SCV: Submitted on 12-11-2017 14:26:14 EST for filing on 12-11-2017

IN THE

Supreme Court of Virginia

RECORD NO. 170712

TINA MARIE BRYANT,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

Andrew C. Graves (VSB#75995)
GravesWhetzel Law, P.L.L.C.
70 North Mason Street, Suite 120
Harrisonburg, Virginia 22802
Telephone: (540) 432-3030
Facsimile: (540) 217-0011
andrew@graveswhetzellaw.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii, iv

STATEMENT OF THE CASE 1

ASSIGNMENTS OF ERROR 2

STATEMENT OF FACTS 3

ARGUMENT 6

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 6

THE COURT OF APPEALS ERRED BY UPHOLDING THE TRIAL COURT'S DENIAL OF THE APPELLANT'S REQUESTED ACCIDENT JURY INSTRUCTION HOLDING THAT IT WOULD CONFUSE THE JURY AND IT WAS NOT A CORRECT STATEMENT OF THE LAW. IN SPITE OF APPELLANT PRESENTING MORE THAN A SCINTILLA OF EVIDENCE SUPPORTING A THEORY THAT THE DISCHARGE OF THE FIREARM WAS ENTIRELY ACCIDENTAL 8

CONCLUSION 29

CERTIFICATE 30

TABLE OF AUTHORITIES

CASES **Page(s)**

Armstead v. Commonwealth, 55 Va. App. 354 (2009) 19

Bell v. Commonwealth, No. 1479-15-2 (Court of Appeals, August 2, 2016) 21

Chambers v. Commonwealth, No. 0786-15-3
(Court of Appeals, May 3, 2016) 21, 22, 23, 27, 28

Commonwealth v. Grimstead, 12 Va. App. 1066, 1067 (1991) 7

Commonwealth v. Vaughn, 263 Va. 31 (2002) 8

Crowder v. Commonwealth, 16 Va. App. 385 23

Delacruz v. Commonwealth, 11 Va. App. 335 (1990) 10, 24

Eaton v. Commonwealth, 240 Va. 235 (1990) 15

Ellis v. Commonwealth, 281 Va. 499 (2011) 20

Emerson v. Commonwealth, 43 Va. App. 263 (2004) 23

Fleming v. Commonwealth, 13 Va. App. 349 (1991) 17, 18, 20

Foster v. Commonwealth, 13 Va. App. 380 (1991) 10, 15

In Re Winship, 397 U.S. 358, 364 (1970) 6

Jimenez v. Commonwealth, 241 Va. 244 (1991) 23

King v. Commonwealth, 64 Va. App. 580 (2015) 9, 10, 11

Martin v. Commonwealth, 218 Va. 4, 3 (1977) 11, 16, 23

McClung v. Commonwealth, 215 Va. 654 (1975) 10

Merritt v. Commonwealth, 164 Va. 653 (1935) 18

Ornelas v. United States, 517 U.S. 690, 697, (1996)..... 7

Scott v. Commonwealth, No. 2289-09-3
(Court of Appeals, March 29, 2011)..... 23

United States v. Adderley, 529 F.2d 1178 (5th Cir. 1976) 18

Winston v. Commonwealth, 268 Va. 564 (2004)..... 18

STATUTES

Virginia Code § 19.2-263.2 15

Virginia Code § 18.2-279 ..... 17, 20, 26, 27

TREATISES:

1-22 Virginia Criminal Law and Procedure Section 22.5 17

ATTORNEY GENERAL OPINIONS

1978 Va. AG Lexis, 138 19

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

TINA MARIE BRYANT, Appellant, was convicted in the Circuit Court of Rockingham County, Virginia on May 18, 2016; this conviction was affirmed by the ruling of the Circuit Court by the Virginia Court of Appeals on April 25, 2017. She was sentenced to a fine of zero ($0) dollars on case number CR15001545-00 – Unlawfully Discharging a Firearm in an occupied dwelling in violation of Virginia Code Section 18.2-279 (J.A. 385 - 387) Appellant was convicted by a Jury of the offense on March 8, 2016. On May 18, 2016, the Honorable Judge Bruce D. Albertson denied the motion to set aside the verdict and upheld the recommendation of the jury. The case was timely appealed to the Virginia Court of Appeals and after hearing the arguments of counsel and considering the briefs filed by both parties, the Court of Appeals affirmed the trial court's decision in an April 25, 2017 Order as to the Assignments of Error raised, finding that the motion to strike the evidence was properly denied and that the denial of the jury instruction about accidental discharge was properly denied. Bryant then requested this Honorable Court grant her Petition for Appeal as to the two Assignments of Error alleged herein and this Court awarded her appeal in an October 30, 2017 Order.

