

BACK STORY

BY FRANK CREMEN, ESQ.

ONE POINT OF VIEW: BEING OVER 60 MAKES YOU VULNERABLE?

Imagine this scenario: an attorney walks into a bar shortly after 5 p.m. to meet a client. He is a 63-year-old senior partner of an 18-member firm. His kids are grown, and his house is paid for. He runs three miles each morning and goes to the gym at least three times a week. He takes no medications. He is kind of a snoot but his wife likes him. While he waits for his client, he orders a scotch on the rocks (no carbs).

Across town, a second attorney walks into a bar to meet a client. He is 58 years old and a sole practitioner. He is upside-down on his mortgage and still has two kids, ages 16 and 17, at home. He had a bout with cancer ten years ago, but chemo took care of that. He carries an extra 50 pounds, and he takes meds for high blood pressure and early-onset diabetes. He plays golf but doesn't have time for other exercise. "Whenever I feel the urge to exercise," he jokes, "I lie down until the feeling goes away." He is loved by his staff, his clients and his family. While he waits for his client, he orders a rum and coke.

Simultaneously, two 20-something young men, hopped up on meth, enter the above-referenced bars. Neither is armed, but each feigns a firearm as he approaches his attorney-victim and demands his wallet. Before making an escape, each is apprehended by armed, off-duty police officers who just happened to be in the bars.

Each of the robbers has a similar criminal history, multiple arrests for drugs and theft, and several misdemeanor convictions. Given the circumstances of each of the robberies and the similar backgrounds of the perpetrators, one would think there will be similar outcomes. One would be wrong. The person who robbed the 63-year-old will be charged with robbery and a sentencing enhancement. Pursuant to Nev. Rev. Stat. 193.167, a person who commits a robbery or one of nine other crimes against someone aged 60 or older, or other "vulnerable person," must receive a second, consecutive sentence of one to 20 years. The penalty for robbery is two to 15 years. The person who robbed our 63-year-old attorney is thus looking at a potential sentence of up to 35 years.

The effect of this enhancement is immediate upon arrest. Pursuant to the jail bail schedules, the man who victimized the 63-year-old will face bail that is twice

that of his compatriot. If he hires private counsel, the fee may also be twice as high. The chances of his being released before trial are much slimmer. His position in plea bargaining is reduced, and the chances are much higher that he will actually go to prison rather than being placed on probation. Nev. Rev. Stat. 193.167 is a strict liability enhancement. The perpetrator does not need to know the age of his victim at the time the crime is committed.

How about our second attorney, the 58-year-old, overweight cancer survivor whose health is not the best? Is he a "vulnerable person" under the enhancement statute? No. For the definition of "vulnerable person," Nev. Rev. Stat. 193.167 refers us to Nev. Rev. Stat. 200.5092, part of Nevada's legislative scheme concerning the abuse, neglect, exploitation and isolation of elderly and vulnerable persons. The Legislature defines a "vulnerable person" as one who is 18 and older who:

1. Suffers from a condition of physical or mental incapacitation because of a developmental disability, organic brain damage or mental illness; or
2. Has one or more mental or physical limitations that restrict the ability of the person to perform the normal functions of everyday living.

One cannot contest the enhancement on the grounds that a 60-year-or-older victim, such as our senior law partner, is mentally and physically fit. That is not relevant. All that matters here is age.

So we have a legislative declaration that all people aged 60 and over are the equivalent of people who are brain-damaged, mentally incompetent or incapable of functioning physically. This is clearly not the case, however, upon this determination, for decades, we have been incarcerating many people for significantly longer periods of time based upon the age of the victim.

Perhaps draconian laws like this—and there are others—contribute to the fact that our prisons and jails are bursting at their seams. **NL**

FRANK J. CREMEN was admitted to practice in Nevada in 1974. He left the Clark County DA's office in 1978 as a chief deputy. He spent the following 36 years in private practice as a trial lawyer, emphasizing criminal law. He sold his office building in November 2014 and closed his practice to new clients. He now has one active case.