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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 151111

JAMES LINDSEY

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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STATEMENT OF THE CASE

In a jury trial in the Circuit Court of Arlington County on August 4-6, 2014, James Lindsey was convicted of petit larceny, third or subsequent offense. (App. 2). The jury sentenced Lindsey to seven days in jail and fined him $2,000. (App. 8). The circuit court entered final judgment on August 14, 2014, and imposed the sentence handed down by the jury. (App. 8-9).

A single judge of the Court of Appeals of Virginia denied Lindsey's petition for appeal on April 16, 2016. (App. 10-14). A panel of that court refused the petition for appeal for the reasons set forth in the earlier order. (App. 15).

On March 2, 2016, this Court awarded Lindsey an appeal on his first assignment of error:

ASSIGNMENT OF ERROR

> The Court of Appeals erred in upholding the trial court's giving of Jury Instruction 16, and denying proffered Instruction 0, because Instruction 16 impermissibly shifted the burden of proof to the defense, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

(App. 16).

STATEMENT OF FACTS

Bryan Knott was working as an ops manager at the Hudson Trail Outfitters Store in an Arlington County mall on December 21, 2013. (App. 29). At about 3:30 p.m., he was returning from lunch, but did not have on his customary work uniform. (App. 29-30). As Knott headed to the back of the store to change into his uniform, he came upon the defendant and had

"a casual conversation" about Lindsey's shirt. (App. 30-31). At the time, nothing indicated that Knott was a store employee. (App. 31, 36-37).

Knott then saw the defendant walk to a display of Olympic goods. (App. 31). There, Lindsey "kind of checked around to see if anyone was checking him out," which "seemed unusual to" Knott. (*Id.*). At that point, the defendant took three hats, put them on his forearm, and then draped his jacket over them. (App. 31, 34-35). Lindsey did not try any of them on, and it "looked like [he] kind of sweep the whole section of them off . . .."

Knott then reported the apparent theft to Brad Dana, the operations manager for the store. (App. 32, 55-56). The defendant was still in the middle of the store. (App. 53). Dana then made a 911 call and stationed himself at the front of the store. (App. 56). Knott also told another store manager, Steve Lappat, about what he had seen, and Lappat then approached the defendant about the matter. (App. 32).

At the store entrance, Lindsey approached Dana and demanded to speak with a manager. (App. 56-57). The defendant was "very agitated and threw some hats down on the counter and began to yell angrily, using a lot of cuss words, that [Dana's] store was racist, that he was going to sue us and we were going to pay for his Christmas." (App. 57). Knott approached them and said to the defendant: "I saw what you did and this

is why I think it's an issue." (App. 33). After the defendant hurled racial and sexual epithets at Knott, the latter "just headed to the back." (App. 34).

Arlington County police officers Matt Robinson and Jeff Khoury came into the store and "started to try [to] diffuse the situation." (App. 58). The defendant, though, continued to be "incredibly aggressive" and cursed and yelled at Dana. (App. 58-59). Lindsey appeared angry that the police had been dispatched to the store. (App. 95). At that point, Knott and Lappat "came closer so they could give their point of view to the officers." (App. 59). They "had been more directly involved in witnessing the concealment" than Dana. (*Id.*).

Officer Robinson then asked Lindsey and his friend Leslie James, who had gone into the store with the defendant and was standing behind him, for their identifications. (App. 60, 86, 102-104). Lindsey provided his identification "reluctantly." (App. 86). The defendant kept asking for his ID back, and ended up grabbing for it from Officer Khoury's hand and knocking it to the ground. (App. 95). After Lappat asked that Lindsey be "banned" from the store, Officer Khoury then directed the defendant to remain with Officer Robinson and went outside to retrieve forms to ban Lindsey. (App. 68, 87, 96-97). Lindsey then grabbed the hats from the counter along with some magazines and other papers and threw them at

Lappat, hitting his shoulder. (App. 62-64, 77-80, 87-89). The defendant also shoved Lappat as the employee went up to Officer Robinson to complain about what Lindsey had done. (App. 63-64, 89).

