IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 091911

ELIZABETH POLLARD NOAKES

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee

BRIEF FOR THE COMMONWEALTH

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BRIEF FOR THE COMMONWEALTH

This case involves the tragic death of fifteen-month-old Noah Colassaco. While in the care of the defendant, Elizabeth Noakes, Noah died from asphyxiation due to Noakes' placement of a 33-pound dog crate atop his crib. This Court must decide whether

Noakes' placement of the dog crate atop Noah's crib was criminally negligent, supporting her conviction for involuntary manslaughter.

STATEMENT OF THE CASE

On July 26, 2007, in a bench trial, Noakes was convicted in the Chesterfield County Circuit Court of one count of involuntary manslaughter, in violation of Virginia Code § 18.2-36. (App. at 255). By final order dated November 16, 2007, Noakes was sentenced to five years incarceration, with four years suspended. (App. at 289-290).

On January 13, 2009, a divided panel of the Court of Appeals affirmed Noakes' conviction. See Noakes v. Commonwealth, No. 0295-08-2, 2009 Va. App. LEXIS 12 (Va. Ct. App. Jan. 13, 2009) (App. at 297).[1] By order dated February 20, 2009, the Court of Appeals granted Noakes' petition for rehearing *en banc*. (App. at 298-299). On August 18, 2009, the Court of Appeals affirmed Noakes' conviction, with one judge dissenting. See Noakes v. Commonwealth, 54 Va. App. 577, 681 S.E.2d 48 (2009) (en banc). (App. at 300).

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[1] Even though Noakes designated every opinion from the Court of Appeals for inclusion in the joint appendix, it appears that the opinions were inadvertently omitted when the appendix was compiled. Accordingly, the Commonwealth has given the citations to the cases instead of referencing particular pages in the appendix.

Noakes then appealed her conviction to this Court, which granted the petition for appeal on January 19, 2010. (App. at 301-302).

NOAKES' ASSIGNMENT OF ERROR

> "The trial court erred in refusing to dismiss the charge of involuntary manslaughter against Noakes because her acts did not rise to the level of criminal negligence nor could she have anticipated the unforeseeable acts that would be performed by the child while inside the crib."

(Def. Br. at 1).

QUESTION PRESENTED

DID THE COURT OF APPEALS CORRECTLY AFFIRM THE JUDGMENT OF THE CIRCUIT COURT, WHICH HELD THAT NOAKES WAS CRIMINALLY NEGLIGENT, AND THUS GUILTY OF INVOLUNTARY MANSLAUGHTER, WHEN SHE PLACED A 33-POUND DOG CRATE ATOP NOAH'S CRIB, PROXIMATELY CAUSING HIS DEATH BY ASPHYXIATION?

STATEMENT OF THE FACTS

On October 18, 2006, fifteen-month-old Noah Alexander Colassaco was killed when he suffocated in a crib under the weight of a 33-pound dog crate. (App. at 19-26, 108-111, 167-168). Although the exact time of Noah's death is unknown, the circumstances surrounding his death are quite clear. (App. at 24-26).

Around noon on the day of Noah's death, the defendant, Elizabeth Noakes, Noah's child-care provider, put him down for a nap. (App. at 113, 129, 144-145, 165, 167). Less than an hour later,[2] Noah, who had been having trouble sleeping, was standing inside of his crib crying. (App. at 49-50, 115-118, 129-131, 144-145, 165). Noakes believed that in order for Noah to fall asleep, he needed to be incapable of standing in the crib. (App. at 51, 92-93, 115-116, 165). So Noakes devised a plan to encourage Noah to sleep by placing a covering over his crib to prevent him from standing. (App. at 50, 92-93, 115-117, 165).