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.**

   This issue was preserved by counsel at the conclusion of the Commonwealth's case (J.A. 213-226) at the conclusion of the trial (J.A. 257-264) and during the hearing on the Motion to Set Aside the Verdict on May 18, 2016, (J.A. 385).

2. **THE COURT OF APPEALS ERRED BY UPHOLDING THE TRIAL COURT'S DENIAL OF THE APPELLANT'S REQUESTED ACCIDENT JURY INSTRUCTION HOLDING THAT IT WOULD CONFUSE THE JURY AND IT WAS NOT A CORRECT STATEMENT OF THE LAW. IN SPITE OF APPELLANT PRESENTING MORE THAN A SCINTILLA OF EVIDENCE SUPPORTING A THEORY THAT THE DISCHARGE OF THE FIREARM WAS ENTIRELY ACCIDENTAL.**

   This issue was preserved by counsel during the trial (J.A. 288) and at the hearing on the properly filed Motion to Set Aside the Verdict on May 18, 2016, (J.A. 385).

STATEMENT OF FACTS

On or about, August 8, 2015, the defendant Tina Marie Bryant, an administrative assistant with no criminal record and a top-secret military clearance drove to the City of Harrisonburg, Virginia with the intent to kill herself (J.A. 230). She ended up at the Country Inn and Suites Hotel in Harrisonburg because she had at that time recently experienced the death of her mother and lost her job, she was very depressed at this time (J.A. 229). Police Officers were called to locate Ms. Bryant and eventually located her at the Country Inn and Suites in Harrisonburg. She got a room on the first floor of the motel and she remained there for the duration of the events until the police entered the room to end the situation. Upon first arriving Ms. Bryant yelled at the police and told them to not come in, that she has a gun, and threatened that "if you come in I will shoot myself." (J.A. 130). Initially she communicated with the officers that she was disgusted with life and wanted the officer to shoot her. When asked about her demeanor Sergeant Mike Deeds stated that she was angry, upset. (J.A. 152).

As time passed in speaking with her she began to calm down. Corporal Tommy James stated the demeanor of the defendant changed over the course of the incident, right before the gun went off he stated she was "more calm" and not as angry as when they first arrived. (J.A. 146). Sergeant Mike Deeds indicated also that Ms. Bryant was de-escalating, going from "if you come in I will take my own

life" to complying with commands and calming down. Further, stating that they were getting a "handle" on the situation and when the firearm went off it was in an unusual time during the conversation with Ms. Bryant. (J.A. 159). Corporal James agreed that the gun went off during an unusual time, surprising him. (J.A. 145). Deputy Terry Hoops, agreed that the situation was getting better, stating that It seemed that she had calmed down and was communicating a little better. (J.A. 190). After the gun discharged there was a short period of silence. Corporal James overheard Sergeant Deeds ask if she was okay. (J.A. 132) She replied that she was ok. (J.A. 132).

On Cross, Examination Sgt. Deeds, was asked more about the conversation after the gun went off, her initial statement to the police was explored, she indicated that she was "okay", and did not tell them to "Stay the Hell away" or anything like that. "She just said I'm not hurt, I'm okay". (J.A. 160).

After the gun went off, she complied with everything they asked her to do. (J.A. 160-161).

Soon after the officers made entry into the room and after getting her secured Sergeant Deeds noticed an injury to Tina's hand with some blood coming from it. Sergeant Deeds indicated that it looked like an injury indicative of someone that had their hand too close to the slide as the slide ejected a round when it came back. (J.A. 160-161).

Corporal James and Sergeant Mike Deeds both testified during the trial that they do not put their fingers on the trigger of their weapons as learned from training because it may cause a sympathetic response and cause a round "to go off", further agreeing that it would not be intentionally done but caused during a stressful situation (J.A. 149). Or a negligent discharge (J.A. 163). In fact, each law enforcement witness that testified stated that they do not place their finger on the trigger due to this same reason, throughout the trial.

There was no testimony about what Ms. Bryant was doing when the round went off except what Tina Bryant (the defendant) testified to. Testifying that she had lost her mother and her job. (J.A. 229). Further stating that she went there to kill herself. She loved the mountains and wanted to see the mountains one last time. (J.A. 231).

The only explanation for when the gun went off was by the defendant who testified at trial that she was planning on killing herself but at the last minute had visions of God and hell and abandoned her desire to kill herself, as she was putting the gun down the gun discharged and she did not want it to go off when it did. (J.A. 234 - 241).

