In The

Supreme Court of Virginia

RECORD NO. 161013

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

JOSHUA CHARLES MOSELEY,

Appellee.

BRIEF OF APPELLEE

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SCV: Submitted on 02-17-2017 15:47:56 EST for filing on 02-17-2017

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IN THE SUPREME COURT OF VIRGINIA

COMMONWEALTH OF VIRGINIA

APPELLANT,

V. RECORD NO. 161013

JOSHUA CHARLES MOSELEY

APPELLEE.

OPENING BRIEF OF APPELLEE

TO: THE HONORABLE JUDGES OF THE SUPREME COURT OF VIRGINIA

STATEMENT OF THE CASE

This case arises from the Circuit Court of the City of Hampton, the Honorable William H. Shaw, III, presiding. Appellee pleaded not guilty to two counts of statutory burglary and two counts of grand larceny in violation of Virginia Code § 18.2-91 and § 18.2-95 (1950, as amended), respectively. A bench trial was held on November 5, 2013, and Appellee made a motion to strike at the conclusion of all the evidence. That motion was denied and Appellee was convicted as charged. On July 17, 2014, Appellee filed a motion to set aside the verdicts of guilt. That motion was argued on July 28, 2014, and was

denied by order of the Court dated August 26, 2014. On May 29, 2015, Appellee was sentenced on each burglary conviction to 10 years in prison with 7 years suspended, conditioned on indeterminate supervised probation and 10 years of good behavior. On each count of grand larceny, Appellee was sentenced to 10 years in prison with all of the time suspended, conditioned on 10 years of good behavior and indeterminate supervised probation. Appellee was also ordered to pay restitution to one of the victims in the amount of $4,216. Appellee timely noted his appeal to the Court of Appeals of Virginia on June 1, 2015. On June 7, 2016 the Court of Appeals reversed the convictions and dismissed the indictments, finding the evidence insufficient for a finding of guilt. The Commonwealth appealed that decision and their petition was granted by this Court on December 13, 2016.

ASSIGNMENT OF ERROR

The Court of Appeals erred in holding that the evidence was insufficient to support Moseley's burglary and larceny convictions because the Court of Appeals improperly applied the standard of review, considered each piece of evidence in isolation, relied on unsupported hypotheses of innocence reasonably rejected by the trial court, and refused to consider affirmative evidence of Moseley's guilt.

STATEMENT OF FACTS

On June 3, 2013, the home of Mary Ann and John Winsley was burglarized sometime between noon and 5:15 p.m. (Joint Appendix, pg. 12-13, 27). Entry to the home appeared to have been made through the garage and various items in the home were disturbed. (Id. at 28). Many items of jewelry and rare currency were missing. (Id. at 14-15). Ultimately, the amount of the loss to the Winsley's was determined to be $4,216. (Id. at 152). On June 3, 2013, at approximately 3:00 p.m., Captain Susan Canny of the Hampton Police Department, was off duty and was returning to her home which is located near to the Winsley's home. (Id. at 31-32). She was driving her vehicle and turned too wide around a corner and came into the path of another vehicle being driven away from the vicinity of the Winsley's home. (Id. at 32-33). Captain Canny did not describe the vehicle she saw but she did identify Appellee as the driver of the vehicle. (Id.) Captain Canny only had a few seconds to observe the driver of the other vehicle. (Id. at 37).

On June 17, 2013, the home of Jonathan Ellis was burglarized some time between 9:30 a.m. and 3:30 p.m. (Id. at 40-41, 45). Entry to the home was apparently made through a closed, but unlocked, rear

patio door. (Id. at 42). When Mr. Ellis arrived home at approximately 3:30 p.m., personal items in the house had been disturbed and multiple items of jewelry were missing. (Id. at 46). Ultimately the value of the items taken was estimated by Mr. Ellis at approximately $2,000 to $3,000; however, all of his missing property was returned to him by the police. (Id. at 49).

