DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CM-724
(Cr. No. 2023-CMD-9433)

MICHAEL EVANS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

MOTION FOR SUMMARY AFFIRMANCE

Pursuant to D.C. App. R. 27(c), appellee, the United States of America, respectfully moves for summary affirmance of appellant Michael Evans's conviction for second degree theft. Evans claims that the trial court erred when it found his actions were not justified by necessity, and therefore, convicted him of theft upon insufficient evidence. Evans's claim is without merit. Summary affirmance is appropriate because "the basic facts are both uncomplicated and undisputed . . . and . . . the trial court's ruling rests on a narrow and clear-cut issue of law." *Oliver T. Carr*

Mgmt. v. National Delicatessen, Inc., 397 A.2d 914, 915 (D.C. 1979); *accord Watson v. United States*, 73 A.3d 130, 131 (D.C. 2013).[1]

BACKGROUND

Procedural History

On December 20, 2023, the government charged Evans by information with one count of theft in the second degree, in violation of D.C. Code § 22-3211, 3212(b) (Record (R.) 12 (Information)).[2] On June 24, 2024, the Honorable Hiram Puig-Lugo conducted a bench trial and found Evans guilty as charged (6/24/24 Transcript (Tr.) 73–74). On July 24, 2024, the Honorable Robert I. Richter sentenced Evans to forty-five days' incarceration, execution of sentence suspended as to all, and one year of supervised probation (R. 55 (Judgment and Commitment Order)). Evans was also ordered to pay $50 to the victim's compensation fund (*id.*). Evans timely noticed this appeal on August 7, 2024 (R. 58 (Notice of Appeal)).

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[1] Pursuant to D.C. App. R. 27(c), if this Court denies summary affirmance, we ask that this motion be treated as our brief on the merits.

[2] All page references to the record are to the PDF page numbers.

The Trial

The Government's Evidence

On December 19, 2023, Myeesha People, an asset protection supervisor at Designer Shoe Warehouse (DSW), was on duty at the DSW store located at 3100 14th Street, NW (6/24/24 Tr. 18–20). At approximately 1:15 p.m., People observed a man — later identified as Evans — enter the DSW store (*id.* at 20). Evans proceeded to the men's clearance section where he removed a pair of black Sperry slides, placed them on his feet, placed his previously worn shoes into the Sperry box, and then placed the box back on the shelf (*id.*). Evans then proceeded to exit the store and descend an escalator, passing all points of sale with the shoes on his feet, and exited onto the street (*id.* at 20–21). People observed this sequence of events directly from the floor, but the events were also captured on the store's CCTV which People subsequently reviewed (*id.* at 21). People followed Evans onto the street along with the store's asset protection agent and confronted Evans (*id.*). People requested the merchandise from Evans's feet and Evans complied (*id.* at 21–22). The value of the shoes was approximately $42 (*id.* at 32).

Evans was then escorted back to the manager's office of the DSW store, where People interviewed Evans (6/24/24 Tr. 22). Evans told her that this was his first time stealing shoes from DSW and he took them because he needed shoes (*id.*). He added that he had been released from the hospital and arrived by bus (*id.*).

The Defense Evidence

Evans, testifying in his own defense, stated that he had been living in Washington, D.C., since the beginning of the COVID-19 pandemic but was unhoused at the time of the incident at DSW (6/24/24 Tr. 47–48). In early December 2023, Evans was sick, and his probation officer ordered him to go to the hospital to treat his injured foot and to resume taking his medications (*id.* at 48). At the hospital, Evans was "hosed . . . down" and all his clothes were soaked (*id.*). The shoes he had been wearing were further damaged with the sole becoming detached from the leather top portion, and there was no cushion remaining on the inside, so Evans was walking on a piece of rubber (*id.* at 49, 54). Evans's feet were in poor condition (*id.* at 49). He had trench foot, fungus, and bacteria, and was missing his toenails (*id.*).