The only testimonial evidence was that the defendant had abandoned her desire to kill herself, and therefore had no desire for the gun to discharge.

Counsel and the Commonwealth both agreed that the Commonwealth had to prove intent for the round to go off during the Commonwealth's Case. (J.A. 61). The Court heard the request for an accident instruction then denied this jury instruction which would have explained the non-intentional discharge of the firearm theory of the defendant. By not requiring the Commonwealth to disprove this theory the burden of proof was shifted and the Commonwealth was not required to prove this part of their case. The jury during deliberations had two questions dealing with accident and intent which the Trial Court would not answer. Both questions dealing with accident or intent, the Court did not further instruct the jury on either.

ARGUMENT

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.

Standard of Review

"An accused is entitled to have every element of the charge against him established by proof beyond a reasonable doubt." *In Re Winship*, 397 U.S. 358,

364 (1970). Tina Marie Bryant challenges the sufficiency of the evidence used to convict her.

"While the evidence must be viewed in the light most favorable to the prevailing party, granting it all reasonable inferences fairly deducible there from and the findings of historical fact are only reviewed for clear error." *Commonwealth v. Grimstead*, 12 Va. App. 1066, 1067, 407 S.E.2d 47, 48 (1991). "However, on appeal, the court must provide a de novo review of the trial court's application of defined legal standards to the particular facts of a case." *Ornelas v. United States*, 517 U.S. 690, 697, 116 S. Ct. 1657, 1662 134 L. Ed. 2d 911 (1996).

Analysis

The Commonwealth's case lacked any indication of intent but for circumstantial evidence occurring after the discharge of the firearm. At the conclusion of the evidence, the defendant had testified that the firearm discharge was accidental and she had no intent for the gun to go off when it did. The case is based on a willful discharge of the firearm and absent proof of any intent to make the firearm discharge she could not be convicted of this non-intentional discharge or accident. The Trial Court had the option to set aside the jury verdict at the Motion to Set Aside, but that motion was denied again stating that intent for the gun to off was not required to be proven by the Commonwealth, or to disprove defense theories on the case. (J.A. 383).

THE COURT OF APPEALS ERRED BY UPHOLDING THE TRIAL COURT'S DENIAL OF THE APPELLANT'S REQUESTED ACCIDENT JURY INSTRUCTION HOLDING THAT IT WOULD CONFUSE THE JURY AND IT WAS NOT A CORRECT STATEMENT OF THE LAW. IN SPITE OF APPELLANT PRESENTING MORE THAN A SCINTILLA OF EVIDENCE SUPPORTING A THEORY THAT THE DISCHARGE OF THE FIREARM WAS ENTIRELY ACCIDENTAL.

Standard of Review

The legal argument hinges on the Trial Court's rationale for denying the instruction. That rationale was that intent is not necessary to be proved by the Commonwealth in an unlawful discharge case, that an accident or non-intentional discharge instruction is not a correct statement of the law in this particular case. "When reviewing a trial court's refusal to give a proffered jury instruction, we view the evidence in the light most favorable to the proponent of the instruction." Commonwealth v. Vaughn, 263 Va. 31 (2002).

Analysis

The defendant testified that her intent was to kill herself and prior to the gun going off had abandoned that intent prior to the gun going off, thereafter saying the gun discharge was accidental. The jury instruction, below, was proffered and refused by the Court, it was taken from King v. Commonwealth, 64 Va. App. 580 (2015).

> 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 haring 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.

King v. Commonwealth, 64 Va. App. 580 (2015). In King, the Court of Appeals held that the defendant was entitled to her requested jury instruction on the defense of accident, because it was supported by more than a scintilla of evidence, the Court further found that it would have also legally entitled her to acquittal under the circumstances if believed by the jury. King, was cited as the supporting case to the court for the proposed instruction, the case is similar in nature to the facts of the instant case and the detailed analysis contained in the Court of Appeals' decision appears to be on point for this court to determine the merits of the requested relief contained in this motion.

King v. Commonwealth, 64 Va. App. 580 (2015). Holding that Defendant was entitled to jury instruction on the defense of accident because it was supported by more than a scintilla of evidence. It would have legally entitled her to acquittal if believed by the jury.

At trial in the King case there were two different accounts of the events that transpired, Id, at 584. Appellant relied on accident theory in her defense and

proffered a modified model jury instruction. This instruction was rejected by the court. Saying the other instructions property told the jury the law of the case. The refused jury instruction from King was:

"Where the defense is that malicious wounding was an accident, the defendant is not required to prove this fact. The burden is on the Commonwealth to prove beyond a reasonable doubt that the malicious wounding was not accidental. If after considering all the evidence you have a reasonable doubt whether the malicious wounding was accidental or intentional, then you shall find the defendant not guilty."

