IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 091895

JACK EDWARD CARTER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

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STATEMENT OF THE CASE

The defendant, Jack Edward Carter, was tried by a judge of the Circuit Court of Henrico County on January 3, 2008, and found guilty of grand larceny. (App. 37). The court sentenced Carter the same day to three years in prison, with two years and six months suspended. (App. 37-38).

Carter appealed his conviction to the Court of Appeals of Virginia, which denied his petition for appeal by one-judge order dated July 22, 2008. A panel of three judges awarded the defendant an appeal by order

dated October 22, 2008. Following briefing and oral argument, a panel majority of that Court affirmed the conviction on September 1, 2009, in a published opinion and one judge dissented. Carter v. Commonwealth, 54 Va. App. 700, 682 S.E.2d 77 (2009).

By order entered December 18, 2009, this Court granted the defendant's petition for appeal.

ASSIGNMENT OF ERROR

The Defendant has assigned the following error:

> **THE COMMONWEALTH FAILED TO PROVE THE GRAND LARCENY INDICTMENT; THAT PAINT WAS STOLEN FROM THE STORE.**

QUESTION PRESENTED

> **WHETHER THE EVIDENCE WAS SUFFICIENT TO PROVE THE DEFENDANT INTENDED TO STEAL PAINT.**

STATEMENT OF FACTS

On August 22, 2007, the defendant, Tracy Browning and three other people met at a hotel where they were living and drove to a Home Depot store in Henrico County. (App. 20-22). The group had planned to take paint from the store and attempt to return it for cash. (App. 23).

Under the plan, Carter would enter the store and load the paint onto a shopping cart, while Browning waited for Carter by the returns desk. (App. 22-23). Browning would then take the paint, and try to return it in exchange for cash. (App. 22).

When the group arrived at Home Depot, Carter entered the store as planned. (App. 22). Browning remained in the truck for a few minutes, and then followed Carter inside the store. (App. 22). Browning waited for the defendant by the returns desk. (App. 22). Carter met Browning by the returns desk with a shopping cart containing four five-gallon buckets of paint, collectively valued at $398.92. (App. 19, 23). Carter left the store and went to a nearby restaurant. (App. 16).

As planned, Browning took the merchandise to the returns desk and attempted to exchange it for cash. (App. 23-24). LeDawn Sawyer, the assistant store manager called to approve the return, recognized the identification Browning had provided to process the return as matching that of someone Sawyer had been "alerted" "to look for." (App. 11-12). Sawyer contacted loss prevention for the store, who in turn contacted police. (App. 11). Sawyer delayed Browning while waiting for police to arrive. (App. 12, 24-25). A video camera in the store recorded what had transpired by the returns desk. (App. 17-18).

After being confronted by police and Jason Farrah, the loss prevention investigator for Home Depot, with the information they had derived from watching the video, Browning admitted to the crime and described the details of the plan to them. (App. 24-25). Police arrested Browning at that time. (App. 24).

Based on the information that Browning gave to police and a description of Carter, Farrah and two uniformed police officers went to a nearby restaurant to find the defendant. (App. 16). When Carter saw Farrah and one of the uniformed officers enter the restaurant, he attempted to run out of the door with a beer in his hand. (App. 16-17). Officers apprehended him at the door. (App. 16).

At trial, Browning testified that, if the store had not accepted the return, she did not know whether or not she would have left the store with the paint, stating "I probably would have, I don't know." (App. 29).

Carter moved to strike the evidence, arguing that the Commonwealth had failed to prove he intended to steal the paint. (App. 30-31). The trial court denied his motion, finding that the evidence was sufficient to show an intent to steal, as the paint was used as a "vehicle or agent" to deprive the store of the value of the items. (App. 32). The trial court found the defendant guilty of grand larceny. (App. 32).

ARGUMENT

THE EVIDENCE WAS SUFFICIENT TO PROVE THAT THE DEFENDANT INTENDED TO STEAL THE PAINT.

