IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 180812

STEPHEN D. RANKIN,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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INTRODUCTION

Stephen Rankin, while on duty as a police officer, fatally shot a suspected shoplifter. Shortly after the shooting, Rankin asked a Walmart security officer not to leave the crime scene because "this is my second one." At Rankin's first-degree murder trial, the jury heard both a recording of the statement (which was made by the camera attached to Rankin's taser) and testimony from the Walmart security officer about it. The jury acquitted Rankin of murder and convicted him of voluntary manslaughter.

The trial court ruled pre-trial that the Commonwealth was not permitted to introduce evidence about a prior shooting from 2011, for which Rankin had not been criminally indicted and for which he was not held civilly responsible. The court did not, however, require the Commonwealth to redact the portion of the taser recording containing Rankin's statement or to direct the security officer to refrain from testifying about it.

The trial court did not err in admitting the evidence. Rankin's unusual post-shooting statement did not expressly inform the jury that Rankin previously had fatally shot another person. It was, however, relevant to Rankin's state of mind. The probative value of the statement was not substantially outweighed by unfair prejudice to Rankin and he was not entitled to sanitize the evidence by excluding his own statement. None of the veniremen who had heard about Rankin's earlier shooting before trial actually served on the jury that deliberated the charges. Finally, any potential error in the admission of the statement was harmless.

The Court of Appeals correctly ruled that the trial court did not err in admitting the evidence. Just as importantly, the Court of Appeals also made an alternate holding that any error in admitting the statement was harmless. Because Rankin did not assign error to that holding, the assignment of error on which this

Court granted review provides no basis for reversing the Court of Appeals' judgment.

STATEMENT OF THE CASE

Rankin was indicted by a grand jury in the Circuit Court of the City of Portsmouth for first-degree murder and use of a firearm in the commission of murder in the shooting death of William Chapman, II. At the conclusion of a seven-day trial, a jury convicted Rankin of voluntary manslaughter and acquitted him of the firearm charge. The jury fixed his punishment at two-and-one-half years in prison (JA 81), and the trial court sentenced Rankin in accordance with the jury's verdict. (JA 83-86).

Rankin noted his appeal to the Court of Appeals of Virginia. Initially, a judge of that Court denied the appeal (JA 87-97), but a panel of the Court later awarded an appeal, in part, upon assignments of error concerning limitations on expert testimony and a contact between a juror and a person observing the trial. (JA 98-99). Following briefing and oral argument on the two granted issues, the Court of Appeals affirmed the trial court's judgment in an unpublished opinion. See Rankin v. Commonwealth, No. 1671-16-1, 2018 Va. App. LEXIS 112 (Va. Ct. App., Apr. 24, 2018) (JA 101-21).

ASSIGNMENT OF ERROR

This Court granted one of Rankin's assignments of error:

> 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.

STATEMENT OF FACTS

A. The offense

Around 7:30 a.m. on April 22, 2015, Portsmouth Police Officer Stephen Rankin responded to a suspected shoplifting call at the Walmart store on Frederick Boulevard. (JA 283, 393, 395). Walmart Security Officer Gregory Provo, who had reported the shoplifting, met Rankin in the store's parking lot. (JA 342-44, 357). Provo spoke to Rankin while both men were seated in their cars. Provo pointed out William Chapman as the shoplifter. (JA 344). Rankin told Provo he would "go get him." (JA 344). Provo followed Rankin's car. (JA 344).

Provo observed Rankin and Chapman facing each other. Provo looked down to put his car in park and when he looked up again, he saw that Rankin had put Chapman on the hood of the police car. (JA 345). Although he could hear Rankin and Chapman speaking loudly, Provo could not hear what they were saying. (JA 361, 362). Provo saw Rankin pull his gun and direct Chapman to get

on the ground. (JA 346). Chapman made a quick "jab" movement, which Provo testified was not a lunge. (JA 346, 348-49, 356, 376, 384). Rankin fired his weapon two times. (JA 346, 349). Provo observed that Chapman did not have anything in his hands, which were at his waist at the time. (JA 349, 385). Provo did not see Rankin's taser in his hand, but saw the taser cartridge on the ground. (JA 370, 382-83).

