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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 190016

GEORGE TREVON WATSON-SCOTT

***Appellant*,**

v.

COMMONWEALTH OF VIRGINIA,

***Appellee*.**

BRIEF FOR THE COMMONWEALTH

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***Appellee*.**

BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

On June 15, 2017, a City of Richmond Circuit Court judge convicted George Trevon Watson-Scott of second-degree murder, in violation of Virginia Code § 18.2-32. By final order entered September 15, 2017, the trial judge sentenced Watson-Scott to forty years of incarceration with sixteen years suspended, for an active sentence of twenty-four years in prison. (App. 293-294).

Watson-Scott appealed this judgment to the Court of Appeals of Virginia, challenging the sufficiency of the evidence to prove malice. Following briefing and argument, the Court of Appeals affirmed Watson-Scott's convictions in an

unpublished opinion dated December 4, 2018. Watson-Scott v. Commonwealth, Record No. 1538-17-2, 2018 Va. App. LEXIS 335 (Va. Ct. App. Dec. 4, 2018).

ASSIGNMENTS OF ERROR

Watson-Scott assigns the following errors:

I. The Court of Appeals erred in affirming the trial court's murder conviction of appellant where the element of malice was absent because there was no person or persons against whom a malicious intent was held.

II. The Court of Appeals erred in affirming the trial court's murder conviction of appellant because the perpetrator did not hold a malicious intent towards the decedent and the doctrine of transferred intent was not implicated.

(Def. Br. at 1-2).

STATEMENT OF FACTS

Shortly after 2:30 p.m. on October 9, 2016, Jean Redwood left her home with her daughter Carmella Winston and Winston's three children to take a pan of lasagna to her son. (App. 32-34, 55). Winston sat in the front passenger seat and her children sat in the back seat. (App. 33). During their drive, they saw Winston's sister, Jewel Henry, walking in the Gilpin Court neighborhood of Richmond, Virginia and agreed to take her to a store on St. James Street, which is where they were going. (App. 34-35, 51). Once they arrived, Redwood parked the car on St. James Street facing Federal Street to drop off Henry. (App. 36-37).

They chatted for five minutes before Henry got out of the car and began walking in the direction of Hill Street, which was the opposite way on St. James Street. (App. 36).[1]

Suddenly, Redwood heard a gunshot. (App. 37). She ducked toward the passenger seat and said, "uh-oh, somebody is shooting." (App. 37). Redwood thought the shot happened nearby, because of how loud it was, but she could not tell from which direction it came. (App. 40-42). Redwood felt glass falling on her shoulder and looked up at her daughter and saw a bullet in the corner of Winston's eye. (App. 38).

Although Winston was still holding her cell phone, Redwood testified she was scared and could not find it to call for help. (App. 38). Redwood exited the car and stood in the middle of the street looking for help. (App. 38). No one responded to her cries for assistance. Id. Winston's son, who had been in the backseat, eventually said, "Granny, turn around and go down the street." (App. 38). Redwood then made a U-turn and drove to a friend's house at Hill Street and 1st Street, where she called the police. (App. 39-40).

[1] The block of St. James Street where the shooting occurred is bounded by Federal Street and Hill Street. St. James Street runs north and south and Hill Street is "more or less east and west." (App. 53). An aerial map of the area was introduced at trial as Commonwealth's exhibit 1. (App. 52-53).

Henry also heard the gunshots. (App. 46). She ducked because she did not know from where the gunshots were coming. (App. 47). Then, not knowing her sister had been shot, Henry continued walking to the store. (App. 46-47). She testified that she heard three to four shots. (App. 45, 48). Henry testified that she did not see anyone in the street when she first left her family in the car. She noted, however, that she was not looking for anyone, but rather was paying attention to people in the car. (App. 49).

At the time of the shooting, Kenneth Moore was sitting in his car smoking marijuana on St. James Street facing towards Hill Street. (App. 56-57, 64). He noticed "two dudes" and their bicycles across the street walking up the path toward Hill Street from Federal Street. (App. 57-58). One of the men had on black pants and a black hoody with a white symbol on the back and the other had on blue jeans. (App. 57, 59). Moore saw them talking and put his head down to look at his phone. (App. 58).

A minute later, Moore heard gunshots and looked up to see the man in the black hoody, standing 20-25 feet away from him, firing a gun "down St. James Street." (App. 58, 61, 78). Moore saw the man pointing the gun "[t]owards the Hill side. The tall building. Toward that area." (App. 59). After the man fired four or five shots, Moore heard him say "the F-word." (App. 60). Moore was

startled and got out of his car. (App. 78, 61). He had never seen someone shooting a gun like that before. (App. 78).

