

## VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 23rd day of March, 2017.*

Antoine Lamont Creecy, Appellant,

against Record No. 151800  
Court of Appeals No. 0605-14-1

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 opinion that there is no reversible error in the judgment of the Court of Appeals.

Law enforcement officers entered a residence in the City of Chesapeake while executing a search warrant. There they found Antoine Lamont Creecy lying in bed. Laying next to his leg was a black knit garment that officers varyingly described as a sock or hat. A knotted plastic bag protruded from the top of the garment. Inside the bag were forty-seven capsules and eight smaller bags and bag corners.\* The garment also included a red straw with powder residue.

Trooper Travis Cooke of the Virginia State Police searched the residence's kitchen. There he found two digital scales, a bag of empty capsules, and a white powder he recognized as a substance used to cut heroin. He recognized the empty capsules as vessels for packaging heroin for distribution. He also recognized the scales as a type used for weighing heroin, rather than ordinary kitchen scales.

Detective Bradley Burton of the Chesapeake Police Department testified that officers also recovered \$1641 in cash, as well as a business card with brown powder residue. He testified that a business card or credit card is commonly used to scoop up heroin, cut it with other substances,

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\* The Department of Forensic Science ("DFS") subsequently tested five of the forty-seven capsules and determined that they contained a combined total of 0.546 grams of powder containing heroin. DFS also tested the bags' contents and determined that three contained a combined total of 7.175 grams of powder containing heroin, and five contained a combined total of 1.420 grams of powder containing cocaine.

and pack it into capsules for distribution. He also testified that one of the digital scales had brown powder residue on it, consistent with the brown powder in some of the small bags found inside the garment in Creecy's bed.

On cross-examination, Detective Burton also testified that the red straw could be used to ingest heroin and cocaine by inserting one end in a nostril and snorting drugs through the other end. He also conceded that the business card could have been used to divide heroin and cocaine into lines to be snorted. He also testified that no bag remnants were found in the residence consistent with being the source of the bag corners found in the garment. However, he testified that considering the amounts of the substances, how they were packaged, and the other items recovered in the search, "[e]verything's consistent with distribution. It's not consistent with personal use." He also testified that even assuming that the red straw was used to ingest drugs, it was not uncommon for drug dealers to use as well as sell their product. Further, if the cocaine had been bought for personal use, it would have been cheaper to buy that quantity in a single package rather than the five smaller packages found in the garment.

Investigator Rich Scott of the Chesapeake Police Department testified that he read Creecy his *Miranda* warnings and questioned him. He testified that Creecy admitted that the garment contained heroin and cocaine that belonged to him. He admitted that he used heroin. When asked about the cocaine, he answered "I sell that, too. It's all mine." Investigator Scott also testified that the heroin found in the small bags was raw, uncut heroin and that Creecy admitted that he cut it.

On cross-examination, Investigator Scott testified that Creecy said that he had used heroin for ten-to-twelve years. He testified that in his experience, it was not common for heroin addicts to also use cocaine. He also testified that ten capsules would be a common level of daily consumption for a person with a ten-to-twelve year history of heroin use.

Creecy was arrested and indicted on, among other things, one count of possessing cocaine with intent to distribute and one count of possessing heroin with intent to distribute, each in violation of Code § 18.2-248. At the end of trial, Creecy proffered jury instructions on simple possession of heroin and simple possession of cocaine. The trial court ruled that a defendant is not entitled to instructions on a lesser-included offense unless there is more than a scintilla of evidence supporting a conviction for it. The court ruled that there was no independent evidence

of simple possession, only hypothetical evidence adduced on cross-examination that it was possible that Creecy used the drugs himself. It therefore refused the proffered instructions.

The jury thereafter convicted Creecy of both relevant counts of the indictment. After sentencing, he appealed to the Court of Appeals, which affirmed by unpublished opinion. Creecy appeals.

Creecy presents two assignments of error, each challenging the refusal of the jury instruction on simple possession of each respective drug. He argues that although the circuit court cited the correct rule in its decision, it misapplied the law because there was more than a scintilla of evidence that he possessed the drugs solely for personal use. Investigator Scott testified that Creecy told him that he used heroin. This was corroborated by independent evidence, i.e., the red straw with powder residue that Detective Burton testified could have been used to ingest them.

The Court reviews the denial of a proffered jury instruction for abuse of discretion. *Sarafin v. Commonwealth*, 282 Va. 320, 325, 764 S.E.2d 71, 74 (2014). The relevant factors are whether “the law has been clearly stated and . . . the instructions cover all issues which the evidence fairly raises.” *Lawlor v. Commonwealth*, 285 Va. 187, 221, 738 S.E.2d 847, 870 (2013) (internal citation omitted).

The Court has “rejected the concept that a jury instruction on the lesser-included offense must always be given.” *Commonwealth v. Leal*, 265 Va. 142, 146, 574 S.E.2d 285, 287 (2003). To the contrary, “jury instructions on lesser included offenses are proper only when there is sufficient evidence to support them.” *Winston v. Commonwealth*, 268 Va. 564, 605, 604 S.E.2d 21, 44 (2004). “When the evidence in a prosecution warrants a conviction of the crime charged, and there is no independent evidence warranting a conviction for a lesser-included offense, an instruction on the lesser offense should not be given.” *Leal*, 265 Va. at 145, 604 S.E.2d at 287. The Court reviews the evidence in the light most favorable to the proponent of the jury instruction. *Sarafin*, 282 Va. at 325, 764 S.E.2d at 74.

The evidence in this case is sufficient to support a conviction for the crimes charged. The heroin itself coupled with scales, cutting agent, and empty capsules for repackaging it for distribution are sufficient to support a conviction for possession of heroin with intent to distribute. Investigator Scott’s unchallenged testimony that Creecy admitted selling cocaine is

sufficient to support a conviction for possession of cocaine with intent to distribute. However, in addition to this, Detective Burton gave expert opinion testimony that the quantities of each drug were consistent with distribution, not personal use. The only question then is whether there is independent evidence that Creecy did not intend to distribute.

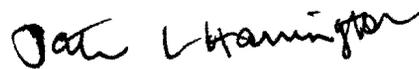
Creecy's self-serving statements are not independent evidence. The only independent evidence is the red straw with powder residue. However, even accepting Creecy's statement that he used heroin and viewing the red straw as corroboration of that statement, personal use and distribution are not mutually exclusive. As Detective Burton testified, it is not uncommon for one who distributes illegal drugs to consume them, too. Accordingly, even viewed in the light most favorable to Creecy, the evidence shows he both used and sold heroin and cocaine. This does not even suggest, let alone establish, that he had no intent to distribute the drugs. Accordingly, the Court of Appeals did not err by affirming the circuit court's judgment.

For these reasons, this Court affirms the judgment of the Court of Appeals. The appellant shall pay to the Commonwealth of Virginia two hundred and fifty dollars damages.

This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of the City of Chesapeake.

A Copy,

Teste:

A handwritten signature in black ink, appearing to read "Oat L. Hamilton". The signature is written in a cursive, somewhat stylized font.

Clerk