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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 160414

MARK THOMAS HOWSARE,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

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In an appeal challenging whether the trial court abused its discretion in giving certain jury instructions, a reviewing court's role is limited to ensuring that the instructions clearly stated the law and that they covered all the issues fairly presented by the evidence. In this case, the trial court instructed the jury that the defendant's state of mind may be shown by his acts and conduct, but the defendant objected to that instruction because it was not a model instruction and because it did not state that the jury could draw similar inferences from the defendant's statements.

In a separate instruction, though, the trial court informed the jury that the defendant's statements were presented for the jury's consideration and that the jury was to determine the weight, value, credibility, and reliability of those statements. This appeal asks the Court to determine whether the trial court erred by giving the challenged instruction referencing Howsare's acts and conduct, and whether any such error was harmless in light of the other instructions, the incriminating nature of the statements Howsare made before the shooting, and the overall strength of the evidence.

STATEMENT OF THE CASE

A grand jury in Stafford County indicted Howsare for first-degree murder, aggravated malicious wounding, and use of a firearm during the commission of a felony. (App. 1-3.) Following a jury trial, Howsare was convicted of second-degree murder, aggravated malicious wounding, and use of a firearm during the commission of a felony. (App. 40, 796-97.) Consistent with the sentence fixed by the jury, the Stafford County Circuit Court sentenced Howsare to an active sentence of 28 years' incarceration. (App. 42-43, 796-97, 807.) Howsare appealed his convictions to the Court of Appeals of Virginia, which denied all six of his assignments of error. (App. 44-52.) Howsare then appealed to this Court, which granted review of two of his assignments of error. (App. 53.)

ASSIGNMENTS OF ERROR

1. The Court of Appeals erred by finding that the trial court did not abuse its discretion in giving jury instruction number seven, regarding intent.

2. The Court of Appeals erred by finding the argument—that jury instruction number seven was inappropriately based on language from cases not involving a jury instruction and meaning to provide rationale for a particular case—was barred by Rule 5A:18.

STATEMENT OF FACTS

On January 19, 2014, William "Willy" Conner, Jr., and his girlfriend, Cheyanne Henry, drove to Howsare's home to help Howsare repair a broken phone line. (App. 121-24.) Howsare was Conner's uncle by a previous marriage, and Conner often helped Howsare around the house and by running errands. (App. 123, 160-63, 877-78.) Sometime around 8:00 that night—after they had succeeded in repairing the phone line—Howsare asked Conner to go to Wal-Mart for him to exchange an air mattress, and Conner agreed to go. (App. 124-25, 165, 906.) At the Wal-Mart, Conner and Henry were unable to exchange the mattress without Howsare because they had exchanged too many air mattresses within the past six months using the same identification. (App. 127.) So Conner and

Henry began driving back to Howsare's home to pick him up and take him back to Wal-Mart to make the exchange. (App. 127-28.)

On the drive back to Howsare's home, Conner called Howsare and told him they were coming to pick him up. (App. 128.) Howsare told Conner, "Like hell you are," and then the phone was disconnected. (App. 128.) Conner called Howsare back and asked him to get up so he could come with them to the store to get his mattress, but Howsare made it clear that he did not want to go, telling Conner "the hell with it," not to "fool with [him]," and to "call it a day." (App. 167, 857, 860, 880, 898.) At some point during the back and forth, Howsare told Conner he was "going to hurt" him, but Conner and Henry did not take the threat seriously. (App. 128-29, 176-79, 192-93, 618, 632.)

When they arrived back at the house, Conner and Henry walked onto Howsare's front porch and tried to open the door to the main entrance, but they were surprised to find the door locked.[1] (App. 131.) Conner and Henry began knocking on the door, asking Howsare to come outside, but Howsare refused. (App. 130-31.) Howsare had been drinking and an

[1] Although Howsare considers this to be the back of his house, most people call it the front or the main entrance because it faces the driveway. (App. 137-40, 144, 169, 202, 275, 374, 376, 382, 397, 435-36, 458, 461, 505-09, 634, 754, 759, 771, 864, 884.)

argument ensued, with Howsare and Conner yelling at each other through the closed door. (App. 131-32, 169-71, 857, 860-61, 869, 875-76, 881-82, 919-20.) Howsare told Conner to "[g]o the hell away" and to "just leave [him] the hell alone," but Conner continued pounding on the door. (App. 860-61, 876.)