Officer Robinson then informed the defendant that he was under arrest for assault and told him not to move. (App. 64, 90). Lindsey, though, fled down the stairs of the mall and, ignoring Robinson's repeated directions not to leave, ran out of the store. (App. 90, 97). Although the defendant "was given multiple commands to stop," he did not do so. (App. 90-91). Finally, Officer Khoury, who was helping Officer Robinson in the foot chase, yelled to Lindsey several times to stop. (App. 98-100). Even after Khoury drew his taser and threatened to use it if the defendant did not stop, Lindsey continued to run away. At that point Khoury used the taser, and the defendant was subdued and then arrested. (App. 100). The chase lasted for about 30 seconds. (App. 90).

Testifying for the defense, James stated that the defendant and Knott had chatted about Lindsey's shirt. (App. 104). After Lindsey looked at the hats on display and picked up two, they continued to browse, at which point Lappat said: "Can I have my hats back." (App. 104-05, 109). By then, James was in a different section of the store from Lindsey and could not see whether he still had the hats. (App. 107-09, 126-27). James

acknowledged at trial that he had no way of knowing whether the defendant had covered up the hats with his jacket. (App. 128). Lappat told Lindsey that he had taken sensors off the hats, but James testified that he had not seen anything on top of the hats or the defendant removing sensors. (App. 110).

James claimed that after the police arrived and checked their IDs, they told him and the defendant they "were free to go" and were not under arrest. (App. 114-15). The defendant, though, picked up the hats and threw them at Lappat. (App. 117-18). As Lindsey was going down the escalator to leave the store, Lappat finally told the police that he wanted to press charges, at which point an officer pursued the defendant. (App. 118-19, 130-32).

In his own testimony, Lindsey acknowledged that he had carried a jacket into the store. (App. 136-37). After having a brief "light-hearted conversation" with Knott about Lindsey's shirt, the defendant picked up a couple of hats and asked James which one he preferred. (App. 140-44, 164). Lindsey claimed that when Lappat asked for his hats back, the defendant was holding one in each hand. (App. 144-45). Lindsey denied that he had taken the sensors off the hats but admitted he had gotten into an "excited" conversation with Dana. (App. 146-47).

Lindsey further stated that he was never arrested in the store or told that he could not leave. (App. 148-49). When Lappat made a "snide remark" as the defendant and James were leaving, Lindsey "just lost control a bit and flung the hats at him." (App. 158, 161-62). The defendant testified that after he saw store employees and the police talking about Lappat possibly pressing assault charges, Lindsey decided to "get out of here, cut my losses and at that point, I was not told that I was under arrest." (App. 163, 167).

Lindsey acknowledged that as he was going down the escalator, Officer Robinson was "trying to get me to hold up." (App. 168). When the defendant got to the front door, however, he "started running." (App. 168-69). Lindsey admitted that as he was running "zig-zaggy, in and out of cars" outside the store, he heard Officer Khoury tell him to stop, but he "kept running." (App. 170-71). After Khoury tried to grab him, Lindsey continued to run but was then tasered. (App. 171). At trial, the defendant stated that he had two convictions for crimes involving moral turpitude, but then admitted the actual number was three. (App. 171-72).

Testifying as a rebuttal witness for the Commonwealth, Knott testified that he saw the defendant conceal the hats for about 20 seconds. (App.

177). At that time, James "was next to him" and was behind Lindsey. (App. 177).

ARGUMENT

THE TRIAL COURT PROPERLY GRANTED INSTRUCTION NO. 16, WHICH CONTAINED A PERMISSIVE INFERENCE RATHER THAN A MANDATORY REBUTTABLE PRESUMPTION.

Over the defendant's objection, the trial court granted Instruction No. 16, which stated: "Willful concealment of goods or merchandise while still on the premises of a store is evidence of an intent to convert and defraud the owner of the value of the goods or merchandise, unless there is believable evidence to the contrary." (App. 6, 183-90). The circuit court rejected the defendant's proposed Instruction No. O, which stated: "You may infer that willful concealment of goods or merchandise while still on the premises of a store is evidence of an intent to convert and defraud the owner of the value of the goods or merchandise." (App. 3).

