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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 161346

DAVID STANLEY JAMES PIJOR,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

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STATEMENT OF THE CASE

The defendant, David Stanley James Pijor, was tried by a judge of the Circuit Court of Fairfax County on September 22, 2015 and found guilty of perjury in violation of Virginia Code § 18.2-434. The trial court sentenced Pijor to five years' imprisonment, with all but six months suspended. (App. 11-13).

Pijor filed a petition for appeal in the Court of Appeals of Virginia. On June 29, 2016, the Court of Appeals, in a per curiam order, denied Pijor's petition for appeal. (App. 14-18). On August 25, 2016, the Court of Appeals denied Pijor's petition for rehearing. (App. 19). This Court granted Pijor's appeal on April 19, 2017.

ASSIGNMENTS OF ERROR

I. The Court of Appeals erred by affirming the trial court's ruling that the Commonwealth was not estopped from proving that, prior to February 4, 2014, Pijor had seen the dog or had received information regarding the whereabouts of the dog.

II. The Court of Appeals erred by affirming the trial court's ruling which allowed the Commonwealth to prove that Pijor had seen the dog or received information about the dog's whereabouts by using evidence of estopped facts, including evidence contradicting the estopped fact that Pijor did not possess the dog between September 6, 2013, and February 4, 2014.

III. The Court of Appeals erred by affirming the trial court's ruling that the perjury indictment for Pijor's testimony (that he had not seen the dog and had received no information regarding the whereabouts of the dog) was not barred by collateral estoppel and double jeopardy components of the Fifth and Fourth Amendments of the United States Constitution and corresponding provisions of the Constitution of Virginia.

IV. The Court of Appeals erred by affirming the trial court's conclusion that the evidence was sufficient to find Pijor guilty of perjury because the evidence at trial was circumstantial, was consistent with innocence, and was

insufficient or prove beyond a reasonable doubt that Pijor committed perjury.

V. This Court should overturn the holding in Sevachko v. Commonwealth that perjury prosecution is not estopped when the defendant is acquitted based on the defendant's testimony that his conduct was innocent.

APPLICABLE STATUTE

The defendant was convicted under Code § 18.2-434, which states:

If any person to whom an oath is lawfully administered on any occasion willfully swears falsely on such occasion touching any material matter or thing, or if a person falsely make oath that any other person is 18 years of age or older in order to obtain a marriage license for such other person, or if any person in any written declaration, certificate, verification, or statement under penalty of perjury pursuant to § 8.01-4.3 willfully subscribes as true any material matter which he does not believe is true, he is guilty of perjury, punishable as a Class 5 felony. Upon the conviction of any person for perjury, such person thereby shall be adjudged forever incapable of holding any office of honor, profit or trust under the Constitution of Virginia, or of serving as a juror.

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS BELOW

Pijor is tried for Grand Larceny

On February 4, 2014, a jury of the Circuit Court for Fairfax County found Pijor not guilty of charges of grand larceny and unlawful entry. (App. 4). Pijor had been accused of stealing Kristy Gooch's dog, Ben, a golden retriever, on September 6, 2013. (Id.). Pijor and Gooch were romantically involved from approximately 2003 to 2011. (App. 317-18).

Pijor testified at his trial on February 4, 2014. Relevant to this appeal, he testified during direct examination as follows:

> Q: Okay.
> At any point in time have you received information on where Ben might be?
>
> A: No, I haven't.
>
> Q: And have you seen the dog since September the 6th?
>
> A: No.

(App. 481).

Pijor is tried for Perjury

When Gooch had last seen her dog Ben on September 6, 2013, he was wearing a collar and tags with Gooch's name and phone number and her parents' address. (App. 320). On February 9, 2014, five days after Pijor's larceny trial testimony, Gooch saw a man in a hoodie walking a golden retriever near her home.

(App. 321). The dog was carrying an orange Frisbee and had a gait similar to Ben's. (App. 321, 326-27). On March 1, 2014, Gooch saw the same man in a hoodie walking a golden retriever with an orange Frisbee. (App. 321). Later that same night, someone threw the Frisbee against Gooch's house and was captured on surveillance video. (Id.).

