SCV: Submitted on 01-24-2017 08:30:48 EST for filing on 01-24-2017

IN THE

# SUPREME COURT OF VIRGINIA

RECORD NO. 161013

**COMMONWEALTH OF VIRGINIA,**

***Appellant*,**

**v.**

**JOSHUA CHARLES MOSELEY,**

***Appellee.***

## BRIEF FOR THE COMMONWEALTH

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## BRIEF FOR THE COMMONWEALTH

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When a defendant appeals a conviction based on circumstantial evidence, an appellate court's role is limited to determining whether—viewing the evidence in the light most favorable to the Commonwealth—a reasonable factfinder could have rejected the defendant's hypotheses of innocence and found him guilty beyond a reasonable doubt. Viewed from this perspective, the circumstantial evidence against Moseley was strong:

- a police officer saw Moseley driving away from a home around the time when the home was burglarized;

- investigators found stolen property from that home and from a second home that had been burglarized in a vehicle that Moseley had been known to drive;

- Moseley's identification and his library card were found in the vehicle's center console mixed together with the stolen property from both homes, and a bill addressed to Moseley was found in the vehicle's glove compartment;

- Moseley later was arrested in the same area as the first burglary near the scene of an attempted third burglary;

- Moseley matched the description of the subject seen in the area of the attempted third burglary;

- Moseley was arrested within walking distance of the vehicle containing stolen property from the first two burglaries; and

- even though it was June, Moseley had heavy knit freezer gloves in his pocket when he was arrested.

Against this backdrop of evidence, Moseley offered only the following partial hypotheses of innocence: 1) the police officer might have misidentified Moseley; 2) some of the stolen property might have been misidentified by its alleged owners; 3) someone might have planted the stolen property in the vehicle; 4) Moseley might have sold the vehicle; and 5) Moseley used the heavy knit freezer gloves to work out.

The trial court rejected Moseley's hypotheses of innocence and convicted him for the two burglaries and grand larcenies, but the Court

of Appeals held that the evidence was insufficient and reversed. This appeal asks whether the Court of Appeals erred by examining each piece of evidence in isolation, by failing to read the evidence in the light most favorable to the Commonwealth, by refusing to consider affirmative evidence of guilt, and by relying on incomplete hypotheses of innocence reasonably rejected by the trial court or never raised below.

## STATEMENT OF THE CASE

Following a bench trial, the Circuit Court for the City of Hampton convicted Moseley of two counts of burglary and two counts of grand larceny. (App. 89-91, 113-14.) The trial court sentenced Moseley to an active sentence of six years' incarceration. (App. 164-66, 172.)

Moseley appealed to the Court of Appeals of Virginia, challenging the sufficiency of the evidence to support his convictions. Specifically, Moseley argued that the Commonwealth had failed to prove that he had exclusively possessed the stolen property found in the vehicle and, therefore, that the permissive inference arising from the recent possession of stolen property did not apply. (Pet. for Appeal in Court of Appeals at 4-5, 10-23; Opening Br. in Court of Appeals at 2, 7-20.) On June 7, 2016, a panel of the Court of Appeals reversed Moseley's

convictions. Moseley v. Commonwealth, Record No. 0881-15-1, 2016 Va. App. LEXIS 182 (June 7, 2016). The Commonwealth appealed, and this Court granted the Commonwealth this appeal 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 grand 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. (Error preserved in the Commonwealth's brief in the Court of Appeals at pages 14-17, 20-24, and by the Court of Appeals' analysis and holdings at pages 9-14 of the slip opinion issued June 7, 2016, App. 181-86.)

## STATEMENT OF FACTS

### A. The first burglary

Around noon on June 3, 2013, Mary Ann Winsley left her home at 5 Wilderness Road in Hampton, Virginia, to go to work. (App. 12-13, 20.) Mary Ann's husband had left home earlier that morning. (App. 20, 27.) When Mary Ann left the house, all the doors and windows were shut and locked. (App. 13-14, 20.) Around 3:00 p.m. that afternoon, Captain

Susan Canny of the Hampton Police Division was driving to her home, which was located in the same neighborhood. (App. 31-32, 39.) Captain Canny lived on a cul-de-sac at the end of El Paso Court, which intersected with Wilderness Road, and the Winsleys' home was situated on the corner of that intersection. (App. 32.) As Canny turned onto El Paso Court from Wilderness Road, she cut the corner close to avoid hitting a utility truck that she assumed would be parked in its usual place on the street. (App. 32.)

After turning the corner, Canny noticed a vehicle on El Paso Court pulling away from the curb next to the Winsleys' house. (App. 32-33.) The driver appeared to be getting ready to exit the cul-de-sac and turn onto Wilderness Road, but he was forced to stop because Canny had turned her vehicle into his lane of travel. (App. 32-33.) The vehicle and the vehicle's driver caught Canny's attention. (App. 32-33.) Canny noticed the driver because the cul-de-sac where she lived was "very small" and "[e]verybody [knew] everybody" who lived on the street, including their neighbors on the corner of Wilderness Road. (App. 32-33, 37.) Canny knew where everyone lived, what cars they drove, and even who visited her neighbors' homes. (App. 32-33.)

As Canny slowed and drove around the other vehicle, she had a clear view of the driver's face through the vehicle's windshield. (App. 32-33, 37-38.) Canny later identified the driver as Joshua Charles Moseley. (App. 32-34.) Moseley appeared startled. (App. 38.)

When John Winsley arrived home that evening around 5:15 p.m., he discovered that the door to his garage was open and the doorframe had been damaged. (App. 27-28.) Inside the home, drawers and cabinets had been pulled open, jewelry boxes were lying upside down on the bed, a fire safe had been broken into, and another safe was missing. (App. 28.) When Mary Ann returned home, she determined that all her jewelry was missing, a large amount of Iraqi currency was missing, and a number of collectible coins and bills worth over $1,000 also were missing. (App. 14-15, 20, 25-26.) Mary Ann estimated the total value of all the stolen property to be around $6,300. (App. 15, 24.)