Howsare had a loaded .357 Dan Wesson revolver, and he yelled through the door that he had a gun and that it was loaded. (App. 132, 170-71, 863, 865-66, 873, 923.) Conner said, "What, have you got a gun you f***ing p***y?" (App. 170; 911 Audio Recording, Commonwealth's Ex. 8, at 4:14.) Howsare replied, "I'm going to shoot you." (App. 151, 192; Commonwealth's Ex. 8 at 4:19.) At this point, Conner told Henry to go stand by the truck just in case something happened, and Henry did as she was told. (App. 132, 136, 172.)

When Henry got back to the truck, she put on her jacket and checked the time on her phone. (App. 138, 172-73.) Next, Henry heard the front door open, followed by three to five gunshots and the sound of glass breaking. (App. 138, 141-42, 144, 173, 634-35.) Henry looked back at the front door and saw Howsare standing there holding a gun. (App. 140-41.) Henry heard Conner say, "F***, f***, f***," and then saw him stagger off the porch and fall down. (App. 145, 173-74, 635.) Henry called out to Conner,

but he did not respond, so she took off running down the driveway. (App. 145, 173-74.)

As she ran, Henry called 911 on her cell phone and reported what had occurred. (App. 145-46, 151; Commonwealth's Ex. 8.) When the police arrived, they found Conner lying on his back approximately 25 to 30 feet from the house, with his head turned to the side facing the house, his hands out at his side, and blood on his face and on the left side of his body. (App. 205-06, 208-09.) Conner also had blood on his hands. (App. 209.) One of the officers checked to see if Conner had a pulse, and he did not. (App. 210.) Conner's body was lying in a very open area, so the officers dragged it approximately 30 feet to some brush where they would be more concealed. (App. 207, 211, 216, 811-16.) Two of the officers checked Conner's vitals again and confirmed that he was dead. (App. 211.)

In the meantime, other officers tried to make contact with Howsare inside the home, but Howsare did not respond to the officers' phone calls or to their efforts to communicate with him over a public address system. (App. 221-22, 225-26, 364, 650-51, 909.) Next, the officers managed to break through a glass window on one of the doors on the east side of the home. (App. 227-34.) As the officers shined their flashlights inside the house, they saw Howsare right in front of them through the open door of a

bathroom. (App. 241.) Howsare was sitting on the toilet holding a gun and pointing it at them as if he were tracking them. (App. 241, 255-56, 263-64.) One of the officers yelled at Howsare to drop the gun and step outside, and Howsare complied. (App. 242-43, 263-64, 914-15.)

Howsare was taken into custody and interviewed by Detective Michelle Gibbons. (App. 363-65.) A partially redacted transcript of the interview was admitted into evidence as Commonwealth's Exhibit 37. (App. 675-76, 838-931.) During the interview, Howsare told Detective Gibbons about his altercation with Conner. (App. 371-73, 856-61.) When Gibbons asked Howsare how it all had ended, Howsare told her that he "pulled the trigger on a .357 four or five times," but that "[t]here was no intent to maim, to hurt, just go away." (App. 373, 863.) Howsare said that he "didn't provoke the man" and that he just "wanted to go to bed," but Conner kept "pounding on the door" and Howsare "kind of snapped." (App. 874-75, 896.) Howsare claimed that he "shot high as s***" when he fired. (App. 876.)

Howsare admitted that he knew it was Conner on the porch when they were arguing. (App. 372, 881.) Howsare "opened the door in a rage" thinking to himself, "[T]his is my own g**d***ed house," and, "I am not listening to this bulls***." (App. 373, 375, 882.) Howsare said he did not do

anything immediately when he opened the door, but he thought Conner lunged at him so he "shot high." (App. 375, 882.) Howsare thought he had shot out the glass in the storm door, and a photograph admitted into evidence at trial confirmed that most of the glass was missing from the frame. (App. 139-45, 890; Oversized photograph of storm door, Commonwealth's Ex. 6.) Howsare stated, "I know I shot whatever I shot." (App. 376, 883.) But he also said that when he did not see Conner, he thought to himself, "[W]ell I got lucky." (App. 375, 888.) Howsare went back inside the house and reloaded the gun. (App. 375-76, 863-64.)