On March 8, 2014, Gooch was driving with her boyfriend, Tam Nguyen, when she saw the same man, in the same hoodie, with a golden retriever and an orange Frisbee. (App. 322). Gooch and Nguyen pulled over in the car, and Gooch called Ben's name. (Id.). Ben immediately dropped the Frisbee, squealed in excitement, and tried to pull towards Gooch. (App. 322, 325). Gooch and Nguyen were able to identify Pijor as the man in the hoodie. (App. 322, 325, 331, 335). Nguyen attempted to follow Pijor, but he ran away with Ben. (App. 323, 336). Gooch immediately called the police. (App. 323).

On April 26, 2014, Nguyen saw Pijor's car at a Giant shopping center. (App. 337-38). Nguyen drove past the vehicle to see if Pijor was inside, but Pijor was not there. (App. 337). Nguyen parked his car and approached Pijor's vehicle. (Id.). Nguyen saw Ben in the back seat of Pijor's vehicle. (Id.). Nguyen went back to his car to wait for the police. (Id.). Pijor left with Ben before the police arrived. (App. 337-38).

Based on probable cause to believe Pijor was stalking Gooch and had stolen Ben, Officer Jacquelynn Smith of the Fairfax County Police obtained a search warrant to have a tracking device installed on Pijor's car on March 8, 2014. (App. 307). Gooch had a difficult time breaking away from her relationship with Pijor; things had been tense and stressful between them. (App. 318). Pijor would lash out if Gooch did not return his phone calls. (App. 319).

After Nguyen saw Pijor and Ben again on April 26, Gooch called and informed Officer Smith, which prompted her to review the tracking data for Pijor's vehicle. Officer Smith traced Pijor's vehicle to where Nguyen had last seen Pijor and Ben together. (App. 308-09).

A few days later, Officer Smith tracked Pijor's vehicle from Pijor's residence to the next block, where she found Pijor with Ben. (App. 309). Pijor told Officer Smith that he found Ben but did not indicate when he had found him. (App. 310). Officer Smith also found a blanket covered with dog hair, a dog bowl, dog food, water, and a leash in Pijor's vehicle. Id.). Officer Smith returned Ben to Gooch that same day. (Id.).

Pijor's father, David W. Pijor, testified at the perjury trial. (App. 361). David testified that Pijor lived with him from September 6, 2013 to February 4, 2014, and he never saw Pijor with Ben. (App. 363-64). The Commonwealth asked David if Pijor had gone to Ocean City for long periods of time with his

friend Bryan at the beginning of 2014. (App. 366). At first, David indicated his son did not leave for long periods of time, however, he then stated he would not consider a week a long period of time and that his son, Pijor, had gone to Ocean City for three weeks at one point. (App. 366). David stated he did not know if Pijor had gone to Ocean City the same day Ben went missing in September 2013. And when confronted with his previous testimony indicating that Pijor did leave for Ocean City on September 6, 2013, he still did not recall. (App. 375-76). David was also away from his home for an extended period of time in March or April of 2014. (App. 368).

The Trial Court's Ruling

Prior to trial, Pijor filed a motion in limine to prohibit the Commonwealth from introducing any evidence that suggested or intended to prove that he took Gooch's dog, Ben. (App. 4-7). During pretrial argument, Pijor asserted that the Commonwealth was collaterally estopped from proving during the perjury trial that he stole Ben because that issue had been previously litigated by the parties in the larceny trial. (App. 5, 252-53). The Commonwealth argued that there were material statements Pijor made during the larceny trial that were perjurious and that it could establish this without relitigating whether he had stolen the dog. (App. 259-61, 264, 267).

The trial court inquired of the Commonwealth what its theory of the case and testimony would be at the perjury trial. (App. 278-79). After hearing argument, the trial judge concluded that the Commonwealth intended to put on evidence that Pijor was in possession of Ben shortly after he testified at his first trial, and then would ask the court to infer Pijor possessed Ben or had knowledge of his whereabouts at the time he testified to the contrary in his larceny trial. (App. 279-80).

