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IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 160879

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

LASHANT LEONARDO WHITE,

Appellee.

BRIEF OF THE APPELLANT

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Appellee.

PETITION FOR APPEAL

STATEMENT OF THE CASE

After a January 29, 2015, bench trial, the Circuit Court for the City of Norfolk found the defendant, Lashant Leonardo White, guilty of possessing heroin with the intent to distribute as a third or subsequent offense and of possessing marijuana, in violation of Virginia Code §§ 18.2-248 and 18.2-250.1, respectively. By final order dated April 29, 2015, the trial court sentenced him to twenty years' and thirty days' imprisonment, with ten years suspended. (App. 75).

White appealed that judgment, assigning the following error in the Court of Appeals of Virginia:

> I. The Trial Court Erred in Denying Appellant's Motion to Suppress based on the Fourth Amendment's Prohibition against Unreasonable Search and Seizure.

Specifically, White divided his assignment of error into three subparts:

> A. Trial Court Erred in Finding that Appellant's Encounter With Police was a Consensual Encounter or a Lawful Patdown Pursuant to "Terry v. Ohio."
>
> B. Trial Court Erred in Finding that Appellant's Physical Resistance of Patdown During a Consensual Encounter Was Not a Withdrawal of His Consent.
>
> C. Trial Court Erred in Finding that a Warrantless Search of Appellant's Bag [R]ecovered in A Hotel Room was Lawful.

In a published decision rendered May 10, 2016, the Court of Appeals affirmed in part and reversed in part, holding that the trial court erred in admitting the digital scale, empty capsules, and ziplock bags recovered from a bag in the hotel room. *White v. Commonwealth*, 66 Va. App. 333, 366-67, 785 S.E.2d 239, 256 (2016). This Court granted the Commonwealth's petition for appeal by order dated October 28, 2016.

ASSIGNMENTS OF ERROR

I. **The Court of Appeals erred in finding that the defendant had a reasonable expectation of privacy in the bag and that his girlfriend did not have apparent authority to consent to its search.** (Preserved by the Commonwealth's Court of Appeals Brief at pp. 14-18).

II. **The Court of Appeals erred in reversing the possession with intent to distribute conviction because, given the overwhelming evidence against him, any error in admitting the evidence from the bag was harmless.** (Preserved by the Commonwealth's Court of Appeals Brief at pp. 18-19).

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS BELOW

The Suppression Hearing

Investigators Glenn Gardiola and Leldon Sapp of the Norfolk Police Department's Vice and Narcotics Division testified at a suppression hearing held on December 1, 2014. On October 18, 2013, they had gone with Norfolk Investigator McCarthy to the Motel 6 at 853 North Military Highway, Norfolk, after 11 p.m. (App. 39-41, 59, 62). They were dressed in plainclothes but were displaying police vests and badges. (App. 47, 73). The three investigators went to the motel in response to a citizen complaint, called into

their office earlier that evening,[1] that narcotics activity was occurring at the motel. (App. 40, 61). The caller did not provide the name or description of any suspect. (App. 45-46, 72). Investigator Gardiola testified that in his nine years in the narcotics division, however, his office had received "numerous" civilian complaints of drug dealing at the motel, and he had personally made previous arrests there; Investigator Sapp also had made drug and prostitution arrests there. (App. 58, 61).

When they first arrived at the motel, the investigators saw White standing in the motel's driveway between its two buildings. (App. 62). The investigators then watched a car enter and circle the lot; when the driver stopped, White approached to speak with her. (App. 40-41, 72). While the police did not see White and the driver exchange anything, Investigator Sapp testified that the interaction looked like a drug transaction. (App. 74). As the police approached, White moved away from the car, and the police noticed money – later determined to be $35 – in his left hand and a cellphone in his right hand. (App. 58-59, 63). Investigators Gardiola and Sapp spoke to White

[1] Investigator Gardiola testified that he assumed the call came in between 4:30 and 5 p.m. and that he learned of it from Sapp. (App. 44-45). Investigator Sapp testified that he received the call at approximately 11 p.m. (H.T. 60, 71).

from an arm's length away, and Investigator McCarthy approached the driver. (App. 41, 63, 73).

