Supreme Court No. 93453-3
COA No. 73113-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN HENRY JOHNSON,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

John Henry Johnson requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Johnson, No. 71311-6-I, filed June 6, 2016. A copy of the Court of Appeals' opinion is attached as Appendix A. A copy of the Court of Appeals' order denying Mr. Johnson's motion for reconsideration is attached as Appendix B.

B. ISSUES PRESENTED FOR REVIEW

1. The "law of the case" doctrine provides that when an unnecessary non-statutory element is included in the to-convict jury instruction, without objection by the State, the State bears the burden to prove the element beyond a reasonable doubt. The law of the case doctrine was adopted by this Court under its rule-making authority and has been the law in Washington State for more than a century. In Johnson's case, the Court of Appeals effectively overruled that case law. The court held the law of the case doctrine does not survive the United States Supreme Court's recent decision in Musacchio v. United States, __ U.S. __, 136 S. Ct. 709, 193 L. Ed. 2d 639 (2016). This Court has never addressed Musacchio, and it was neither cited nor briefed by the parties. Given the long-standing prominence of the law

of the case doctrine, and the Court of Appeals' decision to overrule it without any input from the parties or this Court, is this an issue of substantial public interest that should be decided by this Court? RAP 13.4(b)(1), (4).

2. To prove second degree theft as charged, the State was required to prove Johnson wrongfully took a credit card from Kendra Farmer's purse with the specific intent to deprive her of the credit card. When specific intent is an element, the State must prove the accused intended to produce a specific result. Here, the evidence is lacking because there is no evidence that Johnson ever opened the purse or *knew* it contained a credit card. Even if the State proved he specifically intended to steal the purse, it did not prove he specifically intended to steal the credit card. Did the State fail to meet its burden of proof, warranting review? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Johnson was convicted of one count of second degree theft of an "access device." CP 193; RCW 9A.56.040(1)(c). Testimony at trial established Johnson picked up Kendra Farmer's purse that was sitting on a couch in a Pottery Barn store. 1/26/15RP 61, 78-79; 1/27/15(a.m.)RP 154, 177. Inside the purse were a number of credit

and debit cards. 1/26/15RP 65. But Johnson never opened the purse or looked inside of it. 1/26/15RP 91; 1/27/15(a.m.)RP 153. Thus, there was no evidence that he knew the purse contained credit or debit cards. In other words, even if the State proved Johnson intended to steal the purse, it did not prove he *specifically intended* to steal an "access device."

The to-convict jury instruction informed the jury it could find Johnson guilty if it found beyond a reasonable doubt that he (1) "wrongfully obtained or exerted unauthorized control over property of another"; (2) the property was "an access device"; and (3) Johnson "intended to deprive the other person of *the access device*." CP 157 (emphasis added).

Johnson argued on appeal that the State did not prove the statutory elements of the crime beyond a reasonable doubt. Johnson also argued that under the "law of the case" doctrine, the State bore the burden to prove specific intent to steal an access device because that element was contained in the to-convict instruction and the State did not object to the instruction. AOB at 8. The to-convict instruction stated the State must prove Johnson intended to deprive another of an "access device." CP 157. Thus, Johnson argued, under both the theft

statute and the to-convict jury instruction, the State bore the burden to prove Johnson specifically intended to steal an access device as opposed to just a purse.

The State did not address Johnson's argument regarding the law of the case doctrine. The State did not cite the United States Supreme Court's recent decision in Musacchio v. United States, __ U.S. __, 136 S. Ct. 709, 193 L. Ed. 2d 639 (2016). The State did not argue that Musacchio supersedes over one hundred years of this Court's case law establishing and applying the law of the case doctrine.

The Court of Appeals affirmed. Appendix A. Although the parties did not brief whether or how Musacchio impacts the law of the case doctrine in Washington, and although this Court has never addressed Musacchio, the Court of Appeals relied upon that case to overrule over a century of case law from this Court and hold the law of the case doctrine no longer exists in Washington State.

Johnson filed a motion for reconsideration. The Court of Appeals denied the motion without explanation. Appendix B.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals' opinion, which in effect overrules more than a century of this Court's case law, presents an issue of substantial public interest that should be decided by this Court. RAP 13.4(b)(1), (4).

