IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 092461

WASEEM ALI,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

GREGORY W. FRANKLIN
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071
(804) 371-0151 (FAX)

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

APPELLANT'S ASSIGNMENTS OF ERROR 2

QUESTIONS PRESENTED 3

STATEMENT OF FACTS 3

ARGUMENT 7

1. THE EVIDENCE WAS SUFFICIENT TO PROVE THE DEFENDANT USED FORCE, VIOLENCE AND INTIMIDATION CONCOMITANT WITH THE TAKING SO AS TO SUPPORT THE ROBBERY CONVICTION 7

Standard of Review 7

Analysis 9

2.&3. THE RECORD DOES NOT SUPPORT THE DEFENDANT'S CLAIM THAT A DUE PROCESS VIOLATION OCCURRED AS A RESULT OF THE COMMONWEALTH'S PURPORTED RELIANCE UPON MUTUALLY INCONSISTENT THEORIES TO SUPPORT THE CONVICTIONS FOR LARCENY FROM THE PERSON AND ROBBERY 14

BECAUSE THE DEFENDANT'S CLAIM THAT HE COULD NOT BE CONVICTED OF BOTH ROBBERY AND LARCENY FROM THE PERSON WAS NOT RAISED AT TRIAL, IT IS PROCEDURALLY BARRED ON APPEAL, AND DOES NOT MERIT CONSIDERATION UNDER THE ENDS OF JUSTICE EXCEPTION BECAUSE THE RECORD SUPPORTS CONVICTION FOR BOTH OFFENSES, AND FAILS TO AFFIRMATIVELY PROVE A MISCARRIAGE OF JUSTICE. 15

Applicability of the Ends of Justice Exception 15

Proof of the Offenses 18

Summary 23

CONCLUSION 24

CERTIFICATE 25

TABLE OF AUTHORITIES

Cases

Ali v. Commonwealth, Court of Appeals Record No. 1650-08-4 (2009) (Unpublished) 18