Investigator Gardiola identified himself as a Norfolk police officer and asked to speak with White. (App. 42, 64). When White agreed, Investigator Gardiola explained the phone complaint he was investigating. (App. 42, 73). Investigator Gardiola asked White for his identification, which White provided, and Investigator Gardiola asked dispatch to check for outstanding warrants. (App. 42-43, 73). The dispatcher advised Investigator Gardiola that White was "in the system" but had no active warrants. (App. 42, 50, 73).

Investigator Sapp then asked White "for consent to search" him, and White agreed. (App. 43, 51, 64). In White's left sock, Investigator Sapp felt what he believed, based on his expertise and experience, to be a bag of heroin or cocaine. (App. 65-68, 77-78). When Investigator Sapp tried to take the drugs out of White's sock, White "became combative," "made a shoving motion with his leg and attempted to flee the scene," and "tried to take his hand and stop" Investigator Sapp. (App. 53-54, 69, 75). After a brief struggle, Investigators Gardiola and Sapp retrieved the drugs and placed White in handcuffs. (App. 54, 56-57, 70, 76).

After his arrest, White asked the investigators to notify his girlfriend, Tanya,[2] in Room 219. (App. 87). Investigator Sapp went to Room 219, knocked, explained what had happened, and asked the occupant for her consent to search the room. (App. 87, 92-93). She appeared to have control of the room, and she agreed to a search. (App. 87-88, 92). She told Investigator Sapp that a plastic bag[3] on the bed belonged to White, and she did not object to Sapp's looking inside the bag. (App. 87, 93). In it, Sapp found a digital scale, multiple plastic sandwich bags, and a bag of 200 empty capsules. (App. 88).

After hearing the evidence, the court asked the parties to submit any relevant authorities. (App. 95). It subsequently denied the motion to suppress without explaining its reasoning. (App. 115, 160).

The Trial

At a bench trial held on February 23, 2015, Investigator Sapp testified as the sole witness. He reiterated the circumstances surrounding the stop of

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[2] Tanya did not testify, nor does the record identify her last name. Investigator Sapp testified that White identified her only as his girlfriend, Tanya. (App. 87).

[3] Although the Court of Appeals noted that, "nothing suggest[ed] that the bag was open or transparent," the bag was never described at the suppression hearing. Instead, Investigator Sapp testified that he found additional bags inside the bag that was on the bed. (App. 87-88). At trial, Sapp described it as "a grey plastic bag sitting on the bed." (App. 125).

White. He specified that he recovered three baggies of heroin and one baggie of marijuana from White's sock, as well as a total of $644 and two cell phones from White's person. (App. 124, 129). Sapp also recounted his trip to Room 219 to speak to White's girlfriend and the gray plastic bag sitting on the bed, inside which Sapp found a digital scale, 200 empty capsules, and ziplock bags. (App. 125-26).

After being qualified as an expert in the packaging, distribution, and sale of illegal street drugs, Investigator Sapp explained why the drugs recovered were inconsistent with personal use. (App. 129). The total weight of the drugs in the three baggies was 5.71 grams of raw heroin, packaged in three different weights: 1/8 ounce, 1 gram, and 1/2 gram. (App. 130). Most heroin users, Sapp explained, carry less than a gram on them at any given time, and they do not carry it separated into various weights. (App. 130). Also, White had thirty-one $20 bills, a $10 bill, two $5 bills, and four $1 bills, with each denomination in a separate pocket; in Sapp's experience, drug dealers keep their cash separated like that while conducting business. (App. 130-31). The two cellphones indicated a work phone and a personal phone. App. 131).

