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IN THE

# Supreme Court of Virginia

**RECORD NO. 180812**

STEPHEN D. RANKIN,

*Appellant,*

v.

COMMONWEALTH OF VIRGINIA,

*Appellee.*

## OPENING BRIEF OF APPELLANT

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## STATEMENT OF THE NATURE OF THE CASE AND OF THE MATERIAL PROCEEDINGS IN THE TRIAL COURT

The Appellant, Stephen David Rankin, was charged in the City of Portsmouth with one count of First Degree Murder in violation of Va. Code § 18.2-32 and one count of Use of a Firearm in the Commission of Murder in violation of Va. Code § 18.2-53.1. Trial of this matter was held before a jury in the Circuit Court for the City of Portsmouth from July 27, 2016 to August 4, 2016.

The jury acquitted Mr. Rankin of both first degree and second degree murder but convicted Mr. Rankin of voluntary manslaughter in violation of Va. Code § 18.2-35. The jury recommended a sentence of two and a half years' incarceration. The court imposed the jury's recommended sentence on October 12, 2016. Mr. Rankin timely filed his Notice of Appeal to the Virginia Court of Appeals on October 12, 2016. Mr. Rankin raised six assignments of error. On October 3, 2017, a three-judge panel of that court granted Mr. Rankin's Petition as to Assignments of Error II and III and denied his Petition as to the remaining counts. The Court of Appeals affirmed Mr. Rankin's conviction on April 24, 2018. Mr. Rankin timely filed a Petition for Rehearing *En Banc*, which the court denied on May 24, 2018. Mr. Rankin timely filed his Petition for Appeal to this Court on June 22,

2018. On October 22, 2018, this Court granted Mr. Rankin's Petition as to Assignment of Error I.

The Appellant will be referred to as Appellant, Defendant, or Mr. Rankin. The Appellee will be referred to as the Commonwealth. References to the Joint Appendix are cited as: (J.A. Page No.).

## ASSIGNMENT OF ERROR

I. The trial court erred and abused its discretion when it permitted, over Mr. Rankin's objection, the admission of the statement: "It's my second one," which was made by Mr. Rankin to Mr. Provo immediately following the shooting of Mr. Chapman. This statement was unduly prejudicial to Mr. Rankin and it was irrelevant as it was not probative of any fact before the court. (J.A. 159)

## STATEMENT OF FACTS

This case stems from a police officer-involved shooting involving the Appellant, former Portsmouth City Police Officer Stephen Rankin, and the decedent, William Chapman. Mr. Rankin responded to a call from Wal-Mart in relation to Mr. Chapman who was suspected of shoplifting from the store. (J.A. 344) Upon arriving at the Wal-Mart, Mr. Chapman was met by Gregory Provo, Wal-Mart's loss prevention officer, who identified Mr. Chapman as the suspect. (J.A. 344) Mr. Rankin drove across the parking lot and made contact with Mr. Chapman. (J.A. 344) Mr. Rankin was in a marked police vehicle and wearing his full police uniform. (*See* Comm.

Exs. 55 and 57, Taser Camera Videos), (T.T. Aug. 2, 2016 at 10)

Mr. Provo testified as a Commonwealth witness. He stated that after Mr. Rankin drove away to intercept Mr. Chapman, he followed in his own car and drove over to where Mr. Rankin and Mr. Chapman were located in the Wal-Mart parking lot. (J.A. 344) As Mr. Provo got out of his car, he saw that Mr. Rankin had Mr. Chapman detained. (J.A. 345) Mr. Rankin was behind Mr. Chapman and had Mr. Chapman positioned leaning over the hood of the police car. (J.A. 345) At that point, Mr. Provo saw Mr. Chapman pull away from Mr. Rankin, fling himself around out of Mr. Rankin's grip, and face off with Mr. Rankin. (J.A. 346, 366) Mr. Rankin drew his weapon and commanded Mr. Chapman to get on the ground. (J.A. 346) According to Mr. Provo, Mr. Chapman responded to the commands to get on the ground by making a fighting gesture or motion towards Mr. Rankin. (J.A. 356, 367) Before he made the movement towards Mr. Rankin, Mr. Chapman said "are you going to fucking shoot me?" (J.A. 378)

