VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 12th day of April, 2018.

Javonte D. Holloway, Appellant,

against Record No. 170258
Court of Appeals No. 0544-16-2

Commonwealth of Virginia, Appellee.

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

The trial court convicted Javonte D. Holloway of felony child neglect, in violation of Code § 18.2-371.1; five counts of possession of a controlled substance with the intent to distribute, in violation of Code § 18.2-248; possession of a firearm while in possession of a controlled substance with the intent to distribute, in violation of Code § 18.2-308.4; possession of a concealed weapon, in violation of Code § 18.2-308; and possession of marijuana, in violation of Code § 18.2-250.1. In the Court of Appeals, Holloway unsuccessfully challenged his convictions, arguing that the police lacked a reasonable, articulable suspicion of criminal activity to support the stop of his vehicle. He further argued that the evidence was insufficient to support his convictions for felony child neglect, five counts of possession of a controlled substance with the intent to distribute, and possession of a firearm while in possession of a controlled substance with the intent to distribute. Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is no error in the judgment of the Court of Appeals.

I. BACKGROUND

On September 13, 2013, Officer R. Dalton initiated a traffic stop after observing a "Christmas tree" air freshener dangling from the rear view mirror of the car that Holloway was driving. During the suppression hearing, Officer Dalton testified that he suspected the object was large enough to obscure the driver's view and was in violation of Code § 46.2-1054. He testified that "[t]he dangling object is what brought my attention to the vehicle." He further testified that "My personal [break point], which is what I stop for, is sort of the index card size,

the three by five." Officer Dalton also stops cars with hanging handicapped signs. When asked by the trial court, "[i]s it fair to say that if you see a pine tree dangling from a rear view mirror, you're going to stop it?", Officer Dalton responded, "Yes, sir." The air freshener was measured and the trial court determined that the dimensions were 4.5 inches tall plus a tassel of 2.5 inches and 2.75 inches across at its widest point. The dimensions of the windshield of Holloway's car were 34.7 inches by 52 inches. The trial court denied the motion to suppress, finding that the present case did "not differ significantly from" *Mason v. Commonwealth*, 64 Va. App. 292, 767 S.E.2d 726 (2015), *aff'd*, 291 Va. 362, 784 S.E.2d 296 (2016).

At trial, Officer Dalton testified that when he stopped Holloway's vehicle, he observed Holloway's two-year-old son in the back seat behind the driver's seat. Two adult passengers were also in the car, one in the front passenger seat and the second in the back seat. While Holloway pulled the vehicle to the side of the road, Officer Dalton noticed the three adult passengers "moving around in the vehicle a lot. . . . [i]t was a lot of movement for three people to be making in the vehicle." Holloway's "body moved towards the passenger side of the vehicle" toward the center console.

When Officer Dalton approached the vehicle, Holloway directed the front seat passenger to get the car's registration from the glove box. When the passenger opened the glove box and sorted through the papers inside it, Officer Dalton detected the odor of marijuana. Officer Dalton called for assistance and required Holloway and the others to get out of the car.

During the search of the vehicle, officers found a large quantity of what were initially suspected to be, and were subsequently proven to be, narcotics. In the center console, officers found marijuana wrapped in a summons bearing Holloway's name. Also in the center console were twenty-five glassine envelopes of heroin, five oxycodone tablets, fifty oxycodone pills, three alprazolam tablets, and three capsules containing methamphetamine. The police found a loaded handgun in the driver's side door. When questioned about the gun, Holloway admitted he did not have a concealed weapons permit.

In the car's trunk, Dalton located packaging material, a digital scale, and ammunition. Dalton did not locate any ingestion devices in the car and found $716 loose on Holloway's person. Detective Chris Bryant, testifying as an expert in the distribution of narcotics, opined

that the quantity of drugs, the lack of ingestion devices, and the presence of a large sum of cash were all inconsistent with personal use and consistent with distribution.[1]

Holloway moved to strike the Commonwealth's evidence. Holloway argued that the Commonwealth failed to prove felony child neglect because the evidence showed that the child was belted into the back seat and did not have access to either the drugs or the gun. He argued that "[t]here's just nothing to show that the child was in danger, other than the mere nature of these objects, which you would then have to establish that my client knew that they were there, and that he would have access to them. I don't think that's been shown." The trial court denied the motion to strike the Commonwealth's evidence, with regard to Holloway's knowledge, stating that:

> we have significant occupancy. By that I mean this is a car registered to him. He's driving it. There is a traffic ticket right next to him crumpled up, issued facially to him. He is right next to, within a half an arm's reach of, a gun that's got a bullet in the chamber. He is within a wrist's reach of a pharmacy of illegal substances. He's . . . making furtive movements.