Bivins v. Commonwealth, 19 Va. App. 750, 454 S.E.2d 741 (1995) 12, 13

Blockburger v. United States, 284 U.S. 299 (1932) 19

Bradshaw v. Stumpf, 545 U.S. 175 (2005) 21

Britt v. Commonwealth, 276 Va. 569, 667 S.E.2d 763 (2008) 22

Brown v. Commonwealth, 8 Va. App. 126, 380 S.E.2d 8 (1989) 16

Campbell v. Commonwealth, 12 Va. App. 476, 405 S.E.2d 1 (1991) (en banc) 15

Charles v. Commonwealth, 270 Va. 14, 613 S.E.2d 432 (2005) 17

Commonwealth v. Hudgins, 269 Va. 602, 611 S.E.2d 362 (2005) 19

Durham v. Commonwealth, 214 Va. 166, 198 S.E.2d 603 (1973) 9

Hancock v. Commonwealth, 12 Va. App. 774, 407 S.E.2d 301 (1991) 8

Harris v. Commonwealth, 3 Va. App. 519, 3521 S.E.2d 356 (1985) 12

Houston v. Commonwealth, 87 Va. 257, 12 S.E. 385 (1890) 9

Jackson v. Virginia, 443 U.S. 307 (1979) 8, 14

Jerman v. Director, 267 Va. 432, 593 S.E.2d 755 (2004) 23

Jimenez v. Commonwealth, 241 Va. 244, 402 S.E.2d 678 (1991) 16, 17

Jones v. Commonwealth, 267 Va. 284, 591 S.E.2d 68 (2004) ..... *passim*

Lewis v. Commonwealth, 43 Va. App. 126, 596 S.E.2d 542 (2004) 16

Martin v. Commonwealth, 13 Va. App. 524, 414 S.E.2d 401 (1992) (en banc) 15

Mason v. Commonwealth, 200 Va. 253, 105 S.E.2d 149 (1958) (emphasis added) 22

Maxwell v. Commonwealth, 165 Va. 860, 183 S.E. 452 (1936) 9

McDuffie v. Commonwealth, 49 Va. App. 170, 638 S.E.2d 139 (2006) 16

McMillan v. Commonwealth, 277 Va. 11, 671 S.E.2d 396 (2009) 8

Michaels v. Commonwealth, 32 Va. App. 601, 529 S.E.2d 822 (2000) 17

Mounce v. Commonwealth, 4 Va. App. 433, 357 S.E.2d 742 (1987) 16

Parks v. Commonwealth, 221 Va. 492, 270 S.E.2d 755 (1980) 8

Phillips v. Commonwealth, 257 Va. 548, 514 S.E.2d 340 (1999) 18

Redman v. Commonwealth, 25 Va. App. 215, 487 S.E.2d 269 (1997) 17

Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000) 20

Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997) 21

Tooke v. Commonwealth, 47 Va. App. 759, 627 S.E.2d 533 (2006) 17

United States v. Higgs, 353 F.3d 281 (4th Cir. 2003) 20, 21

Viney v. Commonwealth, 269 Va. 296, 609 S.E.2d 26 (2005) 8

Other Authorities

Rule 5A:18, Rules of the Supreme Court of VIrginia ..... *passim*

Rule 5:25, Rules of the Supreme Court of Virginia 16

Rule 5:28(b), Rules of the Supreme Court of Virginia 3

Section 19.2-294 of the Code of Virginia 18, 19

Section 8.01-680 of the Code of Virginia 8, 14

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BRIEF OF THE COMMONWEALTH

STATEMENT OF THE CASE

Waseem Ali was convicted by a jury in the Circuit Court of Stafford County on April 23, 2008, of robbery, grand larceny from the person, reckless driving, and third offense driving while suspended. The jury fixed his punishment at 12 years in prison for the robbery conviction, five years for the larceny conviction, six months in jail for the reckless driving

conviction, and 12 months in jail for the suspended license conviction. On June 24, 2008, the trial court sentenced Ali in accord with the jury's findings. The Court of Appeals granted Ali an appeal on April 20, 2009 and affirmed his convictions in an unpublished opinion on November 10, 2009. This Court granted Ali an appeal on April 7, 2010, on the three assignments of error below.

APPELLANT'S ASSIGNMENTS OF ERROR

1. **The circuit court erred in denying appellant's motion to dismiss the robbery charge, and the Court of Appeals erred in affirming the robbery conviction, because the evidence did not establish that the taking was accomplished by force or intimidation before or concomitant with the taking.**

2. **The circuit court erred in affirming convictions and sentences for both robbery and larceny from the person arising from one and the same act, and the Court of Appeals erred in affirming the two convictions arising from the same act.**

3. **The Court of Appeals erred in refusing to apply the ends of justice exception to Rule 5A:18 when considering whether appellant could be convicted of both robbery and larceny from the person arising from the same act.**

QUESTIONS PRESENTED[1]

1. **Whether the evidence was sufficient to support the defendant's robbery conviction.**

2. **Whether the record supports the defendant's assertion that a due process violation occurred as a result of the Commonwealth's purported reliance upon mutually inconsistent theories to support the convictions for larceny from the person and robbery.**

3. **Whether the Court of Appeals correctly refused to apply the "ends of justice" exception to Rule 5A:18 where the defendant failed to affirmatively show either that a miscarriage of justice had occurred, that the conduct for which he was convicted was not a criminal offense, or that an element of an offense did not occur.**

STATEMENT OF FACTS

At around 11:30 p.m. on May 20, 2007, Waseem Ali entered the Hidden Valley 7-Eleven store located on Route 1 in Stafford County. (A 32-33).[2] At that time, the manager of the store, Pauline Kessler, was in the back office; her daughter Tara Kessler was in the retail area of the store, behind the counter where the cash register was located. (A 35, 39). Also present on the premises were Tim Gabel and his wife Dee, who were in the back of the "cooler" stocking it with sodas, beer and milk. (A 39).

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[1] Pursuant to Rule 5:28(b), appellee has restated the questions presented.
[2] Page references are to the Appendix and are denoted "(A __)."