The covering consisted of a piece of cardboard, covered with fabric, which she placed on top of the crib. (App. at 116-117, 119, 165-166, 168). On top of the cardboard, Noakes placed a 33-pound folded dog crate. (App. at 116-117, 119, 165-166, 168). The cardboard covered virtually the entire top of the crib, while the dog crate covered only about half of the crib's top.[3] (App. at 83-86, 117, 120, 126, 166). Since Noah typically stood in the same place at the

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[2] Noakes estimated that she returned to the room around 12:30 pm, but she was not certain. (App. at 115-118, 129-131, 144-145, 165).

[3] Noakes said that she positioned the crate on top of the crib with the edges overhanging the sides so that it would not fall onto Noah. (App. at 51, 68, 79-80, 89, 127-128, 166).

front of the crib when he cried, Noakes strategically placed the dog crate over the front of the crib to prevent him from standing. (App. at 47-48, 55-58, 79-82, 89-90, 120-121, 165-166).

After rigging the contraption and making sure that it was "stable," Noakes said "night-night" to Noah, and left the room. (App. at 51-52, 68-70, 82-84, 128, 166). Noah, however, continued to cry. (App. at 52, 128, 166).

When Noakes returned to the room to check on him, she noticed that Noah was still crying, pressing his face up against the mesh wall of the crib. (App. at 51-52, 71, 76-79, 128-129, 144-145, 166). Because she still wanted him to sleep, Noakes took a nylon toy – large "enough to cover the mesh" – and put it up against the side of the crib to prevent Noah from looking out. (App. at 52, 71, 128-129, 144-145, 166). Once again, Noakes said "night-night" to Noah and left the room. (App. at 71, 166).

By one o'clock in the afternoon – nearly one hour after she had initially put Noah in the crib – Noakes, hearing nothing from Noah's room, assumed he was finally asleep. (App. at 52-53, 129-132, 166). She did not return to the bedroom for another two and a half hours. (App. at 53, 71-72, 75-76, 132-133, 166).

Around 3:30 pm, Noakes finally returned to the bedroom to wake another child from his nap. (App. at 53, 132-133, 166). Still assuming that Noah was asleep, Noakes – without even looking in Noah's direction – took the other child downstairs. (App. at 53-54, 73, 90, 133, 166).

A "few minutes" after four o'clock, Noakes returned to the bedroom to wake Noah from his nap. (App. at 54, 133, 151, 166). As Noakes entered the room, she noticed that Noah was standing in the crib with his neck and hand(s) over the side of the crib, wedged in between the crate, the cardboard and the crib wall. (App. at 54-56, 133-136, 166). Immediately Noakes removed the crate and the cardboard from atop the crib, pulled Noah out, and ran with him downstairs to call 9-1-1. (App. at 55-59, 72, 136-138, 166). Because Noah's face was blue, Noakes attempted CPR while she was on the phone with the 9-1-1 operator, hoping "to revive him." (App. at 55, 59-60, 72-73, 136, 138, 153, 166). Unfortunately, her resuscitation efforts failed, and Noah was pronounced dead at her home. (App. at 14-26,138).

ARGUMENT

THE COURT OF APPEALS CORRECTLY AFFIRMED THE JUDGMENT OF THE CIRCUIT COURT, WHICH HELD THAT NOAKES WAS CRIMINALLY NEGLIGENT, AND THUS GUILTY OF INVOLUNTARY MANSLAUGHTER, WHEN SHE PLACED A 33-POUND DOG CRATE ATOP NOAH'S CRIB, PROXIMATELY CAUSING HIS DEATH BY ASPHYXIATION.

Noakes argues that she was not guilty of involuntary manslaughter because the "precautionary measures" that she took to prevent the dog crate from falling onto Noah made his death by asphyxiation completely unforeseeable. (Def. Br. at 15-30). She argues that because she "went to great lengths to anticipate potential risks and prevent them," her placement of the dog crate atop the crib did not demonstrate "a conscious and callous disregard for a death or serious injury that was *likely* to occur." (Def. Br. at 30) (emphasis in original).