The largest baggie contained an "eight ball" of heroin, worth $350 to $400; the gram baggie's street value was $100 to $150; and the half-gram

would sell for $50 to $70. (App. 132). Because the heroin was raw, it could be diluted with a cutting agent to make three times as much powder. (App. 132-33). It could also be packaged into "caps," or individual capsules, containing 1/10 of a gram of heroin. (App. 133). Furthermore, White did not have any paraphernalia for using the heroin. (App. 138-39).

Investigator Sapp testified that the items recovered from the motel room corroborated that White's drugs were not for personal use. (App. 134). The scales could be used to weigh drugs, and packaging material could be used to "break down" the drugs for resale to "double your money." (App. 134).

After the Commonwealth rested, White rested without offering any evidence. (App. 146-47). The Court denied White's motion to strike and found him guilty. (App. 147, 153).

The Court of Appeals affirmed the trial court's refusal to suppress the evidence recovered from White but suppressed the evidence recovered from the motel room and remanded to the trial court. (App. 192, 199, 202-03).

ARGUMENT

Standard of Review

When a defendant contends that the evidence sought to be suppressed was obtained in violation of his Fourth Amendment rights, the

standard of review on appeal is *de novo*. *Glenn v. Commonwealth*, 275 Va. 123, 130, 654 S.E.2d 910, 913 (2008). In performing this review, this Court considers the evidence in the light most favorable to the Commonwealth and accords the Commonwealth the benefit of all inferences fairly deducible from the evidence. *Id.* The defendant has the burden to show that, considering the facts and their inferences in the light most favorable to the Commonwealth, the trial court's denial of his suppression motion was reversible error. *Id*.

In making that determination, the Court is bound by the trial court's factual findings unless they are plainly wrong or without evidentiary support, but it independently determines whether the Fourth Amendment's protections were violated. *Jones v. Commonwealth*, 279 Va. 665, 670, 691 S.E.2d 801, 803 (2010). The determination of whether a third party had apparent authority to consent to a search is a factual finding. *Illinois v. Rodriguez*, 497 U.S. 177, 188-89 (1990).

I. The Court of Appeals erred in finding that White had a reasonable expectation of privacy in the bag and that his girlfriend did not have apparent authority to consent to its search.

At White's request and direction, Investigator Sapp went alone to a motel room to notify White's girlfriend, Tanya, of his arrest. With her consent, Sapp searched the room, including a plastic bag that she identified as belonging to White. White's alleged ownership of the bag is irrelevant to the

reasonableness of the search because he had no reasonable expectation of privacy in the motel room or its contents and because Tanya had, at a minimum, joint access to it and the ability to consent to its search.

The Fourth Amendment of the United States Constitution condemns unreasonable searches and seizures. *Kyer v. Commonwealth*, 45 Va. App. 473, 480, 612 S.E.2d 213, 217 (2005) (*en banc*). In determining reasonableness, courts have "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Robinson v. Commonwealth*, 273 Va. 26, 39, 639 S.E.2d 217, 225 (2007) (quoting *Alvarez v. Montgomery Cty.*, 147 F.3d 354, 358 (4th Cir. 2001)).

A. White did not establish a reasonable expectation of privacy in the bag.

A defendant who moves to suppress evidence has the burden to prove that, based on the totality of the circumstances, he "objectively had a reasonable expectation of privacy at the time and place of the disputed search." *Commonwealth v. Ealy*, 12 Va. App. 744, 751, 407 S.E.2d 681, 685 (1991) (internal quotation marks and citation omitted); *accord Sharpe v. Commonwealth*, 44 Va. App. 448, 455, 605 S.E.2d 346, 349 (2004). Here, White conceded that he had no reasonable expectation of privacy in the

motel room.[4] (App. at 83, 193). *White*, 66 Va. App. at 357, 785 S.E.2d at 251. The Court of Appeals erred in finding that White established a reasonable expectation of privacy in the plastic bag Tanya identified as his.