Lindsey asserts that Instruction No. 16 was unconstitutional because it set forth a mandatory, rebuttable presumption that unconstitutionally shifted the burden of persuasion to the defense. The Court of Appeals, however, rejected this contention, holding that the challenged instruction "merely suggests to the jury a possible conclusion it may draw from

predicate facts" and thus constituted an unobjectionable permissive inference. (App. 12). The Court of Appeals correctly resolved this issue, and this Court accordingly should affirm.

The principles governing this Court's review of Lindsey's argument are well-settled.

> The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." This "bedrock, axiomatic and elementary [constitutional] principle prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime."
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> The analysis is straightforward. "The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes." The court must determine whether the challenged portion of the instruction creates a mandatory presumption or merely a permissive inference. A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion.

Francis v. Franklin, 471 U.S. 307, 313 (1985) (alteration in original, citations omitted). *See also Dobson v. Commonwealth*, 260 Va. 71, 74-75, 531 S.E.2d 569, 571-72 (2000).

In *County Court v. Allen*, 442 U.S. 140 (1979), the Supreme Court elaborated on the role of inferences and presumptions in a criminal jury trial, making clear that they often not only are constitutional but in fact are helpful to the proper resolution of a case.

> Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime – that is, an "ultimate" or "elemental" facts – from the existence of one or more "evidentiary" or "basic" facts. The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently.
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> * * * *
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> The most common evidentiary device is the entirely permissive inference or presumption, which allows – but does not require – the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. In that situation the basic fact may constitute prima facie evidence of the elemental fact. . . . Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it effects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference.
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> A mandatory presumption is a far more troublesome evidentiary device. For it may affect not only the strength of the "no reasonable doubt" burden but also the placement of that burden; it tells the trier that he or they *must* find the elemental

> fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts.

442 U.S. at 156-57 (citations omitted, emphasis in original).

Consistent with these principles, both the circuit court and thereafter the Court of Appeals rightly concluded that Instruction No. 16 was constitutional. (App. 11-12, 190). As Lindsey correctly states on brief, an appellate court's duty in reviewing jury instructions "is to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises." (Def. Br. 5, quoting *Darnell v. Commonwealth*, 6 Va. App. 485, 488, 370 S.E.2d 717, 719 (1988).

At the outset, the Commonwealth notes that jury Instruction No. 16 is identical to an instruction in the Virginia Model Jury Instructions. 2 Virginia Model Jury Instructions, Criminal No. 36.840 (2011 Repl. Ed.). Further, it is similar (but not identical) to the final sentence of Code § 18.2-103, the statute under which Lindsey was convicted: "The willful concealment of goods or merchandise of any store or other mercantile establishment, which still on the premises thereof, shall be prima facie evidence of an intent to convert and defraud the owner thereof out of the value of the goods or merchandise."

Beyond this, one thing immediately distinguishes the present issue from others involving burden-shifting claims. Instruction No. 16 required the Commonwealth to prove beyond a reasonable doubt that Lindsey willfully concealed goods or merchandise while still on the premises of the store, before the jury would need to address the issue of intent. Lindsey himself states on brief that the challenged jury instruction "directed the jurors to find evidence of an intent to defraud ***once the state proved willful concealment*** . . .. (Def. Br. 9, emphasis added). Although the finding instruction, Instruction No. M, concededly listed willful concealment and intent to defraud as separate elements of the offense, by any reasonable measure there is a substantial overlap between the two. (App. 7).

That is, if an individual ***willfully*** conceals goods while still on the premises of a store, virtually the only reasonable inference to be drawn is that he intends to shoplift those goods. *See Barrett v. Commonwealth*, 268 Va. 170, 183, 597 S.E.2d 104, 111 (2004): "'[T]he word [willful] . . . when used in a criminal statute . . . generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely[.] The word is also employed to characterize a thing done without ground for believing it is lawful.'"). *See also Johnson v.* Commonwealth, 35 Va. App.