The evidence, however, viewed in the light most favorable to the Commonwealth, proved that Noah's death by asphyxiation was reasonably foreseeable under the circumstances. Accordingly, this Court should affirm Noakes' conviction for involuntary manslaughter.

Standard of Review

> When the sufficiency of the evidence in a criminal case is challenged on appeal, [this Court] must view the evidence and all reasonable inferences fairly deducible therefrom in the light most favorable to the Commonwealth. Great deference must be given to the factfinder who, *having seen and heard the witnesses, assesses their credibility and weighs their testimony.* Thus, a trial court's judgment will not be disturbed on appeal unless it is plainly wrong or without evidence to support it.

Walton v. Commonwealth, 255 Va. 422, 425-426, 497 S.E.2d 869, 871 (1998) (citations omitted) (emphasis added). See also Parks v. Commonwealth, 221 Va. 492, 498, 270 S.E.2d 755, 759 (1980) (requiring this Court to "discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and *all fair inferences to be drawn therefrom.*") (emphasis in original).

This Court does not "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318-319 (1979) (emphasis in original). Rather, the relevant question is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319 (emphasis in original).

Involuntary Manslaughter

"As a common law crime, involuntary manslaughter is defined not by statute, but in caselaw." Darnell v. Commonwealth, 6 Va. App. 485, 489, 370 S.E.2d 717, 719 (1988). And this caselaw is "well settled." Coyle v. Commonwealth, 50 Va. App. 656, 662, 653 S.E.2d 291, 294 (2007).

Involuntary manslaughter is "'the killing of one accidentally, contrary to the intention of the parties, in the prosecution of some unlawful, but not felonious, act; or in the improper performance of a lawful act.'" Lewis v. Commonwealth, 211 Va. 684, 686, 179 S.E.2d 506, 508 (1971) (quoting Mundy v. Commonwealth, 144 Va. 609, 615, 131 S.E. 242, 244 (1926)). Accord West v. Director, 273 Va. 56, 63-64, 639 S.E.2d 190, 195 (2007); Dowden v. Commonwealth, 260 Va. 459, 470, 536 S.E.2d 437, 443 (2000).

> When the Commonwealth predicates the charge upon an improper performance of a lawful act, it must show that the performance was so improper as to constitute negligence "so gross and culpable as to indicate a callous disregard of human life," but the negligence need "'not be so gross as to raise the presumption of malice.'"

Beck v. Commonwealth, 216 Va. 1, 4, 216 S.E.2d 8, 10 (1975) (citations omitted). Accord Darnell, 6 Va. App. at 489, 370 S.E.2d at 719. See also Craig v. Commonwealth, 34 Va. App. 155, 164, 538

S.E.2d 355, 360 (2000) (noting that malice is unnecessary in manslaughter cases and it is the "touchstone by which murder and manslaughter cases are distinguished.").

This type of negligence is known as "criminal negligence." Lewis, 211 Va. at 687, 179 S.E.2d at 509. Accord West, 273 Va. at 64, 639 S.E.2d at 195. Criminal negligence requires "more than the lack of ordinary care," Lewis, 211 Va. at 687, 179 S.E.2d at 509, and is "essential to a conviction of involuntary manslaughter." Davis v. Commonwealth, 230 Va. 201, 206, 335 S.E.2d 375, 378 (1985). See also King v. Commonwealth, 217 Va. 601, 606, 231 S.E.2d 312, 316 (1977) ("Inadvertent acts of negligence without recklessness, while giving rise to civil liability, will not suffice to impose criminal responsibility."); Banks v. Commonwealth, 41 Va. App. 539, 546, 586 S.E.2d 876, 879 (2003) ("Criminal negligence must be something more than mere inadvertence or misadventure.") (internal quotation marks omitted).