In so deciding, the court relied upon *dicta* in *Rakas v. Illinois*, 439 U.S. 129 (1978), that stated that its decision should not be interpreted as denying lawful visitors present at a home during a search the right to contest seizure of their own property. *Id.* The actual holding in *Rakas* was a refusal to grant standing to challenge a search of car passengers where they demonstrated neither had ownership rights in the car nor asserted property rights in the seized property. *Rakas*, 439 U.S. at 129.

Rakas does not, however, stand for the proposition that merely claiming ownership of an item entitles a defendant to challenge a search regardless of his expectation of privacy in the location of the item. *Cf. Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980); *accord United States v. Howard*, 413 F. App'x 559 , 561 (4th Cir. 2005) (defendant had no

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[4] To establish a reasonable expectation of privacy in a motel room, a defendant must "demonstrate that he was the registered occupant of the room or that he was sharing it with the person to whom the room was registered." *Sharpe*, 44 Va. App. at 456, 605 S.E.2d at 350 (internal citation and quotation marks omitted). Here, White demonstrated only that his girlfriend was in a motel room. He did not demonstrate that the room was registered to her, that he was sharing the room, that he had luggage in the room, or that he had ever been inside the room. The only item in the room that was linked in any way to White was "a grey plastic bag." (App. 125).

reasonable expectation of privacy in bookbag he left in another's car); *United States v. Manbeck*, 744 F.2d 360, 364 (4th Cir. 1984) ("As *Rawlings* made clear, ownership of the item seized is, by itself, insufficient to confer a privacy interest in the area searched."). Ownership is, "at most," a factor to be considered.[5] *Manbeck*, 744 at 364.

In determining whether White has a reasonable expectation of privacy in property held by Tanya, this Court should also consider whether White established a right or took precautions to exclude others from his property. *United States v. Castellanos*, 716 F.3d 828, 833-34 (4th Cir. 2013).

The burden for establishing a reasonable expectation of privacy fell wholly on White. *Rawlings*, 448 U.S. at 104. He did not, however, even establish sole ownership of the bag, relying merely on hearsay testimony that Tanya said it belonged to him.[6] (App. 87, 91). Despite White's failure to meet

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[5] This is, indeed, the holding of the Connecticut case relied upon by the Court of Appeals. *See White*, 66 Va. App. 357, 785 S.E.2d at 251-52 (citing *State v. Callari*, 478 A.2d 592, 596 (Conn. 1984)). While the *Callari* court found that the defendant had a reasonable expectation of privacy in a closed suitcase despite not having a reasonable expectation of privacy in the home that housed his suitcase, Callari – unlike White – was staying in the home as a guest.

[6] In placing so much reliance on Tanya's statement, the Court of Appeals ignored the equally reasonable inference that Tanya and White jointly owned the drug paraphernalia but that she disavowed ownership, knowing that he was already arrested and hoping that she would not be. At least the capsules appeared to be "just bought." (App. 144).

even this prerequisite, the Court of Appeals shifted the burden to the Commonwealth to establish that White did *not* have a reasonable expectation of privacy, as demonstrated by the court's finding that the record did not "indicate[] that the appellant disclaimed ownership of the bag or its contents." *White*, 66 Va. App. at 358, 785 S.E.2d at 252. Similarly, the court noted that "nothing suggests that the bag was open or transparent."[7] *Id.* Because it was White's burden to establish his reasonable expectation of privacy, the lack of evidence regarding whether he established ownership or whether he attempted to exclude others from the bag militates against White, not against the Commonwealth.

