his arm’s length. If the victim could retain possession of the property and prevent the larceny, the potential for violence exists regardless of whether the proximity between the offender and the victim is two feet or twenty feet. *Covelesky*’s flexible definition also takes into account the differing potential for violence depending on the circumstances. For example, if an offender surreptitiously steals an invalid hospital patient’s watch from a table five feet away in his hospital room, this might not be larceny from the person because the patient was not in control of the watch and, being an invalid, could not prevent the larceny by retaining possession of it. The same could be true of larceny of

an object that was the same distance from a sleeping victim.<sup>18</sup> But if the victims in these situations were awake and able to get out of bed, property that is five feet away is likely to be in their area of possession or control so that the larceny could constitute a larceny from a person. Similarly, if an offender, for example, stole a gym patron's duffel bag from his locker while the patron was washing his hands at the sink ten feet away, this could be larceny from the person if the patron was observing his bag and had protection over it at the time of the larceny. The majority's definition of "presence" ignores these factors and creates an artificial and unduly rigid radius of approximately two feet (the length of an arm) around the victim to determine whether MCL 750.357 has been violated. By defining the "presence" element of larceny from a person narrowly so as not to include the victim's area of protection, observation, or control, the Court of Appeals majority created a more stringent standard for "presence" than that developed at common law with respect to both larceny from a person and robbery.

Even if the Court of Appeals' definition of "presence" can be interpreted as including an area that extends beyond the length of the victim's arms, the Court's use of the term "personal space" to define "presence" created a definition that is not only contrary to common law, but is unworkable because it presents a subjective standard that cannot be applied consistently. Again, the majority does not explain what it meant by the phrase "personal space." But Dictionary.com defines "personal space" as "the variable and subjective distance at which one person feels comfortable talking to another."<sup>19</sup> USLegal.com defines "personal space" as follows:

Personal space is an approximate area surrounding an individual in which other people should not physically violate in order for them to feel comfortable

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<sup>18</sup> In *Hall v People*, 39 Mich 717, 719 (1878), this Court held, "The mere fact that the owner of the property may have been asleep at the time the property was taken, would render the crime no less a taking from the person." But *Hall* appears to apply to takings from the body of the sleeping victim.

<sup>19</sup> <<http://dictionary.reference.com/browse/Personal+space>>.

and secure. It is the zone around individuals which they regard as psychologically theirs. The amount of personal space required for any given person is subjective. It also depends on how well you know the other person. The more intimate the relationship, the less personal space is involved.<sup>[20]</sup>

Both of these definitions contemplate a subjectively-sized area surrounding a person upon which others should not intrude. Because the size of these areas differ according to the person, the majority's decision to use the victim's "personal space" to determine whether the defendant stole "from the person of another" could conceivably force courts and juries to engage in case-by-case inquiries regarding the size of the particular victim's personal space to determine if the defendant is guilty of larceny from a person. But the subjective personality characteristics of the victim should not be relevant in determining a defendant's guilt of larceny from a person. See *People v Jolly*, 442 Mich 458, 468; 502 NW2d 177 (1993) (holding that the subjective belief of the victim is not relevant in a robbery case). The definition of "presence" developed in *Covelesky, Gould, Beebe, et al.*, sets forth a more logical and workable test than the definition the Court of Appeals created in this case.

**3. By holding that the "presence" element of larceny from a person is narrower than the "presence" element of robbery, the Court of Appeals ignored this Court's holdings that larceny from a person is a necessarily included lesser offense of robbery and that the "presence" element of the two crimes is identical.**

As discussed above, the term "presence" has a settled meaning at common law, regardless whether applied to the offense of larceny from a person or robbery. And because larceny from a person is a necessarily included lesser offense of robbery, larceny from a person cannot have a more restrictive definition of "presence" than robbery. The Court of Appeals erred in failing to recognize this.

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<sup>20</sup> <<http://definitions.uslegal.com/p/personal-space/>>.

“Necessarily included lesser offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense.” *People v Mendoza*, 468 Mich 527, 532 n 3; 664 NW2d 685 (2003). “[A]ll the elements of a necessarily considered lesser offense are contained within those of the greater offense. Thus, ‘it is impossible to commit the greater without first having committed the lesser.’” *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001) (citations omitted). This is the well-established common-law definition of necessarily included lesser offenses that has been used for over 135 years. See *People v Nyx*, 479 Mich 112, 122; 734 NW2d 548 (2007) (describing “over 130 years of caselaw construing the word ‘inferior’ to mean only lesser crimes that are subsumed within the greater crime”). As contrasted to necessarily included lesser offenses, “[c]ognate offenses share several elements and are of the same class or category as the greater offense, but contain elements not found in the greater offense.” *People v Wilder*, 485 Mich 35, 41; 780 NW2d 265 (2010).