While the trial court found that the issue of whether Pijor stole the dog could not be relitigated based on collateral estoppel grounds and excluded any such evidence, the court ruled it would allow the Commonwealth to introduce evidence of Pijor's subsequent possession of the dog to prove that he lied when he testified on February 4, 2014 that he neither saw the dog at that time nor knew the dog's whereabouts. (App. 287-88).

The Court of Appeals' Holding

The Court of Appeals denied the petition for appeal finding no error with the trial court's conclusion that the doctrine of collateral estoppel did not bar Pijor's perjury prosecution. The Court of Appeals found that Pijor's testimony in the larceny trial that he had not seen Ben or heard anything about his whereabouts since September 6, 2013, "were not essential to determining whether [Pijor] stole [Ben] from Gooch. The Commonwealth did not attempt to prove at the perjury

trial that Pijor had stolen the dog – the ultimate issue of fact decided in the previous trial." (App. 17). Relying on Sevachko v. Commonwealth, 35 Va. App. 346, 544 S.E.2d 898 (2001) (en banc), the Court of Appeals found no error in the trial court's decision. (App. 17).

The Court of Appeals also found the evidence was sufficient to prove beyond a reasonable doubt that Pijor was guilty of perjury. (App. 18). The Court found that the record supported the trial court's rejection of Pijor's alternative theories of innocence. (App. 18).

ARGUMENT

SUMMARY OF ARGUMENT

The Court of Appeals and the trial court properly found that collateral estoppel did not bar the evidence admitted at the perjury trial, and that the evidence was sufficient to prove that the defendant was guilty of perjury. Furthermore, Assignment III is procedurally barred because the trial court was never asked to bar the indictment, but only asked to prohibit evidence. Notably, the trial court did not allow the Commonwealth to introduce evidence establishing that Pijor had stolen the dog. The court did allow the Commonwealth, however, to introduce evidence regarding events that occurred ***after*** the grand larceny trial to show that Pijor was untruthful about seeing Ben, and that he was untruthful when he stated that he did not know Ben's whereabouts. Because Pijor failed to establish all the

necessary elements of collateral estoppel, the trial court properly admitted the Commonwealth's evidence and found Pijor guilty of perjury. Finally, the Court does not need to overrule Sevachko v. Commonwealth because the holding conforms to the established principles of collateral estoppel and double jeopardy.

PROCEDURAL BAR

Pijor alleges in Assignment of Error III that the Court of Appeals erred by ruling that the perjury prosecution was not barred by collateral estoppel and double jeopardy. However, this argument was never made to the trial court and is therefore not preserved for appellate review. Rule 5:25; Scialdone v. Commonwealth, 279 Va. 422, 437, 689 S.E.2d 716, 724 (2010) ("[T]he provisions of Rule 5:25 protect the trial court from appeals based upon undisclosed grounds. . . . If the opportunity to address an issue is not presented to the trial court, there is no ruling by the trial court on the issue, and thus no basis for review or action by this Court on appeal.") (citations, internal quotation marks, and alterations omitted).

Pijor never asked the trial court to dismiss his perjury indictment based on collateral estoppel. The only argument and relief Pijor requested was "an order prohibiting any evidence, testimonial or otherwise, suggesting or intending to prove that Mr. Pijor took Kristy Gooch's dog." (App. 7). "Making one specific argument on an issue does not preserve a separate legal point on the same issue for

review." Edwards v. Commonwealth, 41 Va. App. 752, 760-761, 589 S.E.2d 444, 448 (2003) (citing Clark v. Commonwealth, 30 Va. App. 406, 411-12, 517 S.E.2d 260, 262 (1999); see also Lunsford v. Commonwealth, 55 Va. App. 59, 62, 683 S.E.2d 831 (2009) (admissibility of evidence and the sufficiency of evidence are distinct issues) (citations omitted).

