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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 170712

TINA MARIE BRYANT,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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IN THE

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TINA MARIE BRYANT,

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v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

STATEMENT OF THE CASE

As a consequence of Tina Marie Bryant firing a handgun into the floor of a hotel room, a Rockingham County jury convicted her of unlawfully discharging a firearm within an occupied building, in violation of Virginia Code § 18.2-279. (App. 17). On May 18, 2016, the circuit court denied Bryant's motion to set aside and imposed the jury's recommended sentence of a $0 fine. (App. 31-34).

On appeal to the Court of Appeals of Virginia, Bryant argued that the evidence was insufficient to prove that she had the intent to discharge the firearm and that the trial court erred in refusing her proposed jury instruction on the defense of accident. (App. 35). In a published opinion, the Court of Appeals rejected Bryant's arguments and affirmed her conviction. *See Bryant v. Commonwealth*, 67 Va. App. 569, 798 S.E.2d 459 (2017) (App. 35-47). This appeal followed.

ASSIGNMENTS OF ERROR

The Court granted review of the following assignments of error:

> 1. The Court of Appeals erred by upholding the trial court's denial of the appellant's motion to strike the evidence at the conclusion of the Commonwealth's case, the conclusion of the evidence and at the motion to set aside the jury verdict, as no evidence was produced at trial on the issue of intent as to the discharge of the firearm.
>
> 2. The Court of Appeals erred by upholding the trial court denying the appellant's requested accident jury instruction holding that it would confuse the jury and it was a correct statement of law. In spite of appellant presenting more than a scintilla of evidence supporting a theory that the discharge of the firearm was entirely accidental.

STATEMENT OF FACTS

On August 8, 2015, the Rockingham County Sherriff's Office received a report that Bryant "was mentally unstable and was in possession of a firearm." (App. 129). Officers located Bryant at the Country Inn and Suites in Harrisonburg. (App. 129).

When the officers knocked on Bryant's hotel room on the first floor, she yelled at them not to come in because she had a gun. (App. 130). Bryant told the officers that if they came in, she would shoot herself. (App. 130). One officer, Corporal Tommy James, described her tone of voice as "angry and loud." (App. 132). Another officer, Sergeant Mike Deeds, described her demeanor as "angry and upset." (App. 152).

While the officers were attempting to calm Bryant down, they heard a gunshot in the room. (App. 132, 153). Sergeant Deeds asked if she was okay. (App. 153). After about 15 seconds, Bryant replied that she was not hurt and that she had shot into the floor. (App. 132, 153). Sergeant Deeds advised Bryant to put the gun down on the bed and place her hands on the hotel room window. (App. 153).

Two officers who were monitoring the situation from outside in the parking lot—Investigators Burgoyne and Miller—testified that Bryant went to the window with the gun in her hand and pointed it directly at them. (App. 182, 200). They

communicated this to Sergeant Deeds, who urged Bryant to lay the gun down and place her hands on the window. (App. 156).

Upon receiving a radio confirmation that Bryant had placed her hands on the window, Sergeant Deeds kicked in the door and retrieved a .45 caliber handgun on the bed. (App. 133, 156). Along with the handgun, officers recovered the spent round and a box of ammunition. (App. 135). Corporal James, testifying as an expert in firearms at trial, explained that Bryant's gun had a trigger pull of approximately seven pounds, which was about a pound and a half more than his service weapon. (App. 140).

Bryant was arrested and transported to the hospital. (App. 188). At the hospital, she told a deputy that she was familiar with firearms and that she routinely would go to a range to shoot. (App. 188).

Testifying on her own behalf, Bryant said she had gone to the hotel with the intention of ending her life. (App. 232). According to Bryant, she placed the gun to her head, but took it away after having second thoughts of committing suicide. (App. 232). She admitted her finger was on the trigger, but claimed she did not know how the gun went off. (App. 232-33). And she claimed that she had never shot a gun in her life except on that day. (App. 236).

The trial court gave the Virginia Model Jury Instruction for unlawfully discharging a firearm within an occupied building. *See* 1-18 Va. Model Jury Crim.

Instruction No. G18.100.[1] Bryant proposed an additional instruction, which would have required the Commonwealth to prove the discharge was intentional and not accidental.[2] The trial court declined to give that instruction, finding that it was "unnecessarily confusing" and not supported by the law. (App. 274). At the post-trial hearing on Bryant's motion to set aside the verdict, the trial court discussed at length why the proposed "accident instruction" was not proper and the evidence was sufficient to convict Bryant of the crime. (App. 365-85).