On June 17, 2013, Officer Rausch with the Hampton Police Department was responding to a call for assistance of another possible burglary in the City of Hampton. (Id. at 52). He observed Appellee walking on East Little Back River Road and he made contact with Appellee and ultimately placed him under arrest. (Id. at 52-53). Appellee was wearing attire which was consistent with exercise clothes, such as athletic shoes, shorts and a workout shirt. (Id. at 54). Appellee also had a pair of knit gloves in his pocket which he identified to the officer as his work out gloves. (Id. at 53). The time of Officer Rausch's encounter with Appellee is not revealed in the record.

At 10:30 p.m. on June 17, 2013, Robin Shuffler, a tow truck driver with Pop's Towing, responded to Willow Oaks Apartments to tow a white 1990 Crown Victoria. (Id. at 62, 65). The police were on scene at

the apartment complex when Mr. Shuffler arrived. (Id. at 65). When Mr. Shuffler approached the car, he noticed that all four windows were down and the keys were in the car. (Id. at 64, 65). After Mr. Shuffler towed the vehicle back to the lot, he noticed some money in the console so he decided to inventory its contents. (Id. at 63). He then discovered some suspected marijuana and a bag of jewelry so Mr. Shuffler stopped the inventory, secured the vehicle and the police were alerted the next day. (Id. 63-64).

The next day, on June 18, 2013, Hampton Police Detective Erik Rummel responded to the tow lot to execute a search warrant on the vehicle. (Id. at 68-69). When searching the center console, he located a small maroon box that contained suspected marijuana and underneath that box he also found a Virginia state identification card and Portsmouth library card bearing Appellee's name. (Id. at 69-70). Detective Rummel also found a Virginia power bill in the glove box with Appellee's name on it. (Id. at 70, 112). The power bill was dated March 27, 2013. (Id. at 112). No contraband or stolen property was recovered from the glove box. (Id. at 73). The car was also determined to contain the property that was missing from the Ellis' home and some of the

property that was missing from the Winsley's home. (Id. at 71-73). Upon further questioning about the relative location of items found in the center console, Detective Rummel said the maroon box was on top, the bag of jewelry was underneath, and next to that were the two cards with Appellee's name. (Id. at 73). The detective further testified that he did not document in his report where the identification cards were located in relation to the bag of jewelry. (Id. at 74). Upon even further questioning from the trial court, Detective Rummel described the center console as "jumbled and messy." (Id. at 75). There was also some stolen currency in the center console, as well as a phone and some other papers which were apparently not recovered. (Id. at 75-76). In response to the question from the trial court, whether the items from Commonwealth's Exhibit 12 were "all mingled together or separated or what?", the Detective responded, "They were all just kind of mingled together." (Id. at 76). Detective Rummel also testified that the vehicle was registered through DMV to someone named Kelton Adams-Elkins. (Id. at 75).

Melissa Cook, a property manager at Hampton Creek Apartments, testified that she was familiar with Appellee and that she regularly saw

him driving a white Chevy Impala. (Id. at 58-59). Upon being shown a picture of the white Crown Victoria towed by Mr. Shuffler, Ms. Cook actually identified that as the vehicle which she had seen Appellee drive before. (Id. at 59). Ms. Cook was aware that Appellee stayed on her property for a several month period but she could never say when that period of time was. (Id. at 59-61). The Commonwealth attempted to elicit testimony from her the white Crown Victoria was towed from her property on June 17, 2013; however, she never confirmed that occurred. (Id. at 59-60). In fact, the vehicle was towed from a completely different apartment complex on that day according to Mr. Shuffler. (Id. at 62). The Commonwealth attempted to show some kind of relative distance between the two complexes and was unable to do so. (Id. at 67).