There was never any argument, during the over thirty pages cited by the defendant for his preservation of the issue, that mentions dismissal of the indictment. Therefore, Assignment of Error III is not properly before this Court, because the trial court was never given the opportunity to rule on the issue.[1]

STANDARD OF REVIEW

Assignments of Error I-III raise collateral-estoppel issues. "Because collateral estoppel involves mixed questions of law and fact, not pure questions of law," appellate courts "apply a de novo standard of review" to determine "whether collateral estoppel is applicable but . . . are bound by the underlying factual [determinations of] the fact finder unless they are plainly wrong or unsupported by the evidence." Commonwealth v. Davis, 290 Va. 362, 368-69, 777 S.E.2d 555, 558 (2015).

[1] In any event, as discussed below, the trial court and Court of Appeals' reasoning in finding collateral estoppel does not bar the Commonwealth's evidence and Pijor's perjury conviction should be affirmed. Furthermore, Pijor's argument that an acquitted defendant who testifies at trial should never be subject to a perjury charge for his false testimony is unsupported by the case law and public policy, as discussed below.

Pijor's fourth assignment of error is that the evidence was insufficient to convict him of perjury. When the sufficiency of evidence is challenged on appeal, the Court views the evidence in the light most favorable to the Commonwealth, the prevailing party at trial, drawing all reasonable inferences in the Commonwealth's favor from the facts proved. See Clark v. Commonwealth, 279 Va. 636, 640-41, 691 S.E.2d 786, 788 (2010). The Court must affirm the judgment of the trial court unless that judgment is "plainly wrong or without evidence to support it." Id. Such deference applies not only to the historical facts, but to the inferences from those facts as well. "The inferences to be drawn from proven facts, so long as they are reasonable, are within the province of the trier of fact." Hancock v. Commonwealth, 12 Va. App. 774, 782, 407 S.E.2d 301, 306 (1991).

In reviewing a sufficiency challenge, "[a]n appellate court does not 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' Rather, the relevant question is whether '*any* rational trier of fact could have found the essential elements of the crime 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)). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson, 443 U.S. at 318-19.

ARGUMENT

I. The trial court properly found that collateral estoppel did not bar evidence of Pijor's possession of the dog or knowledge of the dog's whereabouts in his perjury trial.

Pijor argues that the Commonwealth should have been estopped from introducing evidence of Pijor's possession of Ben or his knowledge of the dog's whereabouts to show his testimony on February 4, 2014 was untruthful. The trial court properly denied his motion in limine because collateral estoppel does not bar the evidence.

"Collateral estoppel is a doctrine of fact preclusion that is 'embodied in the fifth amendment protection against double jeopardy.'" Sevachko, 35 Va. App. at 352, 544 S.E.2d at 901 (quoting Simon v. Commonwealth, 220 Va. 412, 415, 258 S.E.2d 567, 569 (1979)). But Pijor has a heavy burden to prevail in this appeal: "it is 'usually impossible to determine with any precision upon what basis the [fact finder] reached a verdict in a criminal case,' leaving the defense of collateral estoppel available to an accused only in 'a rare situation.'" Ramadan v. Commonwealth, 28 Va. App. 708, 714-15, 508 S.E.2d 357, 360 (1998) (quoting Jones v. Commonwealth, 217 Va. 231, 233, 228 S.E.2d 127, 128-29 (1976)). "When a defendant seeks to invoke collateral estoppel, he or she bears the 'burden of proving that the precise issue or question he seeks to preclude was raised and

determined in the first action.'" Davis, 290 Va. at 369, 777 S.E.2d at 558 (quoting Clodfelter v. Commonwealth, 218 Va. 98, 106, 235 S.E.2d 340, 345 (1977)).

