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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 161013

COMMONWEALTH OF VIRGINIA,

***Appellant*,**

v.

JOSHUA CHARLES MOSELEY,

Appellee.

REPLY BRIEF FOR THE COMMONWEALTH

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ARGUMENT

I. The Court of Appeals and Moseley both state the correct standard of review. But correctly stating the standard of review is no substitute for properly applying it.

Moseley notes that the Court of Appeals "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 [the] pieces of evidence in isolation." (Appellee's Br. at 16.) Moseley insists that "each piece [of circumstantial evidence] must be evaluated individually so that a conclusion can be drawn about the collective value." (Appellee's Br. at 16.) But even a cursory reading of the Court of Appeals' opinion disproves Moseley's overly charitable interpretation of the panel's analysis.

Three separate times in the Court of Appeals' opinion, the panel examined an individual piece of evidence, deemed it "suspicious," and then held that the particular piece of evidence was not sufficient, by itself, to establish Moseley's guilt. Moseley v. Commonwealth, Record No. 0881-15-1, 2016 Va. App. LEXIS 182, at *20-21 (June 7, 2016).

First, the panel held that "[t]he presence of [Moseley's identification and library] cards and stolen items together in the same console, although suspicious, does not prove that [Moseley] stole the items, participated in their theft, saw the items, or was aware that they were stolen." Id. at *20. Second, the panel held that Moseley's presence outside the Winsleys' home, along with his presence in the area of the attempted third burglary on the day that crime occurred, "although suspicious, does not prove beyond a reasonable doubt that he committed either charged burglary." Id. at *20-21. Third, the panel held that "the fact that [Moseley] had a pair of freezer gloves in his possession at the time [he was arrested], behavior that was also suspicious, does not exclude the reasonable hypothesis that he possessed the gloves for a reason unrelated to the crimes." Id. at *21.

Manifestly, the Court of Appeals erred by considering and rejecting each of these individual pieces of evidence without considering their collective weight. Circumstantial evidence is not to be "viewed in isolation." Finney, 277 Va. at 89, 671 S.E.2d at 173. This is because the "combined force of many concurrent and related circumstances, each insufficient in itself, may lead a reasonable mind irresistibly to a

conclusion." Id. The Court of Appeals never assessed whether the "combined force" of the Commonwealth's evidence justified Moseley's convictions. Accordingly, the panel incorrectly applied the standard of review, and the panel's decision should be reversed.

II. Moseley misapplies the standard of review by contesting several reasonable inferences that must be resolved in favor of the Commonwealth on appeal.

A. Although the stolen property's location when it was discovered—without more—did not justify a presumption that Moseley was the thief, the trial court could draw reasonable inferences from the stolen property's presence in the car Moseley was known to drive commingled and mixed up together with Moseley's identifying documents.

Moseley argues at length that the presumption or permissible inference arising from the exclusive possession of recently stolen property should not apply in this case.[1] (Appellee's Br. at 10-15.) As Moseley acknowledges in his brief, however, the Commonwealth does not rely on that presumption in this appeal. (Appellee's Br. at 10.)

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[1] "The rule laid down in Price v. Commonwealth . . . is the law of Virginia applicable to this inquiry." Castle v. Commonwealth, 196 Va. 222, 226, 83 S.E.2d 360, 363 (1954) (citing Price, 62 Va. (21 Gratt.) 846, 869 (1872)). In cases where recently stolen property is "thereafter . . . found in the exclusive possession of the prisoner, then such possession *of itself* affords sufficient ground for a presumption of fact that he is the thief." Price, 62 Va. (21 Gratt.) at 869 (emphasis added).

Importantly, Virginia courts have never held that the Commonwealth *must* rely on such a presumption to obtain a larceny or burglary conviction. Thus, Moseley incorrectly argues in his statement of facts that "the only way the Commonwealth could establish [his] 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." (Appellee's Br. at 7.)

For the same reason, Moseley's reliance on Burchette v. Commonwealth, 15 Va. App. 432, 425 S.E.2d 81 (1992), is misplaced. (Appellee's Br. at 11-15.) In Burchette, the defendant's conviction for possessing marijuana with the intent to distribute was based *solely* on the presence of the drugs in the defendant's vehicle and the defendant's brief proximity to that vehicle. 15 Va. App. at 435, 425 S.E.2d at 84.