Provo heard Rankin call in "shots fired," and saw him put handcuffs on Chapman. (JA 353). Rankin told Chapman to "breathe." (JA 353). As Provo was about to walk away from the scene, Rankin asked Provo not to leave, because this was Rankin's "second one." (JA 353).[1]

Sandra Tynes was in the Walmart parking lot on that morning and saw Rankin and Chapman "face-to-face," pushing each other and "tussling." (JA 310). She did not see Rankin put Chapman on the police car. (JA 316). Tynes heard Rankin tell Chapman to get on the ground, then saw smoke coming from Rankin's gun. (JA 311). She also saw Rankin giving the victim CPR. (JA 312).

Portsmouth police lieutenant Kenneth Saucer heard Rankin's "shots fired" call over the police radio. (JA 284-85). Saucer went to the scene, where he saw

[1] The recording from the taser camera captured Rankin saying to Provo, "Don't leave, though. I need you as a witness. This is my second one. Don't leave." (CW Ex. 57 at 0:59-1:04).

Rankin giving Chapman chest compressions. (JA 285). Saucer saw Rankin's taser on the ground; it was illuminated, indicating it was on. (JA 288, 297). Saucer also observed nine-millimeter shell casings on the ground. (JA 288). Firefighter/EMT Asi Torres arrived on the scene and took over CPR on the victim. (JA 303). Chapman was unresponsive and the compressions caused more blood loss for him. (JA 304). Chapman died from gunshot wounds to his face and chest. (JA 331).

B. Pre-trial proceedings

Rankin filed a motion in limine asking the trial court to exclude evidence of, or reference to, Rankin's prior shooting from 2011. (JA 3). Both parties filed additional pleadings on the issue. (JA 6, 12-14, 28-32). The trial court held a hearing on the motion at which the defense argued that evidence of the prior fatal shooting was inadmissible. (JA 140-42).

In objecting to the motion, the prosecutor argued, *inter alia*, that Rankin had made a statement about the prior shooting immediately after he shot the victim. She argued that Rankin's statement that this was his "second one" was captured on a taser camera recording. (JA 144-45, 148-49). The trial judge said that he did not believe the admissibility of Rankin's statement was before the court. (JA 149, 150). Defense counsel agreed with the judge's assessment. (JA 149, 150).

In an opinion letter issued April 7, 2016, the trial judge addressed several

pre-trial motions, including Rankin's motion in limine to exclude evidence of the prior shooting. (JA 38-46). The court ruled that evidence of the 2011 shooting would not be admissible at Rankin's trial, (JA 42) reasoning that "allowing evidence of the 2011 shooting would effectively mean that the criminal and civil cases arising from the 2011 shooting would have to be re-litigated in the course of the instant trial." (JA 42).[2] The court further found that the probative value of the evidence did not outweigh its prejudice. (JA 42). The opinion letter did not address Rankin's statement to Provo, which was captured on the taser camera recording. (JA 41-42).

Rankin filed a second motion in limine, asking the court to prohibit introduction of Rankin's statement that this was his "second one," specifically, any reference captured "on the Taser video and in Gregory Provo's testimony." (JA 61). Again, the court held a hearing. Defense counsel asked for redaction of the taser video recording and exclusion of Provo's testimony regarding Rankin's statement. (JA 153).

The prosecutor argued that Rankin was asking the court to "sanitize" the evidence and stressed that Rankin's statement was not "extrinsic" evidence of the

[2] In the civil case, a federal jury had rejected allegations of excessive force under 42 U.S.C. § 1983 and state law claims of battery and gross negligence. See Johnson v. Rankin, 547 F. App'x 263 (4th Cir. 2013).

2011 shooting. (JA 155). She expressed concern about redacting the tape recording that would be played for the jury and limiting Provo's testimony about what he heard Rankin say. (JA 157). The court denied Rankin's motion. (JA 159).