Michigan’s appellate courts have repeated on multiple occasions the holding in *Calvin*, *supra*, that larceny from a person is a necessarily included lesser offense of robbery. See, e.g., *Beach*, *supra* at 484.<sup>21</sup> It is well established in our jurisprudence that larceny from the person is robbery absent the element of force or violence. *Calvin*, *supra* at 121.<sup>22</sup> In *Chamblis*, *supra* at 425, this Court held:

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<sup>21</sup> Other cases include *People v Jankowski*, 408 Mich 79, 87-90; 289 NW2d 674 (1980); *Chamblis*, *supra* at 424; *People v Light*, 290 Mich App 717, 725; 803 NW2d 720 (2010); *People v Douglas*, 191 Mich App 660, 664; 478 NW2d 737 (1991); *People v McDonald*, 116 Mich App 135, 137; 321 NW2d 868 (1982); *People v Wilkinson*, 76 Mich App 109, 111; 256 NW2d 48 (1977); and *People v Norman*, 14 Mich App 673, 675; 166 NW2d 9 (1968). Michigan’s view that larceny from a person is a necessarily included lesser offense of robbery finds support among numerous legal scholars going back more than 200 years. See *Pierce*, *supra* at 478 (listing sources).

<sup>22</sup> In *Calvin*, *supra* at 121, this Court held, “Each of these offences under our statutes and at common law, to-wit, robbery and larceny from the person, include the stealing and taking of property from the person,—one by force and violence; the other need not be with force or violence; it may be by stealth. In both cases, however, the taking is regarded by the law as a larceny of the property.” See also *Chamblis*, *supra* at 424 (“Robbery is committed only when there is larceny from the person, with the additional element of violence or intimidation.”); 3B Gillespie, Michigan Criminal Law & Procedure (2d ed, 2010 revision), §99:11, p 129 (“Both robbery and stealing from the

Robbery is committed only when there is larceny from the person, with the additional element of violence or intimidation. Perkins on Criminal Law (2d ed), pp 279, 281. We are committed to the view that the crime of larceny from the person embraces the taking of property in the possession and immediate presence of the victim. *People v Gould*, 384 Mich 71; 179 NW2d 617 (1970). If such taking be by force and threat of violence, it is robbery, and hence every robbery would necessarily include larceny from the person and every armed robbery would necessarily include both unarmed robbery and larceny from the person as lesser included offenses.

This Court has also rejected the notion that larceny from a person is a cognate offense of robbery:

[T]he Court's decision in *People v Kamin*, [405 Mich 482; 275 NW2d 777 (1979)], found larceny from the person to be a cognate lesser included offense. We believe this was a mistake. In *People v Jankowski*, 408 Mich 79; 289 NW2d 674 (1980), decided one year after *Kamin*, the Court returned to the *Chamblis* conclusion that larceny from the person is necessarily included in armed robbery." [*Beach, supra* at 484 n 17.]

Because the additional element of force or violence is the only element that distinguishes robbery from larceny from a person, *Chamblis, supra* at 424, the "presence" requirement of the two crimes is necessarily identical. Larceny from a person could not be a necessarily included lesser offense of robbery if the "presence" requirement were more restrictive for larceny from a person than for robbery. Therefore, the common-law definition of "from the person," which includes the victim's presence, is the same for larceny from a person as it is for robbery.

The Court of Appeals' definition of "presence" in this case erroneously alters the crime of larceny from a person by making it so that it could never have been a necessarily included lesser offense of robbery. In fact, the Court explicitly recognized that its definition of "presence" is more restrictive for larceny from a person than for robbery: "Unlike the statutory prohibition of larceny from the person, the armed robbery statute protects an area outside the victim's

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person include the stealing and taking of property from the person, the former by force and violence and the latter by stealth . . .").

personal space.” *Smith-Anthony, supra* at 421 n 4 (94a). Thus, under the Court’s opinion, a perpetrator who uses force to steal an item within the victim’s protection or control, but not within the victim’s personal space, would commit a robbery, but not a larceny from a person.<sup>23</sup> By holding that the “presence” element of larceny from a person is more restrictive than the common-law definition of “presence” used for both robbery and larceny from a person, the Court of Appeals ignored long-standing common law that defined “presence” and made larceny from a person a necessarily included lesser offense of robbery. The Court of Appeals’ definition of “presence” essentially treats larceny from a person as if it had always been a cognate offense of robbery, which is contrary to over a century of jurisprudence in this state.

**4. The 2004 amendment of the robbery statutes, 2004 PA 128, did not alter the definition of “presence” with respect to the larceny from a person statute.**

Before Michigan’s robbery statutes were amended in 2004, the armed robbery statute, MCL 750.529, provided in pertinent part:

Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony . . . .

The pre-amendment unarmed robbery statute, MCL 750.530, provided:

Any person who shall, by force and violence, or by assault or putting in fear, feloniously rob, steal and take from the person of another, or in his presence, any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon, shall be guilty of a felony . . . .