In order to be criminal, the negligence "must be of such reckless, wanton, or flagrant nature as to indicate a callous disregard for human life and of the probable consequences of the act." Lewis, 211 Va. at 687, 179 S.E.2d at 509. That is, the Commonwealth must

prove that "'a homicide was not improbable under all of the facts existing at the time, and that the knowledge of such facts should have had an influence on the conduct of the offender.'" Hargrove v. Commonwealth, 10 Va. App. 618, 620, 394 S.E.2d 729, 731 (1990) (citation omitted). See Conrad v. Commonwealth, 31 Va. App. 113, 121-122, 521 S.E.2d 321, 325-326 (1999) (en banc) (holding that 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.").

Stated differently, criminal negligence is "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." Cable v. Commonwealth, 243 Va. 236, 240, 415 S.E.2d 218, 220 (1992) (citation omitted).

Analysis

Noakes committed involuntary manslaughter because she knowingly placed Noah in an inherently dangerous situation, proximately causing his death. Noakes was fully aware that when

Noah stood in the crib, his head and chin stood above the top of the crib wall. (App. at 47-48, 50-51, 57-58). Noakes was also fully aware that Noah might try to stand even with the covering in place. (App. at 51, 55-56, 68-69, 81, 84, 86-87, 94). And, although she tried to ensure the safety of her contraption, Noakes knew that if the dog crate fell on Noah he would be injured. (App. at 68-74, 80, 82-84, 89). Despite her awareness of these obvious dangers, Noakes nevertheless placed the dog crate covering atop Noah's crib, without even attempting an alternative "covering." (App. at 80, 88-89, 91-94).

Yet, Noakes, citing Forbes v. Commonwealth, 27 Va. App. 304, 498 S.E.2d 457 (1998), argues that the "precautionary measures" she took in placing the dog crate atop Noah's crib "distinguish her acts from those that show wanton negligence and a reckless disregard for human life." (Def. Br. at 19-20). But simply taking some precautionary measures does not automatically relieve Noakes from liability. In Forbes, it was not the defendant's precautionary measures *per se* that absolved him from criminal liability, but the absence of any evidence that the defendant's negligence caused the victim's death.

Forbes was a diabetic. Forbes, 27 Va. App. at 307, 498 S.E.2d at 458. Prior to driving one night, he awoke from sleep feeling "'a little

woozy.'" Id. To counteract his condition, Forbes ate a few mints, drank a glass of orange juice, and sat down for about fifteen minutes. Forbes, 27 Va. App. at 307-308, 498 S.E.2d at 458. Forbes then felt "'fine,'" ate two more mints, and started driving. Forbes, 27 Va. App. at 308, 498 S.E.2d at 458. Shortly thereafter he was involved in a car accident that killed the victim. Forbes, 27 Va. App. at 307, 498 S.E.2d at 458.

Although Forbes attributed the crash to a possible diabetic "blackout," no evidence was presented at trial that revealed his blood sugar level after the accident. Id. In fact, the evidence proved that Forbes – who had only experienced two or three previous blackouts in his thirty years as a diabetic – had never experienced a blackout while he was driving. Id. No witness testified that Forbes was unfit to drive, and no evidence suggested that Forbes should have known he was unfit to drive. Forbes, 27 Va. App. at 307-309, 498 S.E.2d at 458-459.

In reversing Forbes' conviction, the Court of Appeals held that the precautionary measures taken by Forbes prior to driving – *in addition to his feeling of well-being and medical history* – showed that he neither "knew [n]or should have known that his conduct created a

great risk reasonably calculated to produce injury." Forbes, 27 Va. App. at 313, 498 S.E.2d at 461.

Unlike Forbes, whose "precautionary measures . . . were made pursuant to *medical recommendations* for diabetics experiencing a low blood sugar episode," Noakes, 54 Va. App. at 588, 681 S.E.2d at 53 (emphasis added), Noakes tried to make-safe a 33-pound dog crate "that was certainly not manufactured with the intention that it would be placed on a crib such as Noah's." Id. at 589, 681 S.E.2d at 53. Here, "the danger . . . was entirely of [Noakes'] own creation."[4] Id.