C. Material proceedings at trial

During jury selection, several potential jurors said that they had obtained information about the case from the news media or other sources. The court and counsel conducted individual voir dire of those potential jurors. During that process, four veniremen (numbers 67, 19, 26, and 53) referenced some knowledge of Rankin's "past" or specifically the earlier shooting. (JA 200-02, 207-08, 218-20, 252-53). These potential jurors said that knowledge of Rankin's past would not affect their judgment. (JA 202, 208, 220, 253). According to the chart contained in the circuit court manuscript record, the defense used peremptory challenges to remove numbers 53 and 67 and the prosecutor struck number 19. (R. 1535).[3] Juror number 26 sat as an alternate juror, but the alternates were excused before deliberations began. (R. 1535, Tr. 8/2/16 at 176-77). In its initial

[3] The Commonwealth failed to designate the juror chart for inclusion in the Joint Appendix. A copy has been attached as an addendum to this brief. (Add. 1). Any suggestion by the trial judge after denying a reverse Batson motion that juror 19 remained on the jury (JA 267), appears to have been in error.

instructions to the jury, the trial court directed the jurors not to engage in "guess work or speculation." (JA 273).

The opening statements of counsel were not transcribed. (JA 275). During the Commonwealth's case in chief, the prosecution played the recordings from the taser camera, Exhibits 55 and 57. (JA 338-41). Gregory Provo testified about his observations of the interaction between Rankin and Chapman. Provo testified that, following the shooting, as he walked away from the body, Rankin asked that Provo not go far because this was Rankin's "second one." (JA 353).

Rankin testified in his own defense and called other witnesses in his case.[4] At the conclusion of the evidence, the court instructed the jury on the elements of first-degree murder, second-degree murder, and voluntary manslaughter. (JA 65-66). The jury also was instructed on the definition of malice, that the difference between murder and manslaughter is malice, that the jury could infer that an unlawful killing is second-degree murder, and that it must resolve all doubts in Rankin's favor. (JA 67, 69, 70, 71). The court gave five instructions addressing self-defense. (JA 73-77). Finally, the jury was instructed that Rankin was presumed innocent, unless and until the Commonwealth proved his guilt beyond a reasonable doubt (JA 80), and that the jury was responsible for determining the

[4] The taser recording in Exhibit 55, but not Exhibit 57, also was played during Rankin's direct and cross-examination. (JA 397, 406-07, 408).

weight of the evidence and the credibility of the witnesses. (JA 78-79). The closing arguments of the prosecution and defense were not included in the transcripts prepared from trial. (JA 412-13).

ARGUMENT

The Court of Appeals properly upheld the ruling of the trial court admitting Rankin's statement to Gregory Provo. Furthermore, any potential error was harmless.

A. Rankin failed to assign error to the finding of the Court of Appeals that any error was harmless.

The Court of Appeals rejected Rankin's current assignment of error in its per curiam denial order of June 21, 2017. That Court made alternate findings in its order. First, the Court held that the trial court did not err when it admitted Rankin's statement on the tape recording and through Provo's testimony. (JA 87-89). But the Court also concluded, in the alternative, that "even if the trial court erred in admitting the evidence, the error was harmless." (JA 89). A three-judge panel of the Court of Appeals rejected the assignment of error "for the reasons set forth" in the per curiam order of June 21, 2017. (JA 99).

In his petition for appeal in this Court, Rankin included the same assignment of error that he had presented in the Court of Appeals, namely:

> 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.

Rankin did not assign error to the alternate holding of the Court of Appeals that any error in the admission of the evidence was harmless.

Because Rankin did not assign error to the Court of Appeals' harmless-error holding, that holding has not been challenged. "It is well-settled that a party who challenges the ruling of a lower court must on appeal assign error to each articulated basis for that ruling." Manchester Oaks Homeowners Ass'n v. Batt, 284 Va. 409, 421, 732 S.E.2d 690, 698 (2012). Accord Ferguson v. Stokes, 287 Va. 446, 452, 756 S.E.2d 455, 458 (2014). Here, Rankin's assignment of error has left an independent basis "for the challenged ruling uncontested," Manchester Oaks, 284 Va. at 422, 732 S.E.2d at 698, and that fact alone prevents him from obtaining reversal of the lower court's judgment.

In fact, this Court recently dismissed an appeal where the appellant failed to assign error to the application by the Court of Appeals of a procedural default to the issue raised on appeal. See Arthur v. Commonwealth, 2018 Va. Unpub. LEXIS 15 at *3 (Va. July 19, 2018).[5] This Court found that the defendant's failure

[5] Under Rule 5:1(f) of this Court, unpublished opinions of the Court "shall not be received as binding authority," but their citation is "permitted as informative."

to address the Court of Appeals' determination that his assigned error was procedurally barred precluded review of the substantive issue because "[t]he Court of Appeals' determination on that issue is thus an unchallenged, independent basis for its ruling." Id.