In *Randolph, supra*, this Court analyzed these versions of the robbery statutes and rejected the transactional approach to robbery as inconsistent with the plain language of the statutes and the

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<sup>23</sup> For example, under the majority opinion, a defendant who points a gun at a person sitting on a couch and steals a television that is ten feet away could be guilty of armed robbery, but if the element of force or violence is removed

common-law history of robbery. This Court concluded that “the force used to accomplish the taking underlying a charge of unarmed robbery must be contemporaneous with the taking.” *Id.* at 536. *Randolph* rejected the view that a completed larceny could be elevated to a robbery if the defendant used force after the taking and before reaching temporary safety. *Id.* at 546. This Court overruled the Court of Appeals decisions that had adopted a transactional approach to robbery. *Id.* at 546.<sup>24</sup> In 2004, following this Court’s decision in *Randolph*, the Legislature amended the robbery statutes so that the force used need no longer be contemporaneous with the taking, but may be “in the course committing a larceny.” 2004 PA 128. Robbery is now statutorily defined as follows:

(1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.

(2) As used in this section, “in the course of committing a larceny” includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property. [MCL 750.530, as amended by 2004 PA 128.<sup>25</sup>]

This Court has since recognized that the 2004 amendments to the robbery statutes “were, in part, a legislative response to *Randolph*.” *Williams, supra* at 177; see also *GMAC LLC v Dep’t of*

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from the situation (the defendant does not point the gun), the defendant could *not* be guilty of larceny from a person.

<sup>24</sup> *Randolph* overruled *People v Sanders*, 28 Mich App 274; 184 NW2d 269 (1970), *People v LeFlore*, 96 Mich App 557; 293 NW2d 628 (1980), *People v Turner*, 120 Mich App 23; 328 NW2d 5 (1982), and *People v Tinsley*, 176 Mich App 119; 439 NW2d 313 (1989).

<sup>25</sup> Our Court of Appeals has held that the elements of armed robbery are now as follows:

(1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

*Treasury*, 286 Mich App 365, 373; 781 NW2d 310 (2009) (“when a judicial decision is released and the Legislature acts to change the language of the statute, it is strong evidence of the disapproval of the judicial interpretation.”). The robbery statutes, as amended, adopted a transactional approach to robbery. But as this Court explained in *Williams*, *supra* at 177, the amendments also reflected a broader change in the robbery statutes:

[W]e believe that the clear language of the amended statutes reflects a legislative intent to effect a *broader change* in the robbery statutes. The 2004 revisions *deleted* the words denoting *actual* deprivation of property—“rob, steal and take”—and replaced them with a broader phrase: “in the course of committing a larceny.” The deletion and replacement of what this Court long ago called the “familiar words” of robbery is perhaps the best and most compelling indication that the Legislature intended an extensive deviation from the common law rule. Such a revision would have been completely unnecessary if the Legislature had merely sought to adopt a transactional theory of robbery. [*Williams*, *supra* at 177 (emphasis in original)<sup>26</sup>.]

As part of these broad changes, the robbery statutes no longer require a taking “from the person of another, or in his presence.” A person is now guilty of robbery if he, in the course of committing a larceny, “uses force or violence against any person who is present . . . .” MCL 750.530.<sup>27</sup> In other words, a person now commits a robbery if he uses force or violence against a person present during the course of the larceny, even if he was alone when he initially took the property. Whereas the pre-2004 statute required that the taking be in the victim’s presence, the amended statute now requires only that the force or violence be in the victim’s presence. These amendments broadened the temporal scope of robbery by loosening the requirements on *when* a victim’s presence is required.<sup>28</sup> Although the amended robbery statute, MCL 750.530, uses the

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<sup>26</sup> In *Williams*, *supra* at 172, 184, this Court held that a completed robbery is no longer necessary to constitute a robbery—an attempt to commit a larceny is sufficient.

<sup>27</sup> The Court of Appeals in this case correctly stated, “Defendant’s violent actions during her attempted escape also potentially fell within the ambit of the transactional unarmed robbery statute.” *Smith-Anthony*, *supra* at 422 (94a).

<sup>28</sup> Since the 2004 amendments to the robbery statutes, the Court of Appeals has continued to hold that larceny from a person is a necessarily included lesser offense of robbery. See, e.g., *Light*, *supra* at 725. Whether this is correct

word “present” (which appears on its face to be consistent with the word “presence” in the pre-amendment statute), the “presence” requirement of the amended robbery statute applies only to the use of force or violence, whereas the “presence” requirement of the pre-amendment statutes applied to the taking. This presents the question whether the common-law definition of “presence” used, for example, in *Beebe, supra* at 159, still applies to the phrase “uses force or violence against any person who is present” in the amended robbery statute.

But regardless whether the 2004 amendment of the robbery statutes altered the definition of “presence” with respect to robbery, there is no indication that the amendment altered the definition of “presence” with respect to the larceny from a person statute. This Court should not infer from the amendment of the language of one statute a legislative intent to amend the meaning of a different statute:

We will not impute to the legislature a purpose to change a statute which they did not have under consideration. We cannot see why the legislature can be credited with the thought to change, amend, or repeal a statute they did not mention in the act, but did mention another and different statute, leaving the statute here in question as it was written. [*State ex rel Booze v Cresswell*, 117 Miss 795, 808; 78 So 70 (Miss, 1918).]