Ali asked Tara Kessler for a Black and Tan cigar; cigars were kept behind the counter, so she retrieved the cigar, gave it to him, and accepted the dollar Ali presented as payment. (A 81-83). As Tara Kessler opened the register drawer to place the dollar in the drawer, "[t]he defendant reached over and was taking the money" out of the drawer. (A 83). When Tara Kessler saw Ali was taking the money, her reaction was to try "to hold on to the money." (A 83). The following exchange occurred at trial:

> A. [by Tara Kessler] I was trying to hold on to the money and he was trying to pull. We were struggling.
>
> Q. [by the prosecutor] Were you struggling with him?
>
> A. Yes.
>
> Q. Who won the struggle?
>
> A. He did.
>
> Q. What do you mean by that?
>
> A. He got away and ran out the door.
>
> Q. When you were struggling over the money were you trying to—what were you trying to do? Were you trying to move away from him or were you trying to go towards him? What were you trying to do?
>
> A. I was trying to get away and he was holding on to the money.
>
> Q. Okay. And what was he doing when you were trying to get away from him?
>
> A. He was trying to hold on to the money.
>
> Q. Did he have a pretty good grip on it?

A. Yes.

Q. Did you have a pretty good grip on the money too?

A. Yes.

(A. 84-85).

Tara Kessler testified that during the encounter she was scared, "didn't know what was going to happen," and did not know what to do. (A 86). She testified that she was screaming for her mother during the struggle. (A 86).

Pauline Kessler first became aware of the events at the front of the store when she heard her daughter screaming "no, mommy, no, mommy" several times. (A 40). Pauline Kessler explained that though Tara was 23, she has a brain disorder that affects her ability to take in and process information; Tara nevertheless was able to do transactions at the store and communicate effectively. (A 38-39).

When she heard the screaming, Pauline Kessler looked up at a monitor in the back office that displayed a live video surveillance feed from camera at the front of the store. (A 35, 40). The camera was trained on the cash register area; Pauline Kessler testified that she saw Ali on the screen "[p]hysically attacking [her] daughter." (A 40). Pauline stated that Tara "was pulling off to the side and trying to crouch away from him kind of like,

you know, defending herself so-to-speak while she was steadily screaming mommy." (A 41).

Pauline Kessler then came out of the office and entered the front of the store. (A 41). When she entered the front of the store, her daughter and Ali had not separated. (A 42). She could see that Ali had money in his hands and she yelled at him; he "looked up at [her] and took off and [she] ran after him." (A 42). Pauline Kessler told Tara to call 911 as she pursued Ali out of the store and into an adjacent parking lot. (A 43-44). She testified that Timothy Gabel "heard the commotion and came out of the cooler and followed [her] and Mr. Ali." (A 43).

Ali ultimately entered his car and drove onto Route 1 south, knocking down a sign in the process. (A 52). Timothy Gabel continued to chase Ali by car, and Pauline Kessler returned to the store and spoke to the 911 dispatch operator. (A 60). Within a matter of minutes the dispatcher reported that Ali's vehicle had wrecked and he had been caught. (A 62).

During the cross-examination of Pauline Kessler, the video tape of the events at the register was shown to the jury. (A 75, 70-71). Pauline Kessler testified the video was authentic, but explained that the equipment available in the courtroom played it back at an accelerated rate; she stated that although the actual event lasted two minutes, "what you're showing me

is sped up time. You have no way to slow this down to see what I actually seen [sic]." (A 68, 70-71). Pauline testified that because the video was "not in realtime" it was "very misleading" because "[y]ou're just showing bits and pieces of the whole scenario." (A 75).

The trial court admitted the video into evidence, but instructed the jury that it was "not at real speed. It's been sped up and you should consider it with all the other evidence in the case." (A 75). A series of eight still photographs taken from the video also was admitted in evidence. (A 150-157).

The jury convicted Ali of robbery, grand larceny from the person, reckless driving, and driving on a revoked license; the jury acquitted Ali on the charges of burglary and eluding the police. (A 14-16).

ARGUMENT

1. THE EVIDENCE WAS SUFFICIENT TO PROVE THE DEFENDANT USED FORCE, VIOLENCE AND INTIMIDATION CONCOMITANT WITH THE TAKING SO AS TO SUPPORT THE ROBBERY CONVICTION.

