In The

Supreme Court of Virginia

RECORD NO. 131847

LEVIN GRIMES,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On November 20, 2012, Levin Grimes was tried in a bench trial before the Honorable Randolph T. West, Judge of the Newport News Circuit Court, on seven felony counts, including one count of grand larceny in violation of Va. Code § 18.2-95, one count of breaking and entering with the intent to commit larceny in violation of Va. Code § 18.2-91; one count of larceny with intent to sell or distribute property with a value of $200 or more in violation of Va. Code § 18.2-108.01; one count of conspiracy to commit grand larceny in violation of Va. Code § 18.2-23 and Va. Code § 18.2-95, one count of conspiracy to commit larceny with intent to distribute or sell property with a value of $200 or more in violation of Va. Code § 18.2-23 and Va. Code § 18.2-108.01, one count of felony destruction of property in violation of Va. Code § 18.2-137, and one count of possession of burglary tools in violation of Va. Code § 18.2-94. Appendix [hereinafter abbreviated "Ap."] 1, 126.

At the conclusion of the Commonwealth's case-in-chief and again at the conclusion of all the evidence, Grimes' counsel moved to strike the evidence. Ap. 75-77, 79, 127. Judge West denied the

motions to strike and found Grimes guilty as charged. Ap. 79, 85, 127.

At the sentencing hearing on January 29, 2013, Judge West sentenced Grimes to ten years in prison the grand larceny charge, with eight years suspended for a period of 25 years. Ap. 128-130. With respect to the burglary charge, Judge West sentenced Grimes to twelve years in prison, with seven years suspended for a period of 25 years. Ap. 129-130. On each of the two conspiracy counts, Judge West sentenced Grimes to five years in prison, all suspended for a period of 25 years. Ap. 129-130. On the larceny with intent to sell or distribute, Judge West sentenced Grimes to five years in prison, all suspended for a period of 25 years. Ap. 129-130. On the felony destruction of property, Judge West sentenced Grimes to five years in prison, all suspended for a period of 25 years. Ap. 129-130. On the possession of burglary tools, Judge West sentenced Grimes to five years in prison, all suspended for a period of 25 years. Ap. 129-130. In other words, Judge West sentenced Grimes to a total sentence of 47 years in prison, with all but seven years suspended. Ap. 128-130.

On February 15, 2013, Grimes filed a notice of appeal to the Court of Appeals of Virginia. Ap. 131-132. In a published opinion by Judge Stephen R. McCullough dated October 29, 2013, the Court of Appeals affirmed Grimes' conviction for burglary, but reversed Grimes' convictions for grand larceny, conspiracy to commit grand larceny, larceny with intent to sell or distribute property with a value of $200 or more, and conspiracy to sell or distribute property with a value of $200 or more. Ap. 133-141.

On November 25, 2013, Grimes filed a notice of appeal to the Supreme Court from the Court of Appeals' judgment affirming the conviction for burglary. Ap. 142-143.

STATEMENT OF FACTS

On the afternoon of June 18, 2012, Geraldine M. Sykes was standing in a driveway outside her home at 6206 Roanoke Avenue in Newport News, chatting with her neighbor, Joan Beth Taylor. Sykes recalled, "We were discussing the house across the street [at 6207 Roanoke Avenue]. She had expressed interest in maybe securing the house for rental property investment." Ap. 5. "We both [went] around the back [of the house at 6207 Roanoke Avenue]." Ap. 6. "I heard some noise and I told Ms. Taylor that I … heard some noise

under the house. On the way back to the [front] driveway to come out, I heard the noise again, and I said, 'I think somebody is under the house.' That's when [Joan] went across the street to summon an officer." Ap. 6. "I [noticed] a crawlspace [door] that was open, ajar just a little bit." Ap. 6. "Two gentlemen [then crawled out of the crawlspace]." Ap. 7. "[One of them] said [to me], and I quote, 'Ma'am, the lady said I could have this pipe.'" Ap. 7. "He was carrying pipe … under his arm [as he came out of the crawlspace]." Ap. 7. "He went in the opposite direction…. I was standing on the side of the driveway of my neighbor's house, and he was approaching the other side [of the house when] pieces of pipe did drop [from his arms]." Ap. 8. "[He went] around the other side [of the house and went] down Roanoke Avenue towards Mercury Boulevard." Ap. 8. At trial, Sykes identified Levin Grimes as one of the two persons whom she saw emerge from the crawlspace. Ap. 7.