Addressing the child endangerment, the trial court went on to state that:

> his child is in the back seat of this elicit mobile pharmacy. That, in the [c]ourt's opinion, exposes this child to drug dealing, to the -- as the Court of Appeals has said, where there are guns there are drugs -- or where there are drugs there are guns. And exposing a child, who's completely helpless, he is strapped in and immovable in a car seat, indeed constitutes, in the [c]ourt's opinion, or at least gives probable cause for a reasonable prima facie case of child abuse and neglect, in terms of exposing the child to unreasonable risk. Not of ingesting the substances, not of pulling the trigger of the gun, but being in the middle of drug deals.

In finding Holloway guilty, the trial court found

> My sense is that a man who feels that there is enough danger that he's going to carry a loaded weapon within arm's reach with a bullet in the chamber believes he is engaging in dangerous activity, or he wouldn't be armed to that immediate extent. I don't -- my sense is that Mr. Holloway is never off duty as a drug dealer. He's always willing to buy. He didn't go home and stick this money in

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[1] Holloway did not object to Detective Bryant's testimony regarding distribution of narcotics.

> a drawer. He's got it – it's not neatly arranged, but more or less crumpled up in his pockets. He's a drug dealer. He's on duty. And he just happens to be mobile. It's a mobile . . . a mobile drug house. And into this drug house environment he introduces his little child.
>
> The [c]ourt believes that it certainly is a willful act so gross and wanton as to show a reckless disregard for human life, and it so finds.

The trial court thereafter sentenced Holloway to a total of 55 years, 12 months, and 30 days' incarceration and suspended all but 6 years and 6 months. Holloway appealed to the Court of Appeals.

The Court of Appeals denied the petition for appeal. *Holloway v. Commonwealth*, Record No. 0544-16-2, slip op. at 1 (Nov. 17, 2016). It found that the trial court did not err in denying the motion to suppress and that the Commonwealth proved that Officer Dalton had reasonable articulable suspicion for the traffic stop due to the hanging air freshener. Applying *Mason*, the Court of Appeals found that "[t]he air freshener in this case is described in the record as being of a similar size to the parking pass in *Mason*." *Id.* at 3. It also found that the evidence supported Holloway's conviction for child neglect under Code § 18.2-371.1(B)(1).

> Here, the evidence demonstrated appellant carried a loaded firearm in the car and in close proximity to his young child seated behind him. The trial court noted the car was "a mobile drug house" with numerous types of narcotics in large quantities in the vehicle. The trial court also noted appellant's apparent belief he was "engaging in dangerous activity" by virtue of having the loaded weapon within his reach. The record supports the trial court's conclusion that appellant's actions placed the child[] at risk of actual physical harm."

Id. at 6. This appeal followed.

II. ANALYSIS

A. Dangling Object

"When challenging the denial of a motion to suppress evidence on appeal, the defendant bears the burden of establishing that reversible error occurred." *Mason v. Commonwealth*, 291 Va. 362, 367, 786 S.E.2d 148, 151 (2016). "When the defendant contends that the evidence sought to be suppressed was obtained in violation of his Fourth Amendment rights, the standard

of review on appeal is de novo. In performing this review, we consider the evidence in the light most favorable to the Commonwealth and accord the Commonwealth the benefit of all inferences fairly deducible from the evidence." *Id.*

"In *Terry v. Ohio*, 392 U.S. 1, 30 (1968), the Supreme Court held that a police officer may, without violating the Fourth Amendment, make a brief investigatory stop of a person when the officer has a reasonable suspicion, based on objective facts, that criminal activity may be afoot. Such brief investigatory detentions have become known as '*Terry* stops.'" *Id.* "[T]o justify this type of seizure, officers need only 'reasonable suspicion'— that is, 'a particularized and objective basis for suspecting the particular person stopped' of breaking the law." *Heien v. North Carolina,* 574 U.S. __, __, 135 S. Ct. 530, 536 (2014) (quoting *Navarette v. California,* 572 U.S. __, __, 134 S. Ct. 1683, 1688 (2014)). "The Court has said that reasonable suspicion to justify an investigative stop of a vehicle must be based upon specific and articulable facts of criminal activity." *Mason,* 291 Va. at 368, 786 S.E.2d at 151 (collecting cases).

