SCV: Submitted on 04-11-2016 16:42:01 EDT for filing on 04-11-2016

IN THE

Supreme Court of Virginia

RECORD NO. 151111

JAMES LINDSEY,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

On August 4, 2014, trial by jury commenced in the Circuit Court of Arlington County before the Honorable Judge Daniel S. Fiore, II, on charges of Concealment, Third or Subsequent Offense, Assault and Battery, and Obstruction of Justice. On the same day, Judge Fiore struck the charge of Obstruction of Justice. On August 5, 2014, the jury returned a verdict of Not Guilty on the Assault and Battery charge, and a verdict of Guilty on the Concealment, Third or Subsequent Offense charge. On August 6, 2014, the jury sentenced Lindsey to seven days in jail and a fine of $2,000.

The Trial Court, by The Honorable Louise M. DiMatteo, imposed the jury sentence and entered the conviction and sentencing order on August 14, 2014. Lindsey timely noted his appeal of this order to the Court of Appeals on August 19, 2014.

The Court of Appeals denied Lindsey's Petition for Appeal, Per Curiam, on April 16, 2015. A Request for Hearing by a Three-Judge Panel was filed on April 22, 2015. The Petition was denied by the Three-Judge Panel on June 23, 2015.

Lindsey timely noted his appeal of this order to this court on July 21, 2015.

ASSIGNMENT OF ERROR

The Court of Appeals erred in upholding the Trial Court's giving of Jury Instruction 16, and denying proffered Instruction O, 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. (Preserved at JA 183-190).

STATEMENT OF FACTS

On August 4, 2014, trial commenced in the Circuit Court of Arlington County before the Honorable Judge Daniel S. Fiore, II (Joint Appendix, hereinafter JA, 17) on charges of Concealment, Third or Subsequent Offense, Assault and Battery, and Obstruction of Justice (JA 21-22). At trial, the Commonwealth called four witnesses to testify: Bryan Knott, manager at Hudson Trail Outfitters (JA 28-29), Brad Dana, manager at Hudson Trail Outfitters (JA 55), Officer Robinson of the Arlington County Police Department (JA 84), and Officer Khoury of the Arlington County Police Department (JA 93). At the close of the Commonwealth's case, the defense moved to strike the Commonwealth's evidence as to all charges. The Trial Court granted the motion to strike as to the Obstruction of Justice charge.

The Defense called Leslie James to testify (JA 102), and the Defendant also testified (JA 135). The defense renewed the motion to strike at the close of the evidence. JA 191. The Trial Court denied the motion. JA 192. The jury returned a verdict of Not Guilty on the Assault and Battery charge, and a verdict of Guilty on the Concealment, Third or Subsequent Offense charge. Trial Transcript 8/5/14 57.

On December 21, 2013, Lindsey and his friend, Leslie James (hereinafter, "James"), entered the Hudson Trail Outfitters store in Arlington, Virginia. JA 102-103. They both browsed around the store. JA 104-105. Lindsey selected two hats from the display. JA 41, 141. According to Bryan Knott (hereinafter "Knott"), Lindsey concealed the hats underneath his jacket. JA 31. According to Lindsey and James, Lindsey was holding the hats in his hand. JA 108, 145. Lindsey was confronted while he was inside the store. JA 32. Lindsey denied that he had concealed the hats, and became argumentative. JA 33, 145. Further, Lindsey testified that he had money to pay for the hats, and he hadn't yet decided which one to buy when he was confronted. JA 143-144. Lindsey complained to another manager, Brad Dana (hereinafter "Dana"), and remained

inside the store until the police came. JA 56-58, 113. Once the police arrived, Lindsey spoke to them and they checked his identification. JA 86. At first, Officer Khoury was only going to give Lindsey a banning notice. JA 96-97. Subsequently, according to Dana and Officer Robinson, Lindsey picked up the hats that Knott had accused him of concealing, and threw them at Steven Lappat, another store employee. JA 62, 88. Lindsey then struck Lappat in the arm/shoulder. JA 89-90. Officer Robinson informed Lindsey he was going to place him under arrest for assault, and at that point Lindsey ran out of the store. JA 90. A brief foot pursuit ensued (id.), and ultimately, Officer Khoury tased Lindsey and placed him under arrest. JA 100.