Since there was no direct evidence of Appellee's involvements in these crimes, the only way the Commonwealth could establish guilt was through the use of the permissible inference that a person in possession of recently stolen property, without sufficient explanation, can be found to be the thief and the burglar. (Id. at 83-84). Appellee argued vigorously at the conclusion of the trial that the Commonwealth failed to establish he was in possession, exclusive or otherwise, of the recently

stolen property from the Winsley and Ellis homes. (Id. at 84-88). The trial court rejected that argument and found Appellee guilty. (Id. at 89). After some delay in the proceedings, Appellee submitted a written motion to set aside the verdicts of guilt and submitted additional case law on the topic. (Id. at 115-129). The issues raised in the written motion and at argument were again focused on the ways in which the Commonwealth did not establish Appellee was in exclusive possession of the stolen property. The trial court denied the motion to set aside the verdicts and proceeded to sentencing of Appellee on all four charges. (Id. at 148).

ARGUMENT

The Court of Appeals erred in holding that the evidence was insufficient to support Moseley's burglary and larceny convictions because the Court of Appeals improperly applied the standard of review, considered each piece of evidence in isolation, relied on unsupported hypotheses of innocence reasonably rejected by the trial court, and refused to consider affirmative evidence of Moseley's guilt.

I. Standard of Review

On review of a challenge to the sufficiency of the evidence, the reviewing court must "presume the judgment of the trial court to be correct." *Kelly v. Commonwealth*, 41 Va. App. 250, 257, 584 S.E.2d 444,

447 (2003) (*en banc*) (citations omitted). However, when the trial court's decision is "plainly wrong or without evidence" to support it, it shall be reversed. *Id*. The reviewing court does not "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318-19, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979) (emphasis in original and citation omitted). It must instead determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Kelly*, 41 Va. App. at 257, 584 S.E.2d at 447 (quoting *Jackson*, 443 U.S. at 319 (emphasis in original)). The evidence is reviewed in a light most favorable to the prevailing party. *Smith v. Commonwealth*, 282 Va. 449, 453, 718 S.E.2d 452 (2011). The judgment of the trial is court is presumed to be correct and will only be set aside if it is plainly wrong or without supporting evidence. *Viney v. Commonwealth*, 269 Va. 296, 299, 609 S.E.2d 26 (2005). In order to "justify conviction of a crime, it is not sufficient to create a suspicion or probability of guilt, but the evidence must establish the guilt of an accused beyond a reasonable doubt." *Cameron v. Commonwealth*, 211 Va. 108, 110, 175 S.E.2d 275, 276 (1970). The Commonwealth gets "'the

benefit of all inferences fairly deducible from the evidence.'" *Brooks v. Commonwealth*, 282 Va. 90, 95, 712 S.E.2d 464, 466 (2011) (internal citation omitted). However, "[i]n order for inferences to amount to evidence they must be inferences based on facts that are proved, and not inferences based on other inferences." *Smith v. Commonwealth*, 185 Va. 800, 819, 40 S.E.2d 273, 282 (1946).

II. Larceny and Burglary Inferences

The Court of Appeals determined that the inferences resulting from the unexplained possession of recently stolen items do not apply in this case because the Appellee was never in possession of the items in question. *Moseley v. Commonwealth*, 2016 Va. App. LEXIS 182, at *16. The Commonwealth does not challenge the Court of Appeals determination that the inference does not apply and Appellee agrees.

It is well established the "unexplained possession of recently stolen goods permits the fact finder to infer that the possessor is the thief." *Archer v. Commonwealth*, 26 Va. App. 1, 13, 492 S.E.2d 826, 832 (1997). If the theft occurs in the course of a breaking and entering, the larceny inference may also establish guilt of burglary. *Fout v. Commonwealth*, 199 Va. 184, 98 S.E.2d 817 (1957). However, for the

larceny inference to arise, the Commonwealth must establish that the accused was in exclusive possession of property recently stolen. *Best v. Commonwealth*, 222 Va. 387, 389, 282 S.E.2d 16 (1981). This requires a showing that the accused was exercising dominion and control over the stolen property. *Id.*; *see also Nelson v. Commonwealth*, 12 Va. App. 268, 271, 403 S.E.2d 384 (1991). The Virginia Supreme Court has "repeatedly held that the presumption does not arise when the evidence merely reveals that the stolen property was found in a place to which several people, including the accused, had access." *Best*, 222 Va. at 389 (citing *Leebrick v. Commonwealth*, 198 Va. 365, 367, 94 S.E.2d 212, 214 (1956); *Castle v. Commonwealth*, 196 Va. 222, 227, 83 S.E.2d 360, 364 (1954); *Tyler v. Commonwealth*, 120 Va. 868, 871, 91 S.E. 171, 172 (1917)).