Standard of Review

When analyzing a challenge to the sufficiency of the evidence in a criminal case, Virginia appellate courts review the evidence in the light most favorable to the Commonwealth, 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). That principle requires appellate courts to "discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences to be drawn therefrom." Parks v. Commonwealth, 221 Va. 492, 498, 270 S.E.2d 755, 759 (1980) (emphasis in original, citation omitted).

The judgment of the trial court will only be reversed upon a showing that it "is plainly wrong or without evidence to support it." Virginia Code § 8.01-680; see Viney, 269 Va. at 299, 609 S.E.2d at 28.

The reviewing court does not "ask itself whether *it* believes that the evidence at trial established 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). See McMillan v. Commonwealth, 277 Va. 11, 18-19, 671 S.E.2d 396, 400 (2009). 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." Hancock v. Commonwealth, 12 Va. App. 774, 782, 407 S.E.2d 301, 306 (1991).

Analysis

In Virginia, robbery is a common law crime defined as "the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation." Durham v. Commonwealth, 214 Va. 166, 168, 198 S.E.2d 603, 605 (1973) (citations omitted). This Court has held that the element of violence "need only be slight, for anything that calls out resistance is sufficient." Maxwell v. Commonwealth, 165 Va. 860, 183 S.E. 452 (1936), quoting Houston v. Commonwealth, 87 Va. 257, 264, 12 S.E. 385, 387 (1890). Pertinent to the facts of the case at bar, this Court has ruled that a robbery occurs where the victim's concurrent efforts to prevent the theft are physically overcome by the thief.

> Where the owner of personal property, or another having custody or constructive possession of the same, interposes himself to prevent a thief from taking the property, and the force and violence used to overcome the opposition to the taking is concurrent or concomitant with the taking, the thief's action constitutes robbery.

Jones v. Commonwealth, 267 Va. 284, 289, 591 S.E.2d 68, 71 (2004).

In Jones, the manager of a shoe store saw the defendant conceal a pair of boots in his pants and walk out of the store. Id. at 286, 591 S.E.2d at 69. The manager followed Jones and asked him for the boots, but when Jones threatened him with a pistol, the manager was frightened and hid

behind a parked car. Id. This Court ruled that when the manager interposed himself to prevent the theft, the defendant's introduction of force and violence transformed the theft into a robbery. Id. at 290, 591 S.E.2d at 72.

The defendant argues that the Court of Appeals erred in affirming the conviction for robbery on the ground that the evidence did not establish the taking was accomplished by force or intimidation before or concomitant with the taking. (Def. Br. 7). Ali argues that he "directed his action solely at the money in the cash drawer" when he "reached over the counter and grabbed the money in the drawer." (Def. Br. 14). He contends that the force he used "was directed toward the money, not toward Tara Kessler" and that he did not direct "any force, not so much as a touch," toward Tara, alleging that the only contact was when she touched him. (Def. Br. 16).

It is clear that Ali took Tara Kessler by surprise when he initially "reached over and *was taking the money*." (A 83, emphasis added). However, as Ali continued to clean out the cash drawer, Tara recovered her wits, and, however inadvisedly, interposed herself in an attempt to prevent the theft and recover the money already taken. The evidence shows that a struggle lasting about two minutes ensued. The testimony of Pauline and Tara Kessler and the photographs demostrate that Tara and

Ali were fighting over money from the drawer. The still photographs taken from the videotape clearly depict the defendant first taking money from the cash register drawer without any opposition, followed by Tara's attempt to push his hands away from the drawer, and then a general struggle for the money. (A 150-157).

The defendant contends, however, that the evidence shows Ali did not "direct any force against Tara herself," and he notes that the eight still photographs do not show Ali striking or pushing Tara. (Def. Br. 14). This argument fails for several reasons. First, because the still photographs convey only the position of the combatants rather than their movements, it is not clear from the photos precisely what forces they are exerting on each other.

Second, each photograph depicts only a discrete single instant during a struggle lasting two minutes; consequently it is obvious the still pictures do not reflect everything that happened during the struggle. However, Pauline Kessler, who witnessed the events in real time on the video and in person, testified unequivocally that she saw "Ali was physically attacking [her] daughter." (A 65). Tara Kessler testified she was "struggling with [Ali]." (A 84). The testimony of these witnesses is direct evidence that Ali

applied physical force to Tara's person, and the still photographs in no way negate that testimony.