Moore watched the man, whom he later identified as the defendant, ride off on his bicycle. (App. 61-62). When the shooting initially started, Moore did not see the second man and did not know where he went. (App. 59). Moore could also see "two guys in the car" in front of him and Moore's wife standing near the passenger side of his car when the shots were fired. (App. 62).

Moore's wife, Shameek Massey, testified she had just unloaded groceries and returned to her husband's car when she heard four gunshots. (App. 82-83). Massey described the shooter as wearing a black hoody, black pants, and dark sneakers with a dark bike. (App. 83). The man was standing on a sidewalk firing shots toward Hill Street near "an old folks' home." (App. 84, 218). Massey did not see anyone else other than her husband and the two people in a car in front of them. (App. 85).

Officer Doran Preston was the first officer to respond to the scene at 2:56 p.m. (App. 51). When she arrived, she could see a bullet hole in the windshield and could see Winston, who was unconscious but still breathing. (App. 53-54). Officer Preston tried to administer aid until emergency personnel arrived and took Winston to M.C.V. hospital. (App. 55). Winston ultimately died from her gunshot wound. (App. 128).

Police recovered four cartridge cases from the sidewalk on St. James Street, approximately 397 feet from the intersection of Hill Street. (App. 112, 218-24). All were .40 caliber Smith & Wesson cartridge cases and were fired from the same Glock firearm. (App. 132-37).

MATERIAL PROCEEDINGS BELOW

The defendant moved to strike the Commonwealth's evidence, arguing that there was insufficient evidence of identification and that the Commonwealth failed to prove the element of malice. (App. 145-191). As relevant to this appeal, Watson-Scott asserted that there was no evidence that he intended to shoot "at someone." (App. 151, 173).

In response, the Commonwealth argued that it proved malice in multiple ways. First, the prosecution argued that malice may be inferred from the use of a deadly weapon and that Watson-Scott committed a "willful and purposeful act" likely to cause death or great bodily harm. (App. 160-61). The defendant cursing after he fired four bullets was additional evidence of his state of mind. (App. 162). Additionally, the Commonwealth asserted that once it proved the killing was unlawful, the killing was presumed to be second-degree murder absent evidence which negated malice. (App. 162).

The Court denied the motion to strike, holding that the Commonwealth met its burden as to malice because a deadly weapon was used and four shots were

fired. (App. 181). Following brief additional closing arguments, wherein the defendant raised the issue of malice again, the court convicted Watson-Scott of second-degree murder and continued the matter for sentencing. (App. 233-34).

Prior to sentencing, the defense filed a motion to set aside the verdict arguing that there was insufficient evidence of identity and that the Commonwealth failed to establish malice. (App. 237). Watson-Scott argued in the motion that the "absence of an intended target" was dispositive because there was no person against whom a cruel act was committed and because the doctrine of transferred intent did not apply. Id. The court denied the motion. (App. 293-94).

Watson-Scott appealed to the Court of Appeals of Virginia arguing that the evidence was insufficient to prove malice absent proof of a person against whom his conduct was directed and that the doctrine of transferred intent was not applicable on the facts of this case. (App. 304). Following briefing and argument, the Court of Appeals held that the evidence was sufficient to establish that the defendant was acting with malice toward a specific individual – his former companion. (App. 356-357). The Court of Appeals noted that given this finding, it need not address the Commonwealth's alternative arguments regarding malice. (App. 357). The Court of Appeals affirmed the judgment of the trial court. (App. 358).

ARGUMENT

I. THE EVIDENCE WAS SUFFICIENT TO PROVE THE DEFENDANT ACTED WITH MALICE.

The defendant acted with malice when he fired multiple shots down a neighborhood street in the City of Richmond in the middle of the afternoon. In reaching this conclusion, the Court of Appeals held that the record supported the reasonable inference that the defendant was shooting at his former companion. Under these circumstances, the defendant's argument that malice is required to be "held against another" lacks a factual predicate. Thus, even if his legal argument is correct, the defendant's factual premise is flawed, and this Court should affirm his conviction.

In any event, the defendant's position that the Commonwealth must prove at whom the defendant was shooting is not supported by this Court's jurisprudence. Instead, malice can be implied from Watson-Scott's intentional course of conduct that was likely to cause death or great bodily harm, including the use of a deadly weapon. The judgments of the Court of Appeals and of the City of Richmond Circuit Court should be affirmed.