And as Justice Markman explained in *Bush v Shabahang*, 484 Mich 156, 199, 208; 772 NW2d 272 (2009) (Markman, J., dissenting), an amendment of one statute should not alter the meaning of another statute absent the Legislature’s indication of its intent to do so. The amendment of the robbery statutes, accompanied by a conspicuous absence of an amendment of the larceny from a person statute, did not amount to a clear indication of an intent to abrogate the common law-definition of “presence” with respect to the larceny from a person statute. *Moreno, supra* at 46. To modify the common law, the Legislature had to speak in “no uncertain terms,” which it did

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could be a matter of debate in a future case. But this issue has not been raised and need not be addressed in the instant case.

not do in 2004 PA 128 with respect to the larceny from a person statute. *Id.* In fact, by amending the robbery statutes while leaving MCL 750.357 and its “from the person” language intact, the Legislature more likely signaled an intent to retain the meaning of that language in MCL 750.357. Absent any clear indication by the Legislature to alter the common-law definition of “presence” with regard to larceny from a person, this definition should remain in effect for MCL 750.357. *Gahan, supra* at 272.

Here, the Court of Appeals offered no justification for adopting a definition of “presence” with respect to larceny from a person that is contrary to the well-established common law definition and narrower than the meaning of “presence” with respect to robbery. Notably, the Court did not state that the 2004 amendments to the robbery statutes changed the meaning of “presence” with respect to larceny from a person. But by default, the Court of Appeals must have either (1) decided to ignore the common-law definition of “presence,” or (2) changed the definition of “presence” with respect to larceny from a person based on the 2004 amendments to the robbery statutes. Neither of these reasons for departing from the common-law definition is justified. The Court of Appeals’ misguided break from the common law requires correction.

## **5. Conclusion**

Since the larceny from a person crime was first codified in Michigan in 1838, this Court has held that a taking “from the person of another” need not be a taking from the person’s actual body, but may also be a taking in the person’s presence. This Court has held that property is in the presence of a person if it is under his protection or control. *Covelesky, supra* at 97. This includes “a not easily defined distance over which [the victim’s] presence may be deemed to have sway.” *Id.* at 98. Because larceny from a person is a necessarily included lesser offense of robbery, the meaning of “presence” is identical for both crimes. The common-law definition of

“presence” was well-established when the Legislature recodified the larceny from a person statute in 1931. By leaving the statutory language alone, the Legislature expressed that it had no intent to modify the common-law meaning of the term. Since then, Michigan’s courts have continued to use the established common-law definition of “presence.” For example, in *Beebe*, *supra* at 159, our Court of Appeals held that a thing is in the presence of a person when it “is so within his reach, inspection, observation or control” that he could retain possession of it. The 2004 amendment of the robbery statutes gave no clear indication that the Legislature intended to modify the well-established common-law definition of “presence” with respect to the larceny from a person statute. Here, the Court of Appeals erred in adopting a definition of “presence” that is inconsistent with common law and ignores this Court’s holdings that larceny from a person is a necessarily included lesser offense of robbery. This Court should vacate the Court of Appeals analysis and hold that the well-established common-law definition of “presence” continues to apply to the larceny from a person statute and its requirement that there be a theft “from the person of another.”

**B. The Sufficiency of the Evidence**

Due process requires that there is sufficient evidence of guilt to sustain a conviction. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). When determining whether sufficient evidence has been presented to sustain a conviction, this Court reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). The reviewing court must draw all reasonable inferences and make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

**1. Applying the proper common-law definition of “presence,” the evidence was sufficient to support defendant’s larceny from a person conviction.**

There does not appear to be any dispute in this case that the first three elements of larceny from a person were satisfied—defendant took someone else’s property without consent and moved the property with the intent to steal or permanently deprive the owner of the property. *Perkins, supra*, 262 Mich App at 271-272. And although Krumbhaar was not the actual owner of the White Diamonds box that defendant stole, she was in custody and control of the store’s merchandise as its loss-prevention officer. See *Cabassa, supra* at 546 (“McMullen [a gas station attendant], though not the actual owner of the property stolen, was in custody and control of it.”); *Randolph, supra* at 557 n 3 (Markman, J., dissenting) (stating that “Michigan case law has long held that it is unnecessary that the victim be the actual owner of the property that is the subject of the larceny” and explaining that a security guard of the owner of the property can have custody and control over the property). “As against a wrong-doer, an actual possession or custody of the goods would be sufficient.” *Cabassa, supra* at 547, quoting *Durand v People*, 47 Mich 332, 334; 11 NW 184 (1882). The only element in dispute is whether “the property was taken from the person or from the person’s immediate area of control or immediate presence.” *Perkins, supra*, 262 Mich App at 272. The trial court correctly instructed the jury regarding this element: “that the property was taken from Khai Krumbhaar’s person or from Khai Krumbhaar’s immediate area of control or immediate presence.” (87a.) The jury concluded that this element was satisfied. Applying the established and proper common-law standard for determining “presence,” the evidence was sufficient to support the jury’s factual finding that defendant took the White Diamonds box from Krumbhaar’s immediate area of control or immediate presence.

