

2013

**State of Utah, Plaintiff/Appellee, v. John E. Hummel, Defendant/  
Appellant**

Utah Supreme Court

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Case No. 20130281-SC

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IN THE  
UTAH SUPREME COURT

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STATE OF UTAH,  
*Plaintiff/Appellee,*

*v.*

JOHN E. HUMMEL,  
*Defendant/Appellant.*

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Supplemental Brief of Appellee

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Appeal from convictions for theft, two third-degree and two second-degree felonies; attempted theft, a third-degree felony; and theft by deception, a second-degree felony, in the Sixth Judicial District, Garfield County, the Honorable James R. Taylor presiding

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Supplemental Brief of Appellee

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**INTRODUCTION**

The State submits this supplemental brief pursuant to this Court's October 27, 2014, order notifying the parties of the transfer of this matter to this Court from the Court of Appeals and setting the deadline for supplemental briefing. *See* Appellate Docket. The appeal challenges convictions for theft, two third-degree and two second-degree felonies; attempted theft, a third-degree felony; and theft by deception, a second-degree felony, pursuant to Utah Code Ann. §§ 76-6-405 and -406 (West 2004). This supplemental brief is limited to Point I of the State's brief and Points I and II of Defendant's opening brief in the Court of Appeals involving the sufficiency of the evidence. By email sent October 28, 2014,

defense counsel stated his intent not to file supplemental briefing in this matter.

## ARGUMENT

### I.

#### **DEFENDANT’S CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE SHOULD BE VIEWED IN LIGHT OF BOTH HIS FAILURE TO MARSHAL THE EVIDENCE AND THE CIRCUMSTANCES SURROUNDING THE THEFTS**

##### **A. Defendant’s failure to marshal the evidence significantly affects, but is not a barrier to, appellate review of his sufficiency challenge.**

At Point IB. of its responsive brief, the State argues that Defendant’s failure to properly marshal the evidence should prevent appellate review of his sufficiency arguments. Aple.Br. 24-25. The brief was filed twenty-eight days before issuance of *State v. Nielsen*, in which this Court reconciled its previous marshaling decisions and repudiated the default notion of marshaling in favor of the traditional principle which embraces marshaling “as a natural extension of an appellant’s burden of persuasion.” 2014 UT 10, ¶¶33-44, 326 P.3d 645. Accordingly, the failure to marshal no longer forestalls appellate review, but it greatly undermines the credibility of claims of insufficient evidence. *Id.*

Defendant’s failure to marshal the evidence in this case indicates the overall weakness of his sufficiency challenge. He carries the burden of

identifying the relevant evidence put before the jury and demonstrating why, when viewed most favorably to the verdict, it did not support any of his convictions. *State v. Boyd*, 2001 UT 30, ¶13, 25 P.3d 985. But instead of properly marshaling the evidence, or presenting a detailed discussion of it, Defendant recites some of the evidence in his fact statement, then simply reargues the evidence favorable to his position while ignoring unfavorable evidence. His presentation completely overlooks much of the relevant evidence.

For example, neither Defendant's facts nor his insufficiency arguments make any mention of the fact that when he met with the victims, they believed he had been appointed to represent them. *See, e.g.*, Apl't.Br. 5-40.<sup>1</sup> The victims' point of view is critical to the deception charge, which involves false impressions that are "likely to affect the judgment of another in the transaction." Utah Code Ann. § 76-6-401(5) (West 2004). It is equally relevant to the extortion charge because it would affect the victims' view of Defendant's threats concerning the quality of performance to be expected from appointed counsel.

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<sup>1</sup> All the victims believed that Defendant had already been appointed as their counsel when they met with him. R460:22-25; R461:129-30, 217-19; R462:42-48, 70, 114-15.



Defendant's sufficiency arguments also ignore the uncontested evidence that he misappropriated four of the victims' applications for appointed counsel before the judge could review them. R458:65-68, 89-90; R463:115-16; Aplt.Br. 24-41. This unauthorized act demonstrated deception because it prevented the victims "from acquiring information likely to affect" their "judgment in the transaction." Utah Code Ann. §76-6-401(5)(c).

Accordingly, the State maintains its position that Defendant has failed to carry his marshaling burden. Aple.Br. 24-25. That failure does not prevent appellate review of his claim, but it greatly undermines the persuasiveness of his sufficiency arguments. *Nielsen*, 2014 UT 10, ¶ 42 ("[A] party challenging a factual finding or sufficiency of the evidence to support a verdict will almost certainly fail to carry its burden of persuasion on appeal if it fails to marshal.").

**B. The parallel circumstances surrounding the multiple victims are integral to consideration of Defendant's sufficiency claims.**

The parties' appellate briefs have presented the circumstances surrounding Defendant's charged conduct in a compartmentalized format, largely dictated by the number of charges and the numerous appellate issues. However, a global view of the parallel circumstances involving all the victims provides a necessary perspective for review of Defendant's sufficiency challenges.

The victims in this case were, in essence, a captive audience. All were in court on pending criminal matters, all anticipated receiving appointed counsel, and all were sent to speak with the public defender. Defendant was the only public defender contracted with the county. R463:98. All the victims were in need, and all were vulnerable to some degree. They had been criminally charged, and most had been in jail. Those in jail were anxious to be released the same day they spoke with Defendant. R460:24; R461:86-87, 91; R462:97, 116, 119. They were in varying states of financial stress and suffered from various stressors external to their criminal situation, including alcohol and medical problems, the financial and personal repercussions of being away from jobs or home, and an inability to provide for themselves or for their families. R458:20-21, 71; R460:24, 45; R461:75-76, 86-87, 91, 106-10, 203-05, 276-77; R462:44-48, 97, 116, 119; R463:103.