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[1] The granted instruction stated, in relevant part:

> The defendant is charged with a crime of discharging a firearm within an occupied building. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:
> (1) That the defendant discharged a firearm within a building occupied by one or more persons; and
> (2) That the firearm was discharged in such a manner as to endanger the life or lives of such person or persons.

(App. 15).

[2] Bryant's requested jury instruction stated:

> Where, as in the case at bar, the defense is that the discharge of the firearm was accidental, the defendant is not required to prove this fact, beyond a reasonable doubt or by a preponderance of the evidence, but the burden is upon the Commonwealth to prove beyond a reasonable doubt that said firearm discharge was not accidental; therefore, if after hearing all of the evidence, you have a reasonable doubt whether said firearm discharge was accidental or that it was intentional, then you shall find the defendant not guilty.

(App. 4).

ARGUMENT

I. The Court of Appeals did not err in affirming Bryant's conviction.

The central question in this case what level of *mens rea* is required to establish an unlawful discharge of firearm under Code § 18.2-279. Bryant contends the evidence was not sufficient to support her conviction because the Commonwealth did not establish that she had intended to fire the gun. (Def. Br. 7). Both the trial court and the Court of Appeals, however, concluded that the offense requires that the Commonwealth prove that the defendant acted with criminal negligence. (App. 38-41, 375-77). Under that standard, the Court of Appeals held that the evidence was sufficient for the jury to conclude that Bryant acted with criminal negligence by firing the gun. (App. 43-44). The Court of Appeals's holding was correct.

A. Standard of Review

The level of *mens rea* required to establish an unlawful discharge of a firearm under Code § 18.2-279 is a question of law, which the appellate court reviews *de novo*. *See Hilton v. Commonwealth*, 293 Va. 293, 299, 797 S.E.2d 781, 784 (2017). The facts, however, are considered in the light most favorable to the Commonwealth, the party that prevailed below. *Giles v. Commonwealth*, 277 Va. 369, 373, 672 S.E.2d 879, 882 (2009).

When construing statutes, courts "must presume that the General Assembly chose, with care, the words that appear in a statute, and must apply the statute in a manner faithful to that choice." *Johnson v. Commonwealth*, 292 Va. 738, 742, 793 S.E.2d 321, 323 (2016). Thus, this Court must give each word of a statute its "ordinary and plain meaning, considering the context in which it is used." *Hilton*, 293 Va. at 299, 797 S.E.2d at 784-85. The Court is not free to "add language to [a] statute [that] the General Assembly has not seen fit to include." *Johnson*, 292 Va. at 743-744, 793 S.E.2d at 324.

As for the sufficiency of evidence to convict Bryant of the crime, the appellate court considers the evidence and any reasonable inferences fairly deducible from that evidence in the light most favorable to the Commonwealth, the prevailing party below. *Jones v. Commonwealth*, 276 Va. 121, 124, 661 S.E.2d 412, 414 (2008). In reviewing such a challenge, an appellate 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, 318-19 (1979) (emphasis in original). Rather, the appropriate 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). Accordingly, the appellate court must uphold the conviction unless it is plainly wrong or without evidence to support it. *Commonwealth v. McNeal*, 282 Va. 16, 20, 710 S.E.2d 733, 735 (2011).

B. The *mens rea* for unlawfully discharging a firearm within an occupied building is criminal negligence.

Virginia Code § 18.2-279 contains multiple offenses at distinct classes of punishment.[3] For example, the crime of "maliciously" discharging a firearm within an occupied building is a Class 4 felony. Va. Code § 18.2-279. The crime of "willfully" discharging a firearm within or at a school building is also a Class 4 felony. *Id*. Bryant was convicted under the part of the statute that does not contain malice or willfulness, only unlawfulness. That part of the statute states: "If any such act be done unlawfully, but not maliciously, the person so offending is guilty of a Class 6 felony. . . ." *Id*. Thus, an unlawful violation of the statute provides a

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[3] Code § 18.2-279 states, in full:

> If any person maliciously discharges a firearm within any building when occupied by one or more persons in such a manner as to endanger the life or lives of such person or persons, or maliciously shoots at, or maliciously throws any missile at or against any dwelling house or other building when occupied by one or more persons, whereby the life or lives of any such person or persons may be put in peril, the person so offending is guilty of a Class 4 felony. In the event of the death of any person, resulting from such malicious shooting or throwing, the person so offending is guilty of murder in the second degree. However, if the homicide is willful, deliberate and premeditated, he is guilty of murder in the first degree.
>
> If any such act be done unlawfully, but not maliciously, the person so offending is guilty of a Class 6 felony; and, in the event of the death of any person resulting from such unlawful shooting or throwing, the person so offending is guilty of involuntary manslaughter. If any person willfully discharges a firearm within or shoots at any school building whether occupied or not, he is guilty of a Class 4 felony.

significantly lower penalty than a malicious violation of the statute. *See* Va. Code § 18.2-10 (punishments for felony convictions).