**B. The second burglary**

Two weeks later, on June 17, 2013, between 9:30 and 10:00 a.m., Sarah Ellis left her home in Hampton at 83 Fort Worth Street to go to the orthodontist. (App. 40, 45.) Sarah's parents had left home earlier that morning to go to work. (App. 41.) Before leaving the house, Sarah closed,

but did not lock, the back patio door. (App. 41-42.) All the other doors and windows also were closed. (App. 42.) When Sarah's father, Jonathan Ellis, arrived home between 3:30 and 3:40 p.m., he noticed that the back sliding door was unlocked, the door between the house and the garage was open, some of his videogames were scattered on the floor, and jewelry boxes belonging to his wife and daughter were overturned on their beds. (App. 40, 45-46, 50.) Jonathan called 911. (App. 46.) At trial, he estimated that the stolen items were worth close to $5,000. (App. 50.)

### C. The attempted third burglary and Moseley's arrest

Sometime that same day, Officer Eric Rausch responded to the area of Beauregard Heights in response to a report that another burglary had just been attempted. (App. 52.) The "subject who was seen in the area" was described as a black male in his mid-to-late twenties wearing a gray T-shirt and black shorts. (App. 52.) When Officer Rausch arrived and began checking the area, he saw Moseley walking down East Little Back River Road. (App. 52.)

Moseley matched the description Rausch had been given, so he stopped and talked to him. (App. 53.) In his pocket, Moseley had a pair of heavy knit gloves similar to the type of gloves that grocery store

workers wear to protect their hands when they work with frozen foods. (App. 53.) But June 17, 2013, was not a particularly cold day. (App. 53.) Moseley told Officer Rausch that the gloves were his "workout gloves." (App. 53.) Officer Rausch took Moseley into custody.[1] (App. 34, 53.)

### D. Captain Canny identifies Moseley

Captain Canny heard about the reported incident on Beauregard Heights on her police radio. (App. 34.) The incident was reported to have taken place "at the corner of Wilderness and Beauregard Heights behind [where Canny lived]." (App. 34.) Concerned about "burglaries in the area," Canny drove to the investigations bureau to talk to the detectives working the case. (App. 34.) When Canny arrived, she could not find the detectives, but she did see Moseley, who was sitting at a table in one of the rooms. (App. 34.) Canny immediately recognized Moseley as the man who—just two weeks earlier—had pulled away from the curb outside the Winsleys' home and then out onto Wilderness Road around the time when the Winsleys' home was burglarized. (App. 32-34.)

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[1] The Commonwealth initially charged Moseley with attempted burglary based on his alleged involvement in the attempted third burglary, but the trial court granted the Commonwealth's motion to nolle pross that charge before Moseley's trial for the offenses arising out of the two burglaries that are at issue in this appeal. (App. 7, 140.)

### E. Police find stolen property and Moseley's identifying documents in a vehicle Moseley was known to drive

At approximately 10:30 p.m. that evening, a tow truck driver was called to Willow Oaks Apartments to tow a white Crown Victoria. (App. 62-65, 107.) The Willow Oaks apartment complex is located "right across from Little Back River Road," and Moseley had been stopped and apprehended earlier that day on East Little Back River Road "in the area" of the reported attempted burglary. (App. 52, 67.)

When the tow truck driver arrived, the police were present, the car's windows were down, and the keys were inside. (App. 64-66.) After towing the vehicle to a secure tow lot, the tow truck driver began inventorying its contents. (App. 63-64.) When he found a bag of jewelry and some marijuana, he called his boss, who told him not to bother anything. (App. 63.) The next morning they called the police. (App. 63.)

After obtaining search warrants for the vehicle—which was registered to "Kelton Adams-Elkins"—officers searched inside the car and found items connecting Moseley to the vehicle and to the two burglaries at the Winsley and Ellis homes. (App. 69-76.) In the center console, officers found a maroon jewelry box containing a small baggy of suspected marijuana. (App. 69.) Moseley's Virginia identification card and his

Portsmouth library card both were located directly under the jewelry box in the center console. (App. 69-70, 108-11.) The officers also found a bag of jewelry, paper currency, and coins in the center console. (App. 73-76, 97-106.) Some of the coins and currency were in protective plastic sleeves. (App. 101-02, 105-06.) And Moseley's identifying documents were "mingled together" with the stolen property. (App. 75-76, 89-90.) At trial, Mary Ann Winsley, John Winsley, Sarah Ellis, and Jonathan Ellis each identified the items found in the vehicle as the items stolen from their homes in the two burglaries. (App. 16-19, 21, 29-30, 43, 47-49.)

An electric bill addressed to Moseley dated March 28, 2013, also was found in the vehicle's glove compartment. (App. 70, 112.) The bill listed Moseley's address as 1115 E. Pembroke Avenue, Apartment 34, Hampton, Virginia. (App. 112.) Melissa Cook testified that the Hampton Creek Apartments—where she worked as a property manager—are located at that address. (App. 60.) Cook further testified that she recognized the white Crown Victoria as the vehicle she had seen Moseley driving "[p]retty much on a daily basis" during the "several month time period" he had stayed at the Hampton Creek Apartments. (App. 59.)

## MATERIAL PROCEEDINGS BELOW

### A. Motions to strike

During Moseley's motions to strike at the close of the Commonwealth's evidence and again at the close of all the evidence,[2] defense counsel argued that the Commonwealth had failed to prove that Moseley had actually or constructively possessed the stolen property found in the white Crown Victoria. (App. 77, 84-85.) According to defense counsel, Moseley could have sold the vehicle sometime after Melissa Cook saw him driving it. (App. 78-79.) Or, given that the car's windows were down, "anybody else in the area" could have placed the stolen property inside the car sometime before it was towed later that evening. (App. 79-80, 87.)

Defense counsel also challenged Captain Canny's identification of Moseley and the Winsleys' identification of the stolen property found in the vehicle. (App. 79, 85-86, 88.) For these reasons, defense counsel argued that the Commonwealth had failed to make the required

[2] Moseley's only evidence consisted of his booking photograph, which the defense introduced in an effort to discredit Captain Canny's identification of Moseley as the man she saw pulling away from the curb outside the Winsleys' home around the time the home was burglarized. (App. 83, 85.)

showing of recent possession of stolen property to support the permissible inference that Moseley had committed the two burglaries and larcenies at the Winsley and Ellis homes. (App. 77, 86-88.)

The trial court denied Moseley's motions to strike and convicted him of two counts of burglary and two counts of grand larceny. (App. 82, 89-91, 113-14.) In support of its ruling, the trial court found that the stolen property discovered in the vehicle Moseley had been known to drive was found "commingled" and "mixed up together" with Moseley's identifying documents, disproving Moseley's hypothesis of innocence that some unknown person might have dumped the stolen property on top of Moseley's identification and library card. (App. 89-90.) The trial court also noted Cook's testimony that she had seen Moseley driving the car, and the location of Moseley's documents "in different places in the car," apparently in reference to the fact that Moseley's identification and library card were found in the center console, whereas the electric bill addressed to him was found in the car's glove compartment. (App. 90.)