While Mr. Rankin had Mr. Chapman leaned over the hood of his police car he repeatedly commanded Mr. Chapman to remove his hand from his pocket and warned Mr. Chapman that he would be tased if he continued to refuse to do so. (T.T. Aug. 2, 2016 at 34, 37) (*See also*,

Comm. Exs. 55 and 57, Taser Camera Videos) A portion of this altercation was captured on the camera attached to Mr. Rankin's Taser. (J.A. 338-40) After Mr. Chapman refused to remove his hands and continued to struggle, Mr. Rankin attempted to subdue him by deploying his Taser. (J.A. 370), (T.T. Aug. 2, 2016 at 34, 37) (*See also*, Comm. Exs. 55 and 57, Taser Camera Videos) It was after Mr. Rankin's use of the Taser that Mr. Chapman broke away and turned to confronted Mr. Rankin. (J.A. 370-71, 374)

Mr. Provo testified that at that point, Mr. Chapman was in a fighting position (J.A. 348, 350) and that he made a gesture "like a jab" or "jab step" towards Mr. Rankin. (J.A. 348) In response, Mr. Rankin fired two shots, fatally wounding Mr. Chapman. (J.A. 350)

Mr. Provo testified that after the shooting, Mr. Rankin was on the ground with Mr. Chapman rendering aid. (J.A. 353) Mr. Provo's intention at that time was to leave. According to Mr. Provo, he "was about to walk off" when Mr. Rankin said "Don't go far. This is my second one". (J.A. 353)

Mr. Rankin moved to exclude this statement. (J.A. 61) The court denied this motion and permitted the statement to come in through both Mr. Provo's testimony as well as the video captured by the Taser camera.

(J.A. 159), (J.A. 338-40), (J.A. 397, 407, 408) The video from the Taser was played for the jury numerous times and admitted as evidence. (J.A. 338-40), (J.A. 397, 407, 408), (J.A. 419-29)

Mr. Rankin assigns error to the trial court's ruling denying his motion to exclude his statement: "It's my second one."

The jury found Mr. Rankin guilty of voluntary manslaughter and recommended a sentence of two and a half years. The court imposed the jury's recommended sentence on October 12, 2016. Mr. Rankin timely filed his Notice of Appeal to the Court of Appeals on October 12, 2016. Following the denial of his appeal in that court, Mr. Rankin timely filed his Notice of Appeal to this Court on June 22, 2018. This Court granted Mr. Rankin's Petition as to Assignment of Error I on October 22, 2018.

## STANDARD OF REVIEW

I. "Decisions regarding the admissibility of evidence 'lie within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of discretion.'" *Abney v. Commonwealth*, 51 Va. App. 337, 345, 657 S.E.2d 796, 800 (2008) *quoting Michels v. Commonwealth,* 47 Va. App. 461, 465, 624 S.E.2d 675, 678 (2006). "The responsibility for balancing the competing consideration of probative value and prejudice rests in the sound discretion of the trial court. The exercise of that discretion will not be

disturbed on appeal in the absence of a clear abuse." *Ferrell v. Commonwealth*, 11 Va. App. 380, 390, 399 S.E.2d 614, 620 (1990) *citing Coe v. Commonwealth,* 231 Va. 83, 87, 340 S.E.2d 820, 823 (1986)

## ARGUMENT

**I. The trial court erred and abused its discretion when it permitted, over Mr. Rankin's objection, the admission of the statement: "It's my second one," which was made by Mr. Rankin to Mr. Provo immediately following the shooting of Mr. Chapman. This statement was unduly prejudicial to Mr. Rankin and it was irrelevant as it was not probative of any fact before the court. (J.A. 159)**

The threshold determination for the admissibility of evidence is that it must be both relevant and material. "[E]vidence is relevant if it tends to establish the proposition for which it is offered. Evidence is material if it relates to a matter properly at issue. However, relevant evidence should be excluded if the prejudicial effect of the evidence outweighs its probative value." *Evans-Smith v. Commonwealth*, 5 Va. App. 188, 196, 361 S.E.2d 436, 441 (1987) (alteration in original) (internal quotations omitted).