"[R]eviewing courts must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis'" for suspecting legal wrongdoing. *Id.* (quoting *United States v. Arvizu,* 534 U.S. 266, 273 (2002)). "The Fourth Amendment imposes a standard of objective reasonableness." *Id.* "The test is not what the officer thought, but rather whether the facts and circumstances apparent to him at the time of the stop were such as to create in the mind of a reasonable officer in the same position a suspicion that a violation of the law was occurring or was about to occur." *Id.*

Here, Officer Dalton testified that he suspected the Christmas tree object hanging from the rearview mirror was large enough to obscure the driver's view and was in violation of Code § 46.2-1054. He stated that "The dangling object is what brought my attention to the vehicle." Similarly, in *Mason*, the arresting officer testified that Mason "attracted his attention only because he observed a dangling object hanging below its rear-view mirror. . . . He thought the dangling object might be in violation of the law." *Mason*, 291 Va. at 365, 786 S.E.2d at 150.

As the trial court found, the facts of Holloway's case do

> not differ significantly from the *Mason* case. . . . *Mason* involved a dangling object slightly larger than the one in this case; however, the air freshener in the present case is far more similar to the parking pass in the *Mason* case than it is to the slender chain that the Court of Appeals opined would be too small an object to

> warrant a reasonable belief that a driver's vision was obstructed. Accordingly, the logic in *Mason* applies to this case as well.

The trial court could conclude from the fact that the tag was large enough to catch Officer Dalton's eye that he could have reasonably concluded that it was in violation of Code § 46.2-1054. "A reasonable person could readily conclude from the fact that the tag was sufficiently prominent to attract the officer's attention during the brief moments that it passed through his field of view that it might have violated the statute." *Mason*, 291 Va. at 371, 786 S.E.2d at 153.

B. Felony Child Neglect

Holloway also argued that the evidence failed to prove felony child neglect. He contends that the trial court adopted a per se rule that the child's presence in the vehicle was sufficient for a conviction. He bases this conclusion on a three-pronged argument: (1) although a gun was present, there was no evidence that the child could reach the gun; (2) although narcotics were present, they were confined to the center console and there was no evidence that the child could reach them; and (3) there was no evidence that the child was exposed to any illegal drug activity.

Under settled principles of appellate review, when considering the sufficiency of the evidence to sustain a conviction, an appellate court's examination "is not limited to the evidence mentioned by a party in trial argument or by the trial court in its ruling." *Du v. Commonwealth*, 292 Va. 555, 566, 790 S.E.2d 493, 500 (2016) (quoting *Perry v. Commonwealth*, 280 Va. 572, 580, 701 S.E.2d 431, 436 (2010)). Rather, "[a]n appellate court must consider *all* the evidence admitted at trial that is contained in the record." *Commonwealth v. White*, 293 Va. 411, 421, 799 S.E.2d 494, 499 (2017) (quoting *Perry*, 280 Va. at 580, 701 S.E.2d at 436). Furthermore, the appellate court must view the evidence "in the light most favorable to the Commonwealth, the prevailing party in the circuit court," and "accord the Commonwealth the benefit of all reasonable inferences deducible from the evidence." *Rich v. Commonwealth*, 292 Va. 791, 799, 793 S.E.2d 798, 802 (2016) (quoting *Riley v. Commonwealth*, 277 Va. 467, 482-83, 675 S.E.2d 168, 177 (2009)). In other words, the appellate court has a "duty" to so view all the properly admitted evidence at trial that "tends to support the conviction," *Carosi v. Commonwealth*, 280 Va. 545, 553, 701 S.E.2d 441, 446 (2010) (quoting *Carter v. Commonwealth*, 280 Va. 100, 104, 694 S.E.2d 590, 593 (2010)), and to uphold the circuit court's judgment unless it is "plainly wrong or without evidence to support it." *Commonwealth v. Moseley*, 293 Va. 455, 463, 799 S.E.2d 683, 686 (2017) (quoting Code § 8.01-680).