The Court of Appeals also made unsupported inferences in a light unfavorable to the Commonwealth, despite its being the prevailing party below. The court concluded that White "left the bag in the motel room with his girlfriend." *White*, 66 Va. App. at 358, 785 S.E.2d at 252. But, because White did not bear his burden below to establish his reasonable expectation of privacy in the bag, there is no evidence to support this inference. Similarly, the court stated that White "planned to reunite with his girlfriend after the drug transaction ended, as indicated by his request to the officers to go to the

[7] This statement is also unsupported by the record, as the description of a plastic bag as a bag that contained other bags certainly suggests that the bag was open.

room and notify her of his arrest." *Id.* To the contrary, White's request established only that he knew where his girlfriend was and wanted her to know that he had been arrested. Alternatively, the Court of Appeals' conclusions that White left the bag with Tanya and intended to reunite with her after the drug transaction ended support the Commonwealth's position, discussed further below, that Tanya had full access to and control over the bag and could and did consent to the search.

Finally, the Court of Appeals ignored that the location itself lowered reasonableness of White's expectation of privacy. The motel room was not a home, and there was no evidence that he – or Tanya – used it as a residence. Instead, the evidence indicated only that it was a location where some of the paraphernalia associated with his crimes was stored. Under similar circumstances, the Supreme Court of the United States has noted the diminished expectation of privacy in such a location. *See Minnesota v. Carter*, 525 U.S. 83 (1998). In *Carter*, the defendant was in an apartment, rented by another, solely to package illegal drugs for sale. *Id.* at 90. The court noted that as he was using the apartment commercially, as opposed to as a home, he had no legitimate expectation of privacy therein. *Id.* Similarly, White had no legitimate expectation of privacy in a motel room that, at most, he used to store additional drug packaging.

Accordingly, the Court of Appeals applied the wrong legal standard and made unreasonable findings of fact in determining that White had a reasonable expectation of privacy in the bag.

B. Tanya had joint access and apparent ability to consent to a search of the bag.

Even if White had a reasonable expectation of privacy in the bag, the Court of Appeals erred in finding that Tanya could not consent to the bag's search. As the motel room's sole occupant, Tanya had, at a minimum, apparent authority to consent to the search of a plastic bag sitting on one of the beds because she had full access to and control over the bag.

There is no question in this case that Tanya gave consent to search the motel room.[8] Implicit in Tanya's consent to search the motel room was consent to search any closed containers within it. *See Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (police could reasonably consider suspect's consent to search car to include consent to open closed container on floor of car); *Glenn*, 275 Va. at 131, 654 S.E.2d at 914 (quoting *United States v. Ross*,

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[8] "'Consent searches are part of the standard investigatory techniques of law enforcement agencies' and are 'a constitutionally permissible and wholly legitimate aspect of effective police activity.'" *Fernandez v. California,* __ U.S. __, __, 134 S. Ct. 1126, 1132 (2014) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973)). "As a general rule, 'a search authorized by consent is wholly valid.'" *Kyer*, 45 Va. App. at 483, 612 S.E.2d at 218 (quoting *Schneckloth*, 412 U.S. at 222).

456 U.S. 798, 820-21 (1982)), for the proposition that a "lawful search of fixed premises generally extends" to closed containers therein).

The Court of Appeals incorrectly found that Tanya's statement that White owned the bag made Investigator Sapp's search of the bag unreasonable. *White*, 66 Va. App. at 362, 785 S.E.2d at 254. This was an incorrect application of the law of third-party consent. "The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes . . . ." *United States v. Matlock*, 415 U.S. 164, 171 n. 7 (1974) (internal citations omitted); *accord Glenn*, 275 Va. at 132-33, 654 S.E.2d at 914 (third-party authority to consent to a search exists if "third party has either (1) mutual use of the property by virtue of joint access, or (2) control for most purposes").

Here, the bag was in Tanya's sole custody and control; there was no evidence that anyone but her transported it to the room. (App. 87-89, 91, 93). Her access to it was unlimited, as it was an unsealed bag and located on the bed. *See Glenn*, 275 Va. at 133-33, 654 S.E.2d at 915. Accordingly, she had both mutual use by virtue of her joint access and control over the bag's contents: either factor was sufficient to give her authority to consent to the

bag's search. *Glenn*, 275 Va. at 132-33, 654 S.E.2d at 914*; see also Frazier v. Cupp*, 394 U.S. 731, 740 (1959) (where defendant left duffel bag at cousin's home and cousin jointly used duffel, cousin had authority to consent to its search).