### B. Motion to set aside

After trial, Moseley filed a motion to set aside the verdicts. (App. 116-20.) Moseley conceded the Commonwealth had "established the elements of the crimes charged beyond a reasonable doubt," but he argued that the Commonwealth had failed to prove he had committed the crimes. (App. 116.) Moseley argued that the Commonwealth's case "rested exclusively on the larceny/burglary inference," and that the inference was improper because the evidence was insufficient to prove Moseley had possessed the stolen property found in the white Crown Victoria. (App. 119.)

At a subsequent hearing, defense counsel reiterated the same arguments raised in the written pleading. (App. 132-34.) Defense counsel conceded it was reasonable to infer that, in each case, the same person who committed the burglary also committed the larceny. (App. 135.) Next, when the trial court asked defense counsel if she would concede it was a "reasonable inference that the same person committed both," she conceded it was "certainly possible" and "a conclusion that could be drawn," but she argued that it was not the only conclusion that could be drawn from the evidence. (App. 135.)

The trial court noted that a police witness had seen Moseley in the vicinity of the first burglary, and Melissa Cook had seen Moseley driving the car in which the stolen property was found. (App. 135-38.) The trial court further stated it was "inferring" that Moseley was in custody from the time he was arrested until the vehicle was searched the next day, and that the employees at the towing company did not alter the composition of the contents of the car. (App. 138.) At the end of the hearing, the trial court took the matter under advisement. (App. 139-40, 144.) Subsequently, the trial court entered an order denying Moseley's motion to set aside. (App. 148.)

**C. Appeal to the Court of Appeals**

On appeal, a panel of the Court of Appeals of Virginia reversed Moseley's convictions. Moseley, 2016 Va. App. LEXIS 182, at *1, *22. First the panel concluded that—as the Commonwealth had conceded on appeal—the permissible inference arising from the recent possession of stolen property did not apply because the evidence did not prove that Moseley had exercised "exclusive dominion and control over the stolen property" found in the car he had been known to drive. Id. at *16 & n.7.

Next the panel considered and rejected the Commonwealth's contention "that the circumstantial evidence as a whole, even without [the] benefit of the larceny and burglary inferences, is sufficient to prove that [Moseley] was the perpetrator of the charged crimes." Id. at *16, *22. Accordingly, the panel reversed and dismissed, holding that the evidence "fails to exclude the reasonable hypotheses of innocence that flow from the evidence," and that "the circumstantial evidence, although highly suspicious, fails to link [Moseley] to the offenses beyond a reasonable doubt." Id. at *22.

## STANDARD OF REVIEW

"An appellate court does not 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.'" Williams v. Commonwealth, 278 Va. 190, 193, 677 S.E.2d 280, 282 (2009) (quoting Jackson v. Virginia, 443 U.S. 307, 318-19 (1979)). "Rather, the relevant question is whether '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Id. (quoting Jackson, 443 U.S. at 319). A reviewing court should "reverse a judgment of the circuit court only upon a showing that it is plainly wrong or without evidence to support it."

Singleton v. Commonwealth, 278 Va. 542, 548, 685 S.E.2d 668, 671 (2009); see also Va. Code Ann. § 8.01-680 (2015).

Moreover, when the sufficiency of the evidence is challenged after conviction, an appellate court reviews the evidence "in the light most favorable to the Commonwealth, according it the benefit of all reasonable inferences fairly deducible therefrom." Singleton, 278 Va. at 548, 685 S.E.2d at 671. "[T]his examination is not limited to the evidence mentioned by a party in trial argument or by the trial court in its ruling." Bolden v. Commonwealth, 275 Va. 144, 147, 654 S.E.2d 584, 586 (2008). Instead, the "appellate court must consider *all* the evidence admitted at trial that is contained in the record." Id. (emphasis added). And "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, 443 U.S. at 326).

"The fact finder, who has the opportunity to see and hear the witnesses, has the sole responsibility to determine their credibility, the

weight to be given their testimony, and the inferences to be drawn from proven facts." Commonwealth v. McNeal, 282 Va. 16, 22, 710 S.E.2d 733, 736 (2011) (internal quotation marks omitted). "A factfinder's resolution of conflicting facts, as well as competing inferences, receives 'the highest degree of appellate deference.'" Coleman v. Commonwealth, 52 Va. App. 19, 23 n.2, 660 S.E.2d 687, 689 n.2 (2008) (quoting Thomas v. Commonwealth, 48 Va. App. 605, 608, 633 S.E.2d 229, 231 (2006)).

Importantly, in reviewing a conviction based on circumstantial evidence, the "evidence is not viewed in isolation." Finney v. Commonwealth, 277 Va. 83, 89, 671 S.E.2d 169, 173 (2009) (quoting Muhammad v. Commonwealth, 269 Va. 451, 479, 619 S.E.2d 16, 32 (2005)). This is because, "[w]hile no single piece of evidence may be sufficient, the combined force of many concurrent and related circumstances, each insufficient in itself, may lead a reasonable mind irresistibly to a conclusion." Id.

Finally, the Commonwealth's evidence must be "sufficient to exclude every reasonable hypothesis of innocence." Cook v. Commonwealth, 226 Va. 427, 433, 309 S.E.2d 325, 329 (1983). But the

Commonwealth only is required to exclude those hypotheses "which flow from the evidence itself, and not from the imagination of defense counsel." Id. Indeed, it would "place too great a burden on the Commonwealth [to] require it to exclude every possible theory or surmise presented by the defense," and this Court's "precedents do not require this." Black, 222 Va. at 841, 284 S.E.2d at 609.

## ARGUMENT

### I. The trial court's conclusion that Moseley committed both sets of crimes is the most reasonable explanation for all the evidence.

#### A. This Court's decision in Black v. Commonwealth demonstrates the probative value of a defendant's unexplained presence at the scene of a crime.

While the Commonwealth was not required to produce "direct testimony on the part of some one who saw [Moseley] at or near the scene of the crime, in the commission of the act" to support his convictions,[3] the Commonwealth's evidence included Captain Canny's testimony that she saw Moseley pulling away from the curb outside the Winsleys' home during the window of time in which the home was burglarized. (App. 13, 27, 32-33.)