Third, by virtue of their struggle over money, the force Ali used to wrest the money from Tara *was itself* force directed *at* and transmitted to her, in order to defeat her attempt to regain control of the cash. Tara was subjected to having the money violently "yanked away" (A 87) from her grasp by Ali. This in itself was an act of violence and intimidation aimed at forcing her to give up her efforts for control of the money.

Finally, Tara testified that during the events she was scared and was screaming because she did not know what was going to happen and did not know what to do. (A 86). Tara was engaged in a face-to-face physical struggle with a male assailant who was bigger than she was, and who was bent on emptying the cash drawer that Tara was attempting to defend. Notwithstanding the defendant's argument to the contrary, these facts provided evidence from which the jury could conclude that Tara's fear resulted from the "conduct of the accused rather than from the temperamental timidity of the victim." (Def. Br. 17, citing Bivins v. Commonwealth, 19 Va. App. 750, 454 S.E.2d 741 (1995) quoting Harris v. Commonwealth, 3 Va. App. 519, 521, 3521 S.E.2d 356, 357 (1985)).

In contrast to the instant case, in Bivins the thief "*politely* reached over the counter [and took the cash drawer]," which nevertheless caused LaPrade, the clerk, to jump back; "[s]he testified that she had been one foot away from Bivins and was 'scared.'" Bivins, 19 Va. App. at 751-752, 454 S.E.2d at 742 (footnote omitted, emphasis added). The Court of Appeals stated that

> [h]ere, LaPrade's fear, while believable, was based solely upon Bivins' sudden movement to seize the cash drawer. This action-reaction combination is comparable to an *unresisted* purse snatching, rather than a robbery by intimidation.

Id. at 754, S.E.2d at 743 (emphasis added). Tara Kessler's direct resistance to Ali's theft of the money clearly distinguishes this case from Bivins, and places it with Jones among those in which the victim interposes herself to prevent the theft, but whose efforts at resistance are overcome by the defendant. Jones, 267 Va. at 289, 591 S.E.2d at 71. Further, Ali's very willingness to engage in a physical struggle with Tara over the money also had the effect of intimidating her and placing her in fear of what other actions he might take against her if she persisted. This violence preceded and was concomitant with the taking that occurred when Ali ultimately succeeded in "yanking" the money away from her.

The evidence as a whole showed that Ali employed force, violence and intimidation to take money from Tara Kessler. After Ali first grabbed

cash from the drawer, Tara "interpose[d] [her]self to prevent a thief from taking the property, and the force and violence used to overcome the opposition to the taking [was] concurrent or concomitant with the taking." Jones, 267 Va. at 289, 591 S.E.2d at 71. The case at bar is stronger than Jones in that Tara Kessler's opposition to the taking occurred at the location of the taking and was more nearly contemporaneous with it.

The defendant has not demonstrated that the jury's finding of guilt for the robbery of Tara Kessler was "plainly wrong or without evidence to support it," Virginia Code § 8.01-680, nor has he shown that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. at 319. The judgment of the trial court should be affirmed.

2.&3.[3] THE RECORD DOES NOT SUPPORT THE DEFENDANT'S CLAIM THAT A DUE PROCESS VIOLATION OCCURRED AS A RESULT OF THE COMMONWEALTH'S PURPORTED RELIANCE UPON MUTUALLY INCONSISTENT THEORIES TO SUPPORT THE CONVICTIONS FOR LARCENY FROM THE PERSON AND ROBBERY.

[3] Because Arguments 2 and 3 above are interrelated, they are argued together in response to the defendant's arguments 2 and 3.

BECAUSE THE DEFENDANT'S CLAIM THAT HE COULD NOT BE CONVICTED OF BOTH ROBBERY AND LARCENY FROM THE PERSON WAS NOT RAISED AT TRIAL, IT IS PROCEDURALLY BARRED ON APPEAL, AND DOES NOT MERIT CONSIDERATION UNDER THE ENDS OF JUSTICE EXCEPTION BECAUSE THE RECORD SUPPORTS CONVICTION FOR BOTH OFFENSES, AND FAILS TO AFFIRMATIVELY PROVE A MISCARRIAGE OF JUSTICE.