Similarly, in Davis v. Johnson, 274 Va. 649, 655, 652 S.E.2d 114, 117 (2007), a habeas corpus appeal, this Court determined that it was "unable to consider the merits of" Davis's arguments because he had failed to assign error to "an independent basis for the circuit court's judgment that applied [this Court's] decision in Anderson [v. Warden, 222 Va. 511, 281 S.E.2d 885 (1981)]." The same is true here.

As the Court of Appeals has held:

> in "situations in which there is one or more alternative holdings on an issue," the appellant's "failure to address one of the holdings results in a waiver of any claim of error with respect to the court's decision on that issue."

Johnson v. Commonwealth, 45 Va. App. 113, 116, 609 S.E.2d 58, 60 (2005) (quoting United States v. Hatchett, 245 F.3d 625, 644-45 (7th Cir. 2001)) (other citation omitted).

While Rankin has assigned error to one of the bases on which the Court of Appeals relied in affirming the trial court's ruling on the issue, he failed to assign error to another "independent basis for its ruling." Arthur, 2018 Va. Unpub LEXIS

15 at *3; see also Magco of Md., Inc. v. Barr, 262 Va. 1, 1, 545 S.E.2d 548, 548 (2001) (published order) ("since there is an independent basis for the judgment of the Court of Appeals that is not challenged on appeal, this Court cannot reach the merits of those errors assigned by the appellant").

Although Rankin argues that the trial court's admission of the evidence was not harmless error (Def. Br. at 18-19), his failure to assign error to the Court of Appeals' harmless-error holding precludes consideration of his assignment of error by this Court. See Stevens v. Commonwealth, 283 Va. 296, 304 n.*, 720 S.E.2d 80, 84 n.* (2013) (This Court refused to address a holding of the Court of Appeals because Stevens had not assigned error to it, even though Stevens had argued the point in his brief and at oral argument).

The fact that this Court is required to conduct a harmless error analysis in any case where it determines a lower court has committed error, Commonwealth v. White, 293 Va. 411, 420, 799 S.E.2d 494, 498 (2017), does not excuse Rankin's failure to assign error to that independent ruling of the court below. Irrespective of any harmless error analysis this Court may conduct, the fact remains that the finding of harmless error by the Court of Appeals has not been challenged. This Court should affirm the judgment below on that basis.

B. Merits Standard of Review

If the Court reaches the merits, the evidence must be viewed in the light most favorable to the Commonwealth, the prevailing party at trial. Scott v. Commonwealth, 292 Va. 380, 381, 789 S.E.2d 608, 608 (2016). This Court "reviews a trial court's ruling admitting or excluding evidence for abuse of discretion." Payne v. Commonwealth, 292 Va. 855, 866, 794 S.E.2d 577, 582 (2016) (citing Lawlor v. Commonwealth, 285 Va. 187, 229, 738 S.E.2d 847, 871 (2013)).

Where a decision is reviewed for an abuse of discretion, the appellate court does not substitute its own judgment "for that of the trial court," but considers "only whether the record fairly supports the trial court's action." Grattan v. Commonwealth, 278 Va. 602, 620, 685 S.E.2d 634, 644 (2009) (citation omitted). Accord Carter v. Commonwealth, 293 Va. 537, 543, 800 S.E.2d 498, 501 (2017).

The exercise of discretion allows for disagreement among "conscientious jurists" and recognizes the "venerable belief that the judge closest to the contest is the judge best able to discern where the equities lie." Thomas v. Commonwealth, 62 Va. App. 104, 111-12, 742 S.E.2d 403, 407 (2013) (citation omitted). Here, the trial court did not abuse its discretion in admitting Rankin's statement.

C. The statement heard on the taser camera recording and as testified to by Mr. Provo was admissible.

1. The actual words of the statement did not advise the jury that Rankin had previously fatally shot someone.

In rejecting Rankin's current assignment of error, the Court of Appeals noted that the "jury heard the statement during Provo's testimony and during the playing of a video captured by appellant's taser camera." (JA 88). The Court of Appeals correctly concluded, *inter alia*, that Rankin's "statement, without more, did not indicate [Rankin] had shot and killed another person." (JA 88).