Summary of Argument

When the defendant placed the paint into his shopping cart, he had the present intent to claim ownership of the property and then, using this fraudulent claim of ownership, to obtain a refund from the store. This intent to claim ownership is synonymous with the intent to steal. Contrary to the defendant's argument, his intent to commit a separate, subsequent crime – to obtain money by false pretenses – does not negate the intent to steal that he had formed at the time he removed the paint from the store shelves. By representing the paint to be his own, the defendant converted his bare custody of the property into possession, and the larceny was complete. Under the circumstances of this case, a reasonable fact finder could conclude that, when the defendant removed the paint from the shelf, he had the contemporaneous intent to steal the paint.

Standard of Review

When the sufficiency of evidence is challenged on appeal, the Court views the evidence in the light most favorable to the Commonwealth, the prevailing party at trial, including drawing all reasonable inferences in the

Commonwealth's favor from the facts proved. See Viney v. Commonwealth, 269 Va. 296, 299, 609 S.E.2d 26, 28 (2005). The Court must affirm the judgment of the trial court unless that judgment is "plainly wrong or without evidence to support it." Id. Such deference applies not only to the historical facts, but to the inferences from those facts as well. "The inferences to be drawn from proven facts, so long as they are reasonable, are within the province of the trier of fact." Johnson v. Commonwealth, 209 Va. 291, 295, 163 S.E.2d 570, 574 (1968).

Under this standard, "a reviewing court does not 'ask itself whether ***it*** believes the evidence at the trial establishes guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) (emphasis in original and citation omitted). Rather, the relevant question is whether "***any*** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319 (emphasis in original). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id.

Moreover, as this Court has stated:

> The statement that circumstantial evidence must exclude every reasonable theory of innocence is simply another way of stating that the

> Commonwealth has the burden of proof beyond a reasonable doubt.
>
> * * * * * * *
>
> The issue upon appellate review is not whether 'there is some evidence to support' these hypotheses. The issue is whether a reasonable jury, upon consideration of all the evidence, could have rejected [the defendant's] theories in his defense and found him guilty . . . beyond a reasonable doubt.

Commonwealth v. Hudson, 265 Va. 505, 513, 578 S.E.2d 781, 785 (2003).

Sufficiency to Show Intent to Steal

Carter claims that the Commonwealth's evidence was insufficient to sustain his conviction for grand larceny. Carter argues that, because he intended to use the paint to obtain a fraudulent refund from the store, this objective negated his intent to steal the paint.[1] (Def. Br. at 8).

[1] It is not clear from the defendant's brief whether or not he concedes that the asportation element of larceny was achieved. At one point, he admits that the paint was "asporated [sic] in the store," though he contends that the asportation was to accomplish a fraudulent return of the paint to the store, not to steal it. (Def. Br. at 6-7). In another paragraph, the defendant contends that "[a]sportation is not complete until it is carried away." (Def. Br. at 8). However, the panel majority opinion from the Court of Appeals notes that "Carter concedes the Commonwealth proved . . . asportation of the paint within the store." (App. 41). Because the defendant did not assign error to the Court of Appeals' holding that he had conceded that point, he has waived any challenge to that holding on appeal to this Court. Rule 5:25; Ortiz v. Commonwealth, 276 Va. 705, 723-24, 667 S.E.2d 751, 762 (2008) (holding that failure to assign error to Court of Appeals' finding of waiver barred consideration of that issue).

Larceny is a common law crime defined as "the wrongful or fraudulent taking of another's property without his permission and with the intent to permanently deprive the owner of that property." Britt v. Commonwealth, 276 Va. 569, 574, 667 S.E.2d 763, 765 (2008). *Animus furandi* "is generally translated as 'an intent to steal,'" and "an intent to steal" is "an intent to feloniously deprive the owner permanently of his property. But 'feloniously' in this connection simply means 'with criminal intent.'" Butts v. Commonwealth, 145 Va. 800, 812, 133 S.E. 764, 768 (1926).

