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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 159

PETTIS HARDY,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
October 14, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

EUNICE C. LEE, ESQ.  
OFFICE OF THE APPELLATE DEFENDER  
Attorneys for Appellant  
11 Park Place  
Suite 1601  
New York, NY 10007

JARED WOLKOWITZ, ADA  
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE  
Attorneys for Respondent  
One Hogan Place  
New York, NY 10013

Sara Winkeljohn  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 159, People v. Hardy.  
2 Counsel, you like any rebuttal time?

3 MS. LEE: I would, Your Honor; two minutes,  
4 please.

5 CHIEF JUDGE LIPPMAN: Two minutes, go  
6 ahead, counsel.

7 MS. LEE: Good afternoon, Your Honors,  
8 Eunice Lee from the Office of the Appellate Defender,  
9 for Pettis Hardy. Pettis Hardy was entitled to a  
10 circumstantial evidence instruction in this case.  
11 There - - -

12 CHIEF JUDGE LIPPMAN: What - - - what - - -  
13 there was no direct evidence?

14 MS. LEE: There - - - there was no direct  
15 evidence of larceny. In this case, we don't hav - -  
16 -

17 CHIEF JUDGE LIPPMAN: The - - - the - - -  
18 the - - - the video - - -

19 MS. LEE: Well, with - - -

20 CHIEF JUDGE LIPPMAN: - - - is not direct  
21 evidence?

22 MS. LEE: Well, with regard to the video,  
23 first I would note that the Peop - - - below, the  
24 People only argued that the statement was the - - -  
25 the direct evidence in this case, and so there's no

1 basis for assuming, in fact, that the trial court  
2 ever held that the video was direct evidence, so it's  
3 not clear - - -

4 JUDGE STEIN: Well - - - well, didn't - - -  
5 didn't he - - - didn't they start by saying that it  
6 was the statement and then the - - - the court  
7 granted it and there was really no opportunity to  
8 then go through and say everything that - - - that  
9 they thought was - - - was direct evidence.

10 MS. LEE: Actually, Your Honor, the way  
11 that this occurred, when defense counsel made the  
12 request for the charge, he said this evi - - - the  
13 evidence in this case is subject to multiple  
14 inferences, both the video and the testimony, he  
15 raised that in making the request. In response to  
16 that specific request, all the People said was, the  
17 statement is direct evidence, and the court ruled.  
18 So it's - - - it's in fact more likely that the basis  
19 for the court's decision was a finding that it was  
20 the statement that made it direct evidence.

21 But even accepting that that - - - that the  
22 video as - - - as direct evidence is a reviewable  
23 claim, it does not, in fact, constitute direct  
24 evidence in this case.

25 JUDGE PIGOTT: What you like to have had

1 the judge say that he - - - that was not said in  
2 terms of circumstantial evidence?

3 MS. LEE: Well, the - - - the critical  
4 thing that the judge should have said was that for  
5 the jury to convict in this case, they had to find  
6 that the evidence - - - that the evidence excluded  
7 every reasonable hypothesis of - - - of innocence.  
8 That critical concept, that you can't convict unless  
9 you decide that every inference of innocence can be  
10 excluded here. That's absolutely missing from the  
11 instruction that the court did give. The - - - the  
12 judge's instruction talked about weighing  
13 circumstantial evidence with regard to individual  
14 facts, but it never talked about - - -

15 CHIEF JUDGE LIPPMAN: What could be more  
16 direct evidence than the video? What could it be if  
17 it's not direct?

18 MS. LEE: Well - - - well, the problem with  
19 the video, Your Honor, is what the video shows, it  
20 doesn't indicate - - - the - - - the video is not  
21 direct evidence of a larceny here. The video shows  
22 him - - -

23 JUDGE FAHEY: Well, it's an evidence of a  
24 taking. Now, how you interrupt that, of course - - -

25 MS. LEE: Well - - -

1                   JUDGE FAHEY: - - - is up to the - - - is  
2 up to the jury, but it's about as direct as you can  
3 get of a taking.