A. Standard of Review

"Where the sufficiency of the evidence is challenged after conviction," an appellate court reviews the evidence "in the light most favorable to the Commonwealth, according it the benefit of all reasonable inferences fairly deducible therefrom." Singleton v. Commonwealth, 278 Va. 542, 548, 685 S.E.2d 668, 671 (2009). This deferential standard applies "to any reasonable and justified inferences the fact-finder may have drawn from the facts proved." Sullivan v. Commonwealth, 280 Va. 672, 676, 701 S.E.2d 61, 63-64 (2010). "Viewing the record through this evidentiary prism requires [an appellate court] to 'discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and the inferences to be drawn therefrom.'" Bowman v. Commonwealth, 290 Va. 492, 494, 777 S.E.2d 851, 853 (2015) (citation omitted)).

On appeal, "it is not for this [C]ourt to say that the evidence does or does not establish [the defendant's] guilt beyond a reasonable doubt because as an original proposition it might have reached a different conclusion." Cobb v. Commonwealth, 152 Va. 941, 953, 146 S.E. 270, 274 (1929). Instead, the reviewing court "will reverse a judgment of the circuit court *only* upon a showing that it is plainly wrong or without evidence to support it." Singleton. "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the

testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson v. Virginia, 443 U.S. 307, 319 (1979). "These principles apply with equal force to bench trials no differently than to jury trials." Vasquez v. Commonwealth, 291 Va. 232, 249, 781 S.E.2d 920, 930 (2016).

This Court's examination of the record "is not limited to the evidence mentioned by a party in trial argument or by the trial court in its ruling." Bolden v. Commonwealth, 275 Va. 144, 147, 654 S.E.2d 584, 586 (2008). Likewise, "[a]n appellate court may affirm the judgment of a trial court when [that court] has reached the right result for the wrong reason." Perry v. Commonwealth, 280 Va. 572, 579, 701 S.E.2d 431, 436 (2010) (quoting Whitehead v. Commonwealth, 278 Va. 105, 115, 677 S.E.2d 265, 270 (2009)).

B. The record supports the Court of Appeals' conclusion that the defendant was shooting at his former companion.

The record supports the Court of Appeals' conclusion that the defendant was shooting at his former companion when he fired multiple shots down a city street in the middle of the day.[2] As the defendant acknowledges, "If an accused shoots at another intending to kill him, and a third person is killed because of the act, that

[2] During the argument on the motion to strike, the trial court asked multiple questions regarding the reasonable inferences it could draw about the former companion. (App. 174-175). Ultimately, however, the trial court relied on the inference of malice that flows from the use of a deadly weapon to deny the motion to strike. (App. 181). When the court found the defendant guilty it did not elaborate on a theory of malice. (App. 189).

same intent follows the bullet and is transferred to the killing of the third person, even if such death was accidental or unintentional." Riddick v. Commonwealth, 226 Va. 244, 248, 308 S.E.2d 117, 119 (1983). In this case, both the trial court and the Court of Appeals held that Watson-Scott was shooting at a third party when he shot and killed the victim. (App. 174, 356-357). This conclusion is justified by the record.

Kenneth Moore testified that immediately prior to the shooting he saw Watson-Scott *and another man* walking with their bicycles towards Hill Street along the opposite side of St. James Street. (App. 57-58). Moore observed Watson-Scott and the other man talking with each other and then looked down at his phone. (App. 58). A minute later he heard four or five gunshots and looked up to see the defendant firing a gun up St. James Street toward Hill Street. (App. 58, 59). After the shooting ended, Moore heard the defendant curse. (App. 60).

Moore did not see at whom the defendant was shooting because he was focused on the defendant; however, Moore's failure to see one does not mean that the defendant did not have a target. Instead, as the Court of Appeals concluded, "[v]iewing this evidence in the light most favorable to the Commonwealth and according it all reasonable inferences, a rational trier of fact could have found that when appellant fired a deadly weapon multiple times up St. James Street he was attempting to shoot a specific person—*i.e.*, the man with a bike who had been

walking and talking with him just a minute before." Watson-Scott v. Commonwealth, Record No. 1538-17-2, 2018 Va. App. LEXIS 335, at *10 (Va. Ct. App. Dec. 4, 2018).

Indeed, as noted by the trial court, the defendant did not fire up into the air or at the ground. (App. 175). He fired multiple shots down the street, cursed, and then turned off the street down an alley. These actions are consistent with firing his weapon at someone. Cf. Schmitt v. Commonwealth, 262 Va. 127, 145, 547 S.E.2d 186, 198 (2001) (upholding jury instruction that "it is permissible to infer that every person intends the natural and probable consequences of his or her acts"). The other man who had just been with the defendant was the only other person Moore had seen on the street prior to the shooting, except for the men in the car in front of him. Neither Moore nor the other witness, Shameek Massey, testified that defendant's gunfire was directed at them, or the two men in the car. The Court of Appeals' conclusion that the defendant was shooting at the man on the bike is reasonable and supported by the record.