[3] Wilborne v. Commonwealth, 182 Va. 63, 66, 28 S.E.2d 1, 2 (1943).

This Court's decision in Black v. Commonwealth underscores the significance of Captain Canny's testimony. 222 Va. 838, 284 S.E.2d 608 (1981). In Black, the defendant argued that the evidence was insufficient to support his conviction for attempted statutory burglary because 1) the evidence did "not connect him with the dark green Ford Pinto seen cruising the neighborhood or parked in the [potential victim's] driveway," 2) the Commonwealth "offered no physical evidence, such as fingerprints or burglary tools, to show that Black tampered with the . . . door or doorknob," and 3) the witnesses' testimony only showed that two women had "found Black at the front door of the . . . house near the time the attempted break-in occurred." Id. at 841, 284 S.E.2d at 610.

Black argued that this evidence—although suspicious—did not eliminate every reasonable hypothesis of innocence, and that the evidence supported the reasonable hypothesis that Black was looking for a family he thought might live in the home. Id. at 841-42, 284 S.E.2d at 610.

This Court disagreed. Id. Noting that the "fact finder need not believe the accused's explanation and may infer that he is trying to

conceal his guilt," the Court observed that the two women "found Black on premises where he had no permission to be and where, as [one of them] had informed him, the persons he sought did not reside." Id. at 842, 284 S.E.2d at 610. From this and other circumstantial evidence, this Court held that the trial court could have drawn the following reasonable inferences:

- Black's explanation was false;
- Black had been cruising the neighborhood waiting for an opportunity to commit larceny;
- Black saw one of the women leave her house and immediately went there hoping to perpetrate an offense while she was gone;
- Black left the motor running to effect a quick getaway;
- Black was unable to get into the house; and
- when Black heard the woman return home, he abandoned his crime to avoid being caught.

Id. This evidence, the Court held, "though circumstantial, sufficiently establishe[d] Black's guilt beyond a reasonable doubt." Id.[4]

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[4] See also Toler v. Commonwealth, 188 Va. 774, 782, 51 S.E.2d 210, 214 (1949) (holding that "the defendant's presence in the building at the time of the crime, his failure to give a satisfactory explanation therefor, his untrue account of his whereabouts, and his contradictory

### B. This Court's analysis in Black controls the outcome here, especially given that the evidence against Moseley is stronger than it was in Black.

#### 1. Moseley's unexplained presence outside the Winsleys' home supports the reasonable inference that he committed the crimes inside.

Applying Black here, Moseley's unexplained presence outside the Winsleys' home during the window of time it was burglarized constitutes strong circumstantial evidence that Moseley was the perpetrator of the alleged crimes.[5] (App. 13, 27, 32-33.) Specifically, this Court's reasoning in Black justifies drawing the following inferences from Moseley's presence outside the Winsleys' home:

- Moseley was present near the scene of the crimes during the window of time the crimes were committed because he committed them;

- Moseley parked his car by the curb outside the Winsleys' home to effect a quick getaway;

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statements as to how he came into possession of the money found on him" justified his conviction for third offense petit larceny).

[5] See also Derr v. Commonwealth, 242 Va. 413, 424, 410 S.E.2d 662, 668 (1991) (discussing the circumstantial evidence supporting the defendant's convictions, including the fact that his "car was parked near the victim's home during the time these crimes were committed"); Carter v. Commonwealth, 223 Va. 528, 532, 290 S.E.2d 865, 867 (1982) (stating that the "evidence established a number of facts consistent with the defendant's guilt," including that he was "a stranger in the neighborhood").

- When Captain Canny saw Moseley pulling away from the curb, he had just completed the crimes inside; and

- Moseley appeared startled because he realized that Captain Canny would be able to place him at the scene of the crimes he had just committed.

Moreover, nothing in the record suggests an innocent explanation for Moseley's presence outside the Winsleys' home. To the contrary, Captain Canny's testimony sufficiently foreclosed any such hypothesis of innocence. Canny testified that Moseley and the vehicle he was driving caught her attention because the cul-de-sac where she lives is "very small," and because "[e]verybody knows everybody," including their neighbors on the corner of Wilderness Road. (App. 32-33.) Canny further testified that because she and her neighbors look out for each other, they "know exactly where everybody lives," whose car is where, and even who visits whom. (App. 33.)

Based on Canny's testimony, a reasonable factfinder could have rejected the possibilities that Moseley might have parked his car outside the Winsleys' home either because he lived nearby or because he was visiting friends or family in the area. If either had been true,

Captain Canny would have recognized Moseley's vehicle from having seen it in the neighborhood on previous occasions.[6] (App. 32-33.)

Moseley also failed to proffer any other innocent explanation for his presence outside the Winsleys' home.[7] Instead, he merely argued that Captain Canny might have mistaken him for someone else, and the trial court reasonably rejected that argument. (App. 85-86, 117, 135-36.) Left with no alternative to the Commonwealth's straightforward theory of the case, the trial court reasonably concluded that Moseley's presence outside the Winsleys' home was the result of his having just committed the burglary and larceny inside.

**2. The stolen property found in the car Moseley was known to drive tied Moseley to the fruits of both sets of burglaries and larcenies.**

Beyond Moseley's unexplained presence at the scene of the first set of crimes, the Commonwealth's evidence in this case was much stronger than it was in Black. For example, investigators tied Moseley

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[6] Cf. Joyce v. Commonwealth, 56 Va. App. 646, 666, 696 S.E.2d 237, 246-47 (2010) (holding that the trial court did not err when it rejected a hypothesis of innocence based on "pure happenstance").

[7] And it would be too late for him to do so now. See Commonwealth v. Hudson, 265 Va. 505, 514, 578 S.E.2d 781, 786 (2003) (stating that "upon appellate review, the issue of exclusion of reasonable theories of innocence is limited to those theories advanced by the accused at trial").

more closely to the actual commission of the burglary and larceny at the Winsleys' home—and to a second completed burglary and larceny at the Ellises' home—when they recovered stolen property from the two homes in the center console of the vehicle Moseley had been known to drive. (App. 16-19, 21, 29-30, 43, 47-49, 58-59, 69-76, 97-107.) The stolen items were "commingled" and "mixed up together" with Moseley's identification and his library card, justifying the reasonable inference that Moseley placed them there along with his identifying documents. (App. 69-70, 75-76, 89-90, 108-11.)