At the very least, Tanya had apparent authority to consent to a search of the bag. Investigator Sapp was not required to have "positive knowledge" that Tanya had authority to consent to the bag's search. *Vaughn v. Commonwealth*, 53 Va. App. 435, 441, 672 S.E.2d 909, 912 (2009). While the Court of Appeals focused on the fact that Tanya stated that the bag belonged to White, it ignored the other factors found in *Glenn*. Nothing in this record showed that Tanya did not use the plastic bag. *See Glenn*, 275 Va. at 133, 654 S.E.2d at 915. Much like Glenn's backpack, the plastic bag "bore no indicia of ownership, evidenced no limitations on access, had no characteristics that reflected a use by reason of age or gender." *See id.* at 134, 654 S.E.2d at 915. Moreover, unlike Glenn's backpack, which was located in a home with many occupants, the plastic bag here was located in a place to which Tanya had sole access. *See id.* Although she indicated that the bag belonged to White, she did not object to its search or disclaim consent to search it. (App. 93).

Given that Tanya had at least as much access to the bag as White did, he could only vitiate her consent if he was present and objected to a search. *See Fernandez*, 134 S. Ct. at 1133. Here, White was not present. (App. 90-93). The fact that he was absent due to his arrest is irrelevant given that he was lawfully arrested. *See id.* at 1134. White, however, was not wholly without the opportunity to object to a search of the motel room. Investigator Sapp only went to Tanya's room because White asked him to do so. If White actually had believed he had an expectation of privacy in the motel room or its contents, he could have refrained from sending the police to Tanya's door or, at a minimum, objected to a potential search of the room or its contents. "[I]f the search is otherwise objectively reasonable, a potential objector who raises no objection to the search when he has the opportunity to do so 'loses out.'" *Glenn,* 275 Va. at 136, 654 S.E.2d at 917 (quoting *Georgia v. Randolph*, 547 U.S. 103, 121 (2006)); *accord Vaughn*, 53 Va. App. at 442, 672 S.E.2d at 913 (where defendant left bag inside car knowing driver had consented to search of car, he could not later object to its search).

Under these circumstances, the Court of Appeals erred in finding that Tanya's consent to search did not extend to the bag.

II. The Court of Appeals erred in reversing the possession with intent to distribute conviction because, given the overwhelming evidence against White, any error in admitting the evidence from the bag was harmless.

Even if this Court finds that the search of the plastic bag was unreasonable, the Court of Appeals erred in finding that the admission of the evidence was not harmless. In so finding, the court ignored the overwhelming evidence and did not apply the proper legal standard.

Because White asserted a violation of his Fourth Amendment rights, the harmlessness of the evidence must be established beyond a reasonable doubt. *Crawford v. Commonwealth,* 281 Va. 84, 101, 704 S.E.2d 107, 117 (2011). In making that determination, this Court should "consider a host of factors, including the importance of the tainted evidence in the prosecution's case, whether that evidence was cumulative, the presence or absence of evidence corroborating or contradicting the tainted evidence on material points, and the overall strength of the prosecution's case." *Lilly v. Commonwealth*, 258 Va. 548, 551, 523 S.E.2d 208, 209 (1999) (internal quotation marks and citations omitted).

The only items recovered from the motel room were a digital scale, plastic sandwich bags, and empty capsules, all evidence that corroborated White's intent to distribute the drugs recovered from his sock. (App. 88).

Even without the motel room evidence, however, the evidence the police recovered from White's sock overwhelmingly established his intent to distribute heroin.