Applicability of the Ends of Justice Exception

As the appellant concedes on brief, he did not raise at trial the issue now asserted in regard to his convictions in a single trial for both robbery and larceny from the person. (Def. Br. 8). Consequently, the trial court had no opportunity to consider the present due process issue. The "primary function of Rule 5A:18 is to alert the trial judge to possible error so that the judge may consider the issue intelligently and take any corrective actions necessary to avoid unnecessary appeals, reversals and mistrials." Martin v. Commonwealth, 13 Va. App. 524, 530, 414 S.E.2d 401, 404 (1992) (en banc), citing Campbell v. Commonwealth, 12 Va. App. 476, 480, 405 S.E.2d 1, 2 (1991) (en banc).

Rule 5A:18 requires an "objection [be] stated together with the grounds therefor at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice." Under this rule, a specific argument must be made to the trial court at the appropriate

time, or the claim will not be considered on appeal. See Mounce v. Commonwealth, 4 Va. App. 433, 435, 357 S.E.2d 742, 744 (1987).

However, as a basis for appellate review of the concededly defaulted argument, Ali seeks to invoke the "ends of justice" exception to allow consideration of an issue raised for the first time on appeal. But as this Court has ruled, "it is a rare case in which, rather than invoke [Rule 5A:18], we rely upon the exception and consider an assignment of error not preserved at trial . . . ." Jimenez v. Commonwealth, 241 Va. 244, 249, 402 S.E.2d 678, 680 (1991), citing to this Court's similar Rule 5:25; see also McDuffie v. Commonwealth, 49 Va. App. 170, 178, 638 S.E.2d 139, 143 (2006).

> "The ends of justice exception is narrow and is to be used sparingly," and only when a trial court error is "clear, substantial and material." Brown v. Commonwealth, 8 Va. App. 126, 132, 380 S.E.2d 8, 11 (1989). "In order to avail oneself of the exception, a defendant ***must affirmatively show that a miscarriage of justice has occurred***, not that a miscarriage might have occurred." Id. (citing Mounce v. Commonwealth, 4 Va. App. 433, 436, 357 S.E.2d 742, 744 (1987)). "In examining a case for miscarriage of justice, we do not simply review the sufficiency of the evidence under the usual standard, but instead determine ***whether the record contains affirmative evidence of innocence or lack of a criminal offense***." Lewis v. Commonwealth, 43 Va. App. 126, 134, 596 S.E.2d 542, 546 (2004), rev'd on other grounds, 269 Va. 209, 608 S.E.2d 907 (2005). See also Michaels v. Commonwealth, 32 Va. App. 601,

> 529 S.E.2d 822 (2000); Redman v. Commonwealth, 25 Va. App. 215, 221, 487 S.E.2d 269, 272 (1997).

Tooke v. Commonwealth, 47 Va. App. 759, 764-765, 627 S.E.2d 533, 536 (2006).

The ends of justice exception applies to cases in which the defendant has been convicted of a "non-offense," see, e.g., Jimenez v. Commonwealth, 241 Va. 244, 251, 402 S.E.2d 678, 682 (1991), or to cases in which the Commonwealth's evidence affirmatively shows ***his innocence***, cf. Redman v. Commonwealth, 25 Va. App. 215, 222, 487 S.E.2d 269, 272 (1997), or to cases in which a sentence has been imposed in excess of that allowed by law, see, e.g., Charles v. Commonwealth, 270 Va. 14, 20, 613 S.E.2d 432, 435 (2005). "Invoking the ends of justice exception to the contemporaneous objection rule requires a determination not only that there was error in the judgment of the trial court but also that application of the exception is necessary to avoid a grave injustice." Id. at 20, 613 S.E.2d at 435.