In Black, by contrast, no physical evidence—such as fingerprints or burglary tools—connected Black to the actual commission of the crime. This Court affirmed Black's conviction based solely on his presence "at the front of the [victim's] house near the time the attempted break-in occurred," and based on the factfinder's ability to reject Black's proffered explanation for his presence there. Black, 222 Va. at 841-42, 284 S.E.2d at 610.

### 3. Moseley returned to the same area two weeks later, and his presence there tied him to an attempted third burglary and to the vehicle where the stolen property was found.

The evidence here is stronger than it was in Black for the additional reason that Moseley returned two weeks later to the same area where the first burglary had occurred. (App. 34, 52-53.) And when Moseley was stopped and arrested there, he matched the description of a "subject who was seen in the area" of a *third* burglary that had just been attempted.[8] (App. 52-53.) Moreover, a reasonable factfinder could infer that Moseley was arrested within walking distance of the apartment complex where the white Crown Victoria—containing Moseley's identifying documents and the stolen property from both burglaries—was later discovered. (App. 66-67.)

This reasonable inference regarding Moseley's proximity to the vehicle when he was arrested follows from the combination of several facts in the record. First, the Willow Oaks apartment complex where the car was found is located "right across from Little Back River Road,"

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[8] Although the Court of Appeals indicated in its opinion that this was the same neighborhood where the second burglary took place, Moseley, 2016 Va. App. LEXIS 182, at *21, undersigned counsel was not able to confirm that fact in the record.

and Moseley was stopped and arrested earlier that day on East Little Back River Road "in the area" of the attempted third burglary. (App. 52, 67.) Second, the vehicle was left at the apartment complex with its windows rolled down and the keys inside, indicating that whoever left the vehicle there intended to return to it quickly. (App. 64-66.) Third, 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 were found inside—make it more likely that it was Moseley who left the car at the apartment complex while he attempted to commit burglaries in the area. (App. 52, 59, 67, 69-70, 108-12.)

Fourth, when Moseley was arrested he was on foot, leaving open the possibility that he had another means of transportation nearby. (App. 52.) And fifth, despite the fact that the vehicle's condition—unlocked with the keys inside—made it look like someone intended to return to it quickly, no one ever did, and the car eventually was towed later that evening. (App. 62-66.)

Viewed collectively, a reasonable factfinder could infer from this evidence that Moseley parked the car containing stolen property from the two burglaries at the apartment complex across from Little Back

River Road while he attempted a third burglary in the area, but that Moseley's arrest on East Little Back River Road prevented him from returning to the car, and thus that Moseley was still within walking distance of the car when he was arrested.

**4. Moseley's possession of heavy knit freezer gloves in June and the trial court's ability to reject his claim that he used them to work out constitute affirmative evidence of Moseley's guilt.**

Finally, Moseley's possession of heavy knit freezer gloves on a summer day[9]—combined with the other evidence of Moseley's guilt—further supports the reasonable inference that Moseley had the gloves in his pocket when he was arrested because he used the gloves to commit the crimes. Cf. Carter v. Commonwealth, 223 Va. 528, 532, 290 S.E.2d 865, 867 (1982) (noting that the defendant "was wearing a wool coat on a hot summer day, concealing a screwdriver that could be used in a break-in").

Although gloves are typically "designed and manufactured for lawful purposes," they are commonly "worn by burglars to avoid leaving finger prints." Burnette v. Commonwealth, 194 Va. 785, 790, 792, 75

[9] App. 52-53.

S.E.2d 482, 486 (1953); see also Wilborne, 182 Va. at 67, 28 S.E.2d at 3 (noting that the defendant had been "in possession of firearms, flashlights, *gloves*, and other articles commonly employed by burglars") (emphasis added).

John Winsley testified that he thought the police dusted his house for fingerprints. (App. 28.) But no fingerprint evidence was introduced at trial, adding support for the reasonable inference that the burglar wore gloves. And Moseley's claim that he used the gloves to work out contradicted the arresting officer's testimony that they were the "heavier knit" variety that grocery store workers wear for working with frozen foods. (App. 53.)

"The fact finder need not believe the accused's explanation and may infer that he is trying to conceal his guilt." Black, 222 Va. at 842, 284 S.E.2d at 610. And a "defendant's false statements are probative to show he is trying to conceal his guilt, and thus is evidence of his guilt." Rollston v. Commonwealth, 11 Va. App. 535, 548, 399 S.E.2d 823, 831 (1991) (quoted approvingly in Emmett v. Commonwealth, 264 Va. 364, 372, 569 S.E.2d 39, 45 (2002)). Thus, a reasonable factfinder could conclude that Moseley lied when he told the arresting officer that the

freezer gloves were his "workout gloves," and that lie constituted additional affirmative evidence of Moseley's guilt. (App. 53.)

Considered together, "the combined force of [these] many concurrent and related circumstances," even if each is "insufficient in itself," leads a reasonable mind "irresistibly" to the following conclusions. Finney, 277 Va. at 89, 671 S.E.2d at 173 (quoting Muhammad, 269 Va. at 479, 619 S.E.2d at 32). Moseley was seen driving away from the Winsleys' home because he had just burglarized it. Stolen items from that burglary and from the second burglary at the Ellises' home were found in a car Moseley was known to drive because Moseley placed them there after committing the burglaries. Moseley had heavy knit freezer gloves in his pocket when he was arrested because he was using the gloves to avoid leaving fingerprints while he committed and attempted burglaries in the area. And Moseley's arrest prevented him from returning to the car where he had stored the stolen property, resulting in the car being towed and the eventual discovery of the stolen goods. On these facts and reasonable inferences, Moseley's convictions should be affirmed.

## II. The trial court reasonably rejected Moseley's partial hypotheses of innocence.

"The statement that circumstantial evidence must exclude every reasonable theory of innocence is simply another way of stating that the Commonwealth has the burden of proof beyond a reasonable doubt." Commonwealth v. Hudson, 265 Va. 505, 513, 578 S.E.2d 781, 785 (2003). And the "issue upon appellate review is not whether there is some evidence to support" the defendant's hypotheses of innocence, but whether "a reasonable [factfinder], upon consideration of all the evidence, could have rejected [the defendant's] theories in his defense and found him guilty . . . beyond a reasonable doubt." Id.