The defendant's argument that Moore did not see the defendant's target does not alter this conclusion. Moore testified that he was only twenty to twenty-five feet from the defendant, and described being transfixed by the defendant's conduct. (App. 61, 78). The trial court concluded it was reasonable that Moore would not have been looking for the defendant's target because he was focused on the

shooter. (App. 181, 176). Further, the other man was on a bicycle. It is not unreasonable to believe that the target was out of Moore's sight by the time Moore thought to look down the street. Indeed, Redwood's vehicle was approximately a block away and Moore did not see her car from his location. (App. 172). The defendant's conclusions to the contrary rely on inferences to which he is not entitled at this stage of the proceedings, when all inferences flow to the Commonwealth, the prevailing party below. See Bowman, 290 Va. at 494, 777 S.E.2d at 853.

Because the record supports the conclusion that the defendant was shooting at his former companion, the defendant's argument on appeal that "there was no person or persons against whom a malicious intent was held" (Def. Br. at 4) must fail. The judgment of the Court of Appeals and City of Richmond Circuit Court should be affirmed.

C. The Commonwealth was not required to prove an intended target in order to prove malice.

Even if this Court rejects the conclusion that the defendant was shooting at his companion, the record still demonstrates sufficient evidence of malice to convict the defendant of second-degree murder. This Court has long-recognized that although Code § 18.2-32 distinguishes the degrees of murder, the crime is not statutorily defined. Pugh v. Commonwealth, 223 Va. 663, 667, 292 S.E.2d 339,

341 (1982). Instead, the definition of murder comes from common law. "Murder at common law is a homicide committed with malice, either express or implied." Id. (citing Biddle v. Commonwealth, 206 Va. 14, 20, 141 S.E.2d 710, 714 (1965)).

"Malice inheres in the doing of a wrongful act intentionally, or without just cause or excuse, or as a result of ill will." Commonwealth v. Perkins, 295 Va. 323, 329, 812 S.E.2d 212, 217 (2018). To this end, malice requires a showing that the defendant "willfully and purposefully, rather than negligently, embarked on a course of conduct likely to cause death or great bodily harm." Essex v. Commonwealth, 228 Va. 273, 280, 322 S.E.2d 216, 220 (1984). Malice may also be implied "from the wanton and reckless disregard of the safety of others" or when the defendant's conduct "so endangered the lives of innocent persons…as to indicate a reckless indifference for the rights of others and a heart regardless of social duty." Pierce v. Commonewealth, 135 Va. 635, 650, 651, 115 S.E. 686, 691 (1923).

In Essex, this Court explained, by way of example, that:

> one who deliberately drives a car into a crowd of people at a high speed, not intending to kill or injure any particular person, but rather seeking the perverse thrill of terrifying them and causing them to scatter, might be convicted of second-degree murder if death results. One who accomplishes the same result inadvertently, because of grossly negligent driving, causing him to lose control of his car, could be convicted only of involuntary manslaughter. In the first case the act was volitional; in the second it was inadvertent, however reckless and irresponsible.

Id. at 281, 322 S.E.2d at 220.

Just like the example in Essex, even if the defendant here was not intending to kill or injure a particular person, his deliberate actions were nevertheless likely to cause death or great bodily harm. The defendant intentionally fired a Glock handgun four times, expelling .40 caliber bullets, "down" a residential city street in the middle of the afternoon. (App. 132-137, 61). Witnesses watched Watson-Scott pull the trigger and the evidence demonstrates he did so deliberately. (App. 60, 83). Further there were *at least* 11 other people in the area when the defendant fired his weapon. Moore, his wife Massey, the two men in the parked vehicle in front of Moore, the defendant's companion, Henry, Redman, Winston, and Winston's three children were all in the area of the shooting. (App. 56-57, 82, 62, 58, 33).

In addition, the defendant admitted that there were a series of apartment buildings across Hill Street, the direction in which he was shooting. (App. 172). Henry testified that she was also walking on St. James street, toward Hill Street, to go to the store. (App. 45, 36). Massey identified an "old folks home" near where the defendant was standing when he fired the shots. Certainly, the fact-finder could reasonably concluded that firing four or five shots down the street in this

area was "likely to cause death or great bodily harm." Essex, 228 Va. at 280, 322 S.E.2d at 220.