In defining the word "unlawful" under the Code, the Court of Appeals has previously held that the "traditional understanding of the word 'unlawfully' and the conduct usually proscribed by that word" is "criminally negligent conduct." *Scott v. Commonwealth*, 58 Va. App. 35, 52, 707 S.E.2d 17, 26 (2011); *see also Crowder v. Commonwealth*, 16 Va. App. 382, 384, 429 S.E.2d 893, 894 (1993) (interpreting the word "unlawful" in a statute to mean criminal negligence). *Scott* involved a conviction under Code § 18.2-137, which similar to the statute at issue in this case, contains two distinct crimes: (1) unlawfully destroying, defacing, or damaging property and (2) intentionally destroying, defacing or damaging property. In interpreting these two crimes, the Court noted that the statute punishes a person less severely for unlawfully damaging property. *Scott,* 58 Va. App. at 51, 707 S.E.2d at 24. The Court thus held that "the word 'unlawfully' must connote a less culpable mental state than the word 'intentionally.'" *Id*. Traditionally, the *mens rea* associated with unlawful conduct is criminal negligence. *Id*. at 52, 707 S.E.2d at 26. Based on that traditional understanding of the word "unlawful" and the composition of the statute, the Court concluded that criminal negligence was the *mens rea* for unlawful conduct under the statute. *Id*.

Like the statute at issue in *Scott*, Code § 18.2-279 differentiates between two degrees of culpability: maliciously and unlawfully. "The authorities are replete with definitions of malice, but a common theme running through them is a requirement that a wrongful act be done 'willfully or purposefully.'" *Essex v. Commonwealth*, 228 Va. 273, 280, 322 S.E.2d 216, 220 (1984) (quoting *Williamson v. Commonwealth*, 180 Va. 277, 280, 23 S.E.2d 240, 241 (1942)). In contrast, an unlawful act has been defined as "demonstrating criminal negligence." *Brown v. Commonwealth*, 278 Va. 523, 528, 685 S.E.2d 43, 45-46 (2009); *Gooden v. Commonwealth*, 226 Va. 565, 571, 311 S.E.2d 780, 784 (1984); *Kirk v. Commonwealth*, 186 Va. 839, 847, 44 S.E.2d 409, 413 (1947). Here, "[Bryant's] proposed interpretation of the statute, that an unlawful discharge of the firearm requires proof that the offender specifically intended to discharge her weapon, would erase any meaningful distinction between 'maliciously' and 'unlawfully' for purposes of the statute." *Bryant*, 67 Va. App. at 578, 798 S.E.2d at 463.

The statute's homicide provisions further support the Court of Appeals's interpretation. The statute provides that if a malicious violation of the statute results in a person's death, the defendant is guilty of second-degree murder. Va. Code § 18.2-279. If "the homicide is willful, deliberate, and premeditated," the offender is guilty of first-degree murder. *Id*. But if an unlawful shooting results in a person's death, the defendant "is guilty of involuntary manslaughter." *Id*.

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." *Mundy v. Commonwealth*, 144 Va. 609, 615, 131 S.E. 242, 244 (1926). Involuntary manslaughter generally requires a showing of criminal negligence under Virginia law. *See Noakes v. Commonwealth*, 280 Va. 338, 345, 699 S.E.2d 284, 288 (2010); *Gooden*, 226 Va. at 571, 311 S.E.2d at 784; *Kirk*, 186 Va. at 847, 44 S.E.2d at 413.[4] The offense of unlawfully shooting within an occupied building under Code § 18.2-279 should as well.