134, 140, 543 S.E.2d 605, 607, *aff'd en banc*, 37 Va. App. 187, 555 S.E.2d 419 (2001) (statute "does not . . . prohibit simply the concealment of merchandise [but rather] it prohibits a willful concealment").

There is no doubt as to the constitutionality of a jury instruction that the defendant's exclusive possession of recently stolen property supports the permissive inference that he was the thief, absent a reasonable explanation of his possession. *See Barnes v. United States*, 412 U.S. 837 (1973); *Dobson*, 260 Va. at 76, 531 S.E.2d at 572. Yet, the instruction this Court upheld in *Dobson* specifically noted that "[t]he longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession." *Id*. at 74, 531 S.E.2d at 571. If the inference was upheld in *Dobson* even though it does not necessarily point to the defendant's guilt, there is no reason to conclude that the instruction in the present case was any less appropriate.

Regardless, Instruction No. 16 did not violate the defendant's due process rights. First, unlike the instructions held unconstitutional in *Franklin* and *Sandstrom v. Montana*, 442 U.S. 510 (1979), the contested portion of the instruction was not "cast in the language of command." *Franklin*, 471 U.S. at 316. In *Sandstrom*, for example, the court instructed the jury that "the law presumes that a person intends the ordinary

consequences of his voluntary acts." 442 U.S. at 512. Likewise, in *Franklin*, one instruction stated that "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted." *Id.* at 315. Further, such a person was "presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted." *Id.*

The Court of Appeals correctly distinguished the language in these instructions from that contained in Instruction No. 16. The court pointed out the instruction

> does not require the jury to reach any conclusions; it merely informs the jury that it should treat evidence of willful concealment as evidence of intent to convert or defraud. It does not state that willful concealment is 'prima facie' evidence, or use comparable language to state that willful concealment alone satisfies the prosecution's burden of proof as to that element. The instruction merely suggests to the jury a possible conclusion it may draw from predicate facts.

(App. 12). Considering that the jury would already have found that Lindsey had willfully concealed goods and merchandise while still on the store's premises, see pages 12-13 of this brief, the language in Instruction No. 16 was far from imperative. *See Allen*, 442 U.S. at 164 (state statute providing that, with certain exceptions, presence of firearm in automobile was presumptive evidence that all occupants had illegally possessed it was constitutional permissive inference; inference that all four occupants

possessed firearms in plain view "is surely more likely than the notion that these weapons were the sole property of the 16-year-old girl" in the car rather than three adult males); *Barnes*, 412 U.S. at 843-44 (fact that "[f]or centuries courts have instructed juries that inference of guilty knowledge may be drawn from fact of unexplained possession of stolen goods," thereby "reflecting accumulated common experience, provides strong indication that the instruction comports with due process").

Other decisions by this Court buttress the Court of Appeals's ruling that the challenged jury instruction was a permissive inference rather than a mandatory presumption. In *Wilson v. Commonwealth*, 225 Va. 33, 301 S.E.2d 1 (1983), this Court upheld the defendants' "spotlighting" convictions against their argument that two presumptions in a jury instruction reciting verbatim the criminal statute involved were unconstitutional under *Sandstrom*. 225 Va. at 39-40, 301 S.E.2d at 4. The instruction first stated that if at night a person in possession of any of certain specified weapons flashed a light from his vehicle without good cause it "shall raise a presumption of an intent to kill deer or elk in violation of this section." *Id.* at 37, 301 S.E.2d at 2. The instruction then stated that "[e]very person in or on any such vehicle shall be deemed a principal in the second degree . . .." *Id.*