Joan Beth Taylor, Sykes' neighbor, also recalled the encounter: "We walked over to see the house at 6207 across the street from me. It had just been put up for sale, so I was interested in buying it and we walked over just to look it over. We walked across the back and when we got all the way across the back … we noticed when we

walked across the back that the crawlspace was open about two inches. We walked down to the end of the house, and then, coming back, we heard a noise, and Geraldine asked me, 'Did you hear that,' and I said yes. We came on past the crawlspace and we heard the noise again. It was a clanging noise…. We [realized] somebody is under the house, something is under the house. [Geraldine] was going to block the door, and I ran across the street back to my house to call the police…. [A]s I was fixing to run over to my house, we saw the first gentleman coming out from underneath the house." Ap. 12. "[O]nce I saw the first gentleman come out, I ran across the street to call the police." Ap. 13. "I went in my house and called 911, and [then I] came back out." Ap. 13. "[A] second man came out [from underneath the house]. I saw the second one come out, [but] I only saw him [from] the other side of the street because I was standing in my driveway." Ap. 13. "While I was on the phone talking to the 911 dispatcher … the policeman came by, and I motioned for him to come to my house…. [I wanted him] to pull in my driveway because at that time the first one was trying to put everything in the back of a truck." Ap. 13. "[At this point, the second man] came out from behind the house and [went] running down the street. It looked like … a fast

walk or a slow run. The police officer was calling [after him], 'Sir, sir, stop, stop,' [but] he kept going." Ap. 14. Taylor did not make any in-court identification of Grimes as one of the two persons she saw come from under the house. Ap. 12-13.

Newport News Police Officer Michael Miller testified that he was the first officer to respond to Joan Beth Taylor's 911 call: "I just happened to be driving down the road as she was calling Dispatch." Ap. 16. "When I was on patrol … driving southbound on Roanoke just north of Briarfield … I observed a blue Explorer parked … near 6206 Roanoke Avenue…. I saw a black male, later identified as Emmanuel Yates, [who appeared] to be shoving a bag of something – I didn't know what it was at the time – into the passenger side of the vehicle. I [made] a U-turn to get behind the vehicle. A witness, Ms. Taylor, flagged me down to explain that she was on the phone with the dispatcher and that two men were in the back of … 6207 Roanoke taking copper pipe from underneath that residence." Ap. 16. "I saw two men. As I was … detaining Mr. Yates, I saw another … black male wearing what appeared to be a tan shirt and blue jeans walking north on the west side of Roanoke with a handful of copper pipe." Ap. 16-17. "I asked him to come to my location,

[but] he refused. As he was walking away, he said, 'I don't know that person….' It appeared he was pointing in the direction of where I had Mr. Yates … detained…." Ap. 17. "He refused [to stop and] walked away. I then notified [Dispatch] over the radio [and gave a] description of the gentleman and which direction of travel he was going so another [could] come and make contact with that person." Ap. 17. Officer Miller did not make any in-court identification of Grimes as one of the two black males he observed departing from 6207 Roanoke Avenue. Ap. 20-22.