The law of the case doctrine is a long-standing, well-established common law doctrine in Washington State. This Court established the doctrine more than 100 years ago under the Court's inherent authority to govern court procedures. The law of the case doctrine applies in all kinds of cases—both criminal and civil. It applies to all kinds of jury instructions, not just "to-convict" instructions in criminal cases. The law of the case doctrine is not a constitutional doctrine that arises from the Fourteenth Amendment's Due Process Clause. The application of the doctrine in Washington State is governed by this Court's case law. It is not governed by the United States Supreme Court's interpretation of the Fourteenth Amendment. For these reasons, the Court of Appeals' conclusion that the United States Supreme Court's decision in Musacchio governs the outcome in this case is erroneous. This Court should grant review and reverse.

In Musacchio, the United States Supreme Court addressed only whether the Fourteenth Amendment's Due Process Clause requires the

State to prove beyond a reasonable doubt any unnecessary non-statutory elements set forth in the jury instructions. Musacchio, 136 S. Ct. at 715. The Court reiterated that, when a court reviews a sufficiency of the evidence challenge on appeal, due process requires only that the court view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id. (citing Jackson v. Virginia, 443 U.S. 307, 314-15, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The reviewing court assesses whether the evidence is sufficient to prove the elements as set forth in the statute, not the jury instructions. Musacchio, 136 S. Ct. at 715.

Thus, Musacchio addresses only what the federal Due Process Clause requires. It does not address what Washington State's law of the case doctrine requires. The Musacchio Court specifically recognized that, "[w]hen an appellate court reviews a matter on which a party failed to object below, its review may well be constrained by other doctrines such as waiver, forfeiture, and estoppel." Id. at 716. Washington's law of the case doctrine is based on principles of waiver and estoppel and not the Due Process Clause. Whether and how it

applies in any given Washington case is not controlled by the United States Supreme Court's interpretation of the federal constitution.

The law of the case doctrine in Washington is based on principles of waiver and estoppel. The doctrine provides that "jury instructions not objected to become the law of the case." State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). In Hickman, the Court explained "the law of the case doctrine benefits the system by encouraging trial counsel to review all jury instructions to ensure their propriety before the instructions are given to the jury." Id. at 105. In criminal cases, the doctrine is "encapsulated in criminal rule CrR 6.15(c), which requires all objections to jury instructions be made before the instructions are given to the jury." Id.

Because of the beneficial effects of the law of the case doctrine, and because it is so well established, the Court refused to abandon the doctrine despite the State's urging in Hickman. Id.

The law of the case doctrine is more than 100 years old in Washington State. See id. at 101 n.2 ("In 1896, this court held 'whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury, and constitutes upon this hearing the law of the case.'") (quoting Pepperall v. City Park Transit

Co., 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896)). By 1917, the Court "declared the law of the case doctrine to be 'so well established that the assembling of the cases is unnecessary.'" Hickman, 135 Wn.2d at 101 n.2 (quoting Peters v. Union Gap Irr. Dist., 98 Wash. 412, 413, 167 P. 1085 (1917)).

This Court has applied the law of the case doctrine in countless cases over the ensuing decades. See, e.g., State v. France, 180 Wn.2d 809, 814, 329 P.3d 864 (2014) ("'jury instructions not objected to become the law of the case.'") (quoting Hickman, 135 Wn.2d at 102); State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995) ("[I]f no exception is taken to jury instructions, those instructions become the law of the case."); State v. Ng, 110 Wn.2d 32, 39, 750 P.2d 632 (1988) (because the State failed to object to the jury instructions they "are the law of the case and we will consider error predicated on them"); State v. Hames, 74 Wn.2d 721, 725, 446 P.2d 344 (1968) ("'The foregoing instructions were not excepted to and therefore, became the law of the case.'") (quoting State v. Leohner, 69 Wn.2d 131, 134, 417 P.2d 368 (1966)); State v. Holbrook, 66 Wn.2d 278, 281, 401 P.2d 971 (1965) ("Defendant took no exception to these instructions or those pertaining to presumption of innocence, reasonable doubt or burden of proof.