4                   MS. LEE: Well, it's not - - -

5                   JUDGE FAHEY: Now, you could have put  
6 different interpretations on it - - - slow down - - -  
7 you could have said that was his job, to move things  
8 - - - things from one place to another, those are  
9 reasonable interpretations, but it still makes the  
10 evidence direct. I'm having a hard time seeing that.

11                  MS. LEE: Well, it's - - - it's - - - it's  
12 direct evidence of his - - - his actual physical  
13 handling of the purse, but a taking in the legal  
14 sense, meaning that he's exercising dominion and  
15 control over the item in a way that's inconsistent  
16 with the rights of the owner, I would argue that - -  
17 -

18                  JUDGE FAHEY: You know, sometimes evidence  
19 can be direct without being dispositive. If they had  
20 a video of him taking the purse and walking down the  
21 street and going to the apartment, that would be  
22 dispositive, right? But here, it's direct but not  
23 dispositive. I - - - I - - - I agree with you - - -

24                  MS. LEE: Well, it's - - -

25                  JUDGE FAHEY: - - - that it's not

1           dispositive.

2                   MS. LEE:  It - - - it's - - - it's beyond,  
3           though, not being dispositive; it - - - it in fact is  
4           not direct, because here, where there's an  
5           alternative inference for his handling of the purse,  
6           it doesn't establish a taking in the sense of he's  
7           exercising control of this - - - of this purse in a  
8           way that's inconsistent with the - - - the rights of  
9           the owner.

10                   JUDGE ABDUS-SALAAM:  But how - - - how do  
11           you get there, Ms. Lee - - -

12                   JUDGE FAHEY:  I see.

13                   MR. WOLKOWITZ:  - - - when - - - when the  
14           video shows - - - my recollection of the description  
15           of it shows that as soon as the - - - the woman who  
16           owns the purse sort of turns her back, that's when  
17           the defendant is seen on the video picking the purse  
18           up.  He's kind of angled his body so that she doesn't  
19           see him picking up the purse, and then he puts it  
20           down.  And as soon as she leaves, he's going - - -  
21           he's going through the purse and - - - and then picks  
22           it up and takes it with him somewhere.

23                   MS. LEE:  It's - - - it's certainly his - -  
24           - the - - - his handling of the - - - the  
25           complainant's purse and what's depicted on the video

1 is certainly incriminating and certainly is - - - is  
2 subject to an inference of - - - of his guilt, but  
3 the question is, given that inferences have to be  
4 made to get to that stage of - - - of concluding this  
5 to be a larceny, was he still entitled to this  
6 instruction? It certainly is - - - there are  
7 certainly suspicious and - - - and damaging  
8 inferences to be made from that. But given his role  
9 as an employee and that he's working at this night  
10 and in fact that he was at various points authorized  
11 to move the belongings of individuals in the club,  
12 the mere act of - - - of his handling and what's seen  
13 on the video, that, in and of itself, does not  
14 establish a taking.

15 JUDGE ABDUS-SALAAM: Was that - - -

16 MS. LEE: It's not direct evidence of a  
17 taking.

18 JUDGE ABDUS-SALAAM: Was - - - was his  
19 authorization - - - was the authorization to move  
20 property within the club, was that during the actual  
21 events going on in the club? I thought by the time  
22 that he picked up her purse, those events were over,  
23 things were being wrapped up, so you think it was  
24 still his auth - - - he was still authorized to pick  
25 up this particular purse?

1 MS. LEE: Well - - - well, essentially  
2 throughout the night, his - - - what he was  
3 instructed to do was to keep people and their - - -  
4 and their belongings away from the bar area for as  
5 long as people were going to be in the club, because  
6 they were - - - were concerned about theft. And so  
7 it's - - - his duties in terms of that continued  
8 throughout the night. But I - - - I think the issue  
9 is not whether or not he had specific authorization  
10 to move this complainant's purse at that particular  
11 time; it's a question of given that he did have this  
12 authorization, that he is working in the club as an  
13 employee, are there alternative inferences that can  
14 be made from that act? Can we look at that act and  
15 say this is direct evidence of a legal taking? And  
16 in this context, that - - -

17 CHIEF JUDGE LIPPMAN: You mean you can  
18 never have direct evidence that's subject to  
19 different explanations or inferences as to what it  
20 means?