"'The *animus furandi* must accompany the taking, but the wrongful taking of the property in itself imports the *animus furandi*.'" Bryant v. Commonwealth, 248 Va. 179, 183, 445 S.E.2d 667, 670 (1994) (quoting Skeeter v. Commonwealth, 217 Va. 722, 725, 232 S.E.2d 756, 758 (1977)).

> The Commonwealth must also establish "in addition to a taking or caption--a carrying away or asportation of the property of another. There is a caption when the defendant takes possession; he takes possession when he exercises dominion and control over the property. There is an asportation when he carries away the property; any carrying away movement, however slight, even though it takes but a moment, is sufficient."

Id. (quoting 3 C. Torcia, Wharton's Criminal Law § 378 (14th ed. 1980)). "Severance of the goods from the owner and absolute control of the

property by the taker, even for an instant, constitutes an asportation." Mason v. Commonwealth, 200 Va. 253, 256, 105 S.E.2d 149, 151 (1958).

Here, the fact of the taking itself, combined with the evidence of Carter's attempt to commit a subsequent crime using the stolen paint, supplied the proof Carter acted with the *animus furandi* that was necessary to sustain his conviction. "Intent may be, and most often is, proven by circumstantial evidence and the reasonable inferences to be drawn from proven facts." Viney, 269 Va. at 301, 609 S.E.2d at 29. Such circumstantial evidence includes the conduct and statements of the accused. Wilson v. Commonwealth, 249 Va. 95, 101, 452 S.E.2d 669, 673-74 (1995).

Carter entered the store, removed the paint from the shelves, and placed it in a shopping cart. "An item is taken, for purposes of larceny, when a defendant secures dominion or absolute control over the property. The duration of such dominion or absolute control, however, may be very brief or only momentary. The defendant must hold, seize, or grasp the property, with his hands or otherwise." Britt, 276 Va. at 574-75, 667 S.E.2d at 766.

> The mere removal of merchandise from a display shelf to a shopping cart, and the subsequent movement of the shopping cart to other areas of the store, is not larceny unless the

> evidence otherwise shows that the taking was with the intent to steal. ***However, when an individual harbors the requisite intent to steal and permanently deprive the owner of property, acts on such intent by taking possession of the property even for an instant, and moves the targeted property, larceny has been committed.***

Welch v. Commonwealth, 15 Va. App. 518, 522, 425 S.E.2d 101, 104 (1992) (citation omitted) (emphasis added). "Removal of the targeted property from the owner's premises is not required." Id. at 524, 425 S.E.2d at 105. All that is required is that a defendant remove "the items from the locations in the store where they were displayed by the owner." Jones v. Commonwealth, 3 Va. App. 295, 302, 349 S.E.2d 414, 418 (1986).

Here, "the larceny was complete when [the defendant] moved the [paint] from the display shelf with the intent to steal." Welch, 15 Va. App. at 525, 425 S.E.2d at 106. As noted above, "the very existence of the trespassory taking permits the inference (unless other circumstances negate it) that the taker intended to steal the property." McEachern v. Commonwealth, 52 Va. App. 679, 685, 667 S.E.2d 343, 346 (2008) (citing Bryant, 248 Va. at 183, 445 S.E.2d at 670).