Moreover, this Court and others have recognized the strong policy reasons for applying the collateral estoppel doctrine sparingly in subsequent perjury prosecutions. "While the doctrine of collateral estoppel is constitutionally based and will, in proper circumstances, constitute a bar to a criminal trial, a criminal defendant's right to testify in his own defense 'does not include a right to commit perjury.'" United States v. Ruhbayan, 325 F.3d 197, 201 (4th Cir. 2003) (quoting United States v. Dunnigan, 507 U.S. 87, 96 (1993)). "[T]he acquittal of one charged with a crime is no bar to a prosecution for perjury for testimony given by him at the trial, although a conviction would necessarily import a contradiction of the verdict in the former case." Slayton v. Commonwealth, 185 Va. 371, 382, 38 S.E.2d 485, 491 (1946); see also Ruhbayan, 325 F.3d at 201-02 (noting that a blanket rule would "put a premium on perjury and to make immunity from punishment for perjury rest on success in commission of the crime"); Sevachko, 35 Va. App. at 346, 544 S.E.2d at 898 (an acquittal in a former trial does not automatically bar perjury prosecution against defendant who testified falsely).

Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties" in a future proceeding. Ashe v. Swensen, 397

U.S. 436, 443 (1970). "Only where proof of the estopped fact is essential to proving an element of the newly charged offense or cause of action does the doctrine of collateral estoppel also preclude proof of an essential element of the other offense, thereby foreclosing a prosecution for the other offense." Sevachko, 35 Va. App. at 352, 544 S.E.2d at 901.[2]

Collateral estoppel "does not apply if it appears that the prior judgment could have been grounded 'upon an issue other than that which the defendant seeks to foreclose from consideration.'" Lee v. Commonwealth, 219 Va. 1108, 1111, 254 S.E.2d 126, 127 (1979) (quoting Ashe, 397 U.S. at 444); see also Clodfelter, 218 Va. at 107-08, 235 S.E.2d at 345-46 (holding that collateral estoppel did not apply even though defendant's theory that the general district court had adjudicated

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[2] In Sevachko the Court of Appeals reversed and remanded the perjury conviction because the Commonwealth was estopped from relitigating the issue already decided in the defendant's earlier driving on a suspended license case: whether or not he was driving. But the Court held that on remand, the Commonwealth would not be "precluded from proving by other means that [Sevachko] perjured himself, such as by discrediting his alibi that he was having his car repaired, by an admission from him that he had perjured himself, or perhaps by evidence that he admitted to others after the fact that he had testified falsely." 35 Va. App. at 353, 544 S.E.2d at 902. The Court elaborated that even if the factfinder could "coincidentally or necessarily conclude that Sevachko was driving when the Commonwealth proved that he testified falsely, the Commonwealth does not violate the constitutionally based collateral estoppel bar by proving, by such other evidence, that Sevachko implicitly lied when he testified that he was not driving." Id. at 353, 544 S.E.2d at 902. Therefore, the very limited "bar created by the collateral estoppel doctrine" on remand was that the Commonwealth would not be allowed to "prove Sevachko perjured himself by relitigating and proving that he was, in fact, driving." Id. at 354, 544 S.E.2d at 902.

a fact was one possible reason for its dismissal of a charge, when there were other, rational reasons that could underlie the dismissal).

Four requirements must be met to apply collateral estoppel:

> (1) the parties to the two proceedings must be the same; (2) the factual issue sought to be litigated must have been actually litigated in the prior proceeding; (3) the factual issue must have been essential to the judgment rendered in the prior proceeding; and (4) the prior proceeding must have resulted in a valid, final judgment against the party to whom the doctrine is sought to be applied.

Whitley v. Commonwealth, 260 Va. 482, 489, 538 S.E.2d 296, 299 (2000).

Pijor has not met his burden to establish the second and third requirements. Pijor has not established "'that the verdict in the prior action necessarily decided the precise issue he now seeks to preclude.'" Ramadan, 28 Va. App. at 714, 508 S.E.2d at 360 (quoting Rogers v. Commonwealth, 5 Va. App. 337, 341, 362 S.E.2d 752, 754 (1987)). "An acquittal, 'standing alone, does not permit a conclusion with respect' to a court's findings or rationale." Ramadan, 28 Va. App. at 714, 508 S.E.2d at 360 (quoting Copeland v. Commonwealth, 13 Va. App. 450, 453, 412 S.E.2d 468, 470 (1991)).