21 MS. LEE: Well, what's - - - what's  
22 required for the charge is direct evidence going  
23 specifically to the - - - the criminal act. It's not  
24 merely direct evidence of - - -

25 CHIEF JUDGE LIPPMAN: It's not direct



1 evidence that he opens up the bag and he looks  
2 through it and that he's later shown taking it? I  
3 mean - - -

4 MS. LEE: He's - - -

5 CHIEF JUDGE LIPPMAN: - - - isn't - - -  
6 isn't - - - is - - - could - - - could there be  
7 anything more direct as to the taking, and as Judge  
8 Fahey indicated before, not necessarily dispositive,  
9 maybe there's a rational explanation, but - - -

10 MS. LEE: Well - - -

11 CHIEF JUDGE LIPPMAN: - - - I don't know  
12 what could be more direct relating to the taking  
13 itself.

14 MS. LEE: Well, again, it's a - - - a  
15 question of - - - it's certainly - - - it is - - - it  
16 is incriminating. Is this direct, where he is not  
17 seen - - - and it - - - the video does not depict him  
18 leaving it. So has he handled this bag, has he  
19 engaged with this bag in a way that is inconsistent  
20 with the owner's continued rights when he's seen  
21 picking it up, he's seen putting it back down, and  
22 he's working in this club that night? And so in this  
23 situation, yes, it is in fact - - - it's evidence of  
24 movement of some kind; is it evidence of a legal  
25 taking? Is it - - - right, actually, I guess the

1 question - - -

2 JUDGE RIVERA: Well, he's seen handling the

3 - - -

4 MS. LEE: - - - is it direct evidence?

5 JUDGE RIVERA: He's seen handling the bag,

6 he's - - - he's been talking to her, he knows it's

7 her bag - - -

8 MS. LEE: It's - - -

9 JUDGE RIVERA: Looks like a taking.

10 MS. LEE: Well, I - - - I think - - -

11 again, I think what Your Honors are - - - are

12 focusing on to some extent is this idea that does

13 this make - - - is this incriminating and does this

14 make him - - - is there an inference of guilt that

15 can be made from that, and we're not disputing that

16 at all. The question is, is this in the nature of

17 direct evidence where there is in fact an alternative

18 inference for his - - - his handling of the bag.

19 JUDGE RIVERA: Well, to be clear, though,

20 what - - - what would have been direct evidence?

21 What more would he have done on the video?

22 MS. LEE: Well - - -

23 JUDGE RIVERA: Actually physically walk out

24 with it?

25 MS. LEE: - - - certainly, if - - -

1           certainly, if he had physically walked out, that  
2           would - - - would be one - - - one scenario that  
3           would support that. There could - - -

4                    JUDGE STEIN: Well, but in that case,  
5           couldn't there also be other inferences that he was  
6           doing - - - doing - - - going to return it to her or  
7           - - - or, you know, any number of - - -

8                    MS. LEE: Correct, I mean, and that's - - -  
9           well - - -

10                   JUDGE STEIN: So how is that different?

11                   MS. LEE: Well - - -

12                   JUDGE STEIN: What's a diff - - - how - - -  
13           why is there a dividing line between inside the  
14           building and outside the building?

15                   MS. LEE: Well, it - - - it's not really  
16           inside the building, outside the building, it's  
17           looking at basically the - - - the entire  
18           circumstances of his - - - of what's going on this  
19           night. If - - - if a stranger - - -

20                   JUDGE STEIN: But you say it's a stronger  
21           inference if he walks out the door?

22                   MS. LEE: It's - - - it's - - - it's - - -

23                   JUDGE RIVERA: Well, in this case, he  
24           walked by her, so if he's really going to give her  
25           the bag, he would have given her the bag.

1 MS. LEE: Well, I mean, again, it's - - -

2 JUDGE RIVERA: So in - - - in - - - in the  
3 facts of this case, if he's walking out, if the video  
4 is showing him walking out, and she says I saw him -  
5 - -

6 MS. LEE: The - - - in the facts of this  
7 case, there are certainly inferences that can support  
8 that, but given what else is going on, it's a  
9 question of is this circumstantial evidence. It  
10 might be compelling circumstantial evidence.