We reject Holloway's contention that the trial court adopted a per se rule that the child's mere presence in the vehicle was sufficient for a conviction. As in all cases, we base our decision on the totality of the evidence presented to the trial court. When viewed in its totality the evidence presented more for consideration than merely a child in the presence of drugs and a gun.

Code § 18.2-371.1(B), provides in relevant part: "Any parent, guardian, or other person responsible for the care of a child under the age of 18 whose willful act or omission in the care of such child was so gross, wanton, and culpable as to show a reckless disregard for human life is guilty of a Class 6 felony." We have held that such recklessness may be found to exist when the evidence shows that the offender either knew or should have known that his wrongful conduct "subjects a child to a substantial risk of serious injury, as well as to a risk of death, because exposure to either type of risk can endanger the child's life." *Jones v. Commonwealth*, 272 Va. 692, 698, 636 S.E.2d 403, 406 (2006) (quoting *Commonwealth v. Duncan*, 267 Va. 377, 385, 593 S.E.2d 210, 215 (2004)). In *Morris v. Commonwealth*, 272 Va. 732, 636 S.E.2d 436 (2006), we explained that, under Code § 18.2-371.1(B), "'[g]ross negligence' is culpable or criminal when accompanied by acts of commission or omission of a wanton or willful nature, showing a reckless or indifferent disregard of the rights of others, under circumstances reasonably calculated to produce injury, or which make it not improbable that injury will be occasioned, and the offender knows, or is charged with the knowledge of, the probable result of his acts." *Id.* at 739, 636 S.E.2d at 440 (quoting *Barrett v. Commonwealth*, 268 Va. 170, 183, 597 S.E.2d 104, 111 (2004)).

> When considering the level of danger necessary to support a conviction under Code § 18.2-371.1(B)(1), we have held that "the act done must be intended or it must involve a reckless disregard for the rights of another and will probably result in an injury." *Barrett*, 268 Va. at 183, 597 S.E.2d at 111. Conduct that is "gross, wanton and culpable" demonstrating a "reckless disregard for human life" is synonymous with "criminal negligence." *Cable v. Commonwealth*, 243 Va. 236, 240, 415 S.E.2d 218, 220 (1992). Criminal negligence is "judged under an objective standard and, therefore, may be found to exist where the offender either knew or should have known the probable results of his acts." *Kelly v. Commonwealth*, 42 Va. App. 347, 356, 592 S.E.2d 353, 357 (2004) (citations omitted).

Jones, 272 Va. at 701, 636 S.E.2d at 408.[2]

In *Jones*, we upheld a conviction for felony child neglect under similar facts. In *Jones*, a search warrant was issued based on the observance of heavy foot traffic in and out of Jones's apartment, coupled with the testimony of a confidential informant who made under cover purchases of narcotics at the apartment, and who informed police that lookouts were stationed both day and night in the hallways. The informant also told police that weapons were in the apartment. When the search warrant was executed, the police found a child in close proximity to illegal drugs. Our ruling acknowledged the fact of the child's proximity to the drugs but also relied upon the fact that the record also reflected that Jones routinely sold heroin from her apartment while the child was present. Like Holloway, Jones argued that to convict her on these facts would establish a per se rule that any time there are illicit drugs in a home with a young child, the parent or responsible adult is guilty of felony child neglect. Based on the totality of the evidence in *Jones*, we rejected the per se rule argument. Addressing only the presence of the child in the home where drugs were sold, we stated: "[Jones] knew or should have known that her continuous and illegal drug activity at the apartment when her young child was present also created a substantial risk of serious injury from the dangers inherent in the illicit drug trade." *Id.* at 702, 636 S.E.2d at 408.