"Evidence which has no tendency to prove guilt, but only serves to prejudice an accused, should be excluded on the ground of lack of relevancy. For evidence to be admissible it must relate and be confined to the matters in issue and tend to prove an offense or be pertinent thereto. Evidence of collateral facts or those incapable of affording any reasonable

presumption or inference on matters in issue, because too remote or irrelevant, cannot be accepted in evidence." *Wilson v. Commonwealth*, 16 Va. App. 213, 221, 429 S.E.2d 229, 234 (1993) *citing Bunting v. Commonwealth,* 208 Va. 309, 314, 157 S.E.2d 204, 208 (1967).

In the present case, the Commonwealth sought to introduce evidence of a prior shooting in which Mr. Rankin was involved while on duty as a police officer in 2011. A grand jury declined to indict Mr. Rankin for the 2011 shooting and he was found not liable in a federal civil trial. (*See* J.A. 42) Mr. Rankin moved to exclude any mention of that incident from the trial of the present case. (J.A. 3), (J.A. 140) He asserted that any reference to the 2011 incident was not probative of any fact in the case now before the court and that any probative value that did exist was clearly outweighed by the prejudice to the Defendant. (J.A. 3), (J.A. 140-42) He also asserted that such evidence would confuse the jury and necessitate a mini-trial in order to provide the appropriate context concerning the circumstances and justifiable nature of that shooting. (J.A. 3) (J.A. 141) The trial court took the motion under advisement and later issued a letter opinion which stated that "allowing evidence of the 2011 shooting would mean that [the 2011 shooting] would have to be re-litigated in the course of the instant trial. (J.A. 42) The court further held that it "agrees with the

Defense that such evidence would be highly prejudicial to the Defendant and that any legitimate probative value of the evidence does not outweigh such prejudice." (J.A.42) It is true that the court's opinion did not specifically address the statement "It's my second one". The same principles of law, however, must also apply to Mr. Rankin's statement.

When it became clear, in spite of the court's ruling, that the Commonwealth still sought to introduce the statement, Mr. Rankin filed a second motion *in limine*. (J.A. 61) During arguments on that motion, defense counsel noted that the court had already ruled on the admissibility of evidence pertaining to the 2011 shooting and that holding and same rationale—irrelevance, undue prejudice, and the potential to mislead and confuse the jury—should apply with respect to this particular statement as well. (J.A. 153-54, 158)

The court had already correctly ruled that any mention of the 2011 incident was inadmissible. Yet, inexplicably, the court overruled Mr. Rankin's motion. (J.A. 159) The court made no comment on its ruling other than "motion denied". (J.A. 159)

As a result of the court's ruling, the statement "It's my second one" came into evidence several times. It was heard by the jury through the Taser video recording numerous times as well as through Mr. Provo's

testimony. Specifically, two versions of the video containing the statement were played for the jury during the testimony of Jesse Lindmar. (J.A. 338, 340), (Comm. Exs. 55 and 57, Taser Camera Videos) These videos were entered as exhibits. (J.A. 338, 341) The video was also played during Mr. Rankin's testimony (J.A. 397, 407, 408), and the jury viewed it during their deliberations.[1] Mr. Provo testified that after the shooting, Mr. Rankin was on the ground with Mr. Chapman rendering aid. (J.A. 353) Mr. Provo's intention at that time was to leave. He testified that as he "was about to walk off," Mr. Rankin said "Don't go far. This is my second one". (J.A. 353)

As noted above, to be admissible evidence must be both relevant and material. Virginia Rule of Evidence 2:401 provides that: '"Relevant evidence' means evidence having any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence." '"While evidence may be relevant in that it tends to establish the proposition for which it was offered, in order to be admissible, it must also be material . . . ."' *Commonwealth v. Proffitt*, 292 Va. 626, 634, 792 S.E.2d 3, 6 (2016) (*quoting Brugh v. Jones*, 265 Va. 136, 139, 574

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[1] While deliberations are typically secret, in this instance the jury was having difficulty re-playing video. As a result, the jury's foreman requested for assistance from the Court to be able to replay the videos. In response to the jury's request, the court and counsel took steps to ensure that the jury could replay the video through a laptop that was hooked up to a television screen. (J.A. 419-29)

S.E.2d 282, 284 (2003)). "To be material, 'the evidence [must] tend[] to prove a matter that is properly at issue in the case.' Indeed, this materiality requirement is built into Rule 2:401's language, which states that the evidence must be probative of a 'fact in issue."' *Id.* at 634-35 (alterations in original).