11 CHIEF JUDGE LIPPMAN: So - - - so go back  
12 to answering the question. What is it that would be  
13 direct evidence that isn't subject to different  
14 inferences? What would have been that - - - that we  
15 could say is direct evidence? He took it in his hand  
16 and - - - and he had it and you show him - - - show -  
17 - - showed him leaving and getting into his car.  
18 That's direct evidence that wouldn't be subject to  
19 different inferences?

20 MS. LEE: Perhaps that - - - something  
21 along those lines, or perhaps if he's shown - - - if  
22 he's shown taking the bag and putting it into his - -  
23 - his backpack and zipping it up - - - zipping his  
24 personal backpack up, something along those lines,  
25 secreting it.

1 CHIEF JUDGE LIPPMAN: Yeah, but maybe he's  
2 - - - maybe it - - - he's protecting it for her, he's  
3 taking it to put it somewhere else. There's always  
4 going to - - - I guess what we're trying to get at  
5 is, there's always going to be different explanations  
6 for what's shown on the video, but how do you  
7 distinguish what's direct and not direct?

8 MS. LEE: I think - - -

9 CHIEF JUDGE LIPPMAN: Because anything you  
10 could say is subject to different inferences.

11 MS. LEE: Well, when there's something  
12 that's unequivocally est - - - the - - - when it  
13 establishes something that is unequivocally an  
14 element of the offense or goes directly to the  
15 offense, that is something that you can say that is  
16 direct evidence of it, as opposed to something that  
17 requires an interpretation or an inference to come to  
18 the conclusion of - - -

19 CHIEF JUDGE LIPPMAN: Okay, counsel.

20 MS. LEE: - - - yes, this is - - - is an  
21 element.

22 CHIEF JUDGE LIPPMAN: Let's - - - let's  
23 hear from your adversary. Then you'll have rebuttal.

24 MR. WOLKOWITZ: Good afternoon, Your  
25 Honors, may it please the court. Obviously, Your

1 Honor - - -

2 CHIEF JUDGE LIPPMAN: Counsel, deal with  
3 this issue about the video. Does it - - - is it  
4 direct evidence of taking, or is it, as your  
5 adversary says, yeah, he was - - - he was - - - had  
6 it at one time, he didn't have at other times, it - -  
7 - it - - - there are lots of different reasons and  
8 it's not direct evidence. How do we determine what's  
9 direct and what's not?

10 MR. WOLKOWITZ: Well, direct evidence, Your  
11 Honor, here, it has to be a taking and it has to be  
12 moved slightly; that's what People v. Olivo says.  
13 And here - - -

14 CHIEF JUDGE LIPPMAN: If he took the - - -  
15 the - - - the purse - - -

16 MS. LEE: Right.

17 CHIEF JUDGE LIPPMAN: - - - and he just  
18 moved it from on the bar to over to a chair, is that  
19 - - - you know, because he wanted to move it off the  
20 bar, is that direct evidence of taking?

21 MR. WOLKOWITZ: They'd have an explanation,  
22 but as you said, it's not dispositive.

23 CHIEF JUDGE LIPPMAN: That would - - - but  
24 that would still be direct if he - - -

25 MR. WOLKOWITZ: Absolutely.

1 CHIEF JUDGE LIPPMAN: - - - if he just  
2 picked it up and his job was - - - and we know his  
3 job was to keep the - - - those kinds of items away  
4 from the bar - - - if he took it, it was on the bar,  
5 moved it away from the bar, that's direct evidence -  
6 - -

7 MR. WOLKOWITZ: Yes, because - - -

8 CHIEF JUDGE LIPPMAN: - - - of - - - of the  
9 taking?

10 MR. WOLKOWITZ: Of asportation, of the  
11 asportation element from Olivo, at least in - - - in  
12 our opinion, because - - - but you don't even have to  
13 get there for this particular case, because in this  
14 case, it's clearly inconsistent with the owner's  
15 continuous right of contin - - - I'm sorry, the  
16 owner's continuous right of possession. Not only  
17 does the owner of the bag sitting there - - - he  
18 blocks it, he takes it off the top of the couch and  
19 blocks it from her view, then waits for her to leave,  
20 then rifles through for - - - for a minute. If that  
21 is not something that's inconsistent - - -

22 CHIEF JUDGE LIPPMAN: Yeah, yeah, but that  
23 wasn't my question. My question was what if he just  
24 took it off the bar, his job was to keep those kinds  
25 of items off the bar, and put it down somewhere else,

1           like near - - - near the owner?