Based on the evidence adduced from Browning regarding the plan to obtain a fraudulent refund, the trial court could reasonably infer that, at the time he removed the paint from the shelves, Carter intended to represent

the paint as his own in an effort to facilitate the commission of a second crime. It is of no consequence that, once he had stolen the paint, he intended to try to "sell" it back to the owner under fraudulent circumstances; this does not negate his intent to steal the paint at the time of the taking. As the Court of Appeals noted, "'it is no defense to larceny that the taker intended to return it only if he should receive a reward for its return or only upon some other condition which he has no right to impose." (App. 43) (quoting 3 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 19.5(b), at 90 (2d ed. 2003)). Indeed, "'[w]hat better proof can there be of [the intent to deprive the owner of his property], than the assertion of such a right of ownership by the [defendant] as to entitle him to sell it.' An offer to sell the property to its owner is one of the strongest acts of dominion and control over the property." (App. 43) (quoting Regina v. Hall, 69 Eng. Rep. 291, 292 (1848)).

The dissenting opinion of the Court of Appeals cited this Court's opinion in Pritchard v. Commonwealth, 225 Va. 559, 303 S.E.2d 911 (1983), for the proposition that Carter had mere custody of the property and had not taken possession; thus, he had not completed the larceny by simply putting the paint into his cart. (App. 48-49).

> The owner of personal property may deliver it to another upon conditions, or in circumstances, which

> give the recipient bare custody of the property. Constructive possession remains in the owner . . . . Even though the property remains in the control of the custodian, asportation has not been completed until it is carried away in violation of the condition precedent upon which it was delivered. But if the property is carried away before the condition is performed, with the intent to steal it from the owner, the act becomes larceny. This act converts the recipient's bare custody to possession.

Pritchard, 225 Va. 559, 562, 303 S.E.2d 911, 913.

In Pritchard, this Court held that, while the defendant obtained only bare custody of the gasoline pumped into his vehicle by the gas station attendant, the defendant's act of pulling a gun on the attendant allowed him to drive away without paying for the gas, transferring his bare custody into possession. Id. at 563, 303 S.E.2d at 913. When Carter brought the paint to the front of the store, representing it as his own so that Browning could approach the returns desk and obtain a fraudulent refund, his act of representing himself as the true owner of the paint converted his bare custody of the paint into possession and completed the larceny. See Price v. United States, ___ A.2d ___, ___ (D.C. 2009) (holding that the court need not reach the issue of whether the theft was complete when the defendant removed the goods from the store shelf with the requisite intent, as "it is clear that theft of the polyurethane was complete the moment [the

defendant's accomplice] claimed ownership of it in order to return it to Home Depot for store credit").

The fact that the defendant intended to commit a separate crime with the stolen paint, to use it to obtain money from the store by fraudulently holding the paint out to be his own, does not negate the fact that the defendant had the intent to steal the paint when he removed the paint from the shelf of the store. Williams v. Commonwealth, 278 Va. 633, 638, 685 S.E.2d 178, 181 (2009) (holding that a larceny can be complete, but can then "ripen" into another crime, in that case robbery, based on the subsequent conduct of the defendant).

"Intent to steal" involves the taking of an item with a criminal intent; it is of no consequence whether the defendant, at the time of the taking, intends later to sell the item at a pawn shop, to convert it to his own use, or, as here, to use the stolen paint to commit another crime, namely to sell it back to the owner. The question is whether, at the time of the taking, the defendant possessed the felonious intent to deprive the owner permanently of the property.

As the panel majority correctly noted, "[a]pplying the *animus furandi* inference, the trial court could properly infer Carter intended to steal the paint from his wrongful taking of the paint – he removed the paint from the

display shelf and placed it in the cart without any intent to pay for it but with every intent to claim its ownership." (App. 42).

CONCLUSION

For these reasons, the judgment of the Court of Appeals of Virginia affirming the Henrico County Circuit Court should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

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CERTIFICATE OF TRANSMISSION AND SERVICE

On February 19, 2010, the required copies of this brief were hand-delivered to the Clerk's Office of this Court for filing and three copies were mailed to Robert P. Geary, Attorney at Law, 2025 East Main Street, Suite 201, The 21 Professional Center, Richmond, Virginia, 23223, counsel for the appellant. A copy was sent to the Court electronically to scvbriefs@courts.state.va.us.

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