When he was being discharged from the hospital, Evans demanded that his shoes be replaced and threatened to kill himself if they were not (6/24/24 Tr. 49–50). Evans was subsequently transferred to the Psychiatric Institute of Washington (PIW) (*id.*). Before leaving, the hospital provided Evans with two pairs of slip resistant socks (*id.* at 50). Evans was released from PIW on December 19, 2023 (*id.*). He was permitted to check the donation box at PIW for shoes, however, he chose not to take any as there were no shoes in his size (*id.* at 50–51).[3] Evans left PIW wearing the damaged moccasin-style shoes he had been wearing upon arrival at the hospital (*id.*).

It was cold outside, so Evans got on the first bus he could (PIW had provided him with a bus pass) and rode it to the end of its line at the Columbia Heights Metro Station (6/24/24 Tr. 51). Upon arrival, Evans panhandled, hoping to raise enough money to ride the Metro to Greenbelt, so he could visit an AA meeting house and try to find someone to help him buy shoes and get something to eat (*id.* at 53). He also went to several of the local stores to see if he could obtain food (*id.* at 51).

[3] Evans testified he wears a size 15 or 16 shoe (6/24/24 Tr. 51).

Eventually, he entered the lobby of 3100 14th Street, NW, and noticed there was a shoe store located upstairs in the building (*id.* at 51–52). Evans then proceeded upstairs to the shoe store and checked first the regular section and then the clearance section but was unable to find shoes his size (*id.*). He then selected a pair of slides, despite the fact that they were too small, because they had thick soles (*id.*). Evans placed his old shoes in the box and placed the box back on the shelf (*id.*) After placing the shoes back in the box, Evans proceeded to exit the store (*id.* at 52).

Evans testified that, even after he left the store, his feet still hurt and were cold (6/24/24 Tr. 53). He was still trying to panhandle to obtain money to get to Greenbelt (*id.*). Evans was then stopped by People who proceeded to interview him and reclaim the shoes he had taken (*id.* at 53–54). People also told Evans there was a donation bin in the DSW and if he had wanted shoes from that, he could have just asked (*id.* at 61). Evans testified that he had not known the donation bin existed (*id.*).

Trial Court's Findings and Verdict

The defense did not contest that Evans took the shoes, but asserted that he had acted out of necessity (6/24/24 Tr. 65–67). Although the trial

court credited the testimony of both People and Evans, it found Evans guilty as charged (*id.* at 73). The court noted that, to establish necessity, "the defense requires a showing that there is no legal alternative available to the defendant[,] that the harm to be prevented is imminent, and would be directly affected by the defendant's actions, and that the defendant's actions were reasonably designed to actually prevent the threatened greater harm" (*id.* at 70). The court acknowledged that the fact that Evans's shoes were damaged was undisputed (*id.*). However, the court found that Evans failed to demonstrate he was avoiding an imminent harm (*id.* at 73). First, the court found that all of the activities Evans did between leaving PIW and stealing the shoes from DSW (e.g., panhandling and seeking food at restaurants) undercut his argument that there was imminent harm or danger from the shoes he was wearing (*id.* at 72–73).[4]

Second, the court found that Evans had failed to demonstrate that he lacked a legal alternative to stealing the slides, noting that Evans had

[4] The court acknowledged that the government had not objected to Evans's testimony about his medical conditions, but the court noted that it was hearsay nonetheless (6/24/24 Tr. 73).

testified he was panhandling to get on a train and go to an AA meeting where he was going to try and find someone to get him, inter alia, shoes (6/24/24 Tr. 72–73). The court reiterated that Evans's own "testimony underscore[d] the fact that there was no imminent danger here because [of] all the things he was able to do for as long as he did it wearing the shoes that were damaged" (*id.*).

ARGUMENT

The Trial Court Did Not Err When It Found Evans's Theft of the Shoes Was Not Justified by Necessity.