Despite the fact that the Commonwealth, as the proponent of this evidence, had the burden to establish its admissibility, the Commonwealth never asserted why it believed the evidence was relevant and material. *Neal v. Commonwealth*, 15 Va. App. 416, 420, 425 S.E.2d 521, 523 (1992). The thrust of the Commonwealth's argument—in both its written response as well as during the motions hearing—was that it should not be forced to coach its witness to not tell the jury what happened and to be required to hide evidence from the jury and sanitize the evidence. (J.A. 156-57) (J.A. 49) This argument is specious of course because as the Court well knows statements are routinely redacted to excise inadmissible content and witnesses are frequently told not to testify to inadmissible information. *See Fleenor v. Commonwealth*, 200 Va. 270, 105 S.E.2d 160 (1958), *Pierce v. Commonwealth*, 2 Va. App. 383, 345 S.E.2d 1(1986).

"For evidence to be admissible it must relate and be confined to the matters in issue and tend to prove an offense or be pertinent thereto.

Evidence of collateral facts or those incapable of affording any reasonable presumption or inference on matters in issue, because too remote or irrelevant, cannot be accepted in evidence." *Brown v. Commonwealth*, 3 Va. App. 182, 185-86, 348 S.E.2d 849, 851 (1986) (*quoting Bunting v. Commonwealth*, 208 Va. 309, 314, 157 S.E.2d 204, 208 (1967)). "It's my second one" was in relation to a completely unrelated incident that occurred four years prior and had no bearing on anything that happened between Mr. Chapman and Mr. Rankin. The fact that Mr. Rankin was involved in a previous shooting in the line of duty was not probative of any issue the jury was charged with considering. For instance, the statement could in no way assist the jury in any way in determining whether Mr. Rankin's actions were justified. Nor could the statement shed any light on Mr. Rankin's *mens rea* at the time he engaged Mr. Chapman.

Further, it is obvious that this statement served only to muddle the issues and confuse the jury as well as to prejudice Mr. Rankin in the minds of the jury. The statement should have been excluded on these grounds as well. *Brown*, 3 Va. App. at 185, 348 S.E.2d at 851 ("Evidence which has no tendency to prove guilt, but only serves to prejudice an accused, should be excluded on the ground of lack of relevancy.") (*quoting Bunting*, 208 Va. at 314, 157 S.E.2d at 208. To hold that a shooting that occurred in the line of

duty four years prior, for which Mr. Rankin was cleared of all liability—both civilly and criminally—was somehow relevant to determining whether Mr. Rankin acted criminally in the shooting of Mr. Chapman stretches the definition of relevancy far beyond anything contemplated by the Rules of Evidence or the applicable case law. *See Brown*, 3 Va. App. at 186, 348 S.E.2d at 852 (holding where defendant was charged with murder of his wife, that evidence of purported relationships with other women four to eight years prior was "so remote as to be irrelevant and served only to inflame and excite the passions of the jury and to mislead them" and that such evidence did not "afford any reasonable presumption or inference on matters in issue and fail[ed] to provide a logical and natural connection to [defendant's] guilt") (internal quotation omitted).

Furthermore, even if Mr. Rankin's statement was relevant and material to some issue before the jury, any probative value was far outweighed by the prejudice to Mr. Rankin and the misleading and confusing nature of the statement. Virginia Rule of Evidence 2:403(a) provides that: "Relevant evidence may be excluded if: (a) the probative value of the evidence is substantially outweighed by (i) the danger of unfair prejudice, or (ii) its likelihood of confusing or misleading the trier of fact". Thus, even if the court were to determine that the statement was probative

of some fact—which, it clearly is not—the statement is still inadmissible for these reasons.