Howsare claimed as he walked toward his basement he thought he heard Conner pounding on the side of the house, so Howsare fired another shot in that direction before going downstairs. (App. 883, 888-90, 892.) Howsare insisted that he only intended to "scare [Conner] to get him to go away," and that "there was never any intention to hurt him." (App. 892-93.) Howsare said he had been "beaten to a g**d***ed pulp" in the past when he should have used a gun, and "that was not going to happen this evening." (App. 895.)

Howsare told Detective Gibbons that he did not know what had happened to Conner after he had fired the shots, but that he guessed Conner had gone around the house or had left in one of the vehicles. (App.

908, 924-25.) When Gibbons told Howsare that he had shot Conner and that Conner was dead, Howsare acted shocked and then asked about Conner's girlfriend. (App. 926-28.) Howsare said that if she was with Conner, their stories should be identical. (App. 927.)

A medical examiner performed an autopsy on Conner's body, and her report was admitted into evidence as Commonwealth's Exhibit 35. (App. 342-43, 833-37.) Howsare suffered two gunshot wounds—one to his left shoulder and one to his abdomen. (App. 344-48, 834, 837.) The bullet that Howsare shot into Conner's abdomen entered the left side of his lower abdomen and exited out the center of his abdomen, traveling in a left-to-right direction. (App. 346, 834.) That shot did not kill him. (App. 346, 837.)

The bullet that Howsare shot into Conner's left shoulder caused lethal injuries, traveling into Conner's chest cavity, puncturing his left lung, traveling through his heart, puncturing his right lung, exiting the chest cavity, fracturing one of Conner's ribs, and then lodging beneath the skin on the right side of Conner's chest. (App. 346, 834.) The bullet traveled in a left-to-right and downward direction. (App. 347, 834.) Conner also had lacerations on the palm of his left hand that were consistent with his palm having been cut by shards of glass. (App. 348, 834.)

MATERIAL PROCEEDINGS BELOW

At the trial court's request, the Commonwealth submitted its proposed jury instructions before trial. (App. 56-55.) Defense counsel objected to an instruction that read, "Intent is the purpose formed in a person's mind which may, and often must, be inferred from the facts and circumstances in a particular case. The state of mind of the defendant may be shown by his acts and conduct." (App. 6-7, 63-66.) Noting the objection, the trial court took the matter under advisement. (App. 67.)

At a subsequent pre-trial hearing, defense counsel stated her objection to the instruction in greater detail, arguing that the instruction was "not a model jury instruction," and that because the caselaw the Commonwealth cited to support it was so old, "it would have made its way to that role by now" if it was "meant to be a model jury instruction" and if it was "agreed upon by other courts as well." (App. 81-83.) Defense counsel further argued that the instruction was more useful to the Commonwealth than to the defendant, and that because the instruction failed to mention the inferences that could be drawn from Howsare's statements, it was incomplete. (App. 82.) Finally, defense counsel argued that the instruction was unnecessary, that it was "not routinely given," and again that it was "not a model jury instruction." (App. 83.) The trial judge took the matter

under advisement, stating that he would give the parties a decision after he had read the relevant caselaw. (App. 85.)

At the close of all the evidence at trial, defense counsel renewed the objection to the Commonwealth's intent instruction. (App. 686-89.) Defense counsel asked the trial court to "allow any previous objections for the defense to stand," and then argued that the intent instruction, in particular, should not be given because it "does not represent what [the defense] understood to be the model." (App. 688-89.) Defense counsel asserted, "[T]hat was the basis of our objection." (App. 689.) The trial court indicated that it had reviewed the caselaw and held that the instruction would be given. (App. 689.) The instruction was read to the jury as jury instruction number seven. (App. 19.)

After Howsare was convicted and sentenced, he appealed to the Court of Appeals of Virginia, assigning six assignments of error. The Court of Appeals denied Howsare's petition, holding as relevant here that "[i]nstruction number seven properly stated the law applicable to this case" and that "nothing about the instruction . . . is misleading." (App. 45.)