The court goes over the duty of the Trial Court in granting and denying instructions. If a proffered instruction finds any support in credible evidence, however, its refusal is reversible error. McClung v. Commonwealth, 215 Va. 654 (1975). Where conflicting evidence tends to sustain either the CWA or Defense theories of the case the trial judge must instruct the jury as to both theories. Foster v. Commonwealth, 13 Va. App. 380, (1991) citing Delacruz v. Commonwealth, 11 Va. App. 335 (1990).

Testimony that the firearm discharged accidentally was heard and the Court of Appeals in King found that this evidence would support appellant's theory and exceed the scintilla requirement. The court contends the instructions covered the

law just as in the instant case. King relies on Martin v. Commonwealth, 218 Va. 4 (1977), stating that the defendant was entitled to her proposed jury instruction because it was supported by more than a scintilla of evidence and would have legally entitled her to acquittal.

The evidence to support the proffered jury instruction came heavily from the testimony of the defendant and the facts surrounding the events of that day:

Tina Bryant: "I still at that point planned on committing suicide and ending my life that day. I did not want to live and they talked to me through the door for I don't know how long. I'm sorry, I apologize, I'm not good with the time. Everything happened very quickly it seemed like, and we conversed back and forth for a little while. I told them that I was going to kill myself."

Q. "And when you were talking to the officer that day, where was the gun"?

Tina Bryant: "I had it, at one point I had it in my hand and I took the gun, I had my finger on the trigger, I put it to my head, and in the very split second I thought of God and my finger on the trigger and then I heard the gun go off. It was very loud and it startled me, and it really scared me because it was so loud. And then I remember the officer, one of the officers asking me if I was okay and I said, "Yes, I'm okay. I just fired into the floor."

Q. "When you had the gun to your head, you indicate your finger was on the trigger."

Tina Bryant: “That’s correct”.

Q. “and was that, why your finger was on the trigger”?

Tina Bryant: “Because I was going to shoot myself and I hadn’t pulled my finger away from the trigger.” (J.A. 232 - 233).

Q. “What was your thought process”?

Tina Bryant: “It was very quickly. The thought was very quick and in a split-second I thought what if I go to hell? Excuse me. And that’s the only reason I didn’t commit suicide that day. Sorry” (apologizing to the court for cursing). (J.A. 233).

Tina Bryant: “I just wanted to surrender. This had gotten out of control.” (J.A. 233-234).

Q. “Okay. What were you doing with the gun when you turned it away from your head”?

Tina Bryant: “So I had it to my head and I was putting it down when it discharged. I was putting the gun down just to surrender”. (J.A. 234).

Tina Bryant: “I mean I felt terrible that the gun had discharged and I didn’t mean for it to discharge. I didn’t even realize it had discharged until I heard the sound. I’m not familiar with guns so I assume it was like when I pulled the gun back up to, I’m not sure what it’s called, but I pulled it back and maybe it pinched my finger or something. I don’t know. I’m not sure.”

Q. “How many times have you shot a gun in your life”?

Tina Bryant: “I have never shot a gun except that day, obviously. Yeah”.

Q. “the gun wasn’t even yours, was it”?

Tina Bryant: “No, it wasn’t”.

Q. “When you, when you talked to the officer, was he, what effect was he having on you from the beginning? Like what effect did he talking to you have on you”?

Tina Bryant: “Well, it helped me calm down. I would say that”.

Q. “had you started to depress the trigger to kill yourself”?

Tina Bryant: “I did. It was very quickly that it happened”. (J.A. 238).

Q. “Do you recall your reaction to it”?

Tina Bryant: “I was like oh, my God, you know”? (J.A. 239).

Tina Bryant: “So I had the gun to my head and as I was putting it down, I still had my finger on the trigger and I started to depress the trigger when I had it to my head. And as I put it down is when it discharged”. (J.A. 241).

Q. “But you held onto the gun for several minutes after you shot that round, isn’t that correct”?

Tina Bryant: “I don’t know how long I held the gun for. I was extremely nervous. I was nervous when the police officers arrived and I was more nervous when the gun discharged”. (J.A. 245).

Tina Bryant: "I move around a lot, talk with my hands a lot. I don't know how it went off". (J.A. 247). (Tina Bryant)

Q. "But, I mean crystal, you're crystal clear until what point during the day this day on August 8th"?

Tina Bryant: "After the gun discharged. I remember everything up to that point and everything just happened very quickly." (J.A. 250).