"In determining whether relevant evidence should be admitted, the trial court must apply a balancing test to assess the probative value of the evidence and any undue prejudicial effect of that evidence." *McCloud v. Commonwealth*, 269 Va. 242, 257, 609 S.E.2d 16, 24 (2005). Indeed, this is precisely what the trial court did when evaluating Mr. Rankin's original motion to exclude any mention of the 2011 shooting. The court, weighing the various considerations, rightly determined that "such evidence would be highly prejudicial to the Defendant and that any legitimate probative value of the evidence does not outweigh such prejudice." (J.A. 42) When it came to Mr. Rankin's statement, however, the court failed to undertake any analysis whatsoever. (*See* J.A. 159)

Applying this analysis, the prejudice to Mr. Rankin by the repeated introduction of this statement is evident and overwhelms whatever iota of relevance the statement might have had. "'[U]nfair prejudice' refers to the tendency of some proof to inflame the passions of the trier of fact, or to invite decision based upon a factor unrelated to the elements of the claims and defenses in the pending case. *Proffitt*, 292 Va. at 636, 792 S.E.2d at 7. There really are no favorable inferences to draw from the fact that this

was Mr. Rankin's second shooting. On its face, the statement that Mr. Rankin had previously shot someone could only serve to bias and inflame the jury against Mr. Rankin. Not only was the statement not relevant because it was not probative of any issue before the court, it was unduly prejudicial to Mr. Rankin and should have been excluded on that basis. *See Pierce v. Commonwealth*, 2 Va. App. 383, 391, 345 S.E.2d 1, 5 (1986) (holding that admission of the statement "my P.O. wants to put me back in prison," contained within a confession was reversible error because it was "totally irrelevant, not probative of any issue, and [was] prejudicial . . . because it discloses that [defendant] is a parolee and has a criminal record").

This is especially true given that the statement was heard by the jury without any context. The jury was given no guidance at all as to the circumstances surrounding the incident. They were left totally in the dark, free to speculate about what had occurred. Absent this context, the statement was undoubtedly confusing and misleading and should have been excluded on that basis as well. *See* Virginia Rule of Evidence 2:403(a)(ii), *Spurlin v. Richardson*, 203 Va. 984, 990, 128 S.E.2d 273, 278 (1962) (properly excluding evidence that would have confused or misled the jury) . In fact, this absence of context was part of the court's rationale

for excluding evidence of the 2011 shooting in the first place. (J.A. 42) (trial court noting that in addition to the relevancy problems, admission of such evidence would also necessitate a mini-trial necessary to explain the context of shooting).

The only other pertinent assertion made by the Commonwealth with respect to the admissibility of Mr. Rankin's statement was made during the July 26, 2018 motions hearing, and in the context of its argument against sanitizing evidence. Here the Commonwealth asserted that under some circumstances there may be "potentially another bad act that is brought out in the presence of the jury or that is brought out in the course of the prosecution of the case, even if that information may be prejudicial, but if there is probative value that goes along with that particular piece of evidence." (J.A. 157) Again though, the Commonwealth never stated why it believed this evidence was relevant and material; that is, the Commonwealth never alleges what fact the "bad act" is probative of.

Furthermore, though it is far from clear, even if the Commonwealth's statement is taken as an argument that "It's my second one" is admissible as an exception to the general prohibition on prior bad acts evidence, the argument misses the mark because there is no prior bad act here.

A shooting in the line of duty for which Mr. Rankin was cleared of any civil or criminal liability simply cannot be considered a prior bad act of the type contemplated by Virginia Rule of Evidence 2:404(b). *See* Kent Sinclair, The Law of Evidence in Virginia § 8-4 (8th ed. 2018) ("Before evidence of other incidents may be admitted, it must be shown that the other incident did in fact involve some wrongdoing by the accused; otherwise the necessary relevance is lacking.")

Assuming that the 2011 shooting was a prior bad act, it would still only be admissible for certain purposes. The seminal case from this Court, *Kirkpatrick v. Commonwealth*, sets forth the applicable standards.