In *Randolph, supra*, Justice Markman explained that even after an offender removes merchandise from the shelf of the store, the merchandise is still in the “presence” of security

guards who are observing the offender—“the security guards continued to exercise protective custody and control over that property, because they continued to monitor defendant and they still had the right to take the property back.” *Id.* at 556 (Markman, J., dissenting). Justice Markman further stated that “[t]he property is in the presence of the victim, although it is in the actual physical possession of the perpetrator, where the victim exercises protective custody and control over the property.” *Id.* at 557 (Markman, J., dissenting). He explained that as long as security guards observe the suspect with the property, the property remains in their “presence” because it is in their custody and control:

During their observation of defendant, the security guards continued to exercise protective custody and control over the property. That is, the security guards had the authority and the right to take it back. Thus, the property was for all purposes “in [the] presence” of the guards. MCL 750.530. [*Randolph, supra* at 572-573 (Markman, J., dissenting).]

The *Randolph* majority did not dispute Justice Markman’s statement that the security guards had custody and control over the store merchandise before the defendant completed the taking. The *Randolph* majority disagreed only with Justice Markman’s opinion that the security guards continued to exercise custody and control over the property *after* the taking was complete. *Randolph, supra* at 542 n 9, 549 n 20. The majority held, “the fact remains that physical custody and control of the property, actual possession, has been acquired by the thief when he conceals the property.” *Id.* at 549 n 20. A larceny is complete when the defendant conceals the property. *Id.* at 549 (“[W]hen defendant placed the merchandise under his clothing, he committed a taking without force, and his conduct constituted a completed larceny.”); see also *People v Bradovich*, 305 Mich 329, 332; 9 NW2d 560 (1943) (“The crime of larceny was completed when defendants removed the clothing from the rack and concealed it beneath the clothing they were wearing.”). Inferred in the *Randolph* majority’s holding (that the thief gains custody and control of the

property only when the taking is complete) is that the thief does *not* have custody and control of the property *before* the completed larceny. Thus, the observing security guards in *Randolph* had custody and control of the property before the defendant completed the taking.<sup>29</sup>

Here, defendant took a White Diamonds box from a Macy's display while Krumbhaar watched on a closed-circuit television monitor (21a-22a). Krumbhaar then proceeded to the floor to observe defendant more closely (22a). Defendant carried the White Diamonds box through different departments of the store while Krumbhaar followed and observed (23a-25a). As defendant walked from the women's shoe department to the optical department, she pushed the White Diamonds box down into her brown grocery bag (24a-25a). This completed the larceny. *Randolph, supra* at 543-544, 549. Once the larceny was complete, the offense did not continue. *Id.* at 543.

The relevant question is whether the evidence was sufficient to prove that defendant completed the larceny in Krumbhaar's presence. When defendant completed the larceny, Krumbhaar was observing her (24a). Krumbhaar was close enough to see defendant push the White Diamonds box down into her bag and to see that half of the box was sticking out of the

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<sup>29</sup> The facts of *Randolph* are very similar to the facts of the instant case. In *Randolph, supra* at 547, the defendant took merchandise from the shelf of a Meijer store while being observed by store loss-prevention officers. The defendant then concealed the items beneath his coat. *Id.* The loss-prevention officers continued to monitor the defendant while he left the store without paying for the items. *Id.* at 547, 572 (Markman, J., dissenting). When the defendant emerged from the store, several security guards confronted him. *Id.* at 534. When the defendant tried to run, one of the security guards seized him. *Id.* at 534-535. During the defendant's efforts to escape, he assaulted the security guards and lost possession of the merchandise. *Id.* at 535.

Although the facts of *Randolph* are similar to the instant case, the procedural history is not. In *Randolph, supra* at 535, the defendant was charged with unarmed robbery, and a jury convicted him as charged. This Court held that because robbery was not transactional in nature and the defendant did not use force or violence to accomplish the larceny, his unarmed robbery conviction was not supported by the evidence. *Id.* at 551. This Court remanded to enter a conviction on the cognate lesser offense of larceny in a building. *Id.* at 553. It is worth noting that the remedy in *Randolph* (which was decided after *People v Cornell*, 466 Mich 335; 646 NW2d 127 [2002]) is a viable remedy only in limited situations, as jurors may no longer be instructed on cognate lesser offenses. *Cornell, supra*. As this Court explained in *People v Hampton*, 469 Mich 1029; 679 NW2d 66 (2004), "the remedy provided in *People v Randolph*, 466 Mich 532, 552-553; 648 NW2d 164 (2002), that is, remand for entry of a conviction for

bag (24a-26a). While Krumbhaar was conducting her observation of defendant, she was “fairly close” to her (23a). As Judge Whitbeck pointed out in his dissent, Krumbhaar was close enough to defendant to see that she was nervous (24a), to hear her tell two sales associates that she did not need assistance (23a-24a), to hear her ask a third sales associate for a pair of shoes (24a), and to see that she did not pass any money or credit cards (25a). Krumbhaar was also close enough to defendant that she was able to stop defendant as she walked out of the store (28a-29a).