The Court of Appeals further held that Howsare had attempted to "expand the reason for his objection on appeal" to include the argument that the language was improper for a jury instruction because it was based

on language from cases that did not involve jury instructions and because the language merely was intended to provide a rationale for the appellate court's holding in each case. (App. 45.) The Court of Appeals held that Rule 5A:18 barred Howsare from raising this "new argument" for the first time on appeal. (App. 45.)

STANDARD OF REVIEW

"As a general rule, the matter of granting and denying instructions does rest in the sound discretion of the trial court." Cooper v. Commonwealth, 277 Va. 377, 381, 673 S.E.2d 185, 187 (2009). And a reviewing court's "sole responsibility in reviewing the matter is to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises." Swisher v. Swisher, 223 Va. 499, 503, 290 S.E.2d 856, 858 (1982). "[I]n deciding whether a particular instruction is appropriate," the reviewing court "view[s] the facts in the light most favorable to the proponent of the instruction." Cooper, 277 Va. at 381, 673 S.E.2d at 187.

Moreover, even where a reviewing court finds an abuse of discretion, the court still must decide whether any error was harmless. See Va. Code Ann. § 8.01-678 (2015). The Commonwealth bears the burden to prove harmless error. Andrews v. Commonwealth, 280 Va. 231, 291, 699 S.E.2d

237, 271 (2010). And because Howsare assigns error to one of the jury instructions given at trial, the standard for harmless error review of non-constitutional errors set forth in Clay v. Commonwealth, 262 Va. 253, 546 S.E.2d 728 (2001), applies. See Turman v. Commonwealth, 276 Va. 558, 567-68, 667 S.E.2d 767, 771-72 (2008) (applying the test enunciated in Clay in a jury-instruction case).

Under this standard, "in order to determine whether there has been 'a fair trial on the merits' and whether 'substantial justice has been reached,' a reviewing court must decide whether the alleged error substantially influenced the jury. If it did not, the error is harmless." Clay, 262 Va. at 259, 546 S.E.2d at 731 (quoting Code § 8.01-678). "'If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but slight effect, the verdict and the judgment should stand . . . .'" Id. at 260, 546 S.E.2d at 731 (quoting Kotteakos v. United States, 328 U.S. 750, 764 (1946)).

ARGUMENT

I. The trial court did not err by instructing the jury that it could infer Howsare's state of mind from his acts and conduct.

A. Jury instruction number seven properly stated the law, and the instructions as a whole sufficiently covered all the issues raised by the evidence.

At the trial level, Howsare primarily based his objection to jury instruction number seven on the fact that the instruction had not been approved as a model jury instruction.[2] (App. 81-83, 688-89.) That objection fails because, as the General Assembly has explicitly provided, a "proposed jury instruction submitted by a party, which constitutes an accurate statement of the law applicable to the case, shall not be withheld from the jury solely for its nonconformance with model jury instructions." Va. Code Ann. § 19.2-263.2 (2015); see also Brothers v. Commonwealth, 50 Va. App. 468, 473, 478, 650 S.E.2d 874, 877, 879 (2007) (citing Code § 19.2-263.2 and concluding that the trial court did not err by giving two jury instructions that were not model instructions).

Howsare also argues that jury instruction number seven was an inaccurate and incomplete statement of the law, and that it was misleading

[2] Because the trial court did not abuse its discretion by giving the challenged instruction, and because any error could not have been harmful to Howsare's defense, the Commonwealth assumes without conceding that the general objections Howsare raised at the trial level were sufficient to preserve the more specific arguments he raises for the first time on appeal.

and confusing. (Opening Br. at 14; App. 82.) But Howsare concedes on appeal that the instruction "closely followed"[3] this Court's statements in Ridley v. Commonwealth that "[i]ntent is the purpose formed in a person's mind which may, and often must, be inferred from the facts and circumstances in a particular case," and that "[t]he state of mind of an alleged offender may be shown by his acts and conduct." 219 Va. 834, 836, 252 S.E.2d 313, 314 (1979).[4] In comparison, the challenged instruction here reads, "Intent is the purpose formed in a person's mind which may, and often must, be inferred from the facts and circumstances in a particular case. The state of mind of the defendant may be shown by his acts and conduct." (App. 6-7, 63-64.) Thus, jury instruction number seven was a proper statement of Virginia law.