As we did in *Jones*, we reject Holloway's argument that our holding here amounts to a per se rule. The totality of the evidence in this case shows that Holloway's two-year-old child was in the back seat of a car with a large quantity of illegal narcotics in the center console. Specifically, Holloway had twenty-five glassine envelopes of heroin, five oxycodone tablets, fifty oxycodone pills, three alprazolam tablets, and three capsules containing methamphetamine. He also had a loaded handgun, with a round in the chamber, in the driver's side door. Packaging material, a digital scale, and ammunition were found in a bag in the trunk and Holloway had

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[2] Similarly, in a recent unpublished order, we found that the totality of the evidence was sufficient for a "rational trier of fact [to] have found the essential elements of the crime" of felony child neglect "beyond a reasonable doubt." *Wiggins v. Commonwealth*, Record No. 160828, slip op at 6 (Nov. 2, 2017) (quoting *Williams v. Commonwealth*, 278 Va. 190, 193, 677 S.E.2d 280, 282 (2009) (alteration in original)). We affirmed Wiggins's conviction for felony child neglect where the totality of the evidence showed that the child was present in the home with loaded firearms throughout the home, 20 bags of marijuana, and the fact that Wiggins was engaged in illegal drug trafficking. *Id.* at 2-6.

crumpled bills totaling $716 in his pockets. As characterized by the trial court, these facts indicate that Holloway was operating a "mobile drug house" out of his car.

In finding Holloway guilty, the trial court found,

> My sense is that a man who feels that there is enough danger that he's going to carry a loaded weapon within arm's reach with a bullet in the chamber believes he is engaging in dangerous activity, or he wouldn't be armed to that immediate extent. I don't -- my sense is that *Mr. Holloway is never off duty as a drug dealer.* He's always willing to buy. He didn't go home and stick this money in a drawer. He's got it – it's not neatly arranged, but more or less crumpled up in his pockets. He's a drug dealer. He's on duty. And he just happens to be mobile. It's a mobile . . . a mobile drug house. And into this drug house environment he introduces his little child.
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> The Court believes that it certainly is a willful act so gross and wanton as to show a reckless disregard for human life, and it so finds. It finds the defendant guilty as charged.

(Emphasis added.) Based on this evidence, we conclude that the trial court's finding that Holloway was always "on duty" in a mobile drug house and always ready to sell drugs regardless of the presence of his child in the car was neither plainly wrong nor without evidence to support it. The totality of the evidence in this case supports Holloway's conviction for felony child neglect based on the substantial risk of serious injury to the child from the dangers inherent in the illicit drug trade.[3]

Accordingly, the judgment is affirmed. The appellant shall pay to the Commonwealth of Virginia two hundred and fifty dollars damages.

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[3] Other states have taken a similar position. The Indiana Supreme Court has held that "the knowing exposure of a dependent to an environment of illegal drug use poses an actual and appreciable danger to that dependent and thereby constitutes neglect regarding the endangerment requirement of the offense [of neglect of a dependent]." *White v. State*, 547 N.E.2d 831, 836 (Ind. 1989). Indiana's Court of Appeals extended that holding to a conviction for neglect of a dependent during a controlled drug buy, holding "we think that the dangers inherent in drug dealing are much worse than those associated with drug use alone, and we hold that the knowing exposure of a dependent to a drug deal constitutes neglect under Indiana Code Section 35-46-1-4 [(neglect of a dependent)]." *Cleasant v. State*, 779 N.E.2d 1260, 1262-63 (Ind. Ct. App. 2002). *See also State v. Wilson*, 2011 Tenn. Crim. App. LEXIS 933, at *77-79 (Tenn. Crim. App. Dec. 19, 2011) (affirming convictions for child neglect where children lived in a known drug house environment).

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

JUSTICE GOODWYN, dissenting in part.

I respectfully dissent regarding the ruling on the felony child neglect charge. Unlike the apartment in *Jones*, in this case there is no evidence that the defendant had sold drugs, at any time, out of his car or that he intended to do so. In other words, I do not believe there is sufficient evidence in this record to prove that Holloway was always "on duty" or that his vehicle was used as a "mobile drug house." Therefore, I would reverse the conviction on the felony child neglect charge.

A Copy,

Teste: Patricia L Harrington

Clerk