Noakes knew that placing the crate atop Noah's crib was inherently dangerous. (App. at 68-74, 80, 82-84, 89). Her implicit recognition of this danger caused her to take "precautionary measures" to prevent the crate from falling onto Noah. (App. at 68-74, 80, 82-84, 89). And although her "precautionary measures" kept

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[4] This is why Noakes' "precaution" argument on brief is without merit. (Def. Br. at 20-23). Even if, as Noakes argues, it is theoretically possible that *any* device designed to restrain or confine a child could result in the child's death or serious injury, those items, unlike Noakes' contraption, are *specifically designed* for an intended purpose. For example, a parent places a child in children's car seat because that car seat is built for the sole purpose of protecting the child during transit. Although the properly-installed car seat might fail during an accident, that is a fault of manufacturing, not parental precaution. A dog crate is designed to transport animals; it is not designed to serve as an *ad hoc* child restraint.

Noah from being crushed to death, they were completely ineffectual in preventing his death by suffocation – a death that was entirely possible given Noah's ability stand in the crib with his head fully exposed, and Noakes' recognition that Noah might to try stand even with the "covering" in place.[5] (App. at 47-48, 50-51, 55-58, 68-69, 81, 84, 86-87, 94). "In short, [Noakes] voluntarily created the danger for which she was held criminally culpable." Id.

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[5] Noakes also argues that Noah's "ability to lift a crate 30 percent heavier th[a]n . . . himself" was an "improbable feat." (Def. Br. at 32). Thus, Noakes argues that Noah's lifting of the crate was an "intervening cause," making her placement of the crate atop the crib "a remote rather th[a]n [a] proximate cause of . . . [Noah's] death." (Def. Br. at 32-33). This argument is without merit. Not only was Noah's death by suffocation something that Noakes could have reasonably foreseen, see Gallimore v. Commonwealth, 246 Va. 441, 447, 436 S.E.2d 421, 425 (1993), but "an intervening event, even if a cause of the harm, does not operate to exempt a defendant from liability if the intervening event was put into operation by the defendant's negligent acts." Id. Noah would have never suffocated had Noakes not placed the dog crate atop his crib. See O'Connell v. Commonwealth, 48 Va. App. 719, 732, 634 S.E.2d 379, 385 (2006) (finding the defendant proximately caused the victim's deaths when he engaged them in a drag race because "[g]iven th[e] evidence, an average person should or would have foreseen the inherent risk that a driver could lose control during the race, posing a danger of serious injury to himself and others."), and Coyle, 50 Va. App. at 667, 653 S.E.2d at 296 (finding the defendant proximately caused the victim's death when he supplied the victim with an adulterated drug, even though the victim's voluntarily consumption of the drug contributed to his death).

Moreover, after rigging the dangerous contraption over Noah's crib, Noakes did not check on him to make sure he was safe and asleep. Instead, Noakes simply assumed that Noah was asleep because she did not hear anything from his room. (App. at 52-53, 129-132, 166). For over two and a half hours she stayed away from Noah's room. (App. at 53, 71-72, 75-76, 132-133, 166).

When she finally did return to the bedroom to wake another child from his nap, Noakes did not even look in Noah's direction. (App. at 53-54, 73, 90, 132-133, 166). It was not until she returned to the bedroom for the final time that Noakes first observed Noah. (App. at 54-56, 133-136, 151, 166). This was over three hours after she had last seen him. (App. at 52-54, 71-73, 75-76, 90, 129-133, 151, 166). Given that Noah's death could have occurred in minutes, "[l]eaving Noah unattended for even a half-hour . . . was an unjustifiable risk." Noakes, 54 Va. App. at 592, 681 S.E.2d at 55. (App. at 25-26). See Kelly v. Commonwealth, 42 Va. App. 347, 592 S.E.2d 353 (2004) (affirming an involuntary manslaughter conviction where the defendant's child was left in her car seat inside the family van for over seven hours and the defendant never bothered to see if the child was inside the house asleep as he assumed).

