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STATE OF WASHINGTON  
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SUPREME COURT NO. 93453-3

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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**STATE OF WASHINGTON**

**Respondent**

**v.**

**JOHN HENRY JOHNSON,**

**Petitioner**

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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## **I. ISSUES**

This court has granted review of two issues set out in the petition for review. These issues can be paraphrased as follows:

1. Should this court follow the interpretation of the Fourteenth Amendment in Musacchio v. United States, \_\_\_ U.S. \_\_\_, 136 S.Ct. 709, 715, 193 L.Ed.2d 639 (2016)?

2. Did the State prove that the defendant committed second degree theft of an access device?

## **II. STATEMENT OF THE CASE**

The facts are correctly set out in the Court of Appeals opinion. Slip op. at 1-2. In resolving the issue on which review was granted, the essential facts are the following:

Kendra and Ryan Farmer were at the Alderwood Pottery Barn to buy a couch. While Ryan was entertaining their toddler, Kendra was at the counter with their infant and a sales clerk, reviewing fabric samples. Kendra had left her purse on one of the sample couches. While Kendra was distracted, the defendant picked up her purse, folded it in half, and tried to place it in an empty plastic shopping bag while walking towards the front or mall side store exit. Ryan saw the defendant doing so and confronted him. The defendant handed Ryan the purse and reversed course,

quickly exiting out the back of the store into the parking lot. Ryan gave chase, keeping the defendant in sight until he was apprehended by police. 1 RP 76-80, 82, 84, 86, 93.

The jury found the defendant guilty of second degree theft. 1 CP 147.

The Court of Appeals held that there was sufficient evidence to support the jury's verdict. Slip op. at 6-7. This court granted the defendant's petition for review.

### **III. ARGUMENT**

#### **A. THIS COURT SHOULD FOLLOW THE INTERPRETATION OF THE FOURTEENTH AMENDMENT IN MUSACCHIO.**

The defendant assigned error to his conviction for second degree theft on the basis that there was insufficient evidence to support the jury verdict. BOA at 2. He argued that because the trial court included in the to-convict instruction that defendant intended to deprive the other person of the access device, there must be sufficient evidence to support that specific intent as an element of the crime. The defendant asserted that the law of the case doctrine required the State to prove the elements of the charged crime as set forth in the to-convict instruction in order to satisfy the

Fourteenth Amendment's proof beyond a reasonable doubt requirement. BOA 1-2.

The strictures of the Fourteenth Amendment have applied to the state of Washington since it became a state in 1889. Washington follows the federal standard for sufficiency of the evidence. State v. Green, 91 Wn.2d 431, 588 P.2d 1370 (1979) (Green I), modified on reconsideration in State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) (Green II). The standard of proof guaranteed by the Fourteenth Amendment's due process clause provides the sole basis upon which Washington courts review criminal convictions for evidentiary sufficiency. State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996, 999 (1996). That standard is based on the due process right to be convicted on no less than proof beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 313-14, 61 L.Ed.2d 560 (1979); Green II, 94 Wn.2d at 221-22; State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). That standard requires a court to look at the evidence and determine "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.” Green II, 94 Wn.2d at 221.

In Hickman the court held that a party may assign error to the sufficiency of the evidence of elements which were included in the to-convict instruction unnecessarily. Hickman, 135 Wn.2d at 102-103. While venue was not an element of the charged crime, when the court included it in the to-convict instruction the State was required to prove it beyond a reasonable doubt. Id. at 105. Since there was insufficient evidence to prove venue, the case was dismissed. Id. at 106.

Recently the United States Supreme Court clarified that when a jury instruction sets forth all the elements of the charged crime, but incorrectly adds one more element, sufficiency of the evidence is assessed against the charged crime and not against the erroneously heightened jury instructions. Musacchio v. United States, \_\_\_ U.S. \_\_\_, 136 S.Ct. 709, 715, 193 L.Ed.2d 639 (2016).