Q. "When the gun went off, what did you want to happen"?

Tina Bryant: "I just wanted to surrender. I wanted everything over with because at that point I had decided not to kill myself". (J.A. 251).

The issue is that in the case of the unlawful discharge of a firearm is whether a defendant entitled to a jury instruction for accidental or non-intentional discharge? Is the accident theory a correct statement of the law?

The Trial Court felt that the jury was fully informed on the law of the case, however, counsel argued that the jury would infer that every discharge of a firearm inside any occupied structure would result in a guilty finding and that accidents and non-intentional discharges do not rise to that level of criminality within the statute. A jury that is not equipped with a non-intentional or accident instruction during deliberations does not have a correct statement of the law as an accident instruction or non-intentional discharge instruction could be used to acquit the defendant, it puts the defendant at a disadvantage.

"A defendant is entitled to have the jury instructed only on those theories of the case that are supported by [more than a scintilla of] evidence. Eaton v. Commonwealth, 240 Va. 236 (1990). The Commonwealth relied on inferences of evidence to support their own theory of the case and "where conflicting evidence tends to sustain either the prosecution's or defense's theory of the case, the trial judge must instruct the jury as to both theories." Foster v. Commonwealth, 13 Va. App. (1991).

The jury was instructed during the sentencing phase by defense counsel that they must not have believed it was an accident or that she had the require intent to discharge the gun or they would have not found her guilty, the jury then gave her a sentence of "a fine of (zero) dollars." This appears to be an attempt by the jury to nullify their own verdict after hearing counsel argue the points of their questions to the court. The Court denied the Motion to Set Aside the Jury Verdict (J.A. 383).

While the instruction created was based on case law and was not a model instruction "A proposed jury instruction submitted by the party which constitutes an accurate statement of the law applicable to the case, shall not be withheld form the jury solely for its nonconformance with model jury instructions." Virginia Code 19.2-263.2. Without this created and proffered jury instruction, the jury was left with an incomplete statement of the law.

Because the accident instruction tendered was refused and the jury questions were not answered it is Counsel's belief that the jury was not properly instructed and may have been confused. Both the Commonwealth and Defense Counsel argued throughout the trial that intent was essential and that otherwise the jury may find circumstances to be similar to a strict liability standard creating a prejudicial and unconstitutional burden on the defendant. "Denying an instruction on a defendant's theory of defense, if supported by more than a scintilla of the evidence, creates the risk of jury confusion and misunderstanding, especially when the jury has not otherwise been instructed that it is the Commonwealth's burden to disprove the defendant's theory beyond a reasonable doubt." Martin v. Commonwealth, 218 Va. 4 (1977).

Counsel asserts that the evidence during the case indicated beyond a scintilla that an accidental discharge of the firearm occurred. Because of this an "accident" instruction should have been given to the jury to consider during deliberation. The Court refused defendant's proposed accident instruction tendered for submission. During deliberation the jury had two questions: "If the gun was accidently discharged?" and the second question was: "Does the defendant have to have intent to fire the weapon?" (J.A. 315).

Counsel asked that the Court instruct the jury that the discharge had to be intentional and that if an accident they would have to acquit the defendant but the

Court indicated that the jury instruction would instruction the jury sufficiently as to the law, the jury instruction as noted below taken directly from the court's file mentions nothing on the issue of intent or accident and counsel asserts that they are difficult to understand how the facts and law apply.

The Commonwealth argues that they do not have to prove absence of an accident, but then follows up by arguing that it was clear she pulled the trigger and that the jury can find that she intended to pull the trigger. (J.A. 225). If the Commonwealth believes they must prove intent, then they must exclude accident theories and disprove them beyond a reasonable doubt.

What is required of the Commonwealth to prove a violation of Code Section 18.2-279 is that it prove beyond a reasonable doubt that the principal in the first degree intended to shoot at or toward an occupied dwelling. Fleming v. Commonwealth, 13 Va. App. 349 (1991). "A conviction will lie under the current statute upon a showing that the accused knew or should have known that the building was occupied, but that is not the whole story. Although the Commonwealth need not show a specific intent to injure a person, the prosecutor must prove an intentional shooting." 1-22 Virginia Criminal Law and Procedure Section 22.5, analyzing and quoting from Fleming v. Commonwealth, 13 Va. App. 349, 355 (1991).

In Fleming, the facts indicated that Kivett (the shooter in the case) "voluntarily discharged twenty rounds", therefore he intended to shoot, those twenty shots from a semi-automatic weapon at a truck, and therefore also intended to shoot the occupied dwelling behind the truck. It is therefore interpreted as an intentional shooting. Because of the fact that the defendant fired the weapon intentionally, the Court in Fleming said that the fact finder may infer that the perpetrator had an unlawful intent from the commission of an unlawful act. Merrit v. Commonwealth, 164 Va. 653, 662, (1935).