The trial judge excluded extrinsic evidence about the 2011 shooting, for which Rankin was not indicted and was not held civilly liable, based on the judge's conclusion that introduction of such evidence would necessitate a mini-trial within the trial and the prejudicial effect of the evidence would outweigh its probative value. (JA 42). In short, the jury did not hear evidence that Rankin had fatally shot another person.

Only four prospective jurors had heard about Rankin's "past," or specifically, that he previously had shot and killed someone. But the record reveals that none of those veniremen sat on the jury as it deliberated the charges. (Add. 1; Tr. 8/2/16 at 176-77). Moreover, the trial court explicitly instructed the jurors not to engage in "guess work" or "speculation" when assessing the evidence.

(JA 273). This Court has repeatedly recognized that a jury follows the instructions of the court. See Virginia Financial Assocs. v. ITT Hartford Group, Inc., 266 Va. 177, 185, 585 S.E.2d 789, 794 (2003). A juror would have to engage in guess work and speculation to conclude that Rankin's comment that it was his "second one," meant that Rankin previously had fatally shot another person. The record does not suggest that such speculation occurred.

2. The statement was relevant to Rankin's state of mind.

Evidence is relevant if it has "any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence." Va. R. Evid. 2:401. The scope of relevant evidence is "quite broad." Commonwealth v. Proffitt, 292 Va. 626, 634, 792 S.E.2d 3, 6 (2016). Indeed, "[e]very fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue is relevant." Id. at 634, 792 S.E.2d at 6-7 (citation omitted). To be admissible, evidence must also be material, in that it must tend to prove "a matter that is properly at issue in the case." Id. at 635, 792 S.E.2d at 7 (citation omitted).

Rankin's odd statement to Provo was relevant to his state of mind. Rankin had been indicted for first-degree murder and at the time the evidence was admitted at the trial, a first-degree murder verdict was still possible. To prove that

crime, the Commonwealth was required to establish that the killing was intentional, deliberate, and premeditated.

Words and actions immediately following a shooting, those within the res gestae of the event, are often relevant to the issue of intent. "The acts or conduct of the defendant after the crime, which are not elements of the crimes charged, are admissible because they may tend to show a 'consciousness of guilt.'" Hope v. Commonwealth, 10 Va. App. 381, 386, 392 S.E.2d 830, 834 (1990) (en banc) (citation omitted). Here, Rankin said that he *needed* Provo as a witness, this was his "second one." The prosecution could fairly argue that the statement indicated that Rankin needed Provo to testify in his behalf because he knew that he had unlawfully shot Chapman.

As one basis for rejecting this assignment of error, the Court of Appeals found that even if the evidence indicated that Rankin had shot and killed another person, Rankin's statement came within the "'well-established' exceptions to the rule against admitting evidence that the accused had committed other crimes." (JA 88). In particular, citing Smith v. Commonwealth, 239 Va. 243, 256-57, 389 S.E.2d 871, 878 (1990), the Court of Appeals found that the evidence was "relevant to establishing [Rankin's] premeditation, motive or intent, feelings

toward the victim, and the absence of mistake or accident." (JA 89). That decision was correct.

Generally, evidence that tends to show that the accused "has committed another crime independent of, and unconnected with, that for which he is on trial is inadmissible." Fleenor v. Commonwealth, 200 Va. 270, 274-75, 105 S.E.2d 160, 163 (1958); see Va. R. Evid. 2:404(b).

But that general prohibition has exceptions, including evidence that "tends to prove motive, intent, or knowledge of the defendant," Guill v. Commonwealth, 255 Va. 134, 138, 495 S.E.2d 489, 491 (1998), "or negates the possibility of accident or mistake." Ortiz v. Commonwealth, 276 Va. 705, 714, 667 S.E.2d 751, 757 (2008) (citation omitted).

For example, in Porter v. Commonwealth, 276 Va. 203, 661 S.E.2d 415, (2008), the defendant was charged with capital murder of a police officer. Porter admitted that, when he shot the officer, he knew that as a previously convicted felon he was subject to a mandatory prison sentence if found in possession of firearm. Id. at 240, 661 S.E.2d at 433. This Court ruled that admission of Porter's statement was not error, because the statement was "highly probative both of Porter's possible motivation for shooting Officer Reaves and to prove an essential element of the offense charged." Id.