Evans did not contest any of the facts presented in the government's case-in-chief at trial (*see* 6/24/24 Tr. 17, 66), nor does he contest them now on appeal (Appellant's Brief at 1–3). The only argument Evans urges on appeal is that the trial court erred in finding his theft of the shoes was not justified by necessity (*id.* at 8). This argument is unavailing.

A. Standard of Review and Applicable Legal Principles

In reviewing a claim of insufficient evidence, this Court "must view the evidence in the light most favorable to the government, giving full play to the [fact finder's] right to determine credibility, weigh the

evidence, and draw justifiable inferences of fact." *Ewing v. United States*, 36 A.3d 839, 844 (D.C. 2012) (citation omitted). *See also Bolden v. United States*, 835 A.2d 532, 534 (D.C. 2003) (defendants challenging sufficiency of evidence "face a difficult burden"). "The evidence must be sufficiently weighty to allow a finding of guilt beyond a reasonable doubt, but it need not compel such a finding, nor must the government negate every possible inference of innocence." *Johnson v. United States*, 40 A.3d 1, 14 (D.C. 2012) (citation omitted). Instead, there merely must be "some probative evidence on each of the essential elements of the crime" from which a reasonable person could fairly find guilt beyond a reasonable doubt. *Jennings v. United States*, 431 A.2d 552, 555 (D.C. 1981) (citation omitted). This Court will vacate a conviction only where there has been "no evidence" produced from which guilt can reasonably be inferred. *Joiner-Die v. United States*, 899 A.2d 762, 764 (D.C. 2006).

"In reviewing a bench trial, this [C]ourt will not reverse a conviction for insufficient evidence unless appellant establishes that the trial court's factual findings were plainly wrong or without evidence to support them." *Joiner-Die*, 899 A.2d at 764 (citation and internal quotation marks omitted). "Any factual finding anchored in credibility assessments

derived from personal observations of the witnesses is beyond appellate reversal unless those factual findings are clearly erroneous." *Stroman v. United States*, 878 A.2d 1241, 1244 (D.C. 2005).

To establish second-degree theft under D.C. Code § 22-3211(b), the government must prove: "(1) that the accused wrongfully obtained the property of another, (2) that at the time he obtained it, he specifically intended either to deprive another of a right to the property or a benefit of the property or to take or make use of the property for himself without authority or right, and (3) that the property had some value." *Russell v. United States*, 65 A.3d 1172, 1176–77 (D.C. 2013) (citation omitted) (cleaned up).

"[T]he necessity defense exonerates persons who commit a crime under the 'pressure of circumstances,' if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendants' breach of the law." *Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982) (quoting *State v. Marley*, 509 P.2d 1095, 1109 (Haw. 1973)). The necessity defense is unavailable when: "(1) there is a legal alternative available to the defendants that does not involve violation of the law; (2) the harm to be

prevented is neither imminent, nor would be directly affected by the defendants' actions; and (3) the defendants' actions were not reasonably designed to actually prevent the threatened greater harm." *Cardozo v. United States*, 315 A.3d 658, 673 n.8 (D.C. 2024) (en banc) (quoting *Griffin*, 447 A.2d at 778). The common law defense of necessity has been "more discussed than litigated." *United States v. Moore*, 486 F.2d 1139, 1180 (D.C. Cir. 1973). It was seldom raised successfully at common law, and this Court has "rarely found [it] viable over the decades." *See Cardozo*, 315 A.3d at 673.