> The general rule is well established that in a criminal prosecution, proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are of the same nature as the one charged in the indictment, is incompetent and inadmissible for the purpose of showing the commission of the particular crime charged. It is also well established that evidence of other offenses should be excluded if offered merely for the purpose of showing that the accused was likely to commit the crime charged in the indictment. However, the exceptions to the general rule are equally as well established. Evidence of other offenses is admitted if it shows the conduct and feeling of the accused toward his victim, if it establishes their prior relations, or if it tends to prove any relevant element of the offense charged. Such evidence is permissible in cases where the motive, intent or knowledge of the accused is involved, or where the evidence is connected with or leads up to the offense for which the accused is on trial. Also, testimony of other crimes is admissible where the other

> crimes constitute a part of the general scheme of which the crime charged is a part.

*Kirkpatrick v. Commonwealth*, 211 Va. 269, 272, 176 S.E.2d 802, 805 (1970). Clearly, none of the exceptions to the general prohibition on other crimes evidence apply here and this statement was only offered for the impermissible purpose of showing that Mr. Rankin was likely to commit the crime charged in the indictment. The prior incident had nothing to do with Mr. Chapman. Mr. Rankin had never even met Mr. Chapman before encountering him at the Wal-Mart. The prior incident in no way shows how Mr. Rankin might have acted or felt towards him, nor does it establish any prior relationship between the two.

Likewise, as argued at length above, the prior incident does not tend to prove any relevant element of the charged offense. The fact Mr. Rankin was previously involved in a shooting certainly does not shed any light on a possible motive or plan or scheme to murder Mr. Chapman and it is surely not in any way indicative of Mr. Rankin's intent during his encounter with Mr. Chapman. In addition, "[a]dmission of evidence under these exceptions . . . is subject to the further requirement that the legitimate probative value of the evidence must exceed the incidental prejudice caused the defendant. *Guill v. Commonwealth*, 255 Va. 134, 139, 495 S.E.2d 489, 491-92 (1998) (*citing Lewis v. Commonwealth*, 225 Va. 497,

502, 303 S.E.2d 890, 893 (1983)). The trial court had already determined that any mention of the 2011 shooting was unduly prejudicial and likely to confuse the jury. (J.A. 42) Whatever grain of relevance "It's my second one." might be said to have is also eclipsed by its inherent prejudice and its misleading and confusing nature.

For all of these reasons, the ruling of the circuit court erred and abused its discretion in denying Mr. Rankin's motion to exclude the statement. Furthermore, such error was not harmless under the requisite standard of review.

"Non-constitutional error is harmless if other evidence of guilt is so 'overwhelming' and the error so insignificant by comparison that we can conclude the error 'failed to have any 'substantial influence' on the verdict.'" *Bell v. Commonwealth*, 47 Va. App. 126, 140 n.4, 622 S.E.2d 751, 757 (2005) (*quoting United States v. Lane*, 474 U.S. 438, 450, 106 S. Ct. 725, 732 (1986)). As to the first point, the evidence of guilt was far from "overwhelming". In fact, the Commonwealth's evidence showed that Mr. Rankin was a police officer acting in the course of his duty to detain an increasingly violent and volatile suspect. Yet, Mr. Rankin was convicted of voluntary manslaughter for the unlawful killing of Mr. Chapman. This is relevant to the second point of the analysis because it cannot be said then

that the error in admitting this statement was in any way "insignificant". In light of these circumstances, it is not possible to conclude that the fact Mr. Rankin had previously shot someone did not have a substantial influence on the jury's verdict. Likewise, it is impossible to conclude that the statement had no significant impact on the sentence that the jury imposed.

Accordingly the ruling of the trial court must be overturned and the case remanded for a new trial.

## CONCLUSION

Based on the points of authority set forth above, the Appellant, Stephen D. Rankin, by counsel, respectfully requests that this court reverse the decision of the lower court, overturn Mr. Rankin's conviction, and remand the matter for a new trial

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## CERTIFICATE OF SERVICE

In compliance with Rule 5:26, I hereby certify that on December 3, 2018, the correct number of true and accurate copies of this Opening Brief were hand-filed with the Supreme Court of Virginia and an electronic copy filed in PDF format, and the electronic copy in PDF format were served upon counsel for the appellee by email:

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