The Supreme Court addressed the “law of the case doctrine” as applied to sufficiency of the evidence claims. “The law-of-the-case doctrine generally provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” Id. An appellate court's

function is to revisit matters decided in the trial court. That doctrine does not bear on how an appellate court 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. Id.

A reviewing court's limited determination on sufficiency review thus does not rest on how the jury was instructed. When a jury finds guilt after being instructed on all elements of the charged crime plus one more element, the jury has made all the findings that due process requires. The Government's failure to introduce evidence of an additional element does not implicate the principles that sufficiency review protects. Id. at 715.

The United State Supreme Court's decision is the controlling authority on issues involving the interpretation of the United States Constitution. State v. Hess, 12 Wn. App. 787, 792, 532 P.2d 1173 (1975). Since the sufficiency of the evidence standard in Washington is based on an interpretation of federal constitutional law, Hickman no longer controls a challenge to the sufficiency of the evidence where additional elements are included in the to-convict instruction. Pursuant to Musacchio, this court should

determine whether the evidence was sufficient by comparing it to the charged crime.

**B. THE STATE PROVED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT COMMITTED SECOND DEGREE THEFT OF AN ACCESS DEVICE.**

In addition to arguing evidentiary insufficiency based on the law of the case doctrine, the defendant also claims the evidence was statutorily insufficient. The defendant's interpretation of the statute is incorrect. The State is not required to prove that the defendant intended to wrongfully obtain or exert unauthorized control over a specific item as an element of second degree theft.

The elements of second degree theft are: "[a] person is guilty of theft in the second degree if he or she commits theft of:.. (d) [a]n access device." RCW 9A.56.040(d). Theft is defined as to "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). The intent to take property and the nature of the property taken are two separate, essential elements. There is no mens rea requirement to the nature of the property taken. State v. Holmes, 98 Wn.2d 590, 596, 657 P.2d 770 (1983).

Even if the State were required to prove the defendant intended to take Ms. Farmer's access device, there was sufficient evidence to support the conviction.

"[T]he specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99, 101 (1980). In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence. Id.

Here the defendant picked up Ms. Farmer's purse. He folded the purse and tried to conceal it in a plastic shopping bag. He walked away from Ms. Farmer and the sale's associate and towards the mall exit. When confronted by Mr. Farmer, he reversed his direction and fled the store towards the parking lot. Ms. Farmer testified she had her personal credit cards and business credit cards in her purse at the time. This evidence is sufficient for a rational trier of fact to find each of the elements beyond a reasonable doubt. The reasonable inference is the defendant intended to deprive Ms. Farmer of her purse and its belongings. The jury could also reasonably infer that a woman at a shopping mall would have credit or debit cards in her purse. Based on the

defendant's conduct, it would be reasonable for the jury to infer that the defendant intended to steal Ms. Farmer's purse to gain not only Ms. Farmer's purse, but more so, the more valuable items contained therein, specifically, the access devices.

#### **IV. CONCLUSION**

When additional elements are erroneously included in a to-convict instruction the court assesses the sufficiency of the evidence against the elements of the charge, not against the erroneous instruction. If wording the to-convict instruction is such a manner as to make it less confusing for the jury creates an additional mens rea, then that results in an unnecessary additional element. There is sufficient evidence to prove the charge whether the evidence is measured against the erroneous instruction or against the charge of second degree theft. For that reason the conviction should be affirmed.

Respectfully submitted on January 20, 2017.

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THE STATE OF WASHINGTON,

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JOHN HENRY JOHNSON,

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DECLARATION OF DOCUMENT  
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 27<sup>th</sup> day of January, 2017, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

SUPPLEMENTAL BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and Maureen Cyr, [maureen@washapp.org](mailto:maureen@washapp.org), [wapofficemail@washapp.org](mailto:wapofficemail@washapp.org)

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 27<sup>th</sup> day of January, 2017, at the Snohomish County Office.

  
\_\_\_\_\_  
Diane K. Kremenich  
Legal Assistant/Appeals Unit  
Snohomish County Prosecutor's Office