2                       MR. WOLKOWITZ: I would look at the Licitra  
3 case because it - - -

4                       CHIEF JUDGE LIPPMAN: That's still direct -  
5 - -

6                       MR. WOLKOWITZ: Absolutely.

7                       CHIEF JUDGE LIPPMAN: - - - evidence of  
8 taking?

9                       MR. WOLKOWITZ: Of taking, absolutely.

10                      CHIEF JUDGE LIPPMAN: If he took it off the  
11 bar and she's sitting over - - - over where Judge  
12 Stein is and - - - and he takes it and he puts it  
13 right near her, that's direct evidence of taking?

14                      MR. WOLKOWITZ: If you have video of that?  
15 Yes, because it's a desired fact that you're proving  
16 through standalone evidence. It's not - - - you  
17 don't have to make any inference, he took it and he  
18 gave it to Judge Stein.

19                      JUDGE STEIN: You're saying that's one  
20 element and then - - - then - - - but it doesn't go  
21 to the element, for example, of intent.

22                      MR. WOLKOWITZ: Guilt, exactly. It doesn't  
23 go to guilt, right. And nobody's saying that it has  
24 to go - - - like a direct piece of evidence has to go  
25 to guilt by itself - - -



1 JUDGE STEIN: Or intent.

2 MR. WOLKOWITZ: Or intent, right, because  
3 even your own cases here - - -

4 CHIEF JUDGE LIPPMAN: So you're saying any  
5 video that has him touching that bag is direct  
6 evidence?

7 MR. WOLKOWITZ: Direct evidence. But it  
8 doesn't mean he's guilty; that's the difference.

9 JUDGE ABDUS-SALAAM: Wouldn't that - - -  
10 wouldn't it be the same, counsel, if the - - -  
11 someone had witnessed him picking up the bag and  
12 moving it from the bar and rifling through it and  
13 testified to that, would that be direct evidence?

14 MR. WOLKOWITZ: If he - - - if someone saw  
15 it and testified? Absolutely - - -

16 JUDGE ABDUS-SALAAM: Okay.

17 MR. WOLKOWITZ: - - - it's the same thing.

18 JUDGE ABDUS-SALAAM: So that's what I'm  
19 asking.

20 MR. WOLKOWITZ: Yes.

21 JUDGE ABDUS-SALAAM: So the video - - -  
22 you're suggesting that the video is like a witness  
23 testifying, almost.

24 MR. WOLKOWITZ: Absolutely.

25 JUDGE ABDUS-SALAAM: Okay.

1 MR. WOLKOWITZ: Because - - - and also I  
2 want to get back to - - - before, one of the points  
3 you were making about his duties. The - - - the  
4 record here says - - - and I know this is slightly  
5 astray from your question, Justice - - - Judge  
6 Lippman, but the record does say here that the  
7 witness had no responsibility to move any bags by a  
8 couch. At best, the - - - the manager of the club  
9 said that he had said he should look at the bar and  
10 make sure that - - - that people weren't going behind  
11 the bar. But he had never said he could move it off  
12 the couch. And his own witness said the only thing  
13 that he told him was to move it off the bar; the  
14 couch is up a stairs from the bar and a dis - - -  
15 distance from the back of the bar, so I just don't  
16 understand their position, in the end, how this is  
17 not the - - - the - - -

18 JUDGE FAHEY: Well, those are - - - those  
19 are all the elements that go to the proving of - - -  
20 of a petty larceny, of some kind of a larceny, but it  
21 doesn't deal with the direct evidence question.  
22 Isn't the point more succinctly that direct evidence  
23 is ev - - - is proof of a fact that you can draw in  
24 the absence of an inference, circumstantial evidence  
25 requires an inference. The direct evidence can then

1 be used to infer, meaning the elements or the - - -  
2 the five or six elements, but that's not what we have  
3 here. So your argument is at its core, the film is  
4 just like somebody testifying in court that they saw  
5 him do it?