Finally, the Court of Appeals's decision is consistent with this Court's decision in *Ellis v. Commonwealth*, 281 Va. 499, 506, 706 S.E.2d 849, 852 (2011). In that case, the Court considered whether shooting a firearm at or against an occupied building under Code § 18.2-279 required the Commonwealth to prove

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[4] The Court of Appeals has stated that "criminal negligence is an essential element of involuntary manslaughter" regardless of whether the evidence proved a non-felonious unlawful act or an improperly-committed lawful act. *Darnell v. Commonwealth*, 6 Va. App. 485, 491, 370 S.E.2d 717, 720 (1988). However, certain unlawful acts resulting in an accidental death do not require criminal negligence to constitute common-law involuntary manslaughter. Under the common-law, a non-felonious, unlawful act that is *malum in se*, as opposed to *malum prohibitum*, constitutes involuntary manslaughter. *See* 1-3 Virginia Criminal Law and Procedure § 3.7 (2017). Shooting within an occupied building is a felonious act and not *malum in se*, i.e., inherently evil. *See Miller v. Commonwealth*, 25 Va. App. 727, 731, 492 S.E.2d 482, 485 (1997) (*malum in se* crimes are "inherently and essentially evil … without any regard to the fact of [their] being noticed or punished by the law of the state") (quoting Black's Law Dictionary (6th ed. 1990)). Rather, it is a felony that is *malum prohibitum*. *See id.* (*malum prohibitum* are acts that are "'wrong because prohibited,' not by virtue of their inherent character" quoting Black's Law Dictionary (6th ed. 1990))

that the defendant had a specific intent to shoot at a particular building. *Ellis*, 281 Va. at 501, 706 S.E.2d at 849. The Court held that the Commonwealth need not prove specific intent, only general criminal intent. *See id*. at 506, 706 S.E.2d at 852. But the Court declared that the "legislative purpose of Va. Code Ann. § 18.2-279 is meant to prohibit unlawful conduct, whether malicious or ***merely criminally reckless***, which has the potential to endanger the lives of persons inside occupied buildings, without regard to a shooter's actual motive or intent in unlawfully discharging a firearm." *Id*. (emphasis added). Thus, taken in context, the unlawful discharge of a firearm within an occupied building under § 18.2-279 requires that the Commonwealth prove that Bryant acted with criminal negligence.

C. The evidence was sufficient to convict Bryant of unlawfully shooting within an occupied building.

Viewing the evidence in the light most favorable to the Commonwealth, the jury could reasonably conclude based on Bryant's actions that she was criminally negligent when she fired the gun. Expert testimony established that the gun required approximately seven pounds of force to pull the trigger. A distraught Bryant had her hand on the trigger and threatened to shoot herself prior to the gun going off. After she fired the gun, she went to the window and pointed it at two deputies. At the time she fired the gun, the hotel was occupied with guests and Bryant knew that several officers were immediately outside her door and window. By pure chance, the bullet did not ricochet and strike her or anyone else.

Contrary to Bryant's testimony at trial that she was not familiar with firearms, she had told law enforcement after her arrest that she was familiar with firearms, and in fact, she routinely went to a firing range to shoot. The jury, having the benefit of seeing and hearing Bryant testify, was not required to accept her testimony, but instead was free to "rely on it in whole, in part, or reject it completely." *Rollston v. Commonwealth*, 11 Va. App. 535, 547, 399 S.E.2d 823, 830 (1991). Indeed, in its role of judging the credibility of witnesses, the jury was entitled "to disbelieve the self-serving testimony of the accused and to conclude that the accused [was] lying to conceal [her] guilt." *Marable v. Commonwealth*, 27 Va. App. 505, 509-10, 500 S.E.2d 233, 235 (1998); *see also Sandoval v. Commonwealth*, 20 Va. App. 133, 138, 455 S.E.2d 730, 732 (1995) ("The credibility of the witnesses and the weight accorded the evidence are matters solely for the fact finder who has the opportunity to see and hear that evidence as it is presented."). Accordingly, the jury could reasonably find that this was no accident and that Bryant fired the gun "in reckless disregard of the safety of hotel staff, other guests, and the officers who were present." *Bryant*, 67 Va. App. at 583, 798 S.E.2d at 466. [5]

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[5] Bryant relies upon the jury asking during deliberations: "[What] [i]f the gun was accidentally discharged?" and "Does the defendant have to have intent to fire the weapon?" (App. 16). This Court does not deem questions posed by the jury to the trial court during deliberations as "some tacit finding of fact." *Dominguez v. Pruett*, 287 Va. 434, 442, 756 S.E.2d 911, 915 (2014).

II. The Court of Appeals did not err in upholding the refusal of Bryant's proposed jury instruction on the defense of accident.

Bryant proposed a jury instruction that stated, in part, that "if you have a reasonable doubt whether said firearm discharge was accidental or that it was intentional, then you shall find the defendant not guilty." (App. 4). Bryant argues that the Court of Appeals erred in upholding the trial court's refusal of this instruction. (Def. Br. 28). Bryant's proposed instruction, however, was not a correct statement of law and would have had the tendency to mislead the jury.