Defendant had access to these victims by virtue of his contract as the sole public defender for Garfield County. R458:7-8; R463:95, 98, 128. In each case, Defendant met with the victims after they had applied for appointed counsel but before any decision was made. R458:80; R460:20-25; R461:126-30, 217-19; R462:42-44, 58, 70, 114-15. Notwithstanding that fact, each victim believed that Defendant had been appointed at their counsel when they spoke with Defendant. R460:22-25; R461:129-30, 217-19;

R462:42-48, 70, 114-15. Each met face-to-face with Defendant in a closed room of the courthouse, and Defendant broached the subject of retained counsel with the victims, asking about their assets or finances. R458:20-21, 34-35, 43-46, 71; R460:23, 29-30; R461:84-90, 95, 220-23; R462:10-12, 38, 42- 43, 58, 62, 70, 114-15. He did not disclose to the court or the prosecutor that there were undisclosed assets excluded from the victims' applications for counsel. Instead, he succeeded in convincing each individual to retain him on the spot and finalized the deals by preparing bills of sale and promissory notes or, with Burke, charging his father's credit card. R460:30, 38-39; R461:91-93, 114, 211, 221-22; R462:11-12, 43-44, 49-52, 117-18.

Defendant's conduct amounts to in-person solicitation, which is a concern in the legal profession. Utah R. Prof. Conduct 7.3. Under the best of circumstances, direct, in-person solicitation of prospective clients "is fraught with the possibility of undue influence, intimidation, and over-reaching." *Id.*, Comments 1 & 2. The circumstances carry an inherent potential for abuse, subjecting the prospective clients to persuasion likely to overwhelm their judgment. *See id.*

That concern is especially relevant to the disturbingly similar circumstances facing the victims in this case. The victims were subjected to "the private importuning" of a "trained advocate in a direct interpersonal

encounter.” *Id.*, Comment 1. They were not simply listening to an unsolicited sales pitch; facing significant stress from their criminal situations, they were unexpectedly faced with a lawyer insisting that they needed counsel and had to decide immediately whether or not to retain his services. The circumstances reasonably suggest that the victims would find it difficult to fully evaluate what action would suit their own best interests.

Further, they were being asked to purchase the very services they believed they were qualified to obtain for free. Defendant did not ask the victims to decide between his services and those of another, less-qualified defense attorney. Rather, he represented that the likely outcomes he could obtain for the victims would vary depending on whether he represented them as retained or appointed counsel. Moreover, the services at issue were the same services covered by Defendant’s contract with the county. With the exception of the potential federal matters that never arose with regard to Burke, each of the victims retained Defendant to defend against their state criminal charges.

The jury had to evaluate the exchanges between Defendant and the victims in light of these common circumstances to determine whether Defendants’ acquisition of the victims’ property occurred by means of deception and extortion. Aple.Br. 22-48. Viewed most favorably to the

verdict, the circumstances amply demonstrate that Defendant targeted and took advantage of the victims and that his representations were deceptive.

Defendant's duty to the victims would be the same whether they became clients by appointment or by retainer. "An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality...." Utah R. Prof. Conduct 6.2, comment 3. He owes the same duty of competence and diligence as well as the same duty of disclosure. *See id.* Rule 1.1 (requiring competent representation); *id.* Rule 1.3 (requiring diligent and prompt representation). He also has a duty to both clients and prospective clients to avoid false or misleading communication about his services. *Id.* Rule 7.1 & Comments 1 & 2.

Accordingly, whether he was appointed or retained, Defendant had an ethical duty to represent his clients to the best of his ability. The outcomes of the victims' cases did not depend on whether he was appointed or retained as counsel. It is uncontested that Defendant never told the victims as much. Because both the prosecutor and the judge testified that they would handle cases the same whether defense counsel was appointed or retained (R463:99, 113, 159), the jury could reasonably decide that any difference in the outcomes that Defendant suggested would necessarily derive solely from his own action or inaction. The jury could also reasonably

determine that Defendant's representations regarding his services were, at a minimum, misleading and made solely for Defendant's own profit. This is especially true for those matters in which, after being retained, he disposed of the victims' applications for counsel before they could be reviewed by the judge. R458:65-68, 89-90; R463:115-16.

The commonalities of Defendant's interactions with all the victims provide an added perspective for review of Defendant's sufficiency claims, reinforcing that there is ample evidence to support a theft conviction for each of the five victims on all charged alternatives. *See* Aple.Br. 21-48.

### CONCLUSION

For the foregoing reasons, the Court should affirm Defendant's convictions.

Respectfully submitted on November 26, 2014.

SEAN D. REYES  
Utah Attorney General

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Assistant Attorney General  
Counsel for Appellee

## **CERTIFICATE OF COMPLIANCE**

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 1,734 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.

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KRIS C. LEONARD  
Assistant Attorney General

## CERTIFICATE OF SERVICE

I certify that on November 26, 2014, two copies of the Brief of Appellee were ☒ mailed ☐ hand-delivered to:

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Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

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