As the opinion of the Court of Appeals correctly stated, to have the "end of justice" exception applied to this case

> Ali must demonstrate one of the following: (1) the conduct for which he was convicted was not a criminal offense or (2) "the record affirmatively prove[s] that an element of the offense did not occur . . . ." [Redman, 25 Va. App. at 221-22, 487 S.E.2d at 272]. Clearly, Ali cannot demonstrate that the conduct for which he was convicted was not a criminal offense. In fact, much of the confusion in this case is due to the fact that Ali's conduct

> arguably constituted *two* criminal offenses. Therefore, **to invoke "ends of justice,"** it must be **clear from the record** that **an element of either robbery or grand larceny from the person did not occur.**

Ali v. Commonwealth, Court of Appeals Record No. 1650-08-4 (2009)(Unpublished) (A 19-20). Because the record did not plainly show that any of the elements of either grand larceny from the person, or robbery, **did not occur**, the Court of Appeals correctly held that the "ends of justice" exception was unavailable. Id. 4-6, (A 20-22).

Proof of the Offenses

Indeed, rather than supporting the proposition that any element of the offenses did not occur, the record and controlling law support Ali's convictions. The defendant admits that Code § 19.2-294 does not preclude two convictions for the "same act" where, as here, the convictions occur in a single trial. (Def. Br. at 20). For instance, in Phillips v. Commonwealth, 257 Va. 548, 514 S.E.2d 340 (1999), this Court held that Code § 19.2-294 did not bar a defendant's convictions on two felony charges of selling marijuana on school property after he had been convicted in the general district court on two misdemeanor marijuana distribution charges based on the same acts. Id. at 553, 514 S.E.2d at 343. "By its terms, the statute does not apply to simultaneous prosecutions, because only a prior

conviction for the violation of an act will bar a later prosecution for the same act." Id. at 552, 514 S.E.2d at 342 (emphasis in original).

Ali also acknowledges on brief that robbery and grand larceny from the person constitute two distinct offenses for double jeopardy purposes under Blockburger v. United States, 284 U.S. 299 (1932). (Def. Br. 20). This Court in Commonwealth v. Hudgins, 269 Va. 602, 611 S.E.2d 362 (2005) relied upon the rule of Blockburger:

> The applicable rule is that where the *same act* or *transaction* constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Hudgins, 269 Va. at 605, 611 S.E.2d 364 (2005) (emphasis added), quoting Blockburger at 304. Addressing the same two offenses that are in issue here, robbery and grand larceny from the person, this Court held in Hudgins that each offense "requires proof of an element that the other does not and that, pursuant to the Blockburger test, there are two offenses rather than one." Id. at 606, 611 S.E.2d 365.[4]

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[4] Notwithstanding his concessions that Code § 19.2-294 does not preclude two convictions for the "same act" in a single prosecution, and that larceny from the person and robbery are not the same offense for double jeopardy, the defendant's assignment of error reads as if it were a double jeopardy claim. In any case, neither double jeopardy nor the defendant's actual claim of 'mutually inconsistent theories' of guilt was raised in the trial court.

Seeking some basis to attack the verdicts, the defendant asserts for the first time on appeal that the convictions violate the Due Process Clause, because, he alleges, "an inconsistency exists 'at the core' of the government's case." (Def. Br. 21, quoting United States v. Higgs, 353 F.3d 281, 326-27 (4th Cir. 2003)).

Ali asserts that the flaw in this case arises because the prosecution relied upon *mutually inconsistent theories* to prove both a taking *by force* or intimidation to prove robbery, as well as a taking *without force* or intimidation to prove larceny from the person. The defendant also repeatedly asserts these convictions arose "from one and the same act." (Def. Br. 8).

Relying upon Higgs, Ali claims that the existence of an inconsistency at the core of the Commonwealth's case violates due process. (Def. Br. at 16). However, in Higgs, and in the case of Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000), also cited by Ali, the defendant was attacking the allegedly contradictory claims by the government relating to the culpability of *two or more defendants* for one offense, see Higgs, 205 F.3d at 326-327; Groose, 205 F.3d at 1050-1052. Groose held that the prosecution's "manipulation of the evidence" by use of "factually contradictory theories" improperly

"allowed the state to convict as many defendants as possible in a series of cases in which the timing [of the victims' deaths] was crucial." Id. at 1050.

Higgs similarly dealt with the argument that the government should have been prohibited from "presenting mutually inconsistent theories of the same case against *different defendants*." Id. at 326 (emphasis added). The cases of Bradshaw v. Stumpf, 545 U.S. 175 (2005) and Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997) also addressed claims that the prosecution presented *inconsistent factual scenarios* of the events of the same case to convict separate defendants.