6 MR. WOLKOWITZ: Yes.

7 JUDGE FAHEY: Yeah, okay.

8 JUDGE RIVERA: Let - - - let's say we  
9 disagree with you. What about the statement?

10 MR. WOLKOWITZ: See, the statement, though,  
11 again - - - and that's why I agree with Judge - - -  
12 Justice Fahey because in the end, it's an inference,  
13 but this court in Rumble - - - I want to read this  
14 court's language in Rumble, because I think it's very  
15 important for the statement. "If interpreted by the  
16 fact finder as a relative omission of guilt,  
17 distinguishes this case from those based exclusively  
18 on circumstantial evidence."

19 And the reason that is, Your Honors, is in  
20 that case he said "I'm not responsible for what I  
21 did." Now, do we know what "I did" means? You have  
22 to take a little bit of an interpretation. It  
23 doesn't mean you have to take a huge leap, but you  
24 have to take an interpretation, as this court said.

25 JUDGE STEIN: But here he didn't say he did

1 anything. He didn't say he removed it, he didn't say  
2 he had it, he possessed it, he just said he knew  
3 where it was and - - -

4 MR. WOLKOWITZ: Well, Your Honor, in the  
5 context of this - - - of this statement, we believe  
6 he did, because remember first, he's called up and  
7 asked about the purse and he goes I don't know  
8 anything about that. Then he says - - - then they  
9 say, we got you on video, and he says, I don't have  
10 it but I can get it. He goes, I don't have it, but I  
11 can get it, so he didn't deny it - ag - now.

12 JUDGE STEIN: But unlike the video, you - -  
13 - how do you prove any element from that statement  
14 without drawing inferences from all the  
15 circumstances?

16 MR. WOLKOWITZ: Because as Rumble says, it  
17 could be interpreted by the fact finder as an  
18 admission of guilt. There are going to be many cases  
19 of direct evidence - - -

20 JUDGE FAHEY: Well, the - - - the problem  
21 is is it's - - - you see, I agree with Judge Stein, I  
22 don't have it but I can get it can also mean somebody  
23 else has it. It - - - it - - - it requires  
24 inferences - - - now, we're proving facts here, not  
25 guilt, because all proof of guilt is an inference,

1 but a proof of a fact that requires an inference has  
2 to be circumstantial and so here, that statement - -  
3 - unless he says I did it, I'll see if I can get it -  
4 - -

5 MR. WOLKOWITZ: No, but in Rumble - - -

6 JUDGE FAHEY: - - - doesn't get you there.

7 MR. WOLKOWITZ: In Rumble, Your Honor - - -

8 JUDGE FAHEY: Yeah.

9 MR. WOLKOWITZ: - - - he said "I did it."

10 What did he do? Did he start the fire? Did - - -

11 JUDGE FAHEY: A little different statement,  
12 I have to say, you know.

13 MR. WOLKOWITZ: Well, I - - - I understand  
14 that it's not exactly on point.

15 JUDGE FAHEY: Um-hum.

16 MR. WOLKOWITZ: But the language in Rumble  
17 says - - -

18 JUDGE RIVERA: Well, it's a - - - it's a  
19 language that suggest liability, criminal liability,  
20 culpability.

21 MR. WOLKOWITZ: Well - - - well, the  
22 language - - -

23 JUDGE RIVERA: Whereas, I - - -

24 MR. WOLKOWITZ: I'm sorry.

25 JUDGE RIVERA: - - - I don't have it. I

1           didn't do it.

2                   MR. WOLKOWITZ: Right, if he knows who the  
3 person is - - -

4                   JUDGE RIVERA: I - - - I can get it.

5                   MR. WOLKOWITZ: He knows who - - -

6                   JUDGE RIVERA: I can get it.

7                   MR. WOLKOWITZ: He knows who the person is,  
8 he says he knows who the person is, he wants to call  
9 her, he says I can get it. Now, we're talking about  
10 a bag that was stolen.