Moreover, while "a factfinder cannot arbitrarily choose, as between two equally plausible interpretations of a fact, one that incriminates a defendant," the "choice becomes arbitrary . . . only when no rational factfinder could believe the incriminating interpretation of the evidence and disbelieve the exculpatory one." Vasquez v. Commonwealth, 291 Va. 232, 250, 781 S.E.2d 920, 930 (2016). Finally, "upon appellate review, the issue of exclusion of reasonable theories of innocence is limited to those theories advanced by the accused at trial." Hudson, 265 Va. at 514, 578 S.E.2d at 786.

In this case, Moseley only ever offered five partial hypotheses of innocence. First, Moseley argued that Captain Canny might have misidentified him when she thought she saw him pulling away from the curb outside the Winsleys' home. (App. 85-86, 117.) And second, Moseley argued that the Winsleys did not sufficiently identify the stolen property found in the car Moseley had been known to drive. (App. 79, 88.) But Captain Canny never expressed any doubt in the identification, and both Mr. and Mrs. Winsley testified that the stolen items in the vehicle matched items that had been stolen from their home.[10] (App. 16-19, 21, 29-30.) On appeal, this testimony must be taken as true. See Vasquez, 291 Va. at 247, 781 S.E.2d at 929 (noting that the standard of review requires this Court to "regard as true all the credible evidence favorable to the Commonwealth and all fair inferences to be drawn therefrom").

Third, Moseley argued that someone could have planted the stolen property in the vehicle while it was parked at the apartment complex with its windows rolled down and the keys inside. (App. 79-80, 87.)

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[10] Mary Ann Winsley testified that she was "99.9 percent" sure the items in the photographs were hers. (App. 21.)

But a rational factfinder could have concluded that it would have been *highly* unlikely for an unknown person to stash valuable, stolen property in a random vehicle and then to abandon it there, leaving the windows down and the keys inside. See Ervin v. Commonwealth, 57 Va. App. 495, 517, 704 S.E.2d 135, 146 (2011) (noting that factfinders are permitted to infer 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) ("[S]ettled principles provide that people do not relinquish control of items of value like drugs or leave them in places where others might find them.").

Moreover, the trial court reasonably rejected this hypothesis based on the fact that Moseley's identifying documents were found "commingled" and "mixed up together" with Moseley's identifying documents in the center console, disproving Moseley's hypothesis that some unknown person might have dumped the stolen property on top of Moseley's identification and library card. (App. 89-90.)

Fourth, Moseley argued that he could have sold the vehicle to the person whose name was listed as the registered owner in the Department of Motor Vehicles database. (App. 75, 79.) But nothing in

the record suggests that such a sale occurred. And a rational factfinder could conclude that Moseley would not have left his identification card, his library card, and an electric bill addressed to him inside the car if he had sold it to someone he did not know. (App. 69-70, 108-12.) Moreover, Moseley did not have to be the registered owner of the vehicle to use it to commit the crimes so long as he had access to the car. And the presence of his identifying documents inside the car demonstrates that he did. (App. 69-70, 108-12.)

Fifth and finally, Moseley's claim that he used the heavy knit freezer gloves he had in his pocket to work out was presented to the trial court through Officer Rausch's testimony about his interaction with Moseley before the arrest. (App. 53.) But the trial court was not required to accept Moseley's explanation for the gloves and, "having rejected [his] attempted explanation as untrue, [could] draw a reasonable inference that his explanation was made falsely in an effort to conceal his guilt." Covil v. Commonwealth, 268 Va. 692, 696, 604 S.E.2d 79, 82 (2004). Officer Rausch testified that the gloves were similar to the "heavier knit gloves" worn by "grocery store workers" who wear the gloves "for moving frozen foods back and forth." (App. 53). In light of that testimony, a

rational factfinder could conclude that the gloves were not workout gloves, as Moseley claimed, and that Moseley lied about his reason for possessing the gloves in an effort to conceal his guilt. Covil, 268 Va. at 696, 604 S.E.2d at 82.

Moseley did not offer any other hypotheses of innocence at trial, and he may not do so for the first time on appeal. Hudson, 265 Va. at 514, 578 S.E.2d at 786. Accordingly, because "a reasonable [factfinder], upon consideration of all the evidence, could have rejected [Moseley's] theories in his defense and found him guilty . . . beyond a reasonable doubt," this Court should affirm. Id. at 513, 578 S.E.2d at 785.

## III. The Court of Appeals erred by considering each piece of evidence in isolation, failing to read facts in the light most favorable to the Commonwealth, rejecting reasonable inferences, relying on undeveloped hypotheses of innocence, and refusing to consider affirmative evidence of Moseley's guilt.

In the panel opinion, the Court of Appeals began its analysis of the sufficiency of the evidence by correctly noting—as the Commonwealth had argued on brief—that the circumstantial evidence of Moseley's guilt was not to be "viewed in isolation." Moseley, 2016 Va. App. LEXIS 182,

at *16 (quoting Finney, 277 Va. at 89, 671 S.E.2d at 173). But the panel failed to heed that admonition.

The panel also acknowledged that "the Commonwealth need only exclude reasonable hypotheses of innocence that flow from the evidence, not those that spring from the imagination of the defendant." Moseley, 2016 Va. App. LEXIS 182, at *16 (internal quotation marks omitted). And "[m]erely because [a] defendant's theory of the case differs from that taken by the Commonwealth does not mean that every reasonable hypothesis consistent with his innocence has not been excluded." Miles v. Commonwealth, 205 Va. 462, 467, 138 S.E.2d 22, 27 (1964).

In its analysis, though, the panel cited mostly vague and unsupported hypotheses of innocence to discredit individual pieces of evidence, which the panel considered and rejected piece-by-piece.[11]

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[11] In its opinion, the panel seems to rely upon the possible existence of some unspecified theories of innocence that Moseley himself failed to raise at trial. Moseley, 2016 Va. App. LEXIS 182, at *16, *20, *21. The panel's reliance on new theories of innocence constitutes plain error because, "upon appellate review, the issue of exclusion of reasonable theories of innocence is limited to those theories advanced by the accused at trial." Hudson, 265 Va. at 514, 578 S.E.2d at 786 (citing Rules 5A:18 and 5:25).

### A. The panel considered, discounted, and discarded the evidence of the stolen property found in the car Moseley had been known to drive.

First, the panel examined the evidence connecting Moseley "generally to the vehicle in which the stolen items were found." Id. at *18-20. Comparing the case to the Court of Appeals' decision in Nelson v. Commonwealth, 12 Va. App. 268, 403 S.E.2d 384 (1991), the panel concluded that the "evidence and reasonable inferences flowing from" the white Crown Victoria "create a suspicion that [Moseley] was the thief of the stolen items," but that this was not enough. Moseley, 2016 Va. App. LEXIS 182, at *18-20.