This evidence, when viewed in the light most favorable to the prosecution, was sufficient to support defendant’s larceny from a person conviction. Applying the reasoning from *Randolph* and the common-law definition of “presence,” a reasonable juror could conclude that Krumbhaar, as the loss-prevention officer for Macy’s, had protection and control of the White Diamonds box up until the point when defendant completed the larceny and gained control over the box by pushing it down into her bag (24a). The evidence supports the conclusion that Krumbhaar was close enough to defendant at the time the larceny was completed that she could have retained possession of the White Diamonds box if defendant had not taken it and put it in her bag. *Beebe, supra* at 159. The evidence that Krumbhaar approached and stopped defendant outside the store (28a-29a) supports the conclusion that she could have stopped defendant at the time she observed defendant completing the larceny inside the store. Because the jurors could conclude that defendant completed the larceny of the White Diamonds box while it was in Krumbhaar’s protection, custody, and control, the evidence was sufficient to prove that defendant committed a larceny in Krumbhaar’s “immediate area of control or immediate presence.” *Perkins, supra*, 262 Mich App at 272.

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larceny in a building, was proper under the specific facts of that case where the defendant effectively acquiesced in that resolution.”

Had Judges Gleicher and Shapiro been sitting as jurors on this case, they might have found that the White Diamonds box was not within Krumbhaar's custody or control at the time of the larceny.<sup>30</sup> But as Judge Whitbeck stated in his dissent, "we are not to determine, when reviewing a criminal conviction on sufficiency of the evidence grounds, whether had we been sitting as jurors we would have reached the same result as the jury." *Smith-Anthony, supra* at 431-432 (Whitbeck, J., dissenting), citing *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998) (102a). Given the testimony describing the proximity between defendant and Krumbhaar and the flexible common-law definition of "presence," the evidence, when viewed in a light most favorable to the prosecution, *Robinson, supra* at 5, was sufficient to prove that defendant was guilty of larceny from a person.

As discussed earlier, larceny from a person is punished more severely than simple larceny because taking another person's property in his presence presents the potential that that person will resist the larceny in a manner that could lead to violence. *Perkins, supra*, 473 Mich at 633-634; *Taylor, supra* at 633. Here, the heightened risk of violence was present because defendant took the White Diamonds box while it was under a loss-prevention officer's protection and control. In fact, as the Legislature anticipated when enacting the larceny from a person statute, the situation became violent when Krumbhaar attempted to retain the store's property by confronting defendant (29a-33a). If defendant had shoplifted merchandise in an area of the store where no employees or loss-prevention officers were watching that could detain her and retain possession of the merchandise, she would have committed a simple retail fraud or larceny.<sup>31</sup>

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<sup>30</sup> The Court of Appeals majority stated: "Krumbhaar testified that she 'was able to stay fairly close' to defendant in the fragrance department. In our view, that testimony does not describe being within defendant's 'immediate presence.'" *Smith-Anthony, supra* at 419 n 2 (92a-93a).

<sup>31</sup> There are other situations when a person who is caught shoplifting is guilty of only retail fraud rather than larceny from a person. A few examples include when (1) the defendant completes the larceny by concealing the

See, e.g., *State v Barnes*, 345 NC 146; 478 SE2d 188 (NC, 1996) (holding that the evidence was insufficient to support the defendant's larceny from a person conviction where the defendant completed the larceny from a kiosk while the employee was 25-30 feet away at another shop and was not observing the defendant). But by stealing merchandise in an area where a loss-prevention officer was observing and able to retain the property, defendant acted in a manner the larceny from a person statute was designed to prevent.

**2. The caselaw supports the conclusion that the evidence was sufficient to support defendant's larceny from a person conviction.**

Cases from this Court and the Court of Appeals with facts similar to the instant case have upheld convictions of larceny from a person. For example, in *Gould, supra*, 384 Mich at 73-74, the defendant and one of the codefendants entered a restaurant and announced a holdup. The men forced the waitress and her sole customer to lie down on the floor of another room. *Id.* at 74. The men then took money from the cash register, a cigar box, and from the wallet of the customer before leaving. *Id.* The defendant was charged with armed robbery, but was convicted of the lesser offense of larceny from a person. *Id.* at 73. The Court of Appeals reversed, holding that "under the facts in this case, larceny from the person was not an included offense." *Id.* at 75. But this Court reinstated the verdict for several reasons, concluding that "the taking of property in the possession and immediate presence of the waitress and customer in this case was sufficient to sustain a verdict against defendant Gould of larceny from the person." *Id.* at 80. Although the facts of *Gould* are distinguishable to an extent because the defendant took money from the wallet of the customer, this Court also held in *Gould* that the defendant took the cash in the immediate presence of the waitress, *even though she was on the floor and away from the cash register and*

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merchandise while a security guard observes via a closed-circuit monitor, (2) a security guard stops the defendant because of a bulge in his clothing or other suspicious activity following the completion of the larceny, or (3) a

*cigar box. Id.* The *Gould* holding supports the conclusion that a taking completed farther than arm's length from the victim may be in the victim's "presence" where, as in the instant case, the victim had protection or control over the property taken. The Court of Appeals' attempt to distinguish *Gould* on its facts is unavailing. See *Smith-Anthony, supra* at 421 (94a).