Despite how closely the language in the challenged instruction tracks this Court's prior caselaw, Howsare contends that the instruction was incomplete and misleading because it did not instruct the jury that it also could infer Howsare's intent from his statements. (Opening Br. at 12-19.)

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[3] Opening Br. at 14-15.

[4] See also Burns v. Commonwealth, 261 Va. 307, 338, 541 S.E.2d 872, 892 (2001) ("Intent is frequently shown by circumstances or by a person's conduct.").

The Commonwealth concedes that an instruction informing the jury that it could infer Howsare's intent from his conduct or his statements would have been a correct statement of law. See Hargrave v. Commonwealth, 214 Va. 436, 437, 201 S.E.2d 597, 598 (1974); Johnson v. Commonwealth, 209 Va. 291, 295, 163 S.E.2d 570, 574 (1968). But while such an instruction would have been "a correct statement of the legal principles involved and the trial court, in its discretion, could properly have given the instruction, it does not follow that it was reversible error to refuse it." Lincoln v. Commonwealth, 217 Va. 370, 375, 228 S.E.2d 688, 692 (1976). In cases where, as here, "the other instructions fully and fairly cover[] [the] principles of law to be followed in weighing the evidence and determining the credibility of the witnesses," a trial court does not err in refusing the additional instruction. Id.[5]

In this case, the trial court also gave the jury the following instruction: "The statements presented to you as having been made by the defendant are submitted for your consideration along with all the other evidence. The weight, value, credibility and reliability of those statements are questions for

[5] See also Washington S. R.R. Co. v. Lacey, 94 Va. 460, 466, 26 S.E. 834, 836 (1897) (holding that "defects in one instruction may be cured by a correct statement of the law in another, if when the two are read and considered together the court can see that the jury could not have been mislead [sic] by the defective instruction").

your determination." (App. 34.) From this instruction, Howsare could have argued to the jury that "his numerous statements, both during the incident and afterwards to police," supported the conclusion "that he was intending to scare [Conner] off his property," and not to shoot him. (Opening Br. at 16.) Thus the trial court's instructions, considered as a whole, stated the law clearly and "cover[ed] all issues which the evidence fairly raise[d]." Swisher, 223 Va. at 503, 290 S.E.2d at 858.[6]

B. Jury instruction number seven did not improperly single out specific evidence tending to prove a particular fact.

Citing Keefer v. Commonwealth, 56 Va. App. 520, 694 S.E.2d 802 (2010), Howsare further asserts that the challenged instruction should not have been given because it "impermissibly commented on Howsare's acts and conduct by erroneously suggesting weight to be given to specific evidence—the evidence regarding Howsare's acts and conduct." (Opening Br. at 12.) But in Keefer the challenged instruction told the jury that the "intent to defraud" could be inferred from proof of several very specific circumstances, including the contractor "failing to apply for a permit," an

[6] The trial court also instructed the jury that it could "infer that every person intends the natural and probable consequences of his acts." (App. 18.) This Court explicitly approved giving such an instruction in Schmitt v. Commonwealth, 262 Va. 127, 547 S.E.2d 186 (2001).

"unreasonable lack of communication with the homeowner," the "failure to contact the homeowner when the contractor realized he was financially unable to perform the contract," a "request for an advance" accompanied by a subsequently broken promise to complete the work, "other similar transactions by the defendant using false representations," and the contractor's use of "any monies paid to [him]" before paying "all amounts due or to be due for labor or material furnished pursuant to the contract." Id. at 522-23, 694 S.E.2d at 803.