The defendant's argument that he did not have knowledge that anyone else was present does not detract from this conclusion. Clearly, there were at least five people – Winston, her mother, and her three children – within range of his shooting. His decision to open fire without knowing who or what was in his way likewise demonstrates a "wanton and reckless disregard of the safety of others" sufficient to prove malice. Pierce, 135 Va. at 650, 652 115 S.E. at 691, 692 (finding, in reference to loaded spring gun that, "This lurking instrument of death was not only a menace to robbers but also to the policemen, firemen and friends of the accused whose duty or friendship might at any time require them, for some lawful purpose, to enter the building by force."). Cf. Commonwealth v. Ward, 426 Mass. 290, 299, 688 N.E.2d 227, 234 (1997) (finding malice where the defendant played Russian Roulette with the victim, concluding that "the victim died in one of a series of encounters in which the defendant chose to gamble with the life of another.").

Moreover, "malice may be implied from the deliberate use of a deadly weapon in the absence of proof to the contrary." Murphy v. Commonwealth, 64 Va. (23 Gratt.) 960, 972 (1873). Indeed, Virginia juries have been so instructed for over 100 years. See id. Accord Avent v. Commonwealth, 279 Va. 175, 201-

02, 688 S.E.2d 244, 259 (2010). As this Court has explained, "Malice is a *prima facie* inference from the very fact [that a deadly weapon was used], for one must be presumed to have designed to do what he did, or what is the immediate and necessary consequence of his act, unless he can show the contrary." Mercer v. Commonwealth, 150 Va. 588, 593, 142 S.E. 369, 370 (1928) (citation omitted). Here, the defendant did not testify and the evidence showed he fired a gun four to five times down a residential city street in the middle of the day, cursed, and left the scene. These circumstances do not detract from the inference that the defendant was acting with malice.

Finally, "[i]n Virginia, every unlawful homicide is presumed to be murder of the second degree. When the Commonwealth proves an unlawful homicide and establishes the accused as the criminal agent, the presumption, which is no more than an inference, arises, and the defendant has the burden of going forward with some evidence to show circumstances of 'justification, excuse, or alleviation.'" Pugh, 223 Va. at 667, 292 S.E.2d at 341 (quoting Hodge v. Commonwealth, 217 Va. 338, 341, 343, 228 S.E.2d 692, 694, 696 (1976))." In Hodge, this Court explained that the presumption does not displace the Commonwealth's burden of proof, but rather places a burden of production on the defendant to come forward with evidence to support a lesser charge. Id. at 342, 228 S.E.2d at 695.

The defendant in the instant case failed to carry that burden of production. The defendant argues that he had no knowledge that anyone was present on the street, in the direction he was shooting. (Def. Br. at 5, 6). He further hypothesizes that his companion turned down the alley prior to the shots being fired. (Def. Br. at 7). He concludes, therefore, that his actions were not likely to harm anyone. These arguments are not supported by the record.

Although he was uniquely situated to provide the court with information regarding his intent or his companion's actions, the defendant did not present any evidence at trial to this effect. "The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the [permissible inference] that the testimony, if produced, would be unfavorable." Graves v. United States, 150 U.S. 118, 121 (1893). Likewise, "the failure or neglect of an accused to produce evidence within his power might be considered by the jury in connection with the other facts proved in the case." Robinson v. Commonwealth, 165 Va. 876, 880, 183 S.E. 254, 256 (1936).

Certainly, the defendant had no obligation to present any evidence; however, in its absence the trial court did not err in rejecting his hypothesis of innocence. The Commonwealth proved an unlawful homicide and that the defendant was the criminal agent. In the absence of "some evidence to show circumstances of

'justification, excuse, or alleviation," Pugh, 223 Va. at 667, 292 S.E.2d at 341, the Commonwealth met its burden of proof as to malice. Accordingly, the trial court did not err in convicting the defendant of second-degree murder.

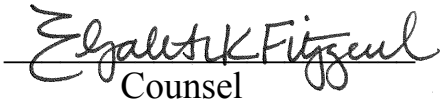
CONCLUSION

This Court should affirm the judgment of the Court of Appeals and of the Circuit Court for the City of Richmond convicting the defendant of second-degree murder.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

Appellee herein.

By: 
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CERTIFICATE OF TRANSMISSION AND SERVICE

On August 30, 2019, this brief was filed electronically with this Court, and the required copies were subsequently hand-delivered to the clerk's office in compliance with Rule 5:26. A copy was emailed to Catherine Lawler, Esq., counsel for the appellant, at lawlerdefense@gmail.com. A courtesy copy has been sent to the trial judge and the Commonwealth's Attorney. This brief complies with Rule 5:26(b).

The Commonwealth desires to present oral argument in this case.

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