Thus they became the law of the case."); Agranoff v. Morton, 54 Wn.2d 341, 345, 340 P.2d 811 (1959); Tonkovich v. Dept. of Labor & Indus., 31 Wn.2d 220, 225, 195 P.2d 638 (1948) ("It is the approved rule in this state that the parties are bound by the law laid down by the court in its instructions where, as here, the charge is approved by counsel for each party, no objections or exceptions thereto having been made at any stage."); Schatz v. Heimbigner, 82 Wash. 589, 590-91, 144 P. 901 (1914) ("These alleged errors are not available to the appellants, because they are at cross-purposes with the instructions of the court to which no error has been assigned. There is but one question open to them; that is, is there sufficient evidence to sustain the verdict under the instructions of the court?").

The law of the case doctrine applies not only in criminal cases but also in civil cases. See, e.g, Agranoff, 54 Wn.2d at 345; Tonkovich, 31 Wn.2d at 225; Schatz, 82 Wash. at 590-91. In criminal cases, it applies not only to to-convict instructions, but also to other types of instructions. See, e.g., France, 180 Wn.2d at 816 ("France is correct that the law of the case doctrine applies to all unchallenged instructions, not just the to-convict instruction."); Ng, 110 Wn.2d at 39 ("because the State failed both at trial and on this appeal to challenge

the applicability of the duress defense to felony murder the instructions, as given, are the law of the case and we will consider error predicated on them").

To-convict jury instructions that are not objected to become the law of the case under a common law doctrine that applies to all kinds of jury instructions in all kinds of cases. A subset of the doctrine provides that when an unnecessary non-statutory element is included in a to-convict instruction that is not objected to, the element becomes the law of the case that must be proved by the State in the same manner as other necessary elements. See State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995) ("Added elements become the law of the case . . . when they are included in instructions to the jury."). The question on appeal is whether the evidence was sufficient to prove the added element beyond a reasonable doubt. Hickman, 135 Wn.2d at 103. To answer this question, the reviewing court applies the sufficiency of the evidence standard as set forth in Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) and State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Hickman, 135 Wn.2d at 103.

Thus, the reviewing court applies the same harmless error standard that applies when deciding whether the evidence was

sufficient to satisfy the proof-beyond-a-reasonable-doubt requirement of the Due Process Clause. See Musacchio, 136 S. Ct. at 715; Jackson, 443 U.S. at 319. But that does not mean the error is an error of constitutional due process governed by United States Supreme Court case law. The error is a procedural error governed by Washington State common law.

The law of the case doctrine is a procedural rule adopted by this Court under its inherent rule-making power. See Agranoff, 54 Wn.2d at 345. The Court has inherent power to govern court procedures, stemming from article four of the state constitution. City of Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006); State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975); Const. art. IV, § 1. "The prime object of all procedural law is the just, speedy, economical and final determination of litigation." Agranoff, 54 Wn.2d at 345. The law of the case doctrine serves these purposes by requiring counsel to promptly call the court's attention to any error in the jury instructions. Id. at 346.

The law of the case doctrine is a matter of court procedure, not constitutional law. Therefore, application of the doctrine is governed

by this Court's case law, not the case law of the United States Supreme Court.

In sum, the Court of Appeals erred in concluding that Johnson's case is controlled by the United States Supreme Court's interpretation of the Due Process Clause in Musacchio. The court's opinion in effect overturned over 100 years of this Court's common law without legal basis. The error is compounded by the court's failure to provide the parties with any opportunity to provide briefing on the Musacchio decision. For these reasons, this Court should grant review.

2. The State did not prove Johnson specifically intended to deprive Farmer of her access device, where there was no evidence that he knew she *had* an access device.

Under both the law of the case doctrine, as discussed above, and the theft statute, the State was required to prove Johnson acted with a specific intent to deprive Farmer of her access device. The State did not meets its burden because there was no evidence that Johnson *knew* Farmer had an access device inside her purse. The Court of Appeals' misinterpretation of the theft statute provides an additional reason why this Court should grant review. RAP 13.4(b)(4).

Johnson was charged with second degree theft of an "access device." CP 193. The statute provides that "[a] person is guilty of theft

in the second degree if he or she commits theft of . . . (d) An access device." RCW 9A.56.040(1)(d).