Determining how intent required for a general intent crime is important for the admission of the refused jury instruction. "The distinction between specific intent and general intent is of little help in deciding when intent is really an issue. All crimes other than those imposing strict liability require a degree of culpability, either knowledge, intent, recklessness, or willfulness." United States v. Adderly, 529 F.2d 1178, 1181 (5th Cir. 1976). These questions when analyzing the facts of this case would require the Commonwealth to prove she intended for the firearm to go off, and for the Commonwealth to prove an intentional discharge.

General intent is further explained: General intent, on the other hand, is defined as the "intent to perform an act even though the actor does not desire the consequences that result." Winston v. Commonwealth, 268 Va. 564, 600 (2004). Where crime consists of an act without reference to intent to do further act or

achieve future consequence, the court asks only if defendant intended to do the proscribed act and that intention is deemed general intent; when definition of crime refers to intent to do some further act or achieve additional consequence, the crime is deemed one of specific intent.

Here the requirement is that the defendant intends to do the proscribed act without further act or achievement, there is no proof that she intended to make the firearm go off as that was abandoned. Whether the jury believes that theory or not requires them to be fully informed on the law. Accordingly, in order to prove the offense of unlawful shooting at an occupied vehicle, the Commonwealth must prove beyond a reasonable doubt that the accused intended to shoot at or toward an occupied vehicle, but not that he had any specific intent to cause bodily injury or fear or apprehension to the person therein. Armstead v. Commonwealth, 55 Va. App. 354, 361, (2009).

Evaluating the intentional aspect of this code section, Attorney General's Opinion 1978 Va. AG LEXIS – 138 – states that "18.2-279 and 18.2-280 prohibit the malicious and willful discharge of a firearm in an occupied building and public places, respectively, without justifiable excuse". The important interpretation from this 1978 Attorney General's opinion is that it indicates the words both malicious and willful. This opinion indicates that one must want the discharge to occur, since the instant case on appeal is not a malicious discharge case, it must therefore

be a willful discharge, in such a case the proffered and refused jury instruction would be proper.

In Ellis v. Commonwealth, 281 Va. 499 (2011). The court held to sustain a conviction under Code § 18.2-279, indicating that the Commonwealth need not prove that the defendant had the specific intent to shoot at or against a particular building. Rather, the evidence need only show that a defendant who unlawfully discharges a firearm knew or should have known that an occupied building or buildings were in his line of fire.

During the oral argument of Ellis at 506, the Commonwealth "conceded that Code § 18.2-279 is not a strict liability crime." Further indicating that the determination was that Ellis knew that the convenience store was in his line of fire or should have realized that the natural, probable consequences of his actions was that stray shots were likely to strike occupied buildings. Distinguish from Tina Bryant's case on appeal, as again in Ellis there was clear intent to discharge the firearm. It is the further consequences that are irrelevant when considering specific versus general intent proof requirements.

Reflecting on the ruling from Fleming, the shots were fired "at a truck located directly in front of an occupied residence from a distance of sixty feet." Fleming v. Commonwealth, 13 Va. App. at 355, (1991). The Court of Appeals determined that it was reasonable for the jury to infer that the shooter in that case,

despite his statement that his intent was to fire shots at the truck, had the general intent to shoot at the dwelling that was also in his direct line of fire, because this was a natural, probable result of his discharging a firearm rapidly and indiscriminately in the vicinity of the dwelling. Id at 355.

The Commonwealth relied on Tina Bryant's initial reaction to the arrival of law enforcement, when she was upset. However, the testimony was that the gun went off at an unusual time when she was being cooperative and seemed to have calmed down. (J.A. 146 and 159). The importance of instruction to the jury must be viewed again to determine the effect it had on the trier of the case and fact. In Carlos Matthew Bell v. Commonwealth, Record 1479-15-2 (August 2, 2016). The Court found that the refusal of the jury instruction was not harmless error. As this refusal could have affected the verdict as the credibility of Ms. Tina Bryant was not impeached, she had no criminal history and evidence showed she had worked at the Pentagon with a top-secret military clearance. (J.A. 228 - 229).

