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IN THE

Supreme Court of Virginia

RECORD NO. 151111

JAMES LINDSEY,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS OF VIRGINIA:

COMES NOW the Appellant, James Lindsey (hereinafter "Lindsey"), by counsel, and files his Reply Brief to this Court respectfully representing the following:

ARGUMENT IN REPLY

The Appellee argues that the jury instruction in the case of Dobson v. Commonwealth, 260 Va. 71, 531 S.E.2d 569 (2000), was held to be constitutional, and thus the instruction in this case should be, too. However, in Dobson, the instruction read: "[P]roof of the exclusive personal possession by the defendant of recently stolen goods is a circumstance from which you may reasonably infer that the defendant was the thief unless the defendant offers a reasonable account of possession consistent with innocence which the Commonwealth has failed to prove untrue." Id. at 74, 531 S.E.2d 571. This instruction specifically contains the language "you may…infer" which Instruction 16 in our case did not contain. This is a crucial distinction between a permissive inference and a mandatory presumption.

The Appellee also relies on Wilson v. Commonwealth, 225 Va. 33, 301 S.E.2d 1 (1983). In Wilson, the instruction is never set out in the

opinion; the court only states that it tracked the statutory language verbatim. See id. at 39, 301 S.E.2d at 4. Thus, it is difficult to compare our Instruction 16 with Wilson. However, the court's holding regarding presumptions interpreted as permissive inferences is correct. See id. The issue is that the language of the instruction must be both permissive and clearly contain an inference, such that a reasonable juror would interpret it as a permissive inference. It is difficult to see how a reasonable juror could interpret an instruction as a permissive inference if the juror is told he/she must find the fact he/she is told to find. To the extent Wilson ruled as such, it is the Appellant's position it was wrongly decided. In addition, Wilson was decided before Francis v. Franklin, 471 U.S. 307 (1985).

The Appellee also relies on Fitzgerald v. Commonwealth, 227 Va. 171, 313 S.E.2d 394 (1984) to support the constitutionality of Jury Instruction 16. However, the court in Fitzgerald only ruled upon the sufficiency of the evidence; the issue of the constitutionality of a jury instruction was never raised. See id. Fitzgerald never mentions Sandstrom v. Montana, 442 U.S. 510 (1979), and it was decided before Francis v. Franklin. See id. In addition, the opinion mentions the "inference" several times; the words "presumption" or "burden

shifting" are not contained anywhere in the opinion, making it not relevant to our assignment of error. See id.

The Appellee also cites to Bullock v. Commonwealth, 205 Va. 558, 138 S.E.2d 261 (1964) and Hodge v. Commonwealth, 217 Va. 338, 228 S.E.2d 692 (1976). These cases were both decided prior to Sandstrom v. Montana (decided in 1979) and Francis v. Franklin (decided in 1985). Appellee also cites to several cases decided after Sandstrom and Francis, and in each of those cases, courts upheld language including the term "infer" in jury instructions: Thompson v. Commonwealth, 279 Va. 131, 688 S.E.2d 220 (2010), Schmitt v. Commonwealth, 262 Va. 127, 547 S.E.2d 186 (2001), and Smith v. Commonwealth, 239 Va. 243, 389 S.E.2d 871 (1990). It is due to the holdings of these cases that led to the Defense's proffered Jury Instruction O, using the phrase "you may infer."

The Appellee's argument that the other jury instructions regarding the presumption of innocence and the requirement of proof beyond a reasonable doubt cure any defects in Instruction 16, is inconsistent with Sandstrom v. Montana, 442 U.S. 510 (1979) and Francis v. Franklin, 471 U.S. 307 (1985):

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.

Next, Appellee argues that the proper standard to apply in determining whether the jury applied a challenged jury instruction properly is a reasonable likelihood standard, citing Boyde v. California, 494 U.S. 370, 378-81 (1990). However, in Boyde, the issue was not whether the instruction shifted the burden to the defendant nor whether there was a presumption versus an inference; rather, the issue was whether the instruction was ambiguous and therefore subject to an erroneous interpretation. See id. at 380. The Boyde court used an Eighth Amendment analysis to decide this question, not a Fourteenth Amendment due process analysis. As the issues are different, this Court should not use the standard from Boyde, but rather the standard from Francis v. Franklin, which is

whether a reasonable juror could have understood the instruction as creating a mandatory presumption that shifted the burden of persuasion to the defendant. See Francis at 315.

Finally, Appellee argues that any error in granting Jury Instruction 16 was harmless beyond a reasonable doubt. Appellee references Lindsey's flight from the scene as additional evidence of his guilt; however, he remained on scene after the allegation of theft; his flight was only after the allegation of assault and battery against the store employee. See JA 85-92. But more importantly, Lindsey's defense was that he did not conceal the items and did not have an intent to steal the items. See JA 141-145. Intent was the primary focus of the defense and the primary issue in the case. The court in Francis v. Franklin stated that they need not decided whether error can ever be harmless, because the Court of Appeals had conducted a careful harmless error analysis. See id. at 325. But, the Francis court cited with approval the language from the Court of Appeals' analysis: "Franklin's only defense was that he did not have the requisite intent to kill. The facts did not overwhelmingly preclude the defense….Because intent was plainly at issue in this case, and was not overwhelmingly proved by the evidence, we cannot find the error

to be harmless." Id. at 325-326. Similarly in this case, intent was plainly at issue, and was not overwhelmingly proved by the evidence. Therefore, the error in this case was not harmless beyond a reasonable doubt.

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 18th day of May, 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
Supreme Court of Virginia
100 North Ninth Street
5th Floor
Richmond, VA 23219-2321.

(3) A copy of the foregoing Reply 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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