# VIRGINIA:

***In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 2nd day of April, 2020.***

Present: Goodwyn, Mims, Powell, Kelsey, McCullough, and Chafin, JJ., and Millette, S.J.

Ricky Dean Tate, Jr., Appellant,

against Record No. 190201
Court of Appeals No. 0230-18-3

Commonwealth of Virginia, Appellee.

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

We have considered the record, briefs, and arguments of counsel, and for the reasons stated below, we will affirm the judgment of the Court of Appeals.

Ricky Dean Tate appeals from a judgment of the Court of Appeals affirming his convictions for three counts of grand larceny in violation of Code § 18.2-95(ii) and one count of statutory burglary in violation of Code § 18.2-91. *Tate v. Commonwealth*, Record No. 0230-18-3 (October 2, 2018) (unpublished).

Tate's convictions stem from incidents that occurred on December 29, 2016 (the "Hrebenak case"), January 2, 2017 (the "Blue Moon Tattoo Parlor case"), and January 21, 2017 (the "Morch/Sheets/Wilner case").* The Court of Appeals ruled that the circuit court did not err in its conclusions that the single larceny doctrine did not apply to the larceny conviction in the Hrebenak case and that the Commonwealth's evidence was sufficient to support the convictions in the Blue Moon Tattoo Parlor and Morch/Sheets/Wilner cases. Tate assigns error to the Court of Appeals' judgment affirming his convictions in each of the three cases. We address each assignment of error in turn.

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* The circuit court case numbers for the grand larceny convictions are CR17000396-00 (the Hrebenak case), CR17000404-00 (the Morch/Sheets/Wilner case), CR17000397-00 (the Blue Moon Tattoo Parlor case) and the statutory burglary conviction is case CR17000403-00 (the Morch/Sheets/Wilner case).

## The Morch/Sheets/Wilner Case

In his first assignment of error, Tate asserts that:

> The Court of Appeals erred in upholding the trial court's ruling that the evidence was sufficient to convict Tate in the Morch/Sheets/Wilner statutory burglary and grand larceny case, where the case was based on the inherently incredible testimony of a co-defendant, Tate testified and denied guilt, and not all of the proper LLC director witnesses testified for the Commonwealth with regard to the lack of permission for Tate to enter or take the items.

The evidence established that the investigating law enforcement officer confirmed that a door to the Morch/Sheets/Wilner residence had been damaged. Sheets and Morch testified that the glass in one of the entry doors to the house was broken, that they did not give Tate permission to enter the house, and that several items, which exceeded two hundred dollars in value, were taken including stereo equipment, a television, a tackle bag full of fishing equipment, and two toy remote control boats. Tate's ex-girlfriend testified that on the night in question, Tate borrowed her car for approximately three hours and returned with a television in the back seat. Following Tate's arrest, the ex-girlfriend permitted the police to search her car, which, as relevant here, produced a remote control device for one of the missing toy boats and a bandana, which she confirmed Tate wore on the night in question. The ex-girlfriend also testified that fishing lines found in her car were not hers and that a crow bar, screw driver and hammer found in her car also were not hers, but were items she previously had seen in Tate's house. Tate's ex-girlfriend also related that when she "got on [Tate's] case about" "what [had] happened," Tate had responded "that he didn't know why he . . . was doing stuff like that" but "would never do any stealing like that ever again." The witness acknowledged her plea agreement with the Commonwealth, which resulted in dismissal of related burglary charges against her. Tate denied that he broke into or stole anything from the Morch/Sheets/Wilner residence. (JA 231).

Tate moved to strike the Commonwealth's evidence, contending that because the residence was owned by an LLC and because all members of that LLC did not testify, the Commonwealth failed to prove that he lacked permission to enter the house. Tate also argued that the testimony of his ex-girlfriend was inherently incredible because she testified in exchange for the agreement to dismiss the burglary charges against her. (JA 275-80).

The circuit court denied the motions to strike and found Tate guilty of all charges. The court found that the ex-girlfriend was credible, that Sheets and Morch established their

ownership, notwithstanding the LLC, that they did not give Tate permission to enter their home, and that Sheets and Morch established the value of the stolen items.

Tate presented the same arguments to the Court of Appeals and to this Court on appeal.

When reviewing the sufficiency of the evidence to support a conviction, "the relevant question is, after reviewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Sullivan v. Commonwealth*, 280 Va. 672, 676 (2010). The "judgment of the trial court is presumed correct and will not be disturbed unless it is 'plainly wrong or without evidence to support it.'" *Commonwealth v. Perkins*, 295 Va. 323, 327 (2018) (quoting *Pijor v. Commonwealth*, 294 Va. 502, 512 (2017)).