B. Discussion

As noted supra, Evans does not dispute the facts found by the trial court, nor does he contest that the elements of second-degree theft were met. Instead, he argues on appeal only that the trial court should have accepted his necessity defense. The court, however, correctly rejected that defense. First, the court noted that — by Evans's own admission at trial — Evans had a legal alternative to stealing the slides: he could have gone to the AA meeting and sought to have someone provide him with shoes (see 6/24/24 Tr. 72–73). *See Griffin*, 447 A.2d at 778 ("If there was a reasonable legal alternative to violating the law, a chance both to refuse

to do the criminal act and also to avoid the threatened harm, the necessity defense will fail.") (quoting *United States v. Bailey*, 444 U.S. 394, 410 (1980)) (cleaned up). Second, the court had an ample basis to conclude, as it did, that the harm to Evans from continuing to walk in his old shoes was not sufficiently "imminent" to justify the theft. Specifically, the court correctly noted that (again by his own admission) Evans had undertaken a significant amount of activity between his release from the hospital and his arrival at the shoe store, including riding a bus, panhandling, and going into restaurants looking for food (6/24/24 Tr. 72–73). Although Evans complained at trial of suffering pain from walking in his old shoes, he notably never asserted (much less showed) that continuing to walk in them instead of stealing the slides would have caused irreparable damage to his feet. As such, the court correctly declined to find that Evans's crime was legally justified. *See Griffin*, 447 A.2d at 778 (noting that appellants had not proffered "any evidence concerning a specific, immediate, identifiable harm, reasonably perceived to be avoided by appellants' action").

Evans's attempt to support a necessity defense on appeal fails to establish any error by the trial court. First, Evans asserts that he showed

he was under the "pressure of circumstances," *see Griffin*, 447 A.2d at 777, because the shoes he was wearing were destroyed or at least severely damaged and he lacked the money to pay for new ones (see Appellant's Brief (Br.) 10–11). However, that Evans lacked the financial ability to replace his shoes does not establish a compelling circumstance as required by the defense of necessity. *See, e.g.*, *State v. Moe*, 24 P.2d 638 (Wash. 1933) (holding that one who, unemployed and in great want but not actually starving, helps himself to groceries from a grocery store is nevertheless guilty of larceny because "economic necessity" is not a defense to crime); *People v. Fontes*, 88 P.3d 484, 486–87 (Colo. Ct. App. 2003) (holding a defense of necessity cannot be based upon economic necessity); *People v. Turner*, 619 N.E.2d 781, 7878 (Ill. App. Ct. 1993) (holding economic necessity has never been recognized or accepted as a defense to otherwise criminal conduct); *Harris v. State*, 486 S.W.2d 573, 574 (Tex. Crim. App. 1972) ("Economic necessity is no justification for a positive criminal offense"); Am. Jur. 2d § 136 (2024) (collecting cases) (noting that courts have repeatedly held that economic necessity is no defense to a criminal act).

Second, Evans asserts (Br. at 11) that, balanced against the $42 value of the shoes he stole, the physical pain he suffered from his damaged shoes was sufficient to show that the harm resulting from his compliance with the law would have significantly exceeded the harm resulting from his breach of the law. *See Griffin*, 447 A.2d at 777. Taken to its logical conclusion, however, this reasoning would permit, on "necessity" grounds, the theft of nearly any non-luxury item — food, clothing, footwear — for use by the thief. Given that theft laws are intended to protect all persons, including the owners of businesses that sell necessities, such reasoning should be rejected. *Cf. Craig v. State*, 410 So. 2d 449, 453 (Ala. Ct. Crim. App. 1981) (noting "the seriousness of this widespread and costly problem" of shoplifting). Moreover, although the most direct harm caused by Evans's theft was the economic loss suffered by DSW, the permission of such thefts generally could include the loss of civil order and the sense of fear that the law will no longer protect persons in their possession of property — especially because others in the community might be encouraged by the Evans's acts to engage in similar conduct. *See generally*, Stuart P. Green, *Looting, Law, and Lawlessness*,