In this case, by contrast, the Commonwealth's evidence was not limited to the presence of the stolen property in the vehicle Moseley was known to drive and Moseley's proximity to the vehicle. For example, Moseley was seen pulling away from the curb outside the Winsleys' home during the window of time the home was burglarized. (App. 32-34.) Accordingly, unlike in Burchette, Moseley's conviction did not

depend on the Commonwealth's ability to prove that he constructively possessed the contraband at the time it was discovered.[2]

Virginia courts also have never held that circumstantial evidence of the type at issue here loses all probative value unless the Commonwealth can prove the defendant had exclusive possession of the recently stolen property at the time it was found. See, e.g., Ford v. Commonwealth, 28 Va. App. 249, 259-61, 503 S.E.2d 803, 807-08 (1998) (affirming the appellant's grand larceny conviction despite his argument that the "larceny presumption [did] not apply because the [stolen] property was found in the woods where several people had access"); Nelson v. Commonwealth, 12 Va. App. 268, 271, 403 S.E.2d 384, 386 (1991) (concluding that the "inference of larceny arising from the exclusive possession of recently stolen property" did not apply, but still considering evidence of the defendant's presence in a stolen vehicle

[2] Even if it did, the evidence tying Moseley to the contraband in the car was stronger than it was in Burchette because Moseley's identifying documents were "commingled" and "mixed up together" with the stolen property, disproving the hypothesis that someone else dumped the stolen items on top of Moseley's identification and library card. (App. 69-70, 75-76, 89-90.) In Burchette, on the other hand, while a receipt and phone bill indicated that the defendant had been in the vehicle recently, "the evidence did not support an inference that the drugs were in the vehicle at the time." 15 Va. App. at 439, 425 S.E.2d at 86.

to determine "whether the Commonwealth's evidence, apart from the inference of larceny, was sufficient to prove [his] guilt").

This Court's decision in Walker v. Commonwealth, 69 Va. (28 Gratt.) 969 (1877), is instructive. There, the defendant argued that the trial court had erred by refusing to instruct the members of the jury that they could not convict him for burglary unless they believed "from *other evidence* than the evidence adduced before them tending to show that the prisoner was in possession of the [stolen] goods" that the defendant committed the burglary. Id. at 977-78 (emphasis added).

Disagreeing, this Court held "even though the mere possession of the stolen property might not be even *prima facie* evidence" of burglary or house-breaking, "certainly the recent possession of the stolen property [was] admissible and very important evidence in the case, and, in connection with the other evidence in the case, may have been amply sufficient to warrant the prisoner's conviction." Id. at 978. The requested instruction was in error because, by instructing the jury to consider only "other evidence" of the defendant's guilt, the instruction "altogether ignore[d] this important evidence" and "treat[ed] it, not only as insufficient to convict, but also as inadmissible." Id.

Likewise here, even if the presence of stolen property in a vehicle Moseley was known to drive—commingled with his identifying documents in the center console—was not "*prima facie* evidence" of Moseley's guilt, it "certainly" was still "very important evidence in the case." Id. at 978. Thus, the trial court reasonably could have inferred from that "very important evidence" and the other strong circumstantial evidence in the case that Moseley placed the stolen property in the center console after he committed both sets of crimes. Id.

B. Moseley challenges several other reasonable inferences that a factfinder could have drawn from the evidence.

When the sufficiency of the evidence is challenged after conviction, "a reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" Wright v. West, 505 U.S. 277, 296-97 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 326 (1979)). Despite this standard of review, Moseley contests several facts and reasonable inferences that must be resolved in the Commonwealth's favor on appeal.

For example, Moseley argues "[i]t is unreasonable, based on [his] presence in the roadway outside the location of a burglary to draw any further inferences about his involvement [in the crime]," and that Moseley's presence there is no more incriminating than "Captain Canny's presence at the same location at the same time." (Appellee's Br. at 17.) But Captain Canny lived on the cul-de-sac, and she was on her way home when she spotted Moseley pulling away from the curb. (App. 32-34.) In contrast, none of the evidence in the record suggests an innocent explanation for Moseley's presence outside the Winsleys' home.