The case at bar, in contrast, involves the culpability of one defendant for two offenses. The record, properly viewed in the light most favorable to the Commonwealth, shows that the convictions did not result from a single act, nor did the Commonwealth rely on inconsistent theories of guilt. Rather, the two offenses occurred seriatim, a larceny from the person followed by a robbery.

Tara Kessler testified that when she opened the cash register to accept Ali's payment, to her astonishment, "[t]he defendant reached over and *was taking the money*." (A 75, emphasis added). The initial taking was achieved by surprise, not by force, violence or intimidation. "[P]roof of violence or intimidation is required in a prosecution for robbery but not for

grand larceny from the person." Hudgins, 269 Va. at 605, 611 S.E.2d at 364. No evidence established that Ali took all of the money in his first attempt. Indeed, the photographic evidence and the testimony of Tara Kessler shows Ali was reaching over the counter and into the drawer over a period of time, at first without any opposition from her.

Ali's initial reaching over the counter and removing money from the cash drawer in Tara's presence involved an asportation of the cash from the drawer. Proof of larceny requires only that there be an asportation, or a movement of the seized goods, *however slight*, coupled with the intent to permanently deprive the owner of those goods. Britt v. Commonwealth, 276 Va. 569, 575, 667 S.E.2d 763, 766 (2008). "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) (emphasis added). Consequently, at the moment the initial asportation occurred, Ali's commission of the crime of grand larceny from the person was complete. The jury, upon proper instructions, found him guilty of that offense.

When Tara recovered from the shock of what she was seeing, she attempted to block Ali from taking any more money and engaged in a struggle for the cash. Tara testified she was scared and yelling for her

mother, and despite her struggle with Ali, he ultimately "yanked it away" and fled. (A 75, 78). The taking of funds that occurred after Tara had interposed herself to prevent further theft was accomplished by force, fear, violence and intimidation, and thereby established his guilt for robbery, as was argued more fully above in argument 1. Cf. Jerman v. Director, 267 Va. 432, 439-440, 593 S.E.2d 755, 759 (2004) (finding the facts supported the occurrence of an abduction by deception followed by an abduction by force).

Summary

The evidence at trial was sufficient to support the defendant's conviction of robbery as it showed that Ali employed force, violence and intimidation in his effort to take the money from Tara Kessler. After Ali first grabbed cash from the drawer, Tara "interpose[d] [her]self to prevent a thief from taking the property, and the force and violence used to overcome the opposition to the taking [was] concurrent or concomitant with the taking." Jones, 267 Va. at 289, 591 S.E.2d at 71.

Because Ali's newly asserted claim of a due process violation was never presented to the trial court, the Court of Appeals correctly ruled it was procedurally defaulted. The Court of Appeals also rightly held that the "ends of justice" exception to Rule 5A:18 was inapplicable because the

defendant failed to prove a miscarriage of justice had occurred, that he was convicted of a non-existent offense, or that any element of either grand larceny from the person, or robbery, was absent. The defendant's newly asserted argument that there was a "core inconsistency" in the Commonwealth's case, based on Ali's contention that the Commonwealth's theory was that the money was taken in a single act committed both with, and without, force, is easily disposed of in light of the fact that there were two distinct offenses that occurred in series.

Finally, rather than negating either offense, the evidence at trial supported the jury's verdict that both a larceny from the person, as well as a robbery, occurred during the course of events at the Hidden Valley 7-Eleven.

CONCLUSION

This Court should affirm the judgment of the Circuit Court of the County of Stafford and the Court of Appeals.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

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Counsel

Kenneth T. Cuccinelli, II
Attorney General of Virginia

Gregory W. Franklin
Assistant Attorney General
Virginia State Bar No. 25077
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804)786-2071
(804)371-0151 fax

CERTIFICATE

On June 1, 2010, the required number of copies of this brief were hand-delivered to the Clerk of this Court and were mailed to S. Jane Chittom, Esquire, Appellate Defender, Office of the Appellate Defender, 701 East Franklin Street, Suite 1001, Richmond, Virginia 23219, counsel for appellant.

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Gregory W. Franklin
Assistant Attorney General