Newport News Police Officer John Chittwood testified that he went in search of the man whom Officer Miller had reported departing from 6207 Roanoke Avenue: "Officer Miller radioed over [for] his backup to be looking for an individual [who walked up] Roanoke and then turned onto Birdella." Ap. 31-32. "On Birdella, I observed a black male with a tan-looking shirt on [and] blue jeans [who was] carrying copper pipes, as described by Officer Miller. He met the description of the individual I was looking for. I was in front of 1023 Birdella [when I] made contact with him." Ap. 32. "He was [actually] wearing a black shirt but it appeared tan because he had a lot of wet mud and sand … all over it." Ap. 33. "It was on his shoes, arms,

face, [and] hands." Ap. 33. "He was carrying … two armfuls of copper piping." Ap. 34. "When I told him I needed to talk to him, he put [the copper piping] down." Ap. 34. "He was taken into custody and then searched…. [W]hen [Officer Webb] searched him, he found three hand-held tools and a little red flashlight." Ap. 33. "I'm not a tool expert but it looked like small cutting or grabbing tools … like pliers, [but] I don't know what they're called." Ap. 34. At trial, Officer Chittwood identified Levin Grimes as the person he stopped at 1023 Birdella. Ap. 32-33. Officer Chittwood recalled that he briefly questioned Grimes: "When I initially stopped him, I told him he was being detained and I asked him what was going on…. Mr. Grimes told me he was a scrapper and goes around looking for pipes and other things he can sell in dumpsters nearby, and [he indicated] that's where he had gotten that copper piping from." Ap. 36-37. Officer Chittwood noted he was not aware of any dumpsters in the vicinity of Roanoke Avenue or Birdella: "Not that I'm aware of – it doesn't mean there's not [any, but] I'm not aware of any." Ap. 37. On cross examination, Officer Chittwood acknowledged that there were dumpsters located behind a convenience store at 48th Street and

Marshall Avenue, not all that far from Grimes' location on Birdella. Ap. 38-39.

Newport News Police Detective Brad Rodgers testified that he examined the crawlspace under the house at 6207 Roanoke Avenue and observed that copper pipes had been removed from under the residence: "Inside the crawlspace as I looked inside, I could see big pieces of … four-inch, 4½-inch copper pipe that was still sitting on the ground in the crawlspace, along with what looked like some type of fabric that was right at the [entrance to] the crawlspace." Ap. 43, 45, 46-47. Detective Rodgers testified that he later interviewed Levin Grimes after first advising him of his Miranda rights: "Once he was in custody, he was brought up to police headquarters, and I proceeded to read his Miranda rights to him, and [after] doing so, he agreed to talk with me and waive his Miranda rights…. In the process of the conversation with him, he … admitted to being out there…. [H]e admitted to being in the area…. [W]hen I asked him about why he had this copper pipe on him, he advised me he found it in a dumpster in the area. However, he couldn't tell me where the dumpster was at or the location of the dumpsters in that area. He also admitted that the vehicle that he was driving, you know, [that] he was in…. [He

indicated] he was just out searching for copper in dumpsters because he's a scrapper…. [I]n our conversation, he continued to deny he was ever on that property [located at 6207 Roanoke Avenue] or under the house…. [W]hen I asked him about why his shirt was dirty and [why] it matched the color of the sand and the dirt underneath the house … he said it was because he was in the dumpsters." Ap. 49-50. Detective Rodgers noted that he was unaware of any dumpsters in the area of Roanoke Avenue or Birdella: "Birdella is the street Mr. Grimes was detained on, and we checked the entire street, [and] all of Roanoke, and then all of the little side streets going off there, and we could not find any dumpsters [such as] Mr. Grimes had described." Ap. 52.

Newport News Police Detective Matthew Jerassa testified that he executed a search warrant on the blue Ford Explorer that had been parked near 6207 Roanoke Avenue. Ap. 63-64. Detective Jerassa recalled, "We recovered several tools [and] cutting implements [from inside the vehicle]. We recovered personal information belonging to a Consuela Smith. We recovered two cell phones. I'd have to look up the actual [details], but off the top of my head, [I think we] recovered a black bag which had clothing items in it

[as well as] several tools. The tools consisted of wire-cutting instruments, pipe-cutting instruments, and pliers." Ap. 64. "There was dirt on the passenger seat…." Ap. 65.

