VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 29th day of October, 2015.

Dewayne Oliver Winslow, Appellant,

against Record No. 150143
Court of Appeals No. 1447-13-4

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is no reversible error in the judgment of the Court of Appeals of Virginia.

This case arises from the theft of two laptops from behind the driver's seat of Benjamin Duncan's vehicle and approximately twenty dollars kept in a small metal box in the lidded center console. In this appeal, the Court considers whether testimony and fingerprint evidence presented by the Commonwealth is sufficient for a conviction of grand larceny.

At the conclusion of the Commonwealth's evidence, defendant Dewayne Oliver Winslow, by counsel, moved to strike the evidence as insufficient. The motion was denied. Winslow declined to present any evidence on his behalf. The circuit court found him guilty of grand larceny and sentenced him to two years' imprisonment, suspended, and placed him on probation. A three-judge panel of the Court of Appeals considered Winslow's appeal solely as to whether the evidence was sufficient to show he was the criminal agent. The Court of Appeals affirmed the judgment of the trial court, and Winslow now appeals.

The standard for reviewing the sufficiency of the evidence in a criminal case is well established:

> A motion to strike challenges whether the evidence is sufficient to submit the case to the [finder of fact]. What the elements of the offense are is a question of law that we review de novo. Whether the evidence adduced is sufficient to prove each of those elements is a factual finding, which will not be set aside on appeal unless

> it is plainly wrong. In reviewing that factual finding, we consider the evidence in the light most favorable to the Commonwealth and give it the benefit of all reasonable inferences fairly deducible therefrom. After so viewing the evidence, the question is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In sum, if there is evidence to support the conviction, the reviewing court is not permitted to substitute its judgment, even if its view of the evidence might differ from the conclusions reached by the finder of fact at the trial.

Linnon v. Commonwealth, 287 Va. 92, 98, 752 S.E.2d 822, 825-26 (2014).

As a preliminary matter, Winslow does not challenge the conclusion that the fingerprint on the metal box did, in fact, belong to him. Rather, Winslow's argument focuses on permissible inferences that may be drawn from the placement of the print on the metal box. Winslow primarily contends that the evidence is not sufficient to establish the inference that he was present at the time and place of the crime, and therefore is insufficient to show that he is the criminal agent. He argues that his fingerprint was found on a moveable box inside a moveable vehicle, which was generally accessible to the public, and the Commonwealth has not set forth the attendant circumstances from which a factfinder could reasonably deduce that the print was placed at the time and place of the crime.

Winslow cites several federal cases and cases from other jurisdictions in support of his argument. The Court, however, adopts its previous statement from Turner v. Commonwealth, 218 Va. 141, 235 S.E.2d 357 (1977), and that of the Court of Appeals below in the instant case: while such advocacy is appreciated, "we need not search afield for guidance. The principles enunciated in Avent v. Commonwealth, 209 Va. 474, 164 S.E.2d 655 (1968), control the disposition of this case." Winslow v. Commonwealth, 64 Va. App. 121, 130 n.3, 765 S.E.2d 856, 860 n.3 (2014) (quoting Turner, 218 Va. at 146, 235 S.E.2d at 360).

A fingerprint alone is not probative of theft unless it is proven that it was placed at the time and place of the theft, as it "is generally recognized that finger print evidence must be coupled with evidence of other circumstances tending to reasonably exclude the hypothesis that the print was impressed at a time other than that of the crime." Avent, 209 Va. at 479, 164 S.E.2d at 659 (quoting McNeil v. State, 176 A.2d 338, 339 (Md. 1961)). However, such attendant circumstances

> . . . need not be circumstances completely independent of the fingerprint, and may properly include circumstances such as the location of the print, the character of the place or premises where it was found and the accessibility of the general public to the object on which the print was impressed. A latent fingerprint found at the scene of the crime, shown to be that of the accused, tends to show that he was at the scene of the crime. The attendant circumstances with respect to the print may show that he was at the scene of the crime at the time it was committed. If they do so show, it is a rational inference, consistent with the rule of law both as to fingerprints and circumstantial evidence, that the accused was the criminal agent.

Avent, 209 Va. at 479-80, 164 S.E.2d at 659. Winslow argues that the attendant circumstances in this case are not sufficient to show that he was present at the time and place of the crime because the box was a moveable object, located inside a moveable and accessible vehicle.

A fingerprint on a moveable or publically accessible object may tend to require more in the way of attendant circumstances for a rational factfinder to conclude beyond a reasonable doubt that the fingerprint is indicative of a criminal offense. See, e.g., Granger v. Commonwealth, 20 Va. App. 576, 578 (1995) (finding a fingerprint on a liquor bottle used to strike the victims insufficient without timing evidence as to when it was placed). The box in question, however, was neither moveable nor accessible to the extent that Winslow alleges.