AUTHORITIES AND ARGUMENT

The Court of Appeals erred in upholding the Trial Court's giving of Jury Instruction 16, and denying proffered Instruction O, 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. (Preserved at JA 183-190).

a. Standard of Review

"A reviewing court's responsibility 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." Darnell v. Commonwealth, 6 Va. App. 485, 488, 370 S.E.2d 717, 719 (1988). "On appeal, when the issue is a refused jury instruction, we view the evidence in the light most favorable to the proponent of the instruction." Lynn v. Commonwealth, 27 Va. App. 336, 344, 499 S.E.2d 1, 4-5 (1998).

"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." Francis v. Franklin, 471 U.S. 307, 313-314 (1985) (implying a *de novo* standard of review).

b. Argument

"[T]he Due Process Clause 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." Sandstrom v. Montana, 442 U.S. 510, 520 (1979), citing In re Winship, 397 U.S. 358, 364 (1970). In this case, the Commonwealth was required to prove that Lindsey willfully concealed the merchandise, and did so with the intent to convert the merchandise to his own (or another's) use without having paid for the merchandise. See Jury Instruction M. JA 7. Jury Instruction 16 relieved the Commonwealth of that burden, and shifted to the defense the burden to disprove criminal intent.

Jury Instruction 16 stated: Willful concealment of goods or merchandise while still on the premises of the 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. JA 6. This instruction was taken word for word from Virginia Model Jury

Instruction No. 36.840. Virginia Model Jury Instructions – Criminal Instruction No. 36.840 (LexisNexis Matthew Bender) (2014). This instruction contains a mandatory, rebuttable presumption.

Mandatory, rebuttable presumptions were found unconstitutional in the cases of Francis v. Franklin, 471 U.S. 307 (1985), Sandstrom v. Montana, 442 U.S. 510 (1979), and Mullaney v. Wilbur, 421 U.S. 684 (1975), as violative of the due process clause of the Fourteenth Amendment. See Franklin at 317 and 325.

> "A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts." Franklin at 314. "A mandatory presumption may be either conclusive or rebuttable. A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption. A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted." Id. at fn 2.

The first part of Instruction 16, "willful concealment…**is** evidence of an intent to convert and defraud…" (emphasis added), directs the jury to find intent to defraud if the jury finds willful concealment. This language goes further than a presumption, but at a minimum contains a mandatory presumption, as it is "cast in the language of command." Id. at 316.

The second part of Instruction 16, "unless there is believable evidence to the contrary" contains the rebuttable portion of this mandatory presumption. This language is just another way of saying 'but the presumption may be rebutted' as the instruction used in Franklin stated. See id.

This language is similar to the instructions declared unconstitutional in Franklin, which stated: "[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. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted." Id. at 311.

"The…constitutional question is whether a reasonable juror could have understood the [instruction] as a mandatory presumption

that shifted to the defendant the burden of persuasion on the element of intent once the State had proved the predicate acts." Id. at 316. A reasonable juror would have understood Instruction 16 in exactly this manner, as it directed the jurors to find evidence of an intent to defraud once the state proved willful concealment, and told the jurors they must do so unless the defendant convinced them otherwise. This is exactly what the Supreme Court cautions against in Franklin:

> When combined with the immediately preceding mandatory language, the instruction that the presumptions "may be rebutted" could reasonably be read as telling the jury that it was required to infer intent to kill as the natural and probable consequence of the act of firing the gun unless the defendant persuaded the jury that such an inference was unwarranted. The very statement that the presumption "may be rebutted" could have indicated to a reasonable juror that the defendant bore an affirmative burden of persuasion once the State proved the underlying act giving rise to the presumption. Standing alone, the challenged language undeniably created an unconstitutional burden-shifting presumption with respect to the element of intent.
>
> Id. at 318.

At trial, the Commonwealth argued that Jury Instruction 16 was appropriate because it tracked the language of the concealment statute, which states in the last sentence: "The willful concealment of goods or merchandise of any store or other

mercantile establishment, while 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." Virginia Code § 18.2-103.

To the extent that the Commonwealth's argument is correct, the statute must be interpreted in a constitutional manner: "…a statute will be construed in such a manner as to avoid a constitutional question wherever this is possible." Yap v. Commonwealth, 49 Va. App. 622, 630, 643 S.E.2d 523, 526 (2007). In Yap, the Court of Appeals considered whether the plain language of Virginia Code §18.2-269, regarding blood alcohol levels ("…shall give rise to a rebuttable presumption….") renders the statute unconstitutional. See id. at 635, 643 S.E.2d at 529. The Court found that the statute was constitutional so long as it was interpreted as a permissive inference. See id. at 636, 643 S.E.2d at 530.