The Trial Court in the instance case on appeal, relies on Chambers v. Commonwealth, Record No. 0786-15-3 (May 3, 2016) at sentencing while analyzing and then refusing the Motion to Set Aside. In that case it was more so based on weighing evidence by a Judge and not a Jury, whereas as a Judge is presumed to know the law the jury has to be instructed on the law of the case. Several statements in Chambers by the defendant are at issue:

Chambers has similar facts as the instant case on appeal, as it involves the discharge of a firearm in an occupied dwelling said to police when first confronted about shots in the wall of the house that "he put it there, and he had the right to shoot the walls in his house if he wanted to."

Officers also testified "to admissions made by Chambers that, if believed could lead a rational finder of fact to believe Chambers had fired the gun intentionally and was trying to just cover up after the fact. Certainly, the Judge knowing the law, considered all of this evidence before ruling. Whereas a Jury would only be able to rule on the instruction of law. The intentional / non-intentional discharge as applied to this statute is one of the areas that the trial court considered and the Court of Appeals did not correct but instead invoked that language in the unpublished opinion. The trial court in Chambers, found his subsequent statement to not be truthful when evaluating his statement as compared to his initial statement.

The court goes on to say that by contrast, Chambers, testified that the gun discharged accidently, and denied many of the statements ascribed to him by the Commonwealth. Id. at p4. The court addressed the Chambers alternative hypothesis of innocence: accident;

"In considering an appellant's alternate hypothesis of innocence…, we must determine "not whether there is some evidence to support the appellant's

hypothesis of innocence, but rather, whether a reasonable fact finder, upon consideration of all the evidence, could have rejected the appellant's theories in his defense and found him guilty of the charge crime beyond a reasonable doubt." Chambers at p.4, quoting Emerson v. Commonwealth; 43 Va. App. 263 (2004).

The Trial Court also referring to a footnote in Chambers, used the Shaun Wallace Scott v. Commonwealth of Virginia, Record No. 2289-09-3 (March 29, 2011). The Trial Court also relies on the onus of a criminal conviction for an act even a lawful act in a criminally negligent manner. Citing Crowder v. Commonwealth, 16 Va. App. 385. Unlawful includes the volitional performance of a lawful act. Volitional means an act by its very nature would require some intent or an act of making a choice or decision; *also*: a choice or decision made as defined by Merriam Webster Dictionary. Holding a gun is lawful and may not be criminal or negligent at all.

When a principal of law is vital to a defendant in a criminal case, a trial court has an affirmative duty to properly instruct a jury about the matter. Jimenez v. Commonwealth, 241 Va. 244 (1991). Martin v. Commonwealth, 218 Va. 4 (1977). In this case, it was determined that although the jury may have rejected the theory of accidental killing by finding defendant guilty of murder, because this finding may have resulted from the mistaken belief that the burden was on the defendant to prove the killing was accidental the error was prejudicial. This

possible change in the burden of proof could have had the jury believing that Tina Marie Bryant needed to prove her theory versus the Commonwealth disproving her theory.

If there is evidence in the record to support the defendant's theory of defense, the trial judge may not refuse to grant a proper, proffered instruction. Delacruz v. Commonwealth, 11 Va. App. 335, 338 (1990).

The Court denied the instruction on accident by stating that this instruction is uneccesarily confusing. Ruling that "I also don't find that it's supported by the law at this state. Against were dealing with apples and oranges type situation. Exception to my ruling is duly noted. (J.A. 288). When analyzing the jury's thoughts through their questions:

We received two questions from the jury that we'll have to bring them up on. It says, "If the gun was accidentally discharged?" Second, "Does the defendant have to have intent to fire the weapon?" (J.A. 315). Intent and accident were clearly being pondered in deliberation.

In response, it was argued when trying to instruct the jury.

Mr. Graves: "And I think the answer to that I yes, she has to intend for the gun to go off. Of the gun doesn't go off by her own volition and desire, then it's not a crime".

Court: "How is it not covered by the statute or by the VMJI"?

Mr. Graves: "Well, that's the reason I wanted to include the intent instruction, Your Honor, that was rejected."

Court: "Uh huh".

Mr. Graves: "is because that to lawyers it's, to me it's confusing when I read that VMJI and of course"

Court: "Can you hand me the file"?

Mr. Graves: "I mean of course I understand and Ms. Wilson and I both were arguing in the closing about intent and that came up a lot, and I think they're reading this jury instruction going, "Where's the word 'intent?' Where's the word 'intent?'" (J.A. 316).

The abandonment of desire to commit a crime was addressed also with the court, while at some point she desires for the gun to go off ending her life, she abandoned that and went to put the gun down when it discharged. Mr. Graves: "And I think that whenever it's a millisecond or whatever, if intent can be formed in the blink of an eye according to all Courts and every murder case that anyone's ever seen, why can't intent be thrown out in the blink of an eye in the same breath"? Court: "I understand. Yes, sir." (J.A. 264). The Trial Court ruling supported that a firearm discharge for whatever reason in the occupied structure was enough for conviction without having to prove intent or disprove accident by the Commonwealth.

