

A man revered a famous guitarist who had recently died. The man convinced his girlfriend, who worked at the cemetery where the guitarist was buried, to help him acquire a 12-foot sculpture of a steel guitar that had been commissioned by the guitarist's surviving spouse and installed on the guitarist's gravesite. One day, when the girlfriend knew that no other cemetery employees would be present, she gave the man the keys to a truck with a hydraulic lift that the cemetery used to install headstones. She and the man then drove to the guitarist's gravesite. The girlfriend maintained a lookout while the man severed the sculpture from its base and raised it onto the truck bed using the hydraulic lift. The man then drove the sculpture to a storage unit he had rented, placed it in the unit, and returned the truck to the cemetery. On the way home from the storage facility, the man was killed in a car accident.

The police later ascertained the identities of the man and the girlfriend and recovered the sculpture unharmed.

If the girlfriend is charged with larceny in a jurisdiction that follows the common law, which of the following is her best defense?

- A. The man, who is deceased, cannot be convicted of larceny.
- B. The sculpture constituted real property.
- C. The sculpture was unharmed.
- D. The taking occurred during the day.

### Explanation:

At common law, a person who (1) aided or encouraged a principal in the commission of a crime and (2) was present at the crime is classified as a **principal in the second degree**. This designation is significant because a principal in the second degree is liable for the offense to the same extent as the principal—even if the principal is not convicted.

Here, the girlfriend aided the man in the unlawful removal of the sculpture from the guitarist's grave by serving as a lookout during the removal. As a result, the girlfriend is a principal in the second degree and can be tried and potentially convicted even though the man, who died before police could apprehend him, was not previously convicted **(Choice A)**. For the girlfriend to be convicted of **common law larceny**, the prosecution must prove that the man:

**unlawfully took and carried away** another's **personal property** *and* did so with the **intent to permanently deprive** the owner of that property.

However, a person who unlawfully **severs** and then **immediately carries away** an **item of real property**—eg, a planted tree or fixture—is **not guilty** of common law larceny. That is because such an item **does not constitute personal property** in its attached state.\* Therefore, the girlfriend's best defense is that the sculpture affixed to the grave constituted real property and, as such, was not subject to common law larceny.

\*In contrast, an item of real property that (1) was previously severed by the owner or (2) was severed by the defendant and later came into the owner's possession is personal property and subject to larceny.

**(Choice C)** It is not a defense to larceny that the stolen property was recovered unharmed.

**(Choice D)** Unlike common law **burglary**, larceny need not be committed at night.

### Educational objective:

A defendant who unlawfully severs and then immediately carries away an item of real property is not guilty of larceny because such an item does not constitute personal property.