In Nelson, though, the evidence implicating the defendant only established that he had been inside a stolen truck at some time during the one-week period after it had been stolen,[12] and that he had lied about being in the truck. Nelson, 12 Va. App. at 271, 403 S.E.2d at 386. Unlike the evidence against Moseley, however, none of the evidence against Nelson placed him at or near the scene of the crime during the window of time when the truck was stolen. Nor did Nelson ever return

[12] Nelson's fingerprints were found on the interior of the truck's rear window. Nelson, 12 Va. App. at 269, 403 S.E.2d at 385.

to the same area where the crime was committed, nor was he found there in possession of items that a reasonable factfinder could infer he had used in the theft.

The absence of these facts in Nelson distinguishes Nelson and refutes the panel's conclusion that the Court's reasoning there is "highly relevant" to this case. Moseley, 2016 Va. App. LEXIS 182, at *18. But the panel failed to consider these differences at this stage of its analysis.

Instead, the panel emphasized that the Commonwealth had been unable to prove when Moseley had last been inside the car. Moseley, 2016 Va. App. LEXIS 182, at *19-20. As a result, the panel concluded that the presence of Moseley's identification card and library card commingled together with the stolen property in the center 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.

But the panel failed to consider the strength of the evidence when Moseley's connections to the car and to the stolen property found inside it are *viewed together* with the other circumstantial evidence of

Moseley's guilt—particularly Moseley's unexplained presence outside the Winsleys' home during the window of time the home was burglarized.

The panel failed to consider other circumstantial evidence of Moseley's guilt altogether. For example, the panel rejected the Commonwealth's argument that a reasonable factfinder could infer that "East Little Back River Road," where Moseley was stopped and arrested, was within walking distance of "Little Back River Road," which was located across from the apartment complex where the white Crown Victoria was found later that evening. Moseley, 2016 Va. App. LEXIS 182, at *14-15 n.6. (App. 52-53, 67). The panel concluded that such an inference would have required the trial court to take judicial notice of the area's geography, which the trial court did not do expressly on the record. Id.

But judicial notice is not the only way to prove a fact about the relative distance between two places. And the Court of Appeals overlooked evidence in the record that, considered together, supports the reasonable inference that the two streets were within walking distance of each other even without requiring the trial court to take

judicial notice of the area's geography. Instead, the trial court could have drawn the inference based on the combined weight of the following factors: Moseley's multiple connections to the vehicle, both past and present; the vehicle's location at an apartment complex across from Little Back River Road; Moseley's unexplained presence on East Little Back River Road; the almost identical nature of the two street names; the fact that Moseley was on foot when he was arrested; and the fact that no one returned to claim the car after Moseley's arrest, resulting in its being towed. (App. 52, 59, 64-67, 69-70, 108-12.)

The Court of Appeals erred by failing to review this evidence "in the light most favorable to the Commonwealth" to determine whether a reasonable factfinder could infer that Moseley was within walking distance of the car containing the stolen property when Moseley was arrested. Instead, the panel focused its full attention on the trial court's failure to take judicial notice of a fact that was sufficiently proven by the "reasonable inferences fairly deducible" from the evidence. Singleton, 278 Va. at 548, 685 S.E.2d at 671.

The panel further compounded these errors by crediting Moseley's theory that there was "ample time for someone to have tampered with

[the car's] contents before it was towed and searched" because the car had been "left unlocked with the windows down and the keys inside." Id. at *20. But the trial court expressly rejected that theory, finding that the commingling of the stolen property and Moseley's identifying documents disproved Moseley's hypothesis that some unknown person might have dumped the stolen property on top of his identification and library cards. (App. 89-90.)

Whether a hypothesis of innocence is reasonable is a question of fact that is binding on appeal unless plainly wrong. Stevens v. Commonwealth, 38 Va. App. 528, 535, 567 S.E.2d 537, 540 (2002). And the trial court's conclusion was not plainly wrong or without evidence to support it. To the contrary, the trial court's rejection of this particular hypothesis of innocence is significantly bolstered by the well-recognized principle that factfinders may infer that people do not abandon valuable contraband in places where the contraband is likely to be discovered by others. See Ervin, 57 Va. App. at 517, 704 S.E.2d at 146; Watts, 57 Va. App. at 233, 700 S.E.2d at 488.

This permissible inference squarely rebuts Moseley's theory that someone might have dumped the stolen property into the vehicle and

then left it there in a place where other people would likely find it. By ignoring this principle and the trial court's stated reasons for rejecting Moseley's hypothesis of innocence, the panel failed to consider whether, "upon consideration of all the evidence," a reasonable factfinder "could have rejected" Moseley's "theories in his defense" and convicted him beyond a reasonable doubt. Hudson, 265 Va. at 513, 578 S.E.2d at 785.

### B. The panel considered, discounted, and discarded the evidence of Moseley's presence outside the Winsley home and in the neighborhood of the attempted burglary.

Next, the panel briefly considered "the fact that [Moseley] was seen driving in the vicinity of the June 3 burglary during the five-hour period of time in which the burglary occurred," along with the fact that Moseley also was seen walking in the neighborhood of an attempted third burglary on June 17th. Id. at *20-21. "[A]lthough suspicious," the panel held, this evidence also "does not prove beyond a reasonable doubt that [Moseley] committed either charged burglary." Id. at 21.

In reaching this conclusion, the panel restated some of the facts in a light more favorable to Moseley. The panel stated that Moseley merely was "seen driving in the vicinity of the June 3 burglary." Moseley, 2016 Va. App. LEXIS 182, at *20-21. But as the panel had

earlier acknowledged, Moseley was not merely seen "in the vicinity." Moseley's car was spotted "against 5 Wilderness Road," where the Winsleys lived, and Moseley was "pulling off the curb" when Captain Canny encountered him. Id. at *2, *14.