In general, the crime of theft requires proof beyond a reasonable doubt that the defendant had a specific intent to deprive the owner of his or her property.[1] RCW 9A.56.020; State v. Blancaflor, 183 Wn. App. 215, 240, 334 P.3d 46 (2014).

The second degree theft statute required the State to prove not only that Johnson had a specific intent to deprive Farmer of her property. The statute required the State to prove he had a specific intent to deprive her of her "access device."

The theft statute defines "theft" as "[t]o wrongfully obtain or exert unauthorized control over *the property* or services of another or the value thereof, with intent to deprive him or her of *such property* or services." RCW 9A.56.020(1)(a) (emphases added). For purposes of second degree theft as charged, "the property" is an "access device." RCW 9A.56.040(1)(d). The second term, "such property," refers to the earlier term "the property," which is an "access device." See Webster's Third New International Dictionary 2283 (1993) (the word "such"

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[1] "Specific intent" is "an intent to produce a specific result, as opposed to an intent to do the physical act that produces the result." State

means "of this or that character, quality, or extent : of the sort or degree previously indicated or implied," or "previously characterized or specified"); State v. Wentz, 149 Wn.2d 342, 351, 68 P.3d 282 (2003) ("Under the last antecedent rule, unless a contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent.") (internal quotation marks and citation omitted). Thus, applying basic principles of statutory construction, the statute required the State to prove Johnson had a specific intent to deprive Farmer of her "access device."

"[W]here specific intent is an element of a crime, the specific intent must be proved as an independent fact and cannot be presumed from the commission of the unlawful act." State v. Louther, 22 Wn.2d 497, 502, 156 P.2d 672 (1945). In other words, in a prosecution for second degree theft of an access device, a specific intent to deprive another of an access device cannot be presumed from evidence that the defendant actually took an access device. The element of specific intent to deprive must be proved as an independent fact. Id.

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v. Esters, 84 Wn. App. 180, 184, 927 P.2d 1140 (1996) (internal quotation marks and citation omitted).

The State did not prove Johnson had a specific intent to deprive Farmer of her access device because there is no evidence that he *knew* she had an access device. Johnson never opened the purse and did not know what was inside of it. 1/26/15RP 91; 1/27/15(a.m.)RP 153. Although Farmer said the purse contained a number of credit and debit cards, 1/26/15RP 65, there is no evidence that Johnson *knew* there were credit or debit cards inside the purse.

The State could not rely upon speculation that Johnson should have known Farmer's purse probably contained credit or debit cards. The State may not rely upon guess, speculation, or conjecture to prove an element of the crime. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

When criminal intent is an element of the crime, the State bears a simultaneous burden to prove actual knowledge. The criminal statute creates a hierarchy of mental states in declining order of seriousness: intent, knowledge, recklessness, and criminal negligence. RCW 9A.08.010; State v. Johnson, 173 Wn.2d 895, 905, 270 P.3d 591 (2012). The mental state of "specific intent" is the highest mental state requirement defined by statute. Johnson, 173 Wn.2d at 905. Within this hierarchy, "proof of a higher mental state is necessarily proof of a

lower mental state." State v. Acosta, 101 Wn.2d 612, 618, 683 P.2d 1069 (1984); RCW 9A.08.010(2). Thus, proof of intent necessarily establishes knowledge. City of Spokane v. White, 102 Wn. App. 955, 10 P.3d 1095 (2000).

Under that same logic, a *lack* of knowledge necessarily equates to a lack of intent.

For example, the crime of unlawful possession of a controlled substance with intent to manufacture or deliver contains the essential element that the defendant possessed a controlled substance with the intent to manufacture or deliver it. State v. Sims, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992). Proof of the crime requires proof that the defendant *had knowledge* of the nature of the controlled substance, as "[i]t is impossible for a person to intend to manufacture or deliver a controlled substance without knowing what he or she is doing. By intending to manufacture or deliver a controlled substance, one necessarily knows what controlled substance one possesses as one who acts intentionally acts knowingly." Id.

Likewise, it is impossible for a person to wrongfully obtain or exert unauthorized control over another person's access device with the intent to deprive the owner of the access device if the purported

wrongdoer has no knowledge that the access device even exists. Proof of intent requires proof of *knowing* conduct. Id.