Conclusion

Noakes knowingly put Noah into an inherently dangerous situation – a situation made dangerous both by the nature of the covering and by Noah's ability to stand in his crib with his head above the crib wall. Noakes knew the dog crate could harm Noah, but she nevertheless proceeded to place it atop his crib. (App. at 47-48, 50-51, 55-58, 68-74, 80-84, 86-87, 89, 94). And, instead of confirming that Noah was safe and asleep, Noakes exacerbated an already dangerous situation by failing to check on him for over three hours. (App. at 52-54, 71-73, 75-76, 90, 129-133, 151, 166). Even though Noakes did not intend for Noah to die, his death was not "improbable" under the circumstances. See Cable, 243 Va. at 240, 415 S.E.2d at 220. Accordingly, this Court should affirm Noakes' conviction.

CONCLUSION

This Court should affirm the judgment of the Court of Appeals and the Circuit Court of Chesterfield County.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
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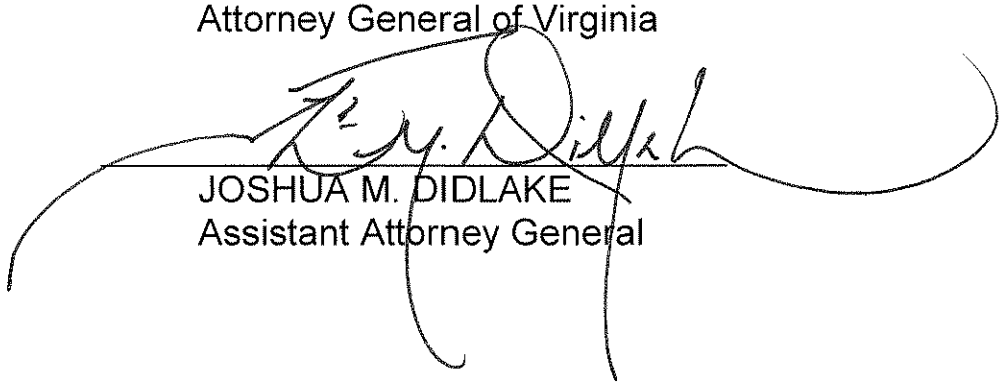

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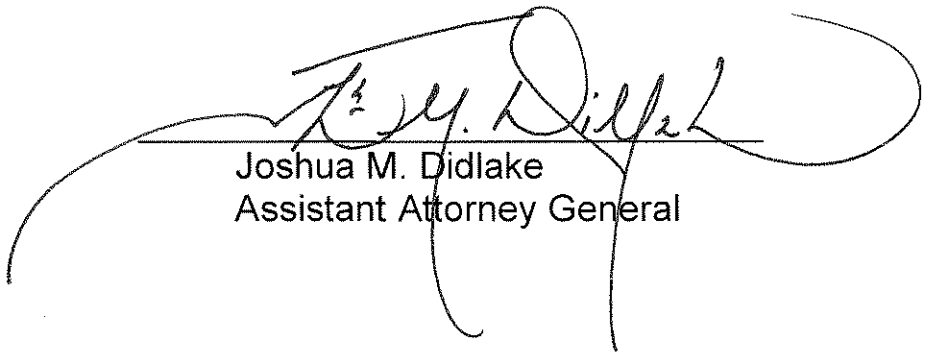
Certificate and Transmission of Service

On March 16, 2010, in accordance with Rule 5:26(d), the required number of copies of this brief were hand-delivered to the Clerk of this Court and three copies were mailed to: James T. Maloney, MALONEY & DAVID, P.L.C., 9 South Adams Street, Richmond, Virginia 23220, counsel for the appellant. An electronic copy of this brief was also submitted to this Court via e-mail at: scvbriefs@courts.state.va.us.

The Commonwealth wishes to present oral argument.



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