11                   JUDGE PIGOTT: So why did it take the jury  
12 so long to reach a verdict? You - - - the way you're  
13 talking, they should have been out about twenty  
14 minutes.

15                   MR. WOLKOWITZ: I'm not - - - I wasn't in  
16 the room. I wasn't there, and I can't speak to what  
17 twelve people want to do. You ask twelve people to  
18 go to a movie, it's going to be a tough decision.

19                   JUDGE PIGOTT: And it may - - - and it may  
20 be that they were having difficulty in - - -  
21 interpreting this evidence that they had, and I think  
22 counsel's argument is that's why you give them the  
23 circumstantial evidence charge and you should give  
24 them a full one.

25                   MR. WOLKOWITZ: Well, just because evidence

1 is difficult doesn't mean you get a circumstantial  
2 evidence charge, Your Honor. You get a  
3 circumstantial evidence charge if the evidence is  
4 wholly or entirely circumstantial.

5 JUDGE PIGOTT: Right, if - - - if it's  
6 subject to different interpretations; I mean, the - -  
7 - the - - - the purse business, the video business, I  
8 mean obviously, if it was absolutely as direct as you  
9 - - - as you seem to imply, they - - - they shouldn't  
10 have had any trouble at all.

11 MR. WOLKOWITZ: But I can't - - - I can't  
12 put myself in that room. I can only look at the  
13 evidence from what is in the record. Now, you bring  
14 twelve members of the community in, you have twelve  
15 people, and I can't - - -

16 JUDGE PIGOTT: I know, but that gets us to  
17 the - - - to the whole Allen charge business and how  
18 long this - - - this jury was out and whether the  
19 Allen charge was appropriate. I take it you were  
20 because you - - -

21 MR. WOLKOWITZ: Well, they don't contest  
22 that the Allen charge is inappropriate.

23 JUDGE PIGOTT: Right, and you moved for it.

24 MR. WOLKOWITZ: We moved for it - - -

25 JUDGE PIGOTT: Right, they - - - and they

1 did not object.

2 MR. WOLKOWITZ: And well, no, they - - -  
3 they objected, they wanted a mistrial, but on appeal,  
4 they don't have any problems with Judge Allen's Allen  
5 charge.

6 JUDGE RIVERA: The text itself?

7 MR. WOLKOWITZ: The text itself, correct.  
8 Is - - - their only issue is whether it was - - -  
9 should have been admitted - - -

10 JUDGE RIVERA: It should have been given to  
11 begin with.

12 MR. WOLKOWITZ: Exactly. And for the  
13 reasons we stated in our brief, we believe that a  
14 mistrial here was totally unwarranted, that the court  
15 - - - they should have went on, they never said the  
16 word deadlocked, they never said, you know, that any  
17 - - - there's any dissension in the jury room, there  
18 was five witnesses, there was videos to different  
19 interpretations, they had deliberated for the first  
20 note under seven hours, the second note at eleven-  
21 and-a-half hours, and for all the factors that this  
22 court has set forth, we don't believe that - - -

23 JUDGE RIVERA: When did they come back  
24 after the second Allen charge? How long does it take  
25 them?



1 MR. WOLKOWITZ: Second Allen charge, I  
2 believe they got it at 3 o'clock and I believe it's  
3 about 10 - - - no, it was 1 o'clock the day before,  
4 and I think they came back at 4:34 that day. So  
5 about three-and-a-half hours.

6 JUDGE RIVERA: The - - -

7 MR. WOLKOWITZ: And they deliberated and  
8 they asked for more notes.

9 JUDGE RIVERA: The 4:34 being four minutes  
10 past the time that - - -

11 MR. WOLKOWITZ: Yes, which defense counsel  
12 at the time didn't say anything about, didn't object  
13 to that. And to the extent that they're making a  
14 point about that now, I - - - I really fail to  
15 understand that point because the jur - - - the jury,  
16 if they wanted to leave - - -

17 JUDGE RIVERA: Yeah.

18 MR. WOLKOWITZ: - - - they wanted to get  
19 out of there and they felt that 4:30 was going to  
20 make them come back the next day, they would have  
21 wrote the note at 4:15.