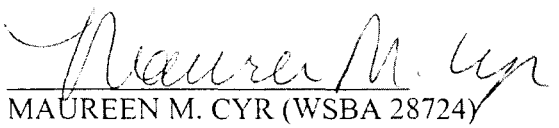
In State v. Lust, 174 Wn. App. 887, 889, 300 P.3d 846 (2013), the defendant took a tavern patron's purse without her permission and removed six credit and debit cards from a wallet inside. He was convicted of third degree theft for stealing the purse and second degree theft for stealing the credit and debit cards. The Court of Appeals held the two offenses were not factually or legally identical, in part, because "the theft statute required proof Mr. Lust intended to deprive the tavern patron of the purse when he took it without her permission and he separately intended to deprive her of the credit and debit cards when he removed them from the wallet inside." Id.

Similarly, here, the charge of second degree theft of an access device required proof of Johnson's separate, specific intent to deprive Farmer of her credit and access cards, which was not satisfied by proving simply that he had an intent to deprive her of her purse. The State did not meet its burden of proof because there is no evidence that Johnson *knew* Farmer's purse contained any credit or debit cards, much less that he intended to deprive her of them. Thus, the evidence was insufficient to sustain the charge beyond a reasonable doubt.

E. CONCLUSION

Because the Court of Appeals' opinion presents an issue of substantial public interest that should be decided by this Court, and conflicts with this Court's case law, this Court should grant review.

Respectfully submitted this 25th day of July, 2016.



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APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

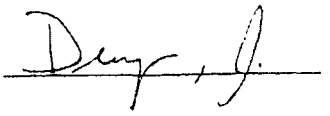
STATE OF WASHINGTON, Respondent, v. JOHN HENRY JOHNSON, Appellant.	)	DIVISION ONE No. 73113-1-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 28th day of June, 2016.

FOR THE COURT:



APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOHN HENRY JOHNSON, Appellant.	)	DIVISION ONE No. 73113-1-I UNPUBLISHED OPINION FILED: June 6, 2016

DWYER, J. — Following a jury trial, John Henry Johnson was convicted of second degree theft of an access device. He now appeals, contending that insufficient evidence was adduced at trial to support his conviction. We affirm his conviction, but remand for correction of a scrivener's error in the judgment.

I

On August 22, 2013, Kendra Farmer[1] and her family were shopping at the Pottery Barn store at Alderwood Mall in Lynnwood. Her husband, Ryan, was with one of their children near the front of the store, while Kendra and another child were near a cash register in a different part of the store. Kendra left her purse on a couch near this cash register while she talked with a sales clerk approximately three to five feet away. Her purse contained numerous personal items, including her wallet, personal credit and debit cards, and business credit

[1] To avoid confusion, we refer to Kendra and her husband, who share a surname, by their first names.

and debit cards.

The purse had a heavy gauge chain that made a distinct sound when moved. Ryan heard the sound of the purse being picked up and looked toward the source of the sound. He saw Johnson attempting to place the purse in a thin plastic shopping bag while moving toward the front entrance of the store. Ryan approached Johnson and told Johnson that the purse did not belong to him.

Johnson returned the purse to Ryan, then turned and walked through the back of the store, out into the parking lot. Ryan brought the purse back to Kendra, then called 911 and followed Johnson. Ryan pursued Johnson until the police arrived.

Johnson was charged with one count of second degree theft of an access device pursuant to RCW 9A.56.040(1)(d). A jury found him guilty.

II

A.

Johnson contends that insufficient evidence supports the jury's verdict. This is so, he asserts, because the State did not establish that Johnson intended to deprive Kendra of an access device. We disagree.

The due process clauses of the federal and state constitutions require that the State prove every element of a crime beyond a reasonable doubt. U.S. CONST. amend. XIV; WASH. CONST. art. I, § 3; Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding

of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). A claim of evidentiary insufficiency admits the truth of the State's evidence and all reasonable inferences from that evidence. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). Thus, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319.