The trial court heard expert testimony that the quantity of drugs recovered from White was inconsistent with personal use. (App. 129). White had nearly six grams of raw heroin, worth at least $500 and packaged in three different weights consistent with quantities of drugs routinely sold. (App. 130, 132). He kept his money – over $600 – in separate pockets based on denomination, consistent with how drug dealers separate their cash while conducting their illicit business. (App. 130-31). He had two cell phones, but no paraphernalia for using the drugs. (App. 131, 138-39). These factors all indicate White's intent to distribute the heroin, rather than to use it himself. *See, e.g.*, *Williams v. Commonwealth*, 278 Va. 190, 194, 677 S.E.2d 280, 282 (2009) (quantity and value of drugs was inconsistent with personal use and packaging was consistent with sale); *McCain I*, 261 Va. at 493, 545 S.E.2d at 547 (packaging of drugs and absence of paraphernalia for use indicated intent to distribute); *Welshman v. Commonwealth*, 28 Va. App. 20, 37, 502 S.E.2d 122, 130 (1998) (*en banc*) (drugs accompanied by specific denominations of money indicated intent to distribute); *Gregory v. Commonwealth*, 22 Va. App. 100, 110, 468 S.E.2d 117, 122 (1996) (3.4

grams of cocaine consistent with distribution, not personal use). Moreover, the police saw White leaning into a woman's car at night in an apparent drug transaction. *Cf. Jones*, 279 Va. at 674, 691 S.E.2d at 806. While the scales and packaging further supported Investigator Sapp's expert opinion that White was distributing heroin, his opinion was fully supported before he knocked on Tanya's door.

The Court of Appeals acknowledged that the evidence of White's attempt to distribute was "strong even without the additional evidence of distribution found in the bag in the motel room." *White,* 66 Va. App. at 365-66, 785 S.E.2d at 256. Despite this, it found that it could not find the evidence harmless because the judge stated that she was finding White guilty after considering "the combination or the accumulation of all the various factors." *Id.* at 366, 785 S.E.2d at 256 (citing App. 152).

But the proper standard is not whether the trial court may have considered the wrongfully admitted evidence. As the Court of Appeals properly noted, the issue is whether the verdict would have been the same without the error. *Id.* at 365, 785 S.E.2d at 255-56 (citing *Cairns v. Commonwealth*, 40 Va. App. 271, 286, 579 S.E.2d 340, 347 (2003)). That inquiry required the court to "evaluate the effect the error may have had on how the finder of fact resolved the contested issues." *Lavinder v.*

Commonwealth, 12 Va. App. 1003, 1007, 407 S.E.2d 910, 912 (1991) (*en banc*). Doing so did not usurp the factfinder's province, because the other evidence was so overwhelming that there was no likelihood of an acquittal even without the evidence from the bag. Courts routinely perform this precise analysis. *See, e.g.*, *Foltz v. Commonwealth*, 284 Va. 467, 473, 732 S.E.2d 4, 8 (2012) (as victim's testimony was "clear and specific" and contested evidence did not go to defendant's specific intent, admission was harmless beyond a reasonable doubt); *Dearing v. Commonwealth*, 260 Va. 671, 674, 536 S.E.2d 903, 905 (2000) ("While it is true that the challenged testimony was incriminating, this testimony was merely cumulative . . . .")

CONCLUSION

For the foregoing reasons, the Court should reverse the Court of Appeals' holding and affirm the judgment of the Circuit Court of the City of Norfolk.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On December 6, 2016, the required number of copies of this brief and appendix were hand-delivered and e-mailed to the Clerk of this Court and mailed and emailed to counsel for the appellee, Daymen Robinson, Esq., VSB No. 66708, Law Office of Daymen W.X. Robinson, Janaf Office Building, 5900 E. Virginia Beach Blvd., Suite 416, Norfolk, Virginia, 23502, (757) 200-0578 (phone), (757) 228-5194 (fax), daymenrobinson@DWXRlaw.com. In accordance with Rule 5:6, I certify that this document contains 5,640 words, in compliance with Rules 5:26(b) and 5:28.

The Commonwealth desires to present oral argument in this case.

Victoria Johnson
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