This Court held that both presumptions amounted only to permissive inferences and did not shift the burden of persuasion but instead only the burden of production. *Id.* at 41-44, 301 S.E.2d at 5-7. This Court noted that "our general rule is to give rebuttable presumptions permissive or burden of production-shifting effect only." *Id.* at 41, 301 S.E.2d at 5. Further, the first presumption was constitutional, because "[t]here was a rational connection between the true facts and the presumed ultimate fact and the presumed fact was more likely than not to follow from the proved facts." *Id.* at 42, 301 S.E.2d at 6. Moreover, the remainder of the jury instructions refuted the possibility that the second presumption might have shifted the burden of persuasion to the defendants. Rather, "under these instructions a reasonable juror would not have believed that the presumption was conclusive or that it shifted the burden of persuasion from the Commonwealth." *Id.* at 44, 301 S.E.2d at 7.

Likewise, in *Dobson* the instruction dealing with the defendant's possession of recently stolen goods established only a permissive inference, one that the jury "was free to reject, irrespective of whether the defendant offered a reasonable explanation consistent with his innocence . . .. The challenged instruction also benefited the defendant by effectively informing the jury that it could *not* infer that the defendant was the thief if he

offered a reasonable explanation of possession consistent with his innocence." *Id*. at 76, 531 S.E.2d at 572 (emphasis in original). Similarly, in the case at bar the jury was effectively told that if the defendant offered "believable evidence to the contrary" about his intent to convert and defraud the owner of the value of the goods, then the Commonwealth could not prove the second element of the offense, as set forth in Instruction No. M. (App. 6, 7).

Also, much as in *Dobson*, the jury here was instructed that: the defendant was presumed innocent and this presumption remained with him throughout the trial; the Commonwealth had to prove each element of the offense beyond a reasonable doubt; the defendant had no burden to produce any evidence; the evidence as a whole had to exclude every reasonable theory of innocence; and the jury had to acquit Lindsey if it found that the Commonwealth failed to prove any of the elements of the offense beyond a reasonable doubt. (App. 4-7). Further, the Commonwealth's closing argument never even hinted at any reliance upon Instruction No. 16 but instead simply pointed to the things in the record that demonstrated the credibility of the Commonwealth's witnesses, rather than Lindsey. (App. 193-99, 204-07). Given this record, there is no reasonable likelihood that the jury in this case applied Instruction No. 16 in an

unconstitutional manner. *See Boyde v. California*, 494 U.S. 370, 378-81 (1990) (reasonable likelihood standard adopted on claims that jury applied challenged instruction so as to prevent consideration of constitutionally relevant evidence).

This Court's differing rulings in two forgery appeals also reflect the constitutionality of Instruction No. 16. In *Fitzgerald v. Commonwealth*, 227 Va. 171, 313 S.E.2d 394 (1984), in affirming the defendant's three forgery convictions, this Court noted that proof that an instrument was forged, made payable to the defendant, and endorsed by him, is sufficient evidence of his intent to defraud the drawee. *Id.* at 174, 313 S.E.2d at 395. The Court pointed to the general rule that the defendant's possession of a forged check, "'which he claims as a payee, is prima facie evidence [of forgery]. Such a prima facie showing of guilt does not rise to the level of a conclusive presumption, and it may be rebutted, but it will warrant submission of the issue of guilt and forgery to the jury, and will support a verdict of guilty if the jury so finds." *Id.* In a similar vein, Lindsey's willful concealment of goods while still on the store's premises was prima facie evidence of his criminal intent.[1] See also Code § 18.2-183 (failure to make

[1] The very fact that, as the Court of Appeals noted, the challenged instruction made no reference to "prima facie" evidence, if anything, inured to the defendant's benefit. (App. 12).

good on dishonored check within five days "shall be prima facie evidence of intent to defraud or of knowledge of insufficient funds)."