The specific criminal intent of the accused may be inferred from conduct where it is plainly indicated as a matter of logical probability. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). However, intent may not be inferred from evidence that is patently equivocal. State v. Vasquez, 178 Wn.2d 1, 14, 309 P.3d 318 (2013). Circumstantial evidence and direct evidence can be equally reliable. Delmarter, 94 Wn.2d at 638. We defer to the jury on questions of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. State v. Killingsworth, 166 Wn. App. 283, 287, 269 P.3d 1064 (2012).

Johnson was charged with second degree theft of an "access device."[2] The pertinent statute provides that "[a] person is guilty of theft in the second degree if he or she commits theft of . . . (d) An access device." RCW 9A.56.040(1)(d). "Theft" means "[t]o wrongfully obtain or exert unauthorized

[2] An "access device" is "any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument." RCW 9A.56.010(1).

control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020(1)(a). The terms "wrongfully obtain" and "exert unauthorized control" in the statute are sometimes referred to together as "theft by taking." State v. Linehan, 147 Wn.2d 638, 644, 56 P.3d 542 (2002).

The parties' dispute regards the mens rea element of the crime. Whereas Johnson asserts that the State was required to prove that he acted with the specific intent to take an access device, the State contends that it was required to prove that he intended to take property and, separately, that the property constituted an access device.

The State is correct. The intent to take property and the nature of the property taken constitute two separate, essential elements. Our Supreme Court has made clear that the statute attaches no additional mens rea requirement to the nature of the property taken. Thus, for example, when the relevant statute requires the property taken to exceed a certain value, the State is not required to prove "that the defendant either know the value of the property he has taken or intend to acquire a particular dollar amount of property." State v. Holmes, 98 Wn.2d 590, 596, 657 P.2d 770 (1983). Indeed, "[n]either factor is an element of theft even though 'intent to deprive' is a necessary element." Holmes, 98 Wn.2d at 596 (citing Delmarter, 94 Wn.2d at 634).

Thus, pursuant to the statute under which Johnson was charged, the State was required to prove that he intended to deprive Kendra of her purse and its contents and, separately, that the property taken, or some part thereof,

constituted an access device. At trial, the State presented evidence that, after he took Kendra's purse, Johnson attempted to conceal it by folding the purse into another bag and quickly leaving the store. From this evidence, a reasonable jury could find that Johnson intended to deprive Kendra of the purse and its contents.[3]

B.

Johnson next contends that, based on the specific to-convict instruction given herein, the State was required to prove that he "intended to deprive [Kendra] of the access device."[4] Jury Instruction 7. This is so, he asserts, because the law of the case doctrine requires that the State, in order to satisfy the Fourteenth Amendment's proof beyond a reasonable doubt requirement, prove the elements of the charged crime *as set forth in the to-convict instruction.*

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[3] Johnson incorrectly cites State v. Lust, 174 Wn. App. 887, 300 P.3d 846 (2013), to argue that when a person steals a purse and is charged with second degree theft, based on the theft of the credit or debit cards inside, the State must separately prove that the defendant intended to deprive the owner of the credit or debit cards. However, in Lust we held that when the defendant stole a woman's purse and separately removed credit and debit cards from inside, the defendant's distinct actions supported convictions for both third and second degree theft, charges which did not merge nor violate double jeopardy prohibitions. 174 Wn. App. at 892. Nothing in Lust supports Johnson's present assertions.

[4] The to-convict instruction stated:

> To convict the defendant of the crime of theft in the second degree, each of the following four elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 22nd day of August, 2013, the defendant wrongfully obtained or exerted unauthorized control over property of another;
>
> (2) That the property was an access device;
>
> (3) That the defendant intended to deprive the other person of the access device; and
>
> (4) That this act occurred in the State of Washington. If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of [sic] elements, then it will be your duty to return a verdict of not guilty.

Johnson's argument is directly foreclosed by the United States Supreme Court's recent decision in Musacchio v. United States, 577 U.S. ____, 136 S. Ct. 709, 193 L. Ed. 2d 639 (2016).