Under settled principles, "[t]he 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. Taylor*, 256 Va. 514, 518 (1998). The fact finder is free to rely on any evidence presented, so long as it is not "inherently incredible," referring to evidence that is "so manifestly false that reasonable men ought not to believe it" or that is "shown to be false by objects or things as to the existence and meaning of which reasonable men should not differ." *Gerald v. Commonwealth*, 295 Va. 469, 487 (2018), *cert. denied*, ___ U.S. ___, 139 S. Ct. 846 (2019). Furthermore, when the accused testifies, the fact finder is entitled to disbelieve his or her self-serving testimony and to conclude that he or she is lying to conceal his guilt. *Carosi v. Commonwealth*, 280 Va. 545, 554-555 (2010).

Based upon our review of the evidence in this light and affording the circuit court due deference with regard to the witnesses' credibility, and for the reasons stated by the Court of Appeals, we hold that the Commonwealth's evidence was competent, not inherently incredible, and sufficient to prove beyond a reasonable doubt that Tate was guilty as charged of statutory burglary and grand larceny of the Morch/Sheets/Wilner residence.

The Hrebenak Case

Tate's second assignment of error charges that:

> The Court of Appeals erred in upholding the trial court's failure to apply the single larceny doctrine in the Hrebenak case, in which the taking of a motor vehicle part or parts was the result of a single impulse with the taking of the other items, and thus the second larceny charge should have been dismissed.

In *West v. Commonwealth*, 125 Va. 747 (1919), this Court explained the single larceny doctrine as follows:

> Broadly stated, the general rule is that the taking of property at different times, though from the same place and the same owner, will constitute separate offenses; and no aggregation of successive petit larcenies, not constituting parts of a continuous transaction, but each complete and distinct in itself, can be combined in one prosecution, so as to make a case of grand larceny. But a series of larcenous acts, regardless of the amount and value of the separate parcels or articles taken, and regardless of the time occupied in the performance, may and will constitute, in contemplation of law, a single larceny, provided the several acts are done pursuant to a single impulse and in execution of a general fraudulent scheme.

*Id.* at 754. Accordingly, for the doctrine to apply in this case, in which we have a series of larcenous acts, committed on the same date or during the same entry to the same property, the evidence must be sufficient for the fact finder to conclude beyond a reasonable doubt that the thief was acting under a single impulse to steal at the time of the series of larcenous acts and in execution of a general fraudulent scheme. However, for the reasons stated below, we need not address whether the single larceny doctrine should have applied in this matter.

A grand jury indicted Tate of three offenses involving burglary at the residence of Keith Hrebenak: one count of statutory burglary and two counts of grand larceny. Tate pled nolo contendere except for the charge against him of grand larceny of "a motor vehicle part or parts" belonging to Hrebenak and he was tried by the court on this indictment. As relevant to this charge, the evidence showed that the "motor vehicle part or parts" referred to the theft of Hrebenak's motorcycle and a golf cart.

In support of the separate indictment against Tate for grand larceny of a motor vehicle part or parts, the Commonwealth presented one of Tate's co-defendants who testified that Tate was excited when he found the motorcycle and was determined to take it, despite the fact that the others involved expressed that it would be too difficult to transport. Tate and his co-defendants towed the motorcycle for a short distance behind the golf cart. Tate sat on the motorcycle to balance it during the tow, but after "spilling off," Tate and his co-defendants moved the motorcycle into the woods and planned to come back for it later. The Commonwealth also demonstrated that Tate and his co-defendants stole the golf cart, which they used to transport

other stolen items, but ultimately abandoned the golf cart after tipping it on its side and when it lost power.

Tate moved to strike the Commonwealth's evidence, arguing that because there was no separation of impulse regarding the theft of the motor vehicle part or parts, the single larceny doctrine applied and the separate charge should be dismissed. The Commonwealth responded that the evidence proved that Tate stole the motorcycle pursuant to an impulse separate from his impulse to steal the other items.

The circuit court denied Tate's motion to strike and found him guilty of grand larceny as charged. The court reasoned that Tate was excited about the motorcycle and wanted to take it, although his co-defendants thought it would be difficult to move and "were not thrilled" about it. The court further explained that when transporting the motorcycle became difficult, Tate and the others pushed the motorcycle over to a place off the road to come back for at a later time. The court made no ruling or finding as to Tate's impulse regarding the theft of the golf cart.