Moseley also argues that his matching the description of a person seen in the area of the attempted third burglary "cannot serve as an inference for anything beyond the fact that [he], who was a person in the area, matched the description of a person in the area." (Appellee's Br. at 18.) But Moseley matched the description of "the subject" seen in the area of the attempted burglary, that description was given to Officer Rausch as he responded to the crime, and Officer Rausch stopped Moseley because he matched the description. (App. 52-53.) Thus, a reasonable factfinder could infer that Officer Rausch stopped Moseley because he suspected Moseley had attempted the burglary in the area.

Moseley argues too that the "record does not establish where [he] was at the time of his arrest or his proximity to the car when he was arrested." (Appellee's Br. at 13.) But Moseley was arrested on East Little Back River Road "in the area" of the attempted third burglary, and the car containing the stolen property was parked at an apartment complex "right across from Little Back River Road." (App. 52, 67.) These and other facts in the record support the reasonable inference that Moseley was still within walking distance of the car when he was arrested. (Opening Br. at 25-27, 38-39.)

Finally, Moseley argues that his possession of heavy-knit freezer gloves when he was arrested, "without anything more, regardless of what type they were or what season it [was], cannot create any inference" and "should not be a factor in this Court's analysis" because it was never "alleg[ed] that gloves were used in the alleged burglaries." (Appellee's Br. at 19.) But gloves are commonly "worn by burglars to avoid leaving finger prints." Burnette v. Commonwealth, 194 Va. 785, 790, 792, 75 S.E.2d 482, 486 (1953).[3] Moseley offered Officer Rausch an

[3] See also Wilborne v. Commonwealth, 182 Va. 63, 67, 28 S.E.2d 1, 3 (1943) (noting that the defendant had been "in possession of firearms, flashlights, gloves, and other articles commonly employed by burglars").

explanation for the gloves that the trial court reasonably could have rejected, and which Moseley implicitly abandons in this Court. (App. 53; Appellee's Br. at 19-21.) And no fingerprint evidence was introduced at trial despite the fact that officers dusted the Winsleys' home for fingerprints. (App. 28.)

Even when the evidence at trial "supports conflicting inferences," this Court "must presume . . . any such conflicts [were resolved] in favor of the prosecution, and must defer to that resolution." Wright, 505 U.S. at 296-97. Accordingly, this Court is required to presume that the trial court resolved each of the above-mentioned conflicts in favor of the Commonwealth, and the Court must "defer to that resolution." Id.

III. In this Court, Moseley raises two hypotheses of innocence, but neither warrants reversal of his convictions.

A. Moseley defaulted his first hypothesis of innocence because he never raised it at the trial level; and even if he had, a reasonable factfinder could have rejected it.

Moseley claims defense counsel argued at trial that Moseley "was in the area of the burglaries for a purpose other than committing the crimes." (Appellee's Br. at 21.) But defense counsel never argued that Moseley's presence outside the Winsleys' home could be explained by

some other purpose.[4] (Appellee's Br. at 21.) And Moseley cannot raise this hypothesis for the first time on appeal. See Commonwealth v. Hudson, 265 Va. 505, 514, 578 S.E.2d 781, 786 (2003) ("[U]pon appellate review, the issue of exclusion of reasonable theories of innocence is limited to those theories advanced by the accused at trial.").

Moseley also fails to identify the "purpose other than committing the crimes" that, according to him, constitutes an innocent explanation for his presence outside the Winsleys' home during the window of time the home was burglarized. (Appellee's Br. at 21.) Thus, rather than offering a true hypothesis of innocence, Moseley merely suggests that such a hypothesis might exist. That is wholly insufficient.

The Commonwealth's evidence must sufficiently exclude "every reasonable hypothesis of innocence," but this only includes hypotheses that "flow from the evidence itself, and not from the imagination of defense counsel." Cook v. Commonwealth, 226 Va. 427, 433, 309 S.E.2d 325, 329 (1983). Moseley has not identified any evidence in the record to support his vague hypothesis of innocence, nor can he given the fact

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[4] Likewise, Moseley never offered an innocent explanation for his presence in the same area two weeks later after an attempted third burglary had just occurred. (App. 52.)

that he has failed even to identify a specific explanation for his presence at the curb outside the Winsleys' home. (App. 32-34.)