In contrast, in *Bullock v. Commonwealth*, 205 Va. 558, 138 S.E.2d 261 (1964), this Court reversed the defendant's forgery and uttering convictions, based on a jury instruction stating that if a person is in possession of a forged document and attempts to cash it, "this raises a presumption that such person forged the same, and unless such possession of forgery is satisfactorily explained, the presumption becomes conclusive." *Id.* at 561, 138 S.E.2d at 263-64. This Court concluded that the "presumption becomes conclusive" language was objectionable and that the instruction "should have told the jury that the unexplained possession of a forged instrument by one who endeavors to obtain money thereon is prima facie evidence that such person forged the instrument, but that such prima facie evidence may be rebutted by an explanation satisfactory to the jury as to how he came into possession of the instrument." *Id.* at 563, 138 S.E.2d at 264-65. *See also Thomas v. Commonwealth*, 279 Va. 131, 160-61, 166-68, 688 S.E.2d 220 (2010) (upholding various challenges to jury instructions on inferences of malice, intent, and flight of defendant); *Schmitt v. Commonwealth*, 262 Va. 127, 145, 547 S.E.2d 186, 199-200 (2001) (instruction that jury could infer that

every person intends natural and probable consequences of his acts was valid permissive inference, because it "did not require the jurors to draw any inference or alter the Commonwealth's burden of proving Schmitt's criminal intent beyond a reasonable doubt"); *Smith v. Commonwealth*, 239 Va. 243, 263-64, 389 S.E.2d 871, 882 (1990) (instruction that jury could infer malice from deliberate use of deadly weapon did not violate *Sandstrom*); *Hodge v. Commonwealth*, 217 Va. 338, 228 S.E.2d 692 (1976) (instruction upheld that unlawful homicide is presumed to be murder in second degree, and burden is on defendant to reduce it to manslaughter or excusable homicide). *Yap v. Commonwealth*, 49 Va. App. 622, 635-37, 643 S.E.2d 523 (2007) (language in Code § 18.2-269 that in event of blood alcohol test result of .08% higher "it shall be presumed the accused was under the influence of alcohol intoxicants at time of alleged DUI was permissive inference, not mandatory presumption).

Consequently, the circuit court here properly granted Instruction No. 16. The instruction contained no mandatory language and merely stated that willful concealment of goods or merchandise while still on store premises is evidence of a criminal intent, subject to believable contrary evidence. The instruction never stated or implied that such evidence amounted to proof of guilt beyond a reasonable doubt. And the remainder

of the trial, including the *voir dire*, other instructions, and closing arguments of counsel, refute any claimed reasonable possibility that the jurors misapprehended the Commonwealth's burden of proof on the intent element of the crime. Particularly considering that the Commonwealth proved beyond a reasonable doubt that the defendant had willfully concealed goods while still at the mall store, there certainly was a sufficient link between the predicate fact and the inferred fact to render the inference constitutional. *See Barnes*, 412 U.S. at 845 (record showed that defendant possessed recently stolen checks payable to individuals he did not know and provided no plausible innocent explanation for such possession; based on "this evidence alone, common sense and experience tell us that petitioner must have known or been aware of the high probability that the checks were stolen").

Finally, any error by the trial court in granting Instruction No. 16 was harmless beyond a reasonable doubt. *See Rose v. Clark*, 478 U.S. 570, 579-80 (1986) (harmless error analysis applicable to *Sandstrom* claim). As argued above, the jury's finding beyond a reasonable doubt that the defendant willfully concealed goods while still on the store premises rendered it highly improbable that it would not have similarly found proof of the defendant's criminal intent beyond a reasonable doubt. And Lindsey's

flight from the store was additional proof of his guilt. Further, the *voir dire*, closing arguments, and other jury instructions entirely comported with the principle that the Commonwealth had to prove each element of the offense beyond a reasonable doubt.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF TRANSMISSION AND SERVICE

On May 4, 2016, the required copies of this brief were filed electronically with this Court and hand delivered to the Clerk's Office in compliance with Rule 5A:19(f). A copy was emailed to Elizabeth Tuomey, Esquire, counsel for appellant, at Elizabeth@tuomeylaw.com. In accordance with Rule 5A:4(d), I certify that this document contains 4,792 words, in compliance with Rules 5A:19(a) and 5A:21(g).

The Commonwealth desires to present oral argument in this case.

S/ _____
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