Consuela Smith of Petersburg, Virginia, testified that she owned a blue Ford Explorer with Virginia license plate number WYC-8028, which around 2 or 3 p.m. on June 18, 2012, she noticed was missing from in front of her mother's house where it had been parked. Ap. 28-29. Smith recalled that her mother's friend, Levin Grimes, had been visiting the house "early that morning, six o'clock in the morning." Ap. 29. Smith noted that her Explorer was recovered in Newport News later that day. Ap. 29-30.

Alethea Anthony, a bank officer with Wells Fargo Bank, testified that Wells Fargo was acting in a fiduciary capacity as executor of the estate of Aubrey G. Pittman, who died in 2010, and that the vacant residence at 6207 Roanoke Avenue was part of the Pittman estate. Ap. 66-67, 71. Anthony testified about the cost of repairing the damage to the pipework at 6207 Roanoke Avenue: "Upon the inspection of my subcontractor that I hired, based on his inspection and what he told me that was required to be done in order to put the property back into the state that it was originally in …, I had to

authorize a payment of forty-seven hundred dollars to replace that pipe." Ap. 67-68.

James Austin, the proprietor of a home-improvement business known as Austin Family Repairs, testified that he repaired or replaced the copper piping that had been removed from 6207 Roanoke Avenue. Austin recalled, "All the drainage due to the age of the house were all brass, which they don't do anymore; [now] they use PVC." Ap. 74. Austin recalled that the cost of the copper piping that was necessary to repair the existing copper piping cost roughly $950. Ap. 74. Austin recalled that while making the repairs, he discovered a hacksaw underneath the house: "As you enter the crawlspace [and] go to the right like you were going to the garage … it was up against the wall where the hot water heater pipe penetrated." Ap. 74.

Levin Grimes rested without testifying at trial or calling any other witnesses. Ap. 79.

ASSIGNMENT OF ERROR

The Court of Appeals erred in affirming the trial court's denial of Grimes' motion to strike the breaking and entering charge where the evidence was insufficient to prove that Grimes actually broke into the residence at 6207 Roanoke Avenue. Ap. 75-79, 85, 127.

ARGUMENT

THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF GRIMES' MOTION TO STRIKE THE BREAKING AND ENTERING CHARGE, WHERE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT GRIMES ACTUALLY BROKE INTO THE RESIDENCE AT 6207 ROANOKE AVENUE.

Standard of Review

When examining a challenge to the sufficiency of the evidence, an appellate court must review the evidence in the light most favorable to the prevailing party at trial and consider any reasonable inferences from the facts proved. Zimmerman v. Commonwealth, 266 Va. 384, 386, 585 S.E.2d 538, 539 (2003). The judgment of the trial court is presumed to be correct and will be reversed only upon a showing that it is "plainly wrong or without evidence to support it." Viney v. Commonwealth, 269 Va. 296, 299, 609 S.E.2d 26, 28 (2005), Va. Code § 8.01-680.

To the extent that this assignment of error involves statutory interpretation, statutory interpretation presents a pure question of law receiving *de novo* review. Wright v. Commonwealth, 275 Va. 77, 80-81, 655 S.E.2d 7, 9 (2008). The reviewing court's primary goal in interpreting a statute "is to ascertain and give effect to legislative intent." Commonwealth v. Zamani, 256 Va. 391, 395, 507 S.E.2d