Although the vehicle may have moved, and a box is a readily "moveable" object, the box essentially stayed in one place, inside the console. Duncan testified that he accessed the box every workday in order to pay for tolls or parking and that the box had remained in the vehicle serving this purpose for at least the year prior to the theft. As it was in a lidded console within his vehicle, the box was not "accessible," but rather secured in a location to which no one had innocent access without Duncan's permission. Duncan testified that he never took the box out of the vehicle and that he was unaware of anyone else touching it prior to the theft. Duncan also testified that he had never seen Winslow prior to the court hearings, was not aware of him entering his vehicle in the past or touching the cash box, and had not given him permission to be in the vehicle. According to fair inferences arising from the testimony offered in this case, there was no innocent access to the box for at least the year prior to the theft.

In Ricks v. Commonwealth, 218 Va. 523, 237 S.E.2d 810 (1977), a fingerprint on a jar of pennies that had not left the victim's house for the last three years was sufficient for a conviction, as the defendant had no innocent access to the jar. The Court in Ricks explained:

> [A] reasonable inference from the Commonwealth's evidence was that the jar, although a readily moveable object, had remained in the victim's bedroom during all times material to this case, and thus could not have been touched by defendant unless he was actually in that room.
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> . . . .
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> The print was on an object which was stored in the bedroom of a private home, a place not accessible to the public in general or the defendant in particular, and a place where the defendant had no right to be. Thus, evidence of the print has been coupled with evidence of "other circumstances" which tend to reasonably exclude the hypothesis that the fingerprint was impressed at a time other than during the commission of the crimes.

Id. at 526-27, 237 S.E.2d at 812. Similarly, in this case, a reasonable inference arises that in at least the year prior to the theft, the metal box remained in the lidded console of a private vehicle, and thus could not have been touched by the defendant unless he was actually in that vehicle with his hand inside the lidded console, a place "where the defendant had no right to be." Id. at 527, 237 S.E.2d at 812.

The Court in Ricks rejected the hypothesis that the fingerprint pre-dated the three-year period in which the moveable jar was present in the bedroom, noting that "there was no evidence that the fingerprint could have been on the jar indefinitely or for a period of years." Id. at 528, 237 S.E.2d 813 (emphasis omitted). Winslow argues that this case is distinguishable from Ricks because one of the Commonwealth's fingerprint experts agreed that fingerprints can last on a surface for "a long time," and so did not preclude the reasonable possibility that the fingerprint was placed at least a year prior to the crime.

In fact, the Commonwealth's witness, Donald Seifert, never agreed that fingerprints could last "a long time" on a surface. Rather, in response to defense counsel's question during cross-examination as to whether fingerprints could last "a long time," Seifert responded, "It depends on the surface and what it's exposed to." As to those conditions, the factfinder heard testimony of nearly daily usage of this box for more than a year by Duncan. Yet the police could only lift five prints, three of which were smudged, and only one of which belonged to Duncan. The single other viable print belonged to Winslow. A rational factfinder, hearing this evidence, could reasonably deduce that the surface of the box smudges easily, that the intact fingerprint from Winslow was likely recent, and that it was highly unlikely that it was more than a year old.

Fair inferences in favor of the Commonwealth thus allow a rational factfinder to conclude that Winslow touched the box but at no point in time had innocent access to the box. "[E]vidence of the print has been coupled with evidence of 'other circumstances' which tend to reasonably exclude the hypothesis that the fingerprint was impressed at a time other than during the commission of the crimes." Ricks, 218 Va. at 527, 237 S.E.2d at 812. Because Duncan testified that both the computers and the money were in the vehicle only hours before, and he became aware that they were missing at approximately the same time from a vehicle he believed that he locked, a rational factfinder can likewise reasonably deduce that the same criminal agent was responsible for the theft of both the computers and the money. The factfinder may therefore reasonably conclude that Winslow was present at the time and place of the theft and was the criminal agent.

Winslow finally argues that the inferences made herein constitute an impermissible shifting of the burden of proof to the defendant, forcing him to provide evidence in the way of an alternative explanation. Yet, the Commonwealth need not negate "every conceivable possibility that an accused, shown to be at the scene of a crime by his fingerprint, was present other than at the time of the commission of the crime. The fingerprint evidence . . . need be coupled only with evidence of other circumstances tending to reasonably exclude the hypothesis that the print was impressed at a time other than that of the crime." Avent, 209 Va. at 480, 164 S.E.2d at 659 (internal quotation marks and citations omitted) (emphasis in original). While the burden of proof remains firmly with the Commonwealth, the Commonwealth is entitled to fair inferences from its evidence. The question presented at the conclusion of all the evidence presented is whether these fair inferences tend to reasonably exclude other hypotheses so as to allow a rational factfinder to find guilt beyond a reasonable doubt. "While a defendant does not have the obligation to testify himself or to offer testimony to explain the presence of his prints, a court cannot supply evidence that is lacking." Id. at 480, 164 S.E.2d at 659.

For the aforementioned reasons, the judgment of the Court of Appeals is affirmed. The appellant shall pay to the appellee two hundred and fifty dollars damages.

Justice Kelsey took no part in the consideration of this case.

This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of Arlington County.

A Copy,

Teste:

Patricia L Harrington

Clerk