Because Moseley was seen pulling away from the curb, a reasonable factfinder could infer that he had parked the car outside the Winsley home during the window of time when the home was burglarized. But that inference becomes more attenuated if—as the panel restated the evidence—Moseley was merely "seen driving in the vicinity" of the home. Id. at *20.[13]

Next, the panel considered this evidence completely in isolation from the evidence connecting Moseley to the car where the stolen property was found. Noting that Captain Canny "did not describe the car [Moseley] was driving," the panel reasoned that she "could not link him to the stolen goods found later in the Crown Victoria." Id. In other words—having already considered and discarded multiple pieces of evidence linking Moseley to the car and the stolen goods inside it—the

[13] Like Moseley, the panel also did not proffer an innocent explanation for Moseley's presence outside the Winsleys' home.

panel discounted and discarded Captain Canny's testimony about Moseley's presence at one of the crime scenes because Canny herself failed to link Moseley to the car where the stolen property from that crime scene was later discovered. Id. at 19-21. This sort of "divide-and-conquer" approach is inconsistent with the requirement that circumstantial evidence not be "viewed in isolation" on appeal. Finney, 277 Va. at 89, 671 S.E.2d at 173.[14]

### C. The panel considered, discounted, and discarded the evidence of Moseley's possession of heavy knit freezer gloves.

Finally, the panel concluded that Moseley's possession of a pair of freezer gloves at the time he was arrested was "suspicious," but that it did not "exclude the reasonable hypothesis that he possessed the gloves for a reason unrelated to the crimes." Moseley, 2016 Va. App. LEXIS 182, at *21. But the only explanation Moseley gave for the gloves was that he used them to work out. (App. 53.) And, as the panel correctly acknowledged, the trial court "was not required to accept [Moseley's] explanation" for the gloves. Moseley, 2016 Va. App. LEXIS 182, at *22.

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[14] Cf. United States v. Arvizu, 534 U.S. 266, 274 (2002) (rejecting a similar approach in the Fourth Amendment context).

Thus, it is not clear what "reason unrelated to the crimes" the panel thought the evidence failed to exclude, but any reason other than the one reason Moseley offered Officer Rausch is defaulted because Moseley did not assert any other explanations for the gloves at trial. Hudson, 265 Va. at 514, 578 S.E.2d at 786.

What is worse, the panel refused to give any affirmative weight to the trial court's ability to reject Moseley's explanation for the gloves, instead holding that, "on the procedural posture of this case, the court's rejection of [Moseley's] explanation to the police *did not* constitute affirmative evidence of guilt." Id. at *22 (emphasis added).

In a footnote, the panel cited the Seventh Circuit's decision in United States v. Zafiro for the proposition that "if the fact finder does not have the opportunity to assess the defendant's statements through his live testimony, its rejection of the contents of his out-of-court statements prevents those statements from having any legal effect in his favor but does not, standing alone, provide affirmative evidence of guilt." Id. at *22-23 n.8 (citing Zafiro, 945 F.2d 881, 888 (7th Cir. 1991)).

But Zafiro plainly does not support the panel's position that a defendant's false out-of-court statements cannot constitute affirmative evidence of guilt. In Zafiro, the defendant "took the stand to defend herself," so the probative value of the defendant's *out-of-court* statements was never at issue. 945 F.2d at 888-89.[15] And "[a] case is not authority for a point that was not actually considered or decided by the Court." Prophet v. Bullock Corp., 59 Va. App. 313, 321, 718 S.E.2d 477, 481 (2011).

More importantly, the panel's stated proposition is inconsistent with Virginia caselaw. This Court's decision in Black demonstrates that a factfinder "need not believe the accused's explanation and may infer that he is trying to *conceal his guilt*." 222 Va. at 842, 284 S.E.2d at 610 (emphasis added). In that case, like this one, the defendant's explanation was offered at the scene of the crime, not on the witness stand at trial. Id. at 840, 284 S.E.2d at 609.

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[15] The footnote further states that Zafiro is "cited with approval" in Wright. Id. at *22 n.8. Wright does cite Zafiro, but only for the accepted proposition that a factfinder can consider "perjured testimony as affirmative evidence of guilt." 505 U.S. at 296.

Moreover, the Court of Appeals held in Rollston v. Commonwealth that the defendant's "multiple inconsistent stories to [his former girlfriend] and the police are further evidence of his guilt" because a defendant's "false statements are probative to show he is trying to conceal his guilt, and thus is *evidence of his guilt*." 11 Va. App. 535, 548, 399 S.E.2d 823, 831 (1991) (emphasis added).[16] This Court explicitly endorsed that approach in Emmett v. Commonwealth, 264 Va. 364, 372, 569 S.E.2d 39, 45 (2002) (citing Rollston for the proposition that the defendant's prior inconsistent statements to the police were "clearly relevant to show [his] consciousness of guilt"). Thus, the panel's refusal to consider affirmative evidence of Moseley's guilt is contrary to controlling Virginia caselaw.

In summary, the Commonwealth's evidence proved that Moseley was seen driving away from the curb outside the Winsleys' home during the window of time it was burglarized; stolen property from that

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[16] See also Slater v. Commonwealth, Record No. 1963-12-2, 2013 Va. App. LEXIS 330, at *8-9 n.1 (Nov. 12, 2013) (noting that, "[w]hile this principle usually arises in cases where a party's statement is delivered as testimony, the principle equally applies in cases where the party's statement was made before trial and, particularly where, as here, the party affirmatively relies upon it at trial as a hypothesis of innocence").

burglary and from a second burglary was later discovered in a car Moseley had been known to drive, commingled with Moseley's identifying documents; Moseley was arrested in the same area as the first burglary near the area where a third burglary had just been attempted, and Moseley matched the description of the subject seen in the area of the attempted third burglary; a reasonable factfinder could infer that Moseley was arrested within walking distance of the car he had been known to drive where the stolen property was found; and Moseley had heavy knit freezer gloves in his pocket when he was arrested, which he claimed he used to work out.

The trial court reasonably rejected the partial hypotheses of innocence that Moseley offered at trial, and the Court of Appeals erred by considering each piece of evidence in isolation from the others, by failing to read certain facts in the light most favorable to the Commonwealth, by rejecting reasonable inferences flowing from the evidence, by relying on undeveloped hypotheses of innocence, and by refusing to consider affirmative evidence of Moseley's guilt. For all these reasons, this Court should reverse the panel's judgment and reinstate Moseley's convictions.

## CONCLUSION

This Court should reverse the Court of Appeals' decision 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,

COMMONWEALTH OF VIRGINIA
Appellant herein

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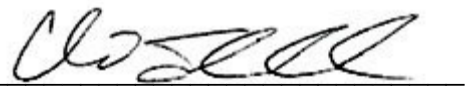

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## CERTIFICATE OF TRANSMISSION AND SERVICE

On January 23, 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 9,545 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 copies: The Honorable Anton Bell