In any event, the trial court has an affirmative duty to properly instruct the jury. See Jimenez v. Commonwealth, 241 Va. 244, 250, 402 S.E.2d 678, 681 (1991) ("….when a principle of law

is vital to a defendant in a criminal case, a trial court has an affirmative duty properly to instruct a jury about the matter.")

In contrast to Jury Instruction 16, the defense proffered Jury Instruction O, which states: 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. JA 3. This language takes into account the holdings of Yap v. Commonwealth, 49 Va. App. 622, 643 S.E.2d 523 (2007) and Kelly v. Commonwealth, 8 Va. App. 359, 374, 382 S.E.2d 270, 278 (1989), both upholding the use of permissive inferences. The instruction in Kelly that was upheld stated: "…you may infer that every person intends the natural and probable consequences of his acts." See id. at 373, 382 S.E.2d at 278. This language is from Virginia Model Jury Instruction No. 2.600. See id.

"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." Franklin at 314. "A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury

that the suggested conclusion should be inferred based on the predicate facts proved. Such inferences do not necessarily implicate the concerns of Sandstrom. A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." Id. at 314-315.

Under Franklin, appellate review must also consider the context of the jury charge as a whole.

> Analysis must focus initially on the specific language challenged, but the inquiry does not end there. If a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on an element of an offense, the potentially offending words must be considered in the context of the charge as a whole. Other instructions might explain the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption.

Franklin at 315.

In Franklin, the State argued that the jury instructions regarding the presumption of innocence and the requirement that the State prove every element of the offense beyond a reasonable doubt was sufficient clarifying language. See id. at 319. However, the Franklin court rejected this proposition:

> As we explained in Sandstrom, general instructions on the State's burden of persuasion and the defendant's presumption of innocence are not "rhetorically inconsistent with a conclusive or burden-shifting presumption," because "[the] jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied." 442 U.S., at 518-519, n. 7. In light of the instructions on intent given in this case, a reasonable juror could thus have thought that, although intent must be proved beyond a reasonable doubt, proof of the firing of the gun and its ordinary consequences constituted proof of intent beyond a reasonable doubt unless the defendant persuaded the jury otherwise. Cf. Mullaney v. Wilbur, 421 U.S., at 703, n. 31. These general instructions as to the prosecution's burden and the defendant's presumption of innocence do not dissipate the error in the challenged portion of the instructions.

Franklin at 319-320.

Similarly, in this case, Instruction A, regarding the presumption of innocence and the burden of proof beyond a reasonable doubt (JA 4), Instruction B, regarding circumstantial evidence (JA 5), and Instruction M, the elements of the offense (JA 7), are insufficient to dissipate the error in Instruction 16. These instructions are general instructions, do not contradict Instruction 16, and, like in Franklin, a reasonable juror could have thought that the required proof beyond a reasonable doubt of intent comes from the willful concealment. See id. at 319. This would be a reasonable belief, as that is exactly what Instruction 16 tells jurors to find.

In sum, the Trial Court erred in giving Jury Instruction 16, because it contained a mandatory, rebuttable presumption which shifted the burden of persuasion to the defense, and thus violates due process. The defense's proffered Jury Instruction O should have been given because it interprets the concealment statute in a constitutional manner, contains a permissive inference, and comports with prior case law upholding permissive inferences.

CONCLUSION

For the reasons stated herein, Appellant Lindsey respectfully requests this Court to reverse the judgment of the Court of Appeals and the Trial Court, and remand the case to the Trial Court for a new trial, if the Commonwealth be so advised.

Respectfully Submitted,

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CERTIFICATE

I hereby certify that on the 11th day of April, 2016:

(1) A PDF version of this brief has been filed through VACES.

(2) Ten paper copies have been hand-delivered to:

Clerk of the Court, Ms. Patricia L. Harrington
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(3) A copy of the foregoing Opening Brief was delivered via email to Robert H. Anderson, Senior Assistant Attorney General, at oagcriminiallitigation@oag.state.va.us.

(4) I have complied with Rule 5:26(e).

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