A. Standard of Review

The decision to grant or deny a jury instruction generally rests "in the sound discretion of the trial court." *Cooper v. Commonwealth*, 277 Va. 377, 381, 673 S.E.2d 185, 187 (2009). Yet, whether an instruction "accurately states the relevant law is a question of law" that this Court reviews *de novo*. *Sarafin v. Commonwealth*, 288 Va. 320, 325, 764 S.E.2d 71, 74 (2014) (internal quotation marks omitted). This Court's "sole responsibility in reviewing" the trial court's decision "is to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises." *Cooper*, 277 Va. at 381, 673 S.E.2d at 187 (internal quotation marks omitted).

When reviewing the trial court's refusal to grant an instruction proffered by the accused, the Court views the facts in the light most favorable to the defendant.

Avent v. Commonwealth, 279 Va. 175, 202, 688 S.E.2d 244, 259 (2010). "However, an instruction is proper only if supported by *more than* a scintilla of evidence." *Id*. (internal quotation marks omitted) (emphasis added); *see also Harris v. Commonwealth*, 134 Va. 688, 695, 114 S.E. 597, 600 (1922) (holding that a defendant is only entitled to an instruction on his theory of the case when it is "supported by some appreciable evidence"). Moreover, "it is error to give" an "instruction [that] may reasonably be regarded as having a tendency to mislead the jury." *Castle v. Lester*, 272 Va. 591, 605, 636 S.E.2d 342, 349 (2006) (internal quotation marks omitted). And an instruction "may not 'single out for emphasis a part of the evidence tending to establish a particular fact.'" *Terry v. Commonwealth*, 5 Va. App. 167, 170, 360 S.E.2d 880, 882 (1987) (quoting *Woods v. Commonwealth*, 171 Va. 543, 548, 199 S.E. 465, 467 (1938)). Lastly, this Court has frequently cautioned against "the danger of the indiscriminate use of language from appellate opinions in a jury instruction." *Clohessy v. Weiler*, 250 Va. 249, 255, 462 S.E.2d 94, 98 (1995) (internal quotation marks omitted).

B. The trial court did not abuse its discretion in refusing Bryant's proposed jury instruction.

Bryant's relies heavily on the Court of Appeals's decision in *King v. Commonwealth*, 64 Va. App. 580, 770 S.E.2d 214 (2015), to argue that her proposed instruction on the defense of accident should have been given to the jury. In *King*, the Court of Appeals found error in not giving the defendant's proposed

instruction on the defense of accident. *Id*. at 592, 770 S.E.2d at 220. The ruling in *King*, however, does not implicate this case. *King* involved a charge of malicious wounding, which requires proof of the "intent to maim, disfigure, disable, or kill." *See* Va. Code § 18.2-51. The charge in this case—unlawfully discharging a firearm in an occupied building—contains no equivalent intent requirement. Thus, *King* has no application here.

As discussed, Bryant's conviction for unlawful discharge of a firearm under Code § 18.2-279 required that the Commonwealth prove criminal negligence. The occurrence of an accident does not preclude a finding of criminal negligence. *See, e.g., Cable v. Commonwealth*, 243 Va. 236, 240, 415 S.E.2d 218, 220 (1992) (defining "involuntary manslaughter," in part, as an accidental killing of a person" (quoting *Beck v. Commonwealth*, 216 Va. 1, 4, 216 S.E.2d 8, 9-10 (1975)). Bryant's proposed jury instruction would have erroneously required the Commonwealth to prove an intentional and non-accidental discharge of a firearm, rather than a criminally negligent one. Because Bryant's proposed instruction was an incorrect statement of law and would have had the tendency to mislead the jury, the trial court did not abuse its discretion in refusing it.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals of Virginia, upholding the judgment of the Circuit Court for Rockingham County, should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein

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CERTIFICATE OF TRANSMISSION AND SERVICE

On January 18, 2018, the required print and electronic copies of the Commonwealth's Brief were transmitted to the Clerk of this Court and to Andrew C. Graves, Esquire, Law Office of Andrew C. Graves, PLLC, 70 North Mason Street, Suite 120, Harrisonburg, Virginia 22802 at andrew@thegraveslaw.com. The undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities and certificate, contains 3,991 words.

The Commonwealth desires to present oral argument in this case.

/s/_____
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Courtesy copies:

Hon. Bruce D. Albertson, Rockingham County Circuit Court
Hon. Marsha L. Garst, Commonwealth's Attorney, Rockingham County