Court: "So show me something that says that you have to have to intend to discharge the firearm itself for this particular charge in the statute." (J.A. 284). Upon review of the pertinent of the statute Code Section 18.2-279;

> 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.

As for the Virginia Model Jury Instruction, stating as follows:

> The defendant is charged with the crime of discharging a firearm within an occupied building. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that 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.

Since the trial court agreed that there was testimony about sympatheic reactions among hands, etc. (J.A. 317). Counsel argued that the fundamental

difference between the instance case on appeal and Chambers was a bench trial where Chambers told officers immediately that he could shoot into his walls if he wanted to, but later said it was an accident, in that case a bench trial the Court knows the law, and could consider accident and willful act. The Court of Appeals did not address non-intentional discharge of 18.2-279 in Chambers because the court found that he fired the gun intentionally, this case sets forward an entirely different analysis. For a jury the statute above and model jury instruction appear void of the word intent, explanation that they must exist is necessary to portray to them how to accurately consider the evidence.

Counsel argued during the motion to set aside that the court knows the law where the jury has to be instructed, a much broader knowledge is held in a bench trial. The Court responds in this case that the burden is more than just a scintilla, it must not be unnecessarily confusing and a true statement of the law. (J.A. 370). The court addresses unlawfully during the sentencing (J.A. 375). Citing her handling the gun in a manner that is inherently dangerous as being enough to rise too unlawful. If the rationale by the Court, is sufficient then it is not required for the Commonwealth to prove their case beyond a reasonable doubt, as they have not excluded the defense of accidental discharge. Being insufficiently ins Court denied the motion to set aside (J.A. 383 - 384).

Since an unlawful act still requires intent, and an accident or unintentional discharge in this case belies that necessary element, the instruction for accident in this case is necessary and a proper statement of the law. Each case dealing with unlawful discharge at or within a dwelling appears to stem from a case where the shooter intended for the necessary reaction in the firearm "pin to primer" and for a bullet to project, the question seems to have been in each just what were they shooting at and what purpose comes from that. In this case, while like Chambers in many ways, the issue is that of an accidental or unintentional discharge of the firearm. While in Chambers, the trier of fact was a Judge, who heard the testimony and evidence and understanding the law found the accident theory to be bogus. In the instant case on appeal, the jury heard the evidence, looked at the law provided to them and themselves inquired about the law of accident and intent, only to be denied the jury instruction that was proffered and refused. The analysis of the statute and jury instruction using the Court's logic is that no further instruction is needed and that because the gun discharged in an occupied building the jury determines guilt.

Tina Bryant was entitled to the rejected jury instruction for accident because it presented the grounds of defense from her point of view and what the evidence at trial pointed to, the legal principal applied was correct and this was not covered in any other jury instruction. Therefore, we believe, while respecting the Trial Court,

that they erred in rejecting the instruction as it would have entitled her to an acquittal and was a proper statement of the law. The Appellant respectfully requests that this Honorable Court reverse the Court of Appeals decision and remand this case for a new trial with the proffered and refused jury instruction.

CONCLUSION

For the reasons stated above, Tina Marie Bryant respectfully requests that this Honorable Court to reverse here conviction and dismiss the indictment or remand the case for a new trial with the proffered and refused jury instruction.

Respectfully Submitted

TINA MARIE BRYANT
By Counsel

/s/ Andrew Carter Graves

Andrew Carter Graves, Esquire
Virginia State Bar #75995
GravesWhetzel Law, P.L.L.C.
70 N. Mason Street, Suite 120
Harrisonburg, Virginia 22802
(540) 432-3030 (Telephone)
(540) 432-8780 (Facsimile)
andrew@graveswhetzellaw.com
Appointed Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26(e) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, a PDF version of this brief has been filed through VACES and three paper copies delivered to the Clerk's Office. An electronic version has also been delivered to opposing counsel via email to: Aaron J. Campbell, Assistant Attorney General, at oagcriminallitigation@oag.state.va.us on this 11th day of December 2017.

Counsel respectfully requests oral argument.

/s/ Andrew Carter Graves

Andrew Carter Graves, Esquire
Virginia State Bar #75995
GravesWhetzel Law, PLLC
70 N. Mason Street, Suite 120
Harrisonburg, Virginia 22802
Phone: 540-432-3030
Facsimile: 540-432-8780
E-mail: andrew@graveswhetzellaw.com