When contraband is found in a vehicle, it is necessary for the Commonwealth to show not only that the accused exercised dominion and control over the vehicle but also that the accused had knowledge of the "presence, nature and character of the contraband *at the time* of such ownership and occupancy." *Burchette v. Commonwealth*, 15 Va. App. 432,435, 425 S.E.2d 81 (1992) (emphasis added). Of course,

ownership or occupancy of a vehicle is never enough by itself to prove knowing possession of contraband. *Id.* Additionally, mere presence inside a vehicle is insufficient to prove the accused exercised dominion and control over a vehicle or its contents. *See Nelson v. Commonwealth*, 12 Va. App. 268, 403 S.E.2d 384 (1991); *Reese v. Commonwealth*, 230 Va. 172, 335 S.E.2d 266 (1985).

With these well-established principles in mind, and even taking the evidence in the record in a light most favorable to the Commonwealth, it is clear the Commonwealth did not establish that Appellee was in possession of the stolen property found in the white Crown Victoria which also contained items bearing Appellee's name. The evidence does nothing to assist the Commonwealth establish that Appellee exercised dominion and control over the contents of the vehicle *at the time* the stolen property was inside the vehicle. It merely shows that at one time, Appellee occupied the vehicle.

It is axiomatic that ownership or occupancy of a vehicle is not sufficient by itself to prove possession of contraband inside a vehicle. In this case, there is *neither* ownership nor occupancy of this Crown Victoria. With respect to ownership, the car was registered to a person

named Kelton Adams-Elkins. With respect to occupancy, Appellee was arrested on June 17, 2013, but not in the car. The record does not establish where Appellee was at the time of his arrest or his proximity to the car when he was arrested, or at any point prior to his arrest. The record does not establish what time he was arrested. The record does show us the car was towed at 10:30 p.m. on June 17, 2013, at an apartment complex parking lot with all four of its windows down and the keys inside of the vehicle. The police were apparently already near the car when the tow truck driver arrived, but we do not know when the police arrived or what role they played in investigating the car on June 17th. The evidence failed to establish any time or space connections between Appellee and the stolen property found in this car.

This Court's reasoning in *Burchette v. Commonwealth*, 15 Va. App. 432, 425 S.E.2d 81 (1992) is particularly applicable to this case. Although *Burchette* was dealing with the presence of drugs in a vehicle, the issues of possession remain the same. In *Burchette*, the police found marijuana between the driver's seat and console of a vehicle that Burchette owned. Id. at 434. The police also found a gun and Burchette's wallet in the glove compartment. *Id.* at 435. A cell phone

was on the console and a telephone bill bearing Burchette's name was also in the car. *Id.* More marijuana was found under the rear seat and in the trunk. *Id.* The vehicle was locked and parked in front of Burchette's house. *Id.* at 434. The police obtained a search warrant for the car after seeing the suspected marijuana through the passenger window. *Id.* Additionally, there was evidence that Burchette had walked past that car on his way to his other car that same day. *Id.* at 435. In reversing his conviction, the Court stated the

> Commonwealth presented no evidence from which one reasonably could infer that Burchette occupied the vehicle or had exercised dominion over it while the marijuana was present in it. The evidence failed to show either when Burchette may have used or occupied the vehicle or when or for how long the drugs or paraphernalia had been in it. The evidence failed to show that Burchette was the exclusive or primary operator of the vehicle, or that he possessed a set of keys to the vehicle, or when or by whom the vehicle had been most recently operated or occupied. The circumstances were not such that one reasonably could infer, to the exclusion of other reasonable hypotheses, that Burchette, as the owner of the vehicle, knew of the presence, nature and character of the contraband that was found in it.