Here, even if considered as other "bad acts" or other crimes evidence, the statement was admissible. As the Court of Appeals correctly concluded, Rankin's statement shed light on his intent, motive, feelings toward the victim, and the absence of accident or mistake.

3. The probative value of the evidence was not substantially outweighed by unfair prejudice to Rankin.

Irrespective of whether Rankin's statement is viewed as evidence of other crimes or bad acts, or as part of the res gestae of the instant shooting, the trial court had a duty to determine if the probative value of the evidence was "*substantially outweighed*" by "the danger of *unfair prejudice*" to Rankin. Va. R. Evid. 2:403 (emphasis added). See Guill, 255 Va. at 139, 495 S.E.2d at 491-92.[6]

As this Court noted in Proffitt, the trial court has considerable discretion in balancing the "competing considerations of probative value and prejudice." 292 Va. at 635, 792 S.E.2d at 7 (citation omitted). Proffitt also reiterated that "all probative direct evidence generally has a prejudicial effect to the opposing party," therefore, "the relevant question is 'whether the probative value of the evidence is substantially outweighed by its *unfair* or *unduly* prejudicial effects.'" Id. at 635-

[6] While Rankin argues on brief that the statement also served to confuse the jury and should have been excluded on that ground as well (Def. Br. at 11, 14), he did not include that basis in his assignment of error to this Court or the Court of Appeals. Rather, the assignment of error addressed only probative value and undue prejudice.

36, 792 S.E.2d at 7 (quoting Lee v. Spoden, 290 Va. 235, 251, 252, 776 S.E.2d 798, 806, 807 (2015)) (other citations omitted). As the Court of Appeals explained in Thomas v. Commonwealth, 44 Va. App. 741, 607 S.E.2d 738, aff'd en banc, 45 Va. App. 811, 613 S.E.2d 870 (2005), "Virginia law . . . intervenes only when the alleged prejudice tends to inflame irrational emotions or leads to illegitimate inferences. And even then, it becomes a matter of degree." 44 Va. App. at 758, 607 S.E.2d at 746.

Furthermore, this Court and the Court of Appeals have recognized that "[a]n accused is not entitled to have the evidence sanitized so as to deny the jury knowledge of all but the immediate crime for which he is on trial." Jones v. Commonwealth, 32 Va. App. 30, 41, 526 S.E.2d 281, 286 (2000) (quoting Scott v. Commonwealth, 228 Va. 519, 526-27, 323 S.E.2d 572, 577 (1984)) (internal quotation marks omitted); see also Burnette v. Commonwealth, 60 Va. App. 462, 485, 729 S.E.2d 740, 750 (2012) (offer to stipulate to cause of death "does not allow the appellant to sanitize the evidence and thus preclude the Commonwealth from introducing photographs showing the dead victim, even if the pictures may be considered gruesome").

The trial court here carefully considered the probative value and prejudicial effect of the evidence. Indeed, the court excluded extrinsic evidence of the 2011

shooting. The court held a hearing and expressed concern over both prejudice to Rankin and the likely need to re-litigate the cases which followed that shooting. While the trial judge did not comment on his ruling allowing admission of Rankin's statement, this Court should not conclude that a careful and deliberate trial judge would cast away care, after a hearing expressly addressing Rankin's statement that this "is my second one."[7] See Thomas, 44 Va. App. at 758, 607 S.E.2d at 746 (stating that Court of Appeals "generally defer[s] to trial judges on this subject because they, unlike us, participate first person in the evidentiary process and acquire competencies on the subject we can rarely duplicate merely by reading briefs and transcripts").

D. Any potential error in the admission of the statement was harmless.

Harmless error review is required in all cases. White, 293 Va. at 420, 799 S.E.2d at 498. Where, as here, the issue is the propriety of an evidentiary ruling, the test is the non-constitutional standard. See Anderson v. Commonwealth, 282 Va. 457, 466-67, 717 S.E.2d 623, 628 (2011).