608, 609 (1998). To this end, the reviewing court determines "the General Assembly's intent from the words contained in a statute." Washington v. Commonwealth, 272 Va. 449, 455, 634 S.E.2d 310, 313 (2006). "An undefined term must be 'given its ordinary meaning, given the context in which it is used.'" Sansom v. Bd. of Supervisors, 257 Va. 589, 594-95, 514 S.E.2d 345, 349 (1999) (quoting Dep't of Taxation v. Orange-Madison Coop. Farm Serv., 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980)). The reviewing court strictly construes penal statutes against the Commonwealth, and resolves any ambiguity or reasonable doubt as to its meaning in the defendant's favor, Welch v. Commonwealth, 271 Va. 558, 563, 628 S.E.2d 340, 342 (2006), but remembers "that the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction," Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983). Hence, the reviewing court "will not apply 'an unreasonably restrictive interpretation of the statute' that would subvert the legislative intent expressed therein." Armstrong v. Commonwealth, 263 Va. 573, 581, 562 S.E.2d 139, 144 (2002) (quoting Ansell v. Commonwealth, 219 Va. 759, 761, 250

S.E.2d 760, 761 (1979)); Lacey v. Commonwealth, 54 Va. App. 32, 37-38, 675 S.E.2d 846, 849 (2009).

Discussion of the Issue

To make out a charge of breaking and entering under Va. Code § 18.2-91, the Commonwealth must prove that a "breaking" occurred. An actual breaking involves some element of force directed against a structure but such force may be slight. Davis v. Commonwealth, 132 Va. 521, 523, 110 S.E. 356, 357 (1922); Dalton v. Commonwealth, 14 Va. App. 544, 418 S.E.2d 563 (1992). For example, according to the Supreme Court of Virginia, pushing an already open door farther open is breaking, Johnson v. Commonwealth, 221 Va. 872, 875-76, 275 S.E.2d 592, 594-95 (1981), as is the lifting of an unlocked cellar door. Finch v. Commonwealth, 55 Va. (14 Gratt.) 643, 646 (1858). The breaking element must be proven in fact. Possession of stolen goods, standing alone, will not make out a breaking. Fields v. Commonwealth, 215 Va. 120, 121, 207 S.E.2d 822, 823 (1974).

"A breaking for purposes of statutory burglary may be either actual or constructive." Finney v. Commonwealth, 277 Va. 83, 88, 671 S.E.2d 169, 172 (2009). An actual breaking merely requires "'the application of some force, slight though it may be, whereby the

entrance is effected. Merely pushing open a door, turning the key, lifting the latch, or resort to other slight physical force is sufficient to constitute this element of the crime.'" Johnson v. Commonwealth, 221 Va. 872, 876, 275 S.E.2d 592, 594-95 (1981) (quoting Davis v. Commonwealth, 132 Va. 521, 523, 110 S.E. 356, 357 (1922)).

The Virginia Supreme Court has stated that "[b]urglary was, at common law, primarily an offense against the security of the habitation, and that is still the general conception of it. A difference is recognized between the crime of wrongfully entering . . . a house where people live and the crime of entering a house where chickens roost." Compton v. Commonwealth, 190 Va. 48, 55, 55 S.E.2d 446, 449 (1949). The burglary statutes exist to protect against "the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence." Yeatts v. Commonwealth, 242 Va. 121, 140, 410 S.E.2d 254, 266 (1991) (internal quotation marks and citation omitted). Recognizing these concerns, the Supreme Court of Virginia recently defined the meaning of a "dwelling house" in the burglary statutes in Giles v. Commonwealth, 277 Va. 369, 672 S.E.2d 879

(2009). The Court held "a dwelling house is a house that one uses for habitation, as opposed to another purpose." Id. at 375, 672 S.E.2d at 883.

In Hitt v. Commonwealth, 43 Va. App. 473, 477, 481, 598 S.E.2d 783, 784-85, 787 (2004), the Court of Appeals of Virginia held the breaking of a room within a dwelling house does not constitute the breaking of a dwelling as required by the burglary statutes; rather, only the breaking and entering from outside the dwelling into the dwelling suffices. In Hitt, the defendant spent the night in a home with the occupants' permission. Id. at 476, 598 S.E.2d at 785. After the occupants departed, the defendant broke into a locked bedroom and stole money from within it. Id. at 477, 598 S.E.2d at 784-85. Like Hitt, the defendant in the case at bar was convicted of statutory burglary under Va. Code § 18.2-91. In considering whether the defendant's actions constituted burglary, the Court of Appeals stated that a "dwelling house" "contemplates a *residence* within which human beings sleep or habitate. It does not contemplate individual rooms or compartments within such a 'residence,' that are not dwelling houses in and of themselves . . . ." Id. at 481, 598 S.E.2d at 787. The Court of Appeals further quoted Lockhart v. State, 60 S.E.