In affirming Tate's conviction for grand larceny on the Hrebenak case, the Court of Appeals explained that the record supported the conclusion that Tate stole various items of personal property from Hrebenak's residence with the intent to keep or sell those items and that he and his cohorts stole the *golf cart* with the purpose of using it to flee the scene and transport the other items. No. 0230-18-3, slip. op. at 7 (October 2, 2018). Reasoning therefore that the golf cart was taken for a different purpose than the other items, the Court of Appeals concluded the theft of the golf cart was a "discrete offense and was not part of the same impulse." *Id.*

On appeal, Tate fails to present adequate argument in support of his broad charge that the Court of Appeals erred in affirming the circuit court's judgment. As observed above, the Court of Appeals explicitly relied on Tate's theft of the golf cart to support the additional conviction of grand larceny, but Tate offers no argument to specifically challenge the actual basis of the Court of Appeals' decision. He fails to even acknowledge the fact that the Court of Appeals, despite explaining that application of the single larceny doctrine is a fact-specific analysis, affirmed the circuit court's judgment based upon its independent application of the facts, rather than affirming Tate's conviction based upon the factual findings and ruling that the circuit court made, which was based upon Tate's theft of the motorcycle. Accordingly, Tate has waived the issue of whether the Court of Appeals erred regarding the application of the single larceny doctrine to the Hrebenak case. *Howard v. Commonwealth,* 281 Va. 455, 461 (2011) (explaining that under Rule

5:27(d) the lack of an adequate argument on brief in support of an assignment of error constitutes a waiver of that issue); s*ee also Andrews v. Commonwealth*, 280 Va. 231, 252 (2010) (citing prior versions of Rules 5:17 and 5:27 for the proposition that the "[l]ack of an . . . argument on brief in support of an assignment of error constitutes a waiver of that issue"); *Jay v. Commonwealth*, 275 Va. 510, 519 (2008) (stating that, "[w]hen an appellant fails to comply with Rule 5:17(c)[(6)], this Court generally treats the argument as waived").

Blue Moon Tattoo Parlor Case

In his final assignment of error, Tate contends that the "Court of Appeals erred in upholding the trial court's ruling that the evidence was sufficient to convict Tate of grand larceny of tires in the Blue Moon Tattoo Parlor case."

Tate was indicted for the grand larceny of certain tires and rims belonging to the owner of the Blue Moon Tattoo Parlor (the "owner"). The Commonwealth's evidence established that on January 3, 2017, the owner arrived at his tattoo shop and noticed the tires and rims had been stolen off his Pontiac Firebird, which had been parked at the shop. Thereafter, the owner's girlfriend saw a photograph on Facebook showing his tires and rims on another vehicle. The owner was able to identify that the tires and rims in the photograph belonged to him because the [wheels] had distinct scuff marks on them. The girlfriend testified that the photograph on Facebook was associated with Bendi Davis. Davis testified that in early January 2017, Tate offered to sell her a set of tires for her Camaro. She agreed to pay one hundred dollars for them and drove Tate from his trailer and to another trailer beside Blue Moon Tattoo. Tate loaded four tires and rims into Davis' car and they returned to Tate's residence and unloaded the tires and rims. The next day, Davis took a photograph of Tate driving her car after he had mounted the tires and rims on her car.

Davis further testified that she became aware that the "tires were likely stolen" after she was contacted by Deputy J. L. Turner of the Pittsylvania County Sheriff's Office. She admitted that she lied to law enforcement when they first contacted her by denying that she had made any changes to her car. Davis also pled guilty to an offense involving the stolen tires and rims.

The circuit court denied Tate's motion to strike the evidence in which he challenged Davis' credibility because she pled guilty to possessing the stolen tires and rims, was a "multiple felon," and had everything to gain by testifying against Tate. The circuit court denied the motion and found Tate guilty of grand larceny, noting that although Davis "lie[d] initially," the court

found that "her testimony [wa]s credible" with respect to "the details as to how and when the stolen wheels and tires were placed on her vehicle."

Tate presented the same argument to the Court of Appeals and to this Court that Davis' testimony was inherently incredible. The trier of fact is the sole judge of the credibility of the witnesses, unless, as a matter of law, the testimony is inherently incredible. *Walker v. Commonwealth*, 258 Va. 54, 70-71 (1999). As mentioned earlier, it is well established that evidence is "inherently incredible" only where it is "so manifestly false that reasonable men ought not to believe it" or that is "shown to be false by objects or things as to the existence and meaning of which reasonable men should not differ." *Gerald*, 295 Va. at 487. Based upon the record before us we cannot say that Davis' testimony was inherently incredible. As a result, "this [C]ourt will not seek to pass upon the credibility of th[is] witness[]." *Id.* at 486-87 (quoting *Rogers v. Commonwealth*, 183 Va. 190, 201-02 (1944)). Therefore, giving deference to the circuit court's exercise of its discretion as fact finder in assessing credibility, we cannot say that its judgment was plainly wrong or without evidence to support it.

Conclusion

Accordingly, for the foregoing reasons, we will affirm the judgment of the Court of Appeals upholding the circuit court's convictions of Tate of three counts of grand larceny in violation of Code § 18.2-95(ii) and one count of statutory burglary in violation of Code § 18.2-91.

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

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Teste:

Clerk