Not surprisingly, the Court of Appeals concluded that this instruction "erroneously suggested the weight which should be given [to] specific evidence" and "impermissibly commented upon the evidence." Id. at 525-26, 694 S.E.2d at 804-05.[7] In this case, by contrast, jury instruction number seven merely informed the jury that Howsare's state of mind could be shown by his "acts and conduct." (App. 6-7, 63-64.) Unlike the instruction in Keefer, instruction number seven did not single out any specific acts or conduct, nor did it suggest whether Howsare's acts and

[7] See also Nelms v. Nelms, 236 Va. 281, 285-86, 374 S.E.2d 4, 7 (1988) (reaching the same conclusion in a case involving similarly fact-specific jury instructions); N.Y. P. & N. R. Co. v. Thomas, 92 Va. 606, 609, 24 S.E. 264, 265 (1896) (stating that jury instructions containing a "*rehearsal* of a part only of the evidence" have the tendency to "impress unduly on the jury such part of the evidence, to the disadvantage of the other evidence in the case") (emphasis added).

conduct indicated whether he was guilty or innocent. Accordingly, Keefer does not support Howsare's contention that instruction number seven "impermissibly commented on Howsare's acts and conduct by erroneously suggesting weight to be given to specific evidence." (Opening Br. at 12.)

To the contrary, the instruction merely informed the jury that it could draw inferences about Howsare's intent from a general category of evidence, namely his acts and conduct. This Court approved a similar instruction in Schmitt, where the Court held that an instruction allowing the jury "to infer that every person intends the natural and probable consequences of his or her acts" merely "stated a permissive inference," and therefore that the trial court did not err in giving the instruction. 262 Va. at 145, 547 S.E.2d at 198-99. Similarly here, instruction number seven merely permitted the jurors to draw their own inferences from Howsare's acts and conduct, and the trial court did not err by giving the instruction.

II. Even if the omission of the word "statements" in the instruction constituted an abuse of discretion, that omission was harmless because Howsare's statements leading up to the shooting were incriminating.

"'No trial is perfect, and error will at times creep in.'" Lavinder v. Commonwealth, 12 Va. App. 1003, 1009, 407 S.E.2d 910, 913 (1991) (quoting Parsons v. Commonwealth, 154 Va. 832, 852, 152 S.E. 547, 554 (1930)). "'Every man is entitled to a fair trial and to nothing more, and so . . .

out of the imperative demands of common sense, has grown the doctrine of harmless error." Id. (quoting Oliver v. Commonwealth, 151 Va. 533, 541, 145 S.E. 307, 309 (1928)) (omission in original).

Before Howsare shot the victim, he made three separate statements that support the reasonable inference that he shot the victim intentionally and maliciously. When Conner talked to Howsare on the phone before the shooting, Howsare told Conner he was "going to hurt" him. (App. 128-29, 176-79, 192-93, 618, 632.) Then when Conner was knocking on Howsare's door, Howsare warned Conner that he had a gun and that it was loaded. (App. 132, 170-71.) Finally, Howsare told Conner "I'm going to shoot you." (App. 151, 192; Commonwealth's Ex. 8 at 4:19.) And then Howsare carried through on his threat, opening the door and firing multiple shots at Conner through the storm door, shooting him in the abdomen and in the shoulder. (App. 138-45, 141-42, 144, 173, 344-48, 373, 634-35, 834, 837, 863, 890; Commonwealth's Ex. 6.)

Despite the incriminating statements in the record, Howsare argues that he was prejudiced by the trial court's failure to instruct the jury that it could infer his intent and state of mind from his statements. (Opening Br. at 12, 16.) But Howsare's contention that he was harmed by that omission rests on flawed premises. First, Howsare ignores Henry's testimony and

her statement to the 911 dispatcher that Howsare told Conner, "I'm going to shoot you," right before Howsare opened the door and fired. (App. 151, 192; Commonwealth's Ex. 8 at 4:19.)[8] It defies logic to think that Howsare could have been *harmed* by the trial court's failure to instruct the jury that it could draw inferences about Howsare's intent and state of mind from his statements when those statements included such an explicit expression of Howsare's intent to shoot the victim. (App. 151, 192; Commonwealth's Exhibit 8 at 4:19.)

