

COURT OF APPEALS OF VIRGINIA

Record No. 1365-25-2

JAY'MEISHA BANKSTON-BURKE
v.
COMMONWEALTH OF VIRGINIA

Present: Judges AtLee, Ortiz and Senior Judge Humphreys

Argued at Richmond, Virginia

Opinion Issued September 1, 2026*

FROM THE CIRCUIT COURT OF THE CITY OF HOPEWELL

Carson E. Saunders, Jr., Judge

Matthew C. Stewart for appellant.

Elizabeth Kiernan Fitzgerald, Assistant Attorney General (Jason S. Miyares,¹ Attorney General, on brief), for appellee.

MEMORANDUM OPINION BY JUDGE RICHARD Y. ATLEE, JR.

Following a bench trial, the trial court convicted Jay'meisha Bankston-Burke as an accessory after the fact to first-degree murder. Bankston-Burke raises two issues on appeal. First, she argues that the evidence was insufficient to prove that a first-degree murder was committed. Next, she argues that the trial court erred by denying her motion for a new trial based on after-discovered evidence. We affirm the trial court.

* This opinion is not designated for publication. *See* Code § 17.1-413(A).

¹ Jay C. Jones succeeded Jason S. Miyares as Attorney General on January 17, 2026.

BACKGROUND

“On appeal, we review the evidence in the ‘light most favorable’ to the Commonwealth,” the prevailing party below. *Clanton v. Commonwealth*, 53 Va. App. 561, 564 (2009) (en banc) (quoting *Commonwealth v. Hudson*, 265 Va. 505, 514 (2003)).

On the evening of October 3, 2023, the Hopewell City Police Department received a report of “shots fired” in the 1100 block of High Street. Officer Agha responded to the call and arrived on scene to find two individuals—Kiesel Tucker and Alexis Tookes—standing outside of a Chevrolet Cruze and an unresponsive male lying in the backseat. The man, later identified as Marciano Thorne, was transported to a nearby hospital where he was pronounced dead. The autopsy report revealed that Thorne was shot four times, three of which were fatal.

While on scene, Officer Agha observed damage to the rear passenger side window of the Chevrolet. He did not find any firearms or cartridge casings in the vehicle, but Tucker told him that the Chevrolet was shot by an occupant of another vehicle.² Based on Tucker’s statement, Agha reviewed the Verkada surveillance³ footage for that area when he returned to the police station that evening. The footage showed a vehicle overtake the Chevrolet, at which point the video showed “muzzle flash[es],” which occur when a gun is fired.

Detective Clark, who was assigned to the investigation, also reviewed the Verkada footage and determined that the other vehicle was a Volkswagen Passat. She obtained the license plate number of the Volkswagen from the City’s license plate reader system and initiated a “be on the lookout” alert for the vehicle. The Volkswagen was registered to Bankston-Burke.

² At the time of the shooting, Tucker was the driver of the Chevrolet, Tookes was in the front passenger seat, and Thorne was in the backseat.

³ Verkada surveillance is a video security system installed throughout Hopewell to which the police have access.

The next day, the Chesterfield County police located the Volkswagen in the parking lot of an apartment complex in Chesterfield County. The Chesterfield County police notified the Hopewell City police of the vehicle's whereabouts and Hopewell City Detective List went to the apartment complex to investigate. While conducting surveillance on the vehicle, List observed Devon Mabry⁴ exit an apartment and enter an Uber. The Chesterfield County police conducted a traffic stop on the Uber and arrested Mabry on unrelated outstanding warrants. During his arrest, police recovered Mabry's cell phone. Text messages on his cell phone showed that Bankston-Burke allowed Mabry to borrow her Volkswagen Passat the previous night.

Hopewell City Detective Martin then obtained search warrants for the Volkswagen and Bankston-Burke's apartment. When he arrived to conduct the searches, a Chesterfield County police officer was conducting a traffic stop on the Volkswagen in the apartment complex parking lot. Bankston-Burke was the driver. Martin searched the vehicle and found Bankston-Burke's cell phone. When asked about the whereabouts of her Volkswagen the night before, Bankston-Burke claimed that she allowed her friend "Kiesha" to borrow the car. She told Martin that she kept a tracking device on the car, which was connected to her cell phone. When asked what time Mabry came to her apartment, she expressed surprise that police knew he had visited her. Martin told Bankston-Burke that Mabry was involved in "an incident" the previous night and that her Volkswagen was caught on camera being used in a homicide. Bankston-Burke said that Mabry left with Kiesha the night before and that she did not know where they went.

When Detective Martin arrived back at the police station that afternoon and began to process the evidence recovered from the Volkswagen, he noticed that Bankston-Burke's cell phone was reset to its factory settings. Bankston-Burke and Mabry were subsequently recorded on two jail phone calls and, during one call, Bankston-Burke told him she "eras[ed] everything"

⁴ Mabry is the father of one of Bankston-Burke's children.

from her cell phone and “reset” it. She also told him that she removed the battery from her car’s tracking device, removed it from the account associated with her cell phone, and disabled it.

Hopewell police obtained another search warrant for her apartment based on these phone calls. When Martin arrived to execute the warrant, Bankston-Burke claimed that the tracking device was in the dumpster of a different apartment complex, but the device was found at the bottom of a laundry hamper in her apartment. Martin interviewed Bankston-Burke again in November of 2023, and she admitted to erasing and resetting the cell phone recovered from the Volkswagen.

A grand jury indicted Bankston-Burke on one count of being an accessory after the fact to murder. At trial, after the Commonwealth rested, Bankston-Burke made a motion to strike, arguing that the Commonwealth had failed to prove that the predicate felony was complete. Specifically, she asserted that the evidence was insufficient to prove premeditation and malice, which are both elements of first-degree murder. The trial court denied her motion to strike. Bankston-Burke then rested without offering any additional evidence and renewed her motion to strike. The trial court again denied the motion and found her guilty of the charge.

After trial but before she was sentenced, Bankston-Burke filed a motion to set aside the verdict based on after-discovered evidence. She and the Commonwealth jointly filed a proffer in which the parties summarized three sources of after-discovered evidence. The first source was Tookes, who initially told police that no one in the Chevrolet had a firearm. In preparation for Mabry’s trial, Tookes amended her statement to police and admitted that, although an occupant of the Volkswagen fired at the Chevrolet first, Tucker did return fire. The second source was Tina Greer, who was driving behind the Volkswagen and the Chevrolet when the shooting occurred. Greer reported that the occupants of both vehicles shot at each other, but that an occupant of the Volkswagen fired the first shots. The third source was Linda Mann, who lived in

the area where the shooting occurred. Shortly after the shooting, Mann contacted police after she recovered an unfired cartridge casing in her driveway, near where