22 CHIEF JUDGE LIPPMAN: Okay, counsel.

23 MR. WOLKOWITZ: Thank you.

24 CHIEF JUDGE LIPPMAN: Thanks.

25 Counselor, rebuttal.

1 MS. LEE: Yes, thank you. Your Honors with  
2 - - - with regard to what was - - - what the problem  
3 was that the jury had in this case, the reason I - -  
4 - I would suggest that it took so long for them to  
5 reach a decision here is that this case was all about  
6 inferences. They didn't have to make decisions about  
7 the credibility of the witnesses; most of the  
8 testimony as to the surrounding circumstances was  
9 undisputed. What was going on here is what do we  
10 make of this, how do we interpret it, and in fact,  
11 the evidence in this case, including the video and  
12 including the statement, was circumstantial. That's  
13 part of what was going on here.

14 With regard to the idea that the - - - the  
15 statement is somehow direct evidence of guilt, it's  
16 very clear that it's not. In the case cited in the  
17 brief where individuals admit to being able to obtain  
18 stolen property, that is not direct evidence of  
19 larceny. And - - - and there's no cases cited  
20 directly on point to refute that.

21 Also, with regard to the - - - the  
22 questions raised as to the video, you know, is what's  
23 in the video enough? The video does present evidence  
24 of facts that are - - - are - - - are relevant to  
25 what's going on and certainly facts that are

1           incriminating, but it has to be facts that are - - -  
2           that go to the offense for it to be considered direct  
3           evidence. For instance - - -

4                         JUDGE ABDUS-SALAAM: Counsel, you - - - you  
5           - - - you would then say that this is not like a  
6           witness testifying to what that witness saw? If the  
7           video had been a - - - a person saying I saw the  
8           defendant do this and do this and do the other thing,  
9           you would say no, that's not direct evidence or - - -

10                        MS. LEE: It's still - - - if a - - - if a  
11           - - - a witness testified to what's depicted in the  
12           video and - - - and simply said I saw him move here  
13           and do this, that - - - und - - - under that  
14           circumstance as well, that would still be  
15           circumstantial evidence because it doesn't go to - -  
16           - it - - - it's not evidence of a taking that goes to  
17           the - - - the - - - the specifics of the offense.

18                        For instance, with regard to the idea that  
19           it does show facts that happened, if you look at what  
20           this court said in the Sanchez case, for instance,  
21           the defendant in that case was accused of  
22           strangulation. He gave a statement admitting being  
23           in the same room with the victim at the time that  
24           this occurred. Now, certainly, you have to be  
25           present to - - - to - - - that's a factor that's - -

1 - you have to be present to strangle someone, but the  
2 court concluded that the evidence in the case was  
3 still circumstantial because the admission of his  
4 presence didn't go to the elements or to the acts of  
5 the actual strangulation. That's part of - - - it's  
6 similar to what - - -

7 JUDGE STEIN: Well, here we don't have a  
8 video of the defendant in the room - - - just in the  
9 room. If that was it, we probably would have - - -  
10 you know - - -

11 MS. LEE: Right, but what the video shows -  
12 - -

13 JUDGE STEIN: - - - an easier time with  
14 this.

15 MS. LEE: Right, but what the video shows  
16 is - - - again, it doesn't show something that  
17 establishes on the face of it a taking in the sense  
18 of it's inconsistent, that - - - that the only  
19 inference to be made is that his - - - his handling  
20 of this purse is inconsistent - - -

21 JUDGE STEIN: You're saying on direct - - -  
22 it - - - it's only direct evidence if there is no  
23 other inference that could possibly be drawn. Is  
24 that - - - is that your - - -

25 MS. LEE: If - - - if on the - - -

1           essentially on the face of it, yes, that the - - -  
2           it's as it goes to the elements of the offense, if  
3           that's the inference that can be made, then it's  
4           direct. Here we don't have that.

5                        CHIEF JUDGE LIPPMAN: Okay, counsel.

6                        Thank you both. Appreciate it.

7                        (Court is adjourned)

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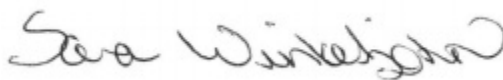
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Pettis Hardy, No. 159 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

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