In this recent decision, the Supreme Court considered and rejected a claim identical to the one now advanced by Johnson. In doing so, the Supreme Court clarified that a Fourteenth Amendment evidentiary sufficiency challenge must be assessed against the elements of the *charged crime*, not against the erroneously heightened elements set forth in a jury instruction. Musacchio, 136 S. Ct. at 715. The law of the case "doctrine does not bear on how to assess a sufficiency challenge when a jury convicts a defendant after being instructed—without an objection by the Government—on all charged elements of a crime plus an additional element." Musacchio, 136 S. Ct. at 716. Indeed, an evidentiary sufficiency review "does not rest on how the jury was instructed." Musacchio, at 136 S. Ct. at 715. Rather, an appellate court must consider "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Musacchio, 136 S. Ct. at 715 (quoting Jackson, 443 U.S. at 319). "The Government's failure to introduce evidence of an additional element does not implicate the principles that sufficiency review protects." Musacchio, 136 S. Ct. at 715.

Our sufficiency inquiry is based on the Fourteenth Amendment's due

process clause and the Jackson standard.[5] Because the United States Supreme Court is the final arbiter on the meaning and interpretation of the United States Constitution, Musacchio supersedes all inconsistent interpretations by the courts of this state.[6] See, e.g., State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

Because sufficient evidence was adduced that Johnson acted with the mens rea required by the statute—namely, that he intended to deprive Kendra of her purse and its contents—Johnson's evidentiary sufficiency challenge fails.

III

Johnson additionally contends that his trial counsel provided him with constitutionally ineffective assistance because the attorney did not object to the State's second motion in limine, seeking to exclude Johnson's hearsay statements.[7] We disagree.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, meaning that it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, meaning that there is a reasonable probability that except for counsel's unprofessional errors, the result of the proceeding would have been

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[5] In State v. Green, 94 Wn.2d at 221-22, our Supreme Court made clear that the Jackson standard controls appellate evidentiary sufficiency review in Washington.

[6] State v. Hess, 12 Wn. App. 787, 792, 532 P.2d 1173 (1975), aff'd, 86 Wn.2d 51, 541 P.2d 1222 (1975); accord S.S. v. Alexander, 143 Wn. App. 75, 92, 177 P.3d 724 (2008) (explaining that the United States Supreme Court is the ultimate authority concerning the interpretation of the federal constitution).

[7] The State requested that the court "keep out [Johnson's] hearsay statements unless we take it out of the presence of the jury."

different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801. Hearsay is not admissible except as provided by the evidence rules, by other court rules, or by statute. ER 802.

Herein, the State sought to exclude Johnson's out of court statements. These statements were hearsay. Johnson does not point to a hearsay exception that would have allowed their admission. The trial court properly granted the State's motion to exclude them. Because any objection by Johnson's counsel would have been misplaced and futile, counsel's representation was not deficient and Johnson's claim of ineffective assistance fails.

IV

Johnson next contends that the court erred when it granted the State's motion to exclude testimony that Johnson entered guilty pleas to the charges constituting his prior convictions.[8] This is so, Johnson asserts, because ER 608(b) does not preclude such evidence. We disagree.

Specific instances of the conduct of a witness, offered for the purpose of attacking or supporting the witness's credibility, may not be proved through extrinsic evidence. ER 608(b). Johnson sought to admit extrinsic evidence that

[8] The State requested that the court "exclude testimony that [Johnson] pleaded guilty as opposed to being convicted regarding his prior crimes."

he pled guilty to his prior crimes. He sought to then use this evidence to suggest that, because he did not also plead guilty in this case, he is likely innocent in this instance. However, such extrinsic evidence is inadmissible for the proposed purpose. Thus, the court properly granted the State's motion to exclude evidence that Johnson pled guilty to his prior charges.

VI

Johnson also asserts that there was a scrivener's error in the judgment and sentence that must be corrected.[9] The State does not dispute that this error exists.

Notwithstanding the fact that the better procedure would have been to file a motion in the trial court, see CrR 7.8(a); RAP 7.2(e), because the error is clear, in the interests of judicial economy, we remand the matter to the superior court for the error to be corrected.[10]

Affirmed.

We concur:

[9] The judgment and sentence incorrectly states that Johnson was convicted of second degree theft under RCW 9A.56.040(1)(c), when he was actually convicted under RCW 9A.56.040(1)(d).

[10] Because this is a clerical, rather than substantive, endeavor, Johnson need not be present when this change is effectuated.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73113-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: July 25, 2016