Second, Howsare mistakenly assumes that the omission undercut his argument that the jury could infer Howsare's intent from the statements he made "afterwards to police." (Opening Br. at 16.) As one such example, Howsare cites his claim to Detective Gibbons that he did not intend to hurt Conner. (Opening Br. at 16; App. 892-93.) But the trial court properly instructed the jury about those statements in jury instruction number twenty, which informed the jurors that the "weight, value, credibility and reliability" of the defendant's statements were "questions for [their] determination." (App. 34.) This instruction gave Howsare a basis from

[8] Howsare did not include this statement in his "Statement of Facts," and he argues on brief that it can be inferred from his statements that "he had a loaded gun (*versus a statement that he was going to shoot it*) and that he had no intent to hurt [Conner] . . . that he was intending to scare [Conner] off his property." (Opening Br. at 16 (emphasis added).)

which he could have argued his theory of the case based on the statements he believes to be exculpatory; therefore, any error in the omission in instruction number seven was harmless. See Clinchfield Coal Corp. v. Compton, 148 Va. 437, 443-44, 139 S.E. 308, 310 (1927) (holding that "the omission of a complete statement of the case in a single instruction becomes harmless" where "it appears that each theory is clearly and fully set forth, though in separate instructions, and that the jury understand the issue submitted to them").

Moreover, instruction number twenty was a better fit for the statements Howsare made to Detective Gibbons because—unlike the statements Howsare made in the heat of the moment immediately before shooting Conner—Howsare had every reason to lie to Detective Gibbons about his intent, and by that point he had had sufficient time to concoct his story. Cf. Smith v. Commonwealth, 239 Va. 243, 260-61, 389 S.E.2d 871, 880 (1990) (holding that the defendant's taped statement to the police was not admissible under the state-of-mind exception to the hearsay rule because the defendant "had a clear motive to lie" and had "had sufficient time to fabricate a story").

Finally, any error in giving jury instruction number seven was harmless because, even assuming the omission undermined Howsare's

efforts to convince the jury to believe his self-serving statements to police, the evidence against Howsare was overwhelming. See Velasquez v. Commonwealth, 276 Va. 326, 330-31, 661 S.E.2d 454, 457 (2008) (holding that any error in granting the challenged instruction was "harmless because of the overwhelming evidence of the defendant's guilt"). On the night of the shooting, Howsare threatened to hurt Conner, warned him that he had a loaded gun, said, "I'm going to shoot you," and then opened the door and fired three to five shots, hitting Conner twice and killing him. (App. 128-29, 132, 138, 141-42, 144, 151, 192, 170-71, 173, 176-79, 192-93, 210-11, 618, 632, 634-35; Commonwealth's Ex. 8 at 4:19.)

The location of the gunshot wounds disproves Howsare's claim that he only tried to scare Conner and that he "shot high." (App. 876.) See Commonwealth v. Vaughn, 263 Va. 31, 36, 557 S.E.2d 220, 223 (2002) (holding that the defendant's inability to provide an alternative explanation for the gunshot wound to the victim's back left the defendant with "no evidence demonstrating that he did not intend to maim, disfigure, disable, or kill [him]"); Brandau v. Commonwealth, 16 Va. App. 408, 413, 430 S.E.2d 563, 565-66 (1993) (holding that the "physical evidence showing the number of shots and the positioning of the bullet holes in the door coupled with [the defendant's] admission that he knew a person was

outside the door negates a mere intent to scare that person"). And Howsare's statements before the shooting and later to Detective Gibbons rebut any claim that Howsare killed the victim while acting in the heat of passion. Against this backdrop of evidence, any error necessarily was harmless, and Howsare is not entitled to any relief.

CONCLUSION

This Court should affirm Howsare's convictions for second-degree murder, aggravated malicious wounding, and use of a firearm during the commission of a felony.

Respectfully submitted,

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CERTIFICATE OF TRANSMISSION AND SERVICE

On December 9, 2016, an electronic version of this brief was filed electronically with this Court, and the required copies were subsequently hand-delivered to the clerk's office in compliance with Rule 5:26(e). A copy was emailed to Catherine French, counsel for the appellant, at cfrench@adm.idc.virginia.gov. In accordance with Rule 5:26(h), the undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities, and certificate contains 5,314 words and is within the page limit allowed under Rule 5:26(b).

The Commonwealth desires to present oral argument in this case.

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Courtesy copies: The Honorable Eric Olsen
The Honorable Michael E. Levy