Id. at 435-36.

Later in the opinion, while specifically discussing the wallet and recently dated phone bill found in the car, the Court reemphasized those items

> [w]hile relevant . . . do not establish how recently Burchette may have used or occupied the vehicle or that he did so at a time when the drugs were present. The fact that some of Burchette's personal possessions were found in the vehicle during the search establishes, at most, that he had, at some point in time, been in the vehicle. That evidence does not establish that he had been in the vehicle when the contraband was present.

Id. at 437. Again, the *Burchette* case makes it very clear there must be some temporal connection between the occupancy of the vehicle and the presence of the contraband; a fact that was simply never established in this case.

As such, the Court of Appeals correctly concluded that the burglary and larceny inferences do not apply and the Commonwealth should not get the benefit of them when weighing the evidence in this case.

III. Weight of the Circumstantial Evidence

It is the position of the Commonwealth that, absent the larceny and burglary inferences, the weight of the circumstantial evidence alone is sufficient to survive review. The Appellee disagrees.

The Commonwealth argues that the Court of Appeals incorrectly considered the evidence as individual pieces instead of collectively; however, in order to craft an analysis of the value of circumstantial

evidence, each piece must be evaluated individually so that a conclusion can be drawn about the collective value. This was the approach taken by the Court of Appeals in their decision. The Court correctly set out the standard they were using to evaluate the circumstantial evidence, explicitly recognizing through their citation to *Finney v. Commonwealth*, 277 Va. 83, 671 S.E.2d 169 (2009) that they were not viewing these pieces of evidence in isolation. *Moseley*, 2016 Va. App. 182 at *16.

Similarly the Commonwealth's contention that the Court of Appeals erred by refusing to consider evidence of the Appellee's guilt is without merit and contrary to their position that the Court was viewing evidence piece by piece in isolation. By considering the evidence in isolation and weighing its value, the Court was obviously considering evidence of Appellee's potential guilt.

On June 3, 2013 it is undisputed that a burglary occurred between 12:00pm and 5:00pm at 5 Wilderness Road. Captain Canny testified at trial that she lives in the area of 5 Wilderness Road and that on June 3, 2013 at approximately 3:00pm she was headed home when she cut off another driver traveling the opposite direction. She initially testified

that the driver was exiting the cul-de-sac that she was entering, but later said that it "looked like" he was pulling off the curb in front of 5 Wilderness Road. Canny never stopped driving and observed the other driver for a few seconds at most. Weeks later, when she went to the police station to speak to detectives about an individual they had in custody suspected of burglary in the same general area, she had a "gut reaction" in which she identified the suspect, Appellee, as the person she had seen in the other car on June 3. It is unreasonable, based on the Appellee's presence in the roadway outside the location of a burglary to draw any further inferences about his involvement. In the same way that Captain Canny's presence at the same location at the same time does not create a reasonable inference that she may have been involved in the burglary, the Appellee's presence does not either.

Both the trial court and the Commonwealth make much of the Appellee's presence in a neighborhood where the burglaries occurred. Specifically, the Commonwealth suggests that *Black v. Commonwealth*, 222 Va. 838, 284 S.E.2d 608 (1981) should control based on its holding relating to unexplained presence at a crime scene. However, the facts in *Black* are quite different from this case. In *Black*, the defendant was

located on the porch of a home where an attempted burglary was committed. Additionally, he made a series of statements about his presence there that the factfinder was free to disbelieve. In our case, even in the light most favorable to the Commonwealth, no one can place the Appellee any closer than the roadway outside the home. Additionally, there were no statements made relating to why Appellee may have been there and therefore the trial court could not have determined them to be incredible.