81 Tul. L. Rev. 1129, 1151–56 (2007) (discussing the necessity defense in the context of looting).

Third, Evans repeats (Br. 11–14) his primary argument below, namely that he reasonably believed that the harm to his feet from continuing to walk in his old shoes was sufficiently "imminent" to justify the theft of the slides. *See Morgan v. Foretich*, 546 A.2d 407, 411 (D.C. 1988) (citing *Griffin*, 447 A.2d at 778). As noted supra, however, the trial court had a more than adequate basis to reject this claim. When Evans was released from PIW, he did not immediately attempt to obtain new shoes; instead, he travelled by bus to Columbia Heights where he spent a considerable amount of time panhandling (see 6/24/24 Tr. 53, 72–73); and also walked to several stores or restaurants looking to obtain food (*id.* at 51). Thus, although Evans undoubtedly suffered pain from walking in his old shoes, he was evidently able to continue walking in them. The trial court's conclusion accordingly was (at a minimum) a permissible view of the evidence, and hence not clearly erroneous. *See Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

Fourth, Evans argues (Br. 14–16) that his theft of the shoes was reasonably designed to prevent a greater harm, namely alleviating the pain from the medical conditions afflicting his feet. *See Griffin*, 447 A.2d at 778 (citing *Marley*, 509 P.2d at 1109); *Reale v. United States*, 573 A.2d 13, 15 (D.C. 1990) (citing *Griffin*, 447 A.2d at 778). But even accepting the validity of Evans's own description of those medical conditions, he never presented any evidence that his trench foot, fungal infection, and bacterial infection would be remedied by acquiring new shoes, let alone the Sperry slides which he stole. Indeed, Evans stated that even in the stolen shoes, his feet were cold and they still hurt (6/24/24 Tr. 53). Rather, the evidence in the record demonstrates that Evans wanted to replace his old shoes because they were damaged and did not cushion his feet, not because he reasonably believed new shoes would solve his trench foot and other medical conditions.

Finally, Evans insists (Br. at 16–17) that he established that he had no "reasonable legal alternative to violating the law," *see Griffin*, 447 A.2d 778 (quoting *Bailey,* 444 U.S. at 410 (1980)), because it was not his fault the hospital damaged his old shoes, he could not find shoes in his size in the hospital donation bin, and his panhandling was not

sufficiently successful to allow him to buy new shoes, train fare, and food. However, as the trial court correctly noted, Evans himself said that he was planning to go to an AA meeting house and there seek someone to get him new shoes and something to eat (6/24/24 Tr. 72–73). Evans failed to show that it was impossible for him to make that trip before resorting to the theft of the slides. Furthermore, rather than surreptitiously stealing the slides, Evans could have sought shoes from the DSW's own donation bin (*id.* at 61). Although Evans may have been unaware of that donation bin, he never even sought to ask if he could legally be given shoes by DSW before resorting to theft. Lastly, Evans's complaint that he was unable to find anything in his size in the hospital donation bin (see Br. 16–17; 6/24/24 Tr. 49–51) is undercut by the fact he stole a pair of shoes which likewise did not fit — and, by his own admission, still left his feet in pain. In any event, Evans does not argue here, and provided no evidence at trial, that no medical treatment could have been performed to alleviate his underlying conditions, much less that he tried to obtain such medical intervention before resorting to theft. In light of that failure, the trial court did not err in rejecting his necessity defense. *Cf. Griffin*, 447 A.2d at 778 (affirming trial court's rejection of necessity

defense, where appellants' offenses "were not undertaken as a last resort, after all else had been attempted, to avoid an immediate harm").

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be summarily affirmed.

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney

CHRISELLEN R. KOLB
NICHOLAS P. COLEMAN
Assistant United States Attorneys

/s/
MATTHEW L. BROCK
VA Bar #99271
Assistant United States Attorney
601 D Street, NW, Room 6.232
Washington, D.C. 20530
Matthew.Brock@usdoj.gov
(202) 252-6829

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Timothy Cone, Esq., on this 9th day of December, 2024.

/s/
MATTHEW L. BROCK
Assistant United States Attorney