In *Gould, supra*, 384 Mich at 80, this Court cited *Subilosky, supra*, in support of its conclusion. In *Subilosky*, four men entered a bank, announced a holdup, ordered all of the people to lie on the floor, and took money from the cash drawers. This Court quoted with approval the following holding from *Subilosky*:

"The defendant contends that, because testimony shows that the cash was taken from the cash drawers for which the tellers Judith Dillon and Joseph Prachniak were responsible, a verdict of 'not guilty' should have been directed on the indictment charging larceny from the person of Lombardi, the murder victim. Lombardi, also a teller, was acting manager of the bank on the day of the robbery, and was in the banking room when the robbers entered. There was no error.

The funds in the bank were under Lombardi's protection; hence the essential elements of the crime of larceny from the person have been shown. See *Commonwealth v. Weiner* [1926], 255 Mass 506, 509 [152 NE 359]; *Commonwealth v. Homer* [1920], 235 Mass 526, 533 [127 NE 517]. '[I]t is sufficient if the property be taken from the presence of the victim \* \* \* [that is] within his area of control.' Anderson, Wharton's Criminal Law & Procedure, § 553." [*Gould, supra*, 384 Mich at 80, quoting *Subilosky, supra* at 166.]

Thus, in *Subilosky*, the court held that the evidence was sufficient to support the defendant's larceny from a person conviction even though the victim was not manning the drawers from which the defendant took the cash. In other words, the larceny from a person conviction was proper even though the victim was not within arm's length of the property. Under *Subilosky*, a defendant may be guilty of larceny from a person if he takes an item belonging to a business in the presence of an employee who has protection over the item. Similarly here, because the

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security guard stops the defendant after he triggers the security alarms.

evidence supported the conclusion that defendant took store merchandise in Krumbhaar's presence and the merchandise was under Krumbhaar's protection (as a Macy's loss-prevention officer), the evidence was sufficient to support defendant's conviction of larceny from a person.

In *People v Rodgers*, 248 Mich App 702, 705; 645 NW2d 294 (2001), the defendant entered a Speedy Muffler shop, brandished a shotgun, announced a "stick up," and began emptying the cash drawer in the presence of the manager and one employee. The defendant ordered the manager and employee into the back room, where a third employee was working on a car. *Id.* This third employee observed the defendant emptying the cash drawer from the back room. *Id.* at 706. The defendant then entered the back room, where he ordered all three employees to empty their pockets, but took cash only from the manager. *Id.* The defendant was convicted of three counts of armed robbery. *Id.* at 704. He argued on appeal that because he took money only from the manager, the evidence was sufficient to support only one of the three armed robbery convictions. *Id.* at 706. The Court of Appeals disagreed, holding that the evidence was sufficient to support the defendant's convictions of three counts of armed robbery because the defendant assaulted all three employees *and stole the company's cash from the register in the "presence" of all three employees*, who all had a right to possess the cash superior to the defendant. *Id.* at 713. In other words, although one of the employees was in the back room when the defendant took the money from the cash drawer, the defendant was nonetheless in the "presence" of that employee at the time. The *Rodgers* holding supports the proposition that a store employee has store property in his protection and control even when physically distanced from that property. Under *Rodgers*, a defendant may be guilty of robbery or larceny from a person as long as he takes store property while store employees are present and aware of the taking, even if in another room. Applying *Rodgers*, the evidence in the instant case that

defendant took store merchandise while a store loss-prevention officer observed from a “fairly close” distance was sufficient to support her larceny from a person conviction.

In *Beebe*, *supra* at 156, the defendant entered a store and asked the owner for five cases of beer. The owner carried four cases of beer outside and put them into the trunk of the defendant’s car. *Id.* When the owner came outside with the fifth case, he requested payment. *Id.* at 157. At that point, the defendant pulled out a gun, pointed it at the store owner, and said, “We’ll call it even.” *Id.* The two men were ten feet away at the time. *Id.* The defendant then got into his car and drove off. *Id.* The *Beebe* Court held that when the defendant pulled out the gun, the “goods were sufficiently within the victim’s control that he could have recovered them if he had not been overcome by fear.” *Id.* at 159. Therefore, the defendant used force to take the cases of beer from the owner’s presence. *Id.* This holding supports the conclusion that defendant was in Krumbhaar’s presence when she took the White Diamonds box. In both *Beebe* and the instant case, the merchandise was in the defendant’s physical possession (on defendant’s person and in *Beebe*’s car) with the store employee observing at the time of the taking. But the store employees in both cases had a superior right to possess the merchandise and retain custody or control over it. Here, as in *Beebe*, the employee could have retained possession of the property but for the larceny (with the additional use of force in *Beebe*), so defendant took the merchandise in the employee’s “presence.”