Weeks later, on the 17th of July 2013, the Appellee was detained for being in the "area"[1] of a reported attempted burglary. There was a description given of a person seen in the area that matched the Appellee. The matching description cannot serve as an inference for anything beyond the fact that the Appellee, who was a person in the area, matched the description of a person in the area. There was no

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[1] The geographic locations of the different places testified to at trial is hazy at best. There is a Little Back River Road and an East Little Back River Road, but the record is absent of any information as to how close those two locations are together. There are some statements suggesting that 5 Wilderness Road, Beauregard Heights and 83 Forth Worth may be in the same area or neighborhood but further clarification does not exist. As such, no conclusions or inferences should be drawn from speculation about where these locations may be.

further report that the description was of someone involved in the attempted burglary or even how far away the Appellee was located from the potential crime scene.

There is also a great deal of attention paid by the Commonwealth to the fact that when detained, the Appellee was in possession of knit gloves that were similar to a type that might be used by grocery store employees moving things in freezers. It is the position of the Appellee that it is unnecessary to delve deep into an analysis of glove types because at no point is there an allegation that gloves were used in the alleged burglaries. There were fingerprints taken at one location but no testimony that there was any investigative conclusion that the burglar was wearing gloves. Possessing gloves, without anything more, regardless of what type they are or what season it is, cannot create any inference. The gloves should not be a factor in this Court's analysis.

Finally, there is the vehicle. A Crown Victoria containing items from the burglaries as well as personal items of the Appellee was located parked and with all four windows down. The Appellee's connection to the vehicle was uncertain. At best, the Commonwealth established that at some point in time, Appellee was inside the white

Crown Victoria. Based upon the date of the power bill bearing Appellee's name, he may have last been inside the vehicle on March 27, 2013, well before the crimes against the Winsley's and the Ellis' were committed. Accepting Melissa Cook's testimony, that she saw Appellee drive the Crown Victoria on a regular basis, certainly provides an explanation for why his personal items would have been inside the car. However, Ms. Cook's testimony was completely uncertain as to when she observed Appellee driving the vehicle. She could not even narrow it down to a range of months or even the year in which she made these observations. Even in the light most favorable to the Commonwealth, viewed in their totality, the circumstantial evidence in this case is insufficient. The Court of Appeals applied the correct standard of review, *Moseley*, 2016 Va. App. LEXIS 182 at *9, 10, and the Commonwealth's contention that they applied it incorrectly is mere speculation, unsupported by the Court's opinion.

The Commonwealth also alleges, as error, that the Court of Appeals considered hypotheses of innocence not presented by the defense at trial. That contention, and the five specific detailed hypotheses regarding specific facts as outlined in the Commonwealth's

brief, overcomplicates the issue. On a basic level, the hypotheses of innocence argued by defense counsel at trial was that: the Appellee was in the area of the burglaries for a purpose other than committing the crimes and that, although the Appellee had once driven the car regularly, someone else must have placed the stolen items in the vehicle and abandoned it in the parking lot. It is the position of the Appellee that this particular hypothesis of innocence was, and is still, reasonable, even given the facts and inferences afforded to the Commonwealth.

CONCLUSION

The Court of Appeals set out the proper standard for reviewing the sufficiency of the evidence, determined that the larceny and burglary inferences did not apply, examined the evidence in its totality and determined that the circumstantial evidence could not exclude a reasonable hypothesis of innocence and was not enough for a rational trier of fact to have found guilt beyond a reasonable doubt. As such, Appellee, Joshua Moseley, prays this Court affirm the decision of the Court of Appeals, reversing the convictions and dismissing the indictments.

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CERTIFICATE OF SERVICE

I, F. Daniel Mazzio, hereby certify that on this 17th day of February, 2017, I hand delivered ten copies of this Brief of Appellee with the Clerk of the Supreme Court and an electronic copy was filed, via VACES. On the same day, an electronic copy was sent, by email, to Christopher Schandevel, Assistant Attorney General, 202 North Ninth Street, Richmond, Virginia 23219, phone (804) 786-2071, oagcriminallitigation@oag.state.va.us.

Counsel was appointed for purposes of this appeal. The Appellee desires oral argument.

Additionally, I certify that this Brief is exactly 4,463 words in length (as counted by the word count feature of Microsoft Word), in compliance with Rule 5:26, and is 22 pages long.

F. Daniel Mazzio
Deputy Public Defender