"Where a previous judgment of acquittal was based upon a general verdict," a reviewing court is required to "'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" Jones,

211 Va. at 233, 228 S.E.2d at 129 (quoting Ashe, 397 U.S. at 444). "Collateral estoppel is not to be applied mechanically, however, but only with 'realism and rationality.'" Ruhbayan, 325 F.3d at 201 (quoting Ashe, 397 U.S. at 444).

Pijor has failed to demonstrate that the ultimate fact at the first trial—whether or not he stole Ben—was relitigated in the perjury trial. In fact, the trial judge in the perjury trial prohibited the Commonwealth from presenting any evidence that Pijor had stolen Ben. The perjury trial determined whether the defendant had or received information on Ben's whereabouts or possessed Ben since September 6, 2013, and had testified falsely. These facts were not necessarily decided by the jury in the larceny trial.

Whether or not Pijor saw or possessed Ben or had knowledge of Ben's whereabouts since September 6, 2013 on February 4, 2014, was not an essential element that had to be decided at his grand larceny trial. While it was material, particularly because at the time of the larceny trial Ben had not been returned to Gooch, Pijor's knowledge or possession of Ben was not essential or necessarily determined by the jury when it acquitted him of larceny and unlawful entry. The trial court correctly recognized that the Commonwealth did not need to and did not intend to demonstrate that Pijor stole Ben in the perjury case. Instead, the Commonwealth introduced evidence regarding Pijor's actions after his larceny trial

to demonstrate that Pijor's testimony at the larceny trial was false.[3] Simply put, the evidence presented in Pijor's perjury trial was not a "mere rehash" of that presented in his earlier larceny trial. Ruhbayan, 325 F.3d at 204. The disputed evidence the Commonwealth introduced in the perjury trial related to his possession of the dog after the larceny trial.

Furthermore, the Court should not look behind the jury's general verdict of acquittal because it is impossible to determine if the jury credited Pijor's testimony on those issues. See Jones, 217 Va. at 233, 228 S.E.2d at 129. The jury may have credited or discredited parts of both Pijor's testimony and the Commonwealth's evidence, or it may have simply believed that the Commonwealth failed to prove Ben was stolen, given that at the time of the larceny trial the dog's location was still unknown. There is nothing in the record or the jury's verdict in the larceny trial to suggest that the factual issues Pijor alleges were resolved—his possession of the dog and knowledge of the dog's whereabouts on February 4, 2014—were actually resolved and essential to the judgment such that the Commonwealth was estopped in the subsequent perjury trial. "[R]easonable doubt as to what was decided by a prior judgment should be resolved against using it as an estoppel." Kauffman v. Moss, 420 F.2d 1270, 1274 (3d Cir. 1970).

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[3] For this reason, Pijor's reliance on United States v. Nash, 447 F.2d 1382 (4th Cir. 1971), (Appellant's Brief, at 26-27), is misplaced. In that case, the Fourth Circuit found that Nash's conviction for perjury was based on the same evidence as that underlying her mail theft prosecution.

Therefore, the trial court did not err in allowing the Commonwealth to introduce evidence that Pijor committed perjury on February 4, 2014, when he stated that he had not seen Ben after September 6, 2013 and had no information about Ben's whereabouts but was later found in possession of Ben.

II. The Court of Appeals and trial court correctly found the evidence sufficient to establish that the defendant was guilty of perjury.

"In order to sustain a perjury conviction under [Code § 18.2-434], the Commonwealth [has] the burden of proving: (1) that an oath was lawfully administered; (2) that the defendant willfully swore falsely; and (3) that the facts to which he falsely swore were material to a proper matter of inquiry." Mendez v. Commonwealth, 220 Va. 97, 102, 255 S.E.2d 533, 535 (1979). Pijor argues that the Commonwealth failed to prove that his testimony on February 4, 2014, was false.