The Court of Appeals’ disregard of *Beebe* in this case is misplaced. The Court of Appeals stated that *Beebe* was distinguishable for the following reason:

In *Beebe*, this Court construed the armed robbery statute, which at the time applied to armed thefts from a victim’s person “or in his presence.” Unlike the statutory prohibition of larceny from the person, the armed robbery statute protects an area outside the victim’s personal space. [*Smith-Anthony, supra* at 421 n 4 (94a).]

But as discussed, because larceny from a person is a necessarily included lesser offense of robbery, the “presence” element is identical, despite the Legislature’s use of the phrase “or in his presence” in the robbery statutes. Therefore, the Court’s analysis of that element with respect to the armed robbery statute in *Beebe* was equally applicable to the larceny from a person statute. The Court of Appeals’ statement in this case that the “presence” element of larceny from a person is narrower than the “presence” element of robbery ignores well-established common law to the contrary.

The Court of Appeals’ reliance on *Gadson, supra*, is misplaced. In *Gadson, supra* at 308, the defendant met the complainant in a tavern and drove him around to different places while they drank whiskey and beer. The complainant, who began the evening with \$146, pulled money out of his pocket on at least three occasions to pay for whiskey, beer, and \$10 for gasoline. *Id.* When they arrived at the complainant’s house, the complainant went into his bedroom to lie down. *Id.* at 308-309. The defendant walked into the bedroom and proposed sexual intercourse. *Id.* at 309. When the complainant declined, the defendant wrestled with him and forcibly removed his pants before the complainant grabbed them back from her. *Id.* The complainant testified that he had about \$138 when he entered the bedroom, but had only 65 cents when he left. *Id.* The complainant neither saw nor felt the defendant take his money. *Id.* He looked for the money on the bed and the floor, but could not find it. *Id.* The defendant was convicted of larceny from a person. *Id.* at 308. On appeal, the defendant argued that the prosecution had not established beyond a reasonable doubt (1) “that the complaining witness’s money was stolen, not merely lost,” or (2) “if the theft were considered established, . . . that it was a larceny from the person and not merely a surreptitious taking of money which, during the alleged wrestling episode, may have fallen from his pocket to the bed or floor.” *Id.* at 310. This Court, without

adopting the defendant's arguments or providing any other explanation for its ruling, held that the proofs were insufficient to prove that the larceny "was accomplished by 'stealing from the person of another.'" *Id.*, quoting MCL 750.357. But nothing in *Gadson* holds or even implies that larceny from a person may not be accomplished if the victim is outside of the arm's length of the perpetrator. In fact, *Gadson* says nothing whatsoever about the proximity of the complainant and the defendant. It is just as likely that this Court based its ruling on the lack of evidence that the defendant stole the money at all. In any case, even if *Gadson* had held that larceny from a person requires a taking from the body of the victim, this Court subsequently took a different direction in *Gould*, where this Court reversed a Court of Appeals opinion that relied on *Gadson*. *Gould, supra*, 15 Mich App at 92.

### **3. Conclusion**

Krumbhaar, as a Macy's loss-prevention officer, had protection and control over the White Diamonds box defendant had removed from the store display up until defendant completed the larceny by putting it in her bag. During Krumbhaar's observation of defendant carrying the White Diamond's box, she was "fairly close" to defendant, could see defendant's mannerisms, could hear defendant's conversations, and was able stop defendant as she left the store. Viewing these facts in a light most favorable to the prosecution, a reasonable juror could conclude that at the point that defendant completed the larceny, the White Diamonds box was so within Krumbhaar's protection and control that she could have retained possession of it. Therefore, the evidence was sufficient to support the jury's conclusion that defendant took the White Diamonds box from Krumbhaar's immediate area of control or immediate presence.

In reaching a conclusion to the contrary, the Court of Appeals majority did not cite any Michigan cases that support its definition of "presence" or its holding that the evidence was

insufficient to support defendant's conviction. Rather, caselaw in Michigan, including *Covelesky*, *Gould*, *Rodgers*, and *Beebe*, support the conclusion that there was sufficient evidence in this case for the jury to find defendant guilty of larceny from a person. This Court should reverse the Court of Appeals and reinstate defendant's larceny from a person conviction.

**RELIEF**

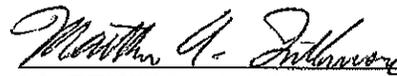
WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Matthew A. Fillmore, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court reverse the Court of Appeals judgment and reinstate defendant's larceny from a person conviction.

Respectfully Submitted,

JESSICA R. COOPER  
Prosecuting Attorney  
Oakland County

THOMAS R. GRDEN  
Chief, Appellate Division

By:

  
MATTHEW A. FILLMORE (P59025)  
Assistant Prosecuting Attorney  
Oakland County Prosecutor's Office  
1200 North Telegraph Road  
Pontiac, Michigan 48341  
(248) 452-9178

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