"While a defendant does not have the obligation to testify himself or to offer testimony to explain the [Commonwealth's evidence], a court cannot supply evidence that is lacking." Avent v. Commonwealth, 209 Va. 474, 480, 164 S.E.2d 655, 659 (1968). Nothing in the record supports Moseley's claim that his presence outside the Winsleys' home can be explained by some unspecified innocent purpose, and this Court cannot supply such evidence for him. Id. Moreover, Captain Canny's testimony sufficiently excluded any innocent explanation. (App. 32-33.)

Accordingly, as the Commonwealth argued in its opening brief, Opening Br. at 21-23, Moseley's unexplained presence pulling away from the curb outside the Winsleys' home during the window of time it was burglarized is strong circumstantial evidence Moseley committed the crimes inside. See Derr v. Commonwealth, 242 Va. 413, 424, 410 S.E.2d 662, 668 (1991); Carter v. Commonwealth, 223 Va. 528, 532, 290 S.E.2d 865, 867 (1982); Black v. Commonwealth, 222 Va. 838, 842, 284 S.E.2d 608, 610 (1981). In the absence of an innocent explanation, the trial court reasonably could conclude that no such explanation exists.

B. Moseley's second hypothesis fails because the trial court reasonably could have inferred that no one would abandon valuable stolen property, and the evidence sufficiently tied Moseley to the car and to the stolen property inside.

Moseley also argues "someone else must have placed the stolen items in the vehicle [he had been known to drive] and abandoned it in the parking lot." (Appellee's Br. at 21.) But Moseley does not identify the "someone else" he contends "must have" abandoned the stolen property in the vehicle, nor has he identified any evidence in the record to support that hypothesis. And this Court cannot supply that evidence for him. Avent, 209 Va. at 480, 164 S.E.2d at 659.

Moreover, the trial court reasonably could have rejected this hypothesis based on the well-recognized principle that people do not abandon valuable contraband in places where it is likely to be discovered by others. See Ervin v. Commonwealth, 57 Va. App. 495, 517, 704 S.E.2d 135, 146 (2011) (noting that valuable contraband is "unlikely to be abandoned or carelessly left in an area"); Watts v. Commonwealth, 57 Va. App. 217, 233, 700 S.E.2d 480, 488 (2010) (noting that "people do not relinquish control of items of value like drugs or leave them in places where others might find them").

Instead, the trial court reasonably could have concluded that Moseley parked the car containing stolen property from the two burglaries while he attempted a third burglary in the area, and that Moseley's subsequent arrest prevented him from returning to the car, resulting in its being towed later that evening. (App. 52, 62-67.) That conclusion was bolstered by Moseley's multiple connections to the car—including that he had been known to drive it on a regular basis and that his identifying documents and an electric bill addressed to him were found inside. (App. 52, 59, 67, 69-70, 108-12.)

Moreover, the trial court explicitly rejected Moseley's theory that someone could have dumped the stolen items on top of his identifying documents because some of the stolen items were found "commingled" and "mixed up together" in the center console with the identifying documents. (App. 89-90.) Against this backdrop, the Commonwealth's evidence sufficiently excluded both of Moseley's proffered hypotheses of innocence, and Moseley's convictions should be affirmed.

CONCLUSION

This Court should reverse the Court of Appeals' judgment and affirm the judgment of the Circuit Court for the City of Hampton convicting Joshua Charles Moseley of two counts of burglary and two counts of grand larceny.

Respectfully submitted,

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CERTIFICATE OF TRANSMISSION AND SERVICE

On March 3, 2017, an electronic version of this brief was filed electronically with this Court, and the required copies were subsequently hand-delivered to the clerk's office in compliance with Rule 5:26(e). A copy was emailed to F. Daniel Mazzio, counsel for the appellee, at fmazzio@ham.idc.virginia.gov. In accordance with Rule 5:26(h), the undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities, and certificate contains 3,015 words and is within the page limit allowed under Rule 5:26(b).

The Commonwealth desires to present oral argument in this case.

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Courtesy copy: The Honorable Anton Bell