Under that standard, error is harmless "[w]hen it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the

[7] The trial court excluded evidence of Rankin's mobile messages the morning of the shooting in which he made negative comments about the City of Portsmouth and his job. (Tr. 7/28/16 at 130-31).

merits and substantial justice has been reached." Rose v. Commonwealth, 270 Va. 3, 12, 613 S.E.2d 454, 458 (2005) (quoting Code § 8.01-678). See Carter, 293 Va. at 545, 800 S.E.2d at 502 (error is harmless where it "did not 'influence the jury' or had only a 'slight effect.'") (citation omitted).

In this case, the jury was instructed not to speculate. (JA 273). The statement at issue occupied five seconds of the recording presented in Commonwealth's Exhibit 57. Provo mentioned the statement once during his testimony. He did not elaborate on it; he was not questioned about it. (JA 353-55).[8]

The jury declined to convict Rankin of first or second-degree murder, but convicted him instead of voluntary manslaughter. Thus, the jury concluded that Rankin intentionally, shot Chapman, without malice, either "while in mutual combat or in the sudden heat of passion upon reasonable provocation." (JA 66).[9] Rankin cannot establish that any potential error in admitting the evidence influenced the jury in reaching that verdict or deprived him of a fair trial.

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[8] The record does not contain a request by the defense for a cautionary instruction following Provo's testimony.

[9] The jury reached that conclusion despite instructions advising it of the permissive inference of malice based on use of a deadly weapon and such an inference of second-degree murder for all unlawful homicides. (JA 68, 70).

CONCLUSION

Because Rankin failed to assign error to the independent holding of the Court of Appeals that any error in the admission of the evidence was harmless, this Court should affirm the judgment on that basis. Were the Court to reach the merits of Rankin's claim, the Court should affirm the holding of the Court of Appeals that the trial court did not err in admitting the evidence. Finally, any potential error in the admission of the statement was harmless. The judgment of the Court of Appeals of Virginia and the Circuit Court of the City of Portsmouth should thus be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein.

By: /s/.
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CERTIFICATE OF TRANSMISSION AND SERVICE

On December 28, 2018, this brief was filed electronically with this Court and the required paper copies were hand-delivered to the Clerk's Office in compliance with Rule 5:26. A copy of the document was emailed to James O. Broccoletti, Esquire at james@zobybroccoletti.com; Randall J. Leeman, Jr., Esquire at randall@zobybroccoletti.com; and Nicole A. Belote, Esquire at NBelote@kozakfirm.com. The undersigned certifies that the brief complies with the page and word count limitations of Rule 5:26(b). The brief, excluding the cover page, table of contents, table of authorities and certificate, contains 5,105 words.

The Commonwealth desires to present oral argument in this case.

By: /s/.
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Addendum

CIRCUIT COURT
COURTROOM #4

HONORABLE JUDGE
JOHNNY E. MORRISON

CIRCUIT COURT OF THE
CITY OF PORTSMOUTH

Commonwealth of Virginia

vs

Stephen D. Rankin

Jury Panel

1 ~~28~~
2 ~~32~~
3 ~~16~~
4 ~~67~~ Δs #2
5 ~~52~~
6 ~~24~~ Δs #4
7 ~~10~~ Δs #3
8 ~~19~~ 8m Commonwealth 1
9 ~~61~~ 8m Commonwealth 2
10 ~~12~~
11 ~~4~~
12 ~~53~~ Δs #1
13 ~~6~~
14 ~~73~~ Commonwealth #3
15 ~~5~~
16 ~~36~~
17 ~~38~~
18 ~~17~~
19 ~~30~~ Commonwealth #4
20 ~~20~~
21 13
22 26
23 ~~65~~ Commonwealth #6
24 ~~8~~ Commonwealth ~~#5~~
25 ~~35~~ Δs #7
26 ~~29~~ Δs #6
27 37
28 ~~3~~ Δs #5
29 ~~22~~ Commonwealth #7

Alternates

21	13
22	26
23	65

1	28
2	32
3	16
4	67
5	52
6	24
7	10
8	19
9	61
10	12
11	4
12	~~53~~
13	6
14	73
15	5
16	36
17	38
18	17
19	30
20	20

Stephanie Morales / Brandon Wroblesk / Cedric Wiggins
Commonwealth's Attorney

James Broccoletti / Nicole Belote
Defense Attorney

Jury In:

Jury Out:

fd M of Voluntary Manslaughter
2½ years / #32 Foreman
Verdict

Alternates

24	25	26
8	35	29
27	28	29
37	3	22

Alternates

1535