215, 216 (Ga. Ct. App. 1908), for the notion that where a case involves a private home, "breaking into the house is necessary to be shown, in order to constitute a burglary. The breaking and entering of one of the rooms of such private dwelling-house, where the entrance into the house is accomplished without breaking, is not burglary." Hitt, 43 Va. App. at 483, 598 S.E.2d at 788 (internal quotation marks omitted). Since the defendant in Hitt had not broken into a dwelling, but only into a room within one, the Court of Appeals reversed the conviction. Id.; see also Lacey v. Commonwealth, 54 Va. App. 32, 38-41, 675 S.E.2d 846, 849-850 (2009) (burglary conviction reversed where defendant's entry through the open garage door and subsequent breaking of an interior door failed to meet the elements of burglary).

Grimes was convicted of statutory burglary under Va. Code § 18.2-91. In relevant part, that section provides that "[i]f any person commits any of the acts mentioned in § 18.2-90 with intent to commit larceny . . . he shall be guilty of statutory burglary." In turn, Va. Code § 18.2-90 states in relevant part that "[i]f any person . . . in the daytime breaks and enters . . . a dwelling house . . . he shall be deemed guilty of statutory burglary." Thus, a conviction under Va.

Code § 18.2-91 required the Commonwealth to prove (1) a breaking and entering in the daytime of (2) a dwelling house and (3) with intent to commit larceny.

Appellant contends the Commonwealth failed to prove that Grimes actually broke into the residence at 6207 Roanoke Avenue. At most, the evidence established that he crawled under the residence, which is not the same thing as entering the residence. Before a conviction for breaking and entering can ensue, there must be some evidence that the defendant actually broke into and entered the residence. However, such evidence is lacking in the case at bar. As Grimes' counsel noted in his motion to strike, "And [with regard to] the burglary itself, we would suggest that they didn't actually go into the house. They went underneath the house and that therefore … is not a burglary." Ap. 77. The crawlspace did not connect interiorly with other portions of the house and thus was not an integrated part of the whole house. As the Court of Appeals acknowledged in its opinion below, "[T]here is no evidence that the crawl space here connects with the interior of the home, nor is the crawl space employed for 'ordinary household functions.'" Ap. 140-141.

Because Grimes did not break into the dwelling house of another, but at most went into a crawlspace under the residence, Grimes' breaking and entering conviction should be reversed and dismissed.

CONCLUSION

For the reasons urged herein, it is requested that this Court reverse the judgment of the Court of Appeals with respect to the breaking and entering conviction.

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CERTIFICATE

I, Charles E. Haden, certify this 23rd day of May, 2014 that: 1) three copies of the Opening Brief of Appellant and one copy of the Appendix, with one electronic copy on CD, were served, via UPS Ground Transportation, to Victoria Johnson, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, 900 East Main Street, Richmond, VA 23219 (telephone: 804-786-6515; fax: 804-371-0151; email: vjohnson@oag.state.va.us); 2) fifteen copies of the Opening Brief of Appellant and ten copies of the Appendix, with ten electronic copies on CDs, were hand-filed in the Clerk's Office of the Supreme Court of Virginia, 100 North Ninth Street, Richmond, VA 23219-2334; 3) I am an appointed attorney; 4) I request oral argument; 5) the word count is 4,237 words; and 6) I certify I have complied with Rule 5:26(h).

Charles E. Haden

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