Any element of a crime may be proved by circumstantial evidence. Lovitt v. Commonwealth, 260 Va. 497, 513-14, 537 S.E.2d 866, 877 (2000). Such evidence "is as competent and is entitled to as much weight as direct evidence, provided [the evidence as a whole] is sufficiently convincing to exclude every reasonable hypothesis except that of guilt." Coleman v. Commonwealth, 226 Va. 31, 53, 307 S.E.2d 864, 876 (1983); see also Commonwealth v. Moseley, __ Va. __, __ S.E.2d __, __, 2017 Va. LEXIS 86, at *11 (June 8, 2017).

The evidence presented in this case was sufficient to prove that Pijor committed perjury on February 4, 2014. It is clear from the record that Pijor took the stand on that date and an oath was lawfully administered to him. (App. 480). Pijor then willfully swore falsely when he confirmed that he did not "[a]t any point in time [prior to the larceny trial] . . . receive[] information on where Ben might be" and that he had not "seen the dog since September 6th." (App. 483).

Viewed in the light most favorable to the Commonwealth, the evidence established that Pijor was seen with Ben five days after Pijor testified in his larceny trial that he had not seen Ben since Ben had disappeared and did not know Ben's whereabouts. Indeed, on February 9, 2014, Gooch saw a man in a hoodie walking a golden retriever near her home. (App. 321). The dog was carrying an orange Frisbee and had a very similar gait to Ben's. (App. 321, 326-27). On March 1, 2014, Gooch saw the same man in a hoodie walking a golden retriever with an orange Frisbee. (App. 321). Later that same night, the Frisbee was thrown against Gooch's house. (Id.). On March 8, 2014, Gooch was driving with her boyfriend, Tam Nguyen, when she saw the same man in the same hoodie with a golden retriever and an orange Frisbee. (App. 322). Gooch and Nguyen pulled over, and Gooch called Ben's name. (Id.). Ben immediately dropped the Frisbee, squealed in excitement, and tried to pull towards Gooch. (App. 322, 325). Gooch and Nguyen were able to see Pijor's face during this episode. (App. 322, 325, 331,

335). Nguyen attempted to follow Pijor, but he ran away with Ben. (App. 323, 336). Finally, on April 26, 2014, eighty-one days after testifying, Pijor was found with Ben in his possession.

Given that Pijor was seen with Ben five days after he testified at trial, as well as his subsequent actions, the trial court's finding that he perjured himself when he testified that he had not seen the dog since September 6, 2013 and had no knowledge of its whereabouts, was not plainly wrong. It was reasonable for the trial court to reject Pijor's hypothesis of innocence, which was that he searched for the dog after the trial and found him. See Turner v. Commonwealth, 218 Va. 141, 148-49, 235 S.E.2d 357, 361 (1977) (while a defendant does not have the obligation to testify himself, a court cannot supply evidence that is lacking). Furthermore, Pijor's continued possession of Ben for months after his trial, until April 26, 2014 when he was apprehended by police with the dog, suggests that he had no plans to return the dog and had guilty knowledge of his actions.

Therefore, the evidence taken in the light most favorable to the Commonwealth and all inferences fairly deducible from it, was sufficient to find that Pijor committed perjury on February 4, 2014 when he testified falsely about his possession and knowledge of Ben's whereabouts.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
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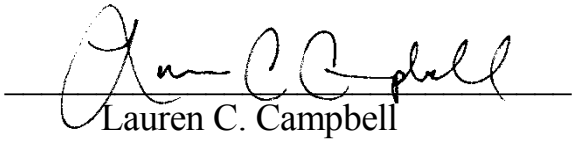
CERTIFICATE OF TRANSMISSION AND SERVICE

On June 20, 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 by Patrick M. Blanch, Esq., counsel for the appellant, at Patrick@zbolegal.com. 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 5,083 words and is within the required page limit under Rule 5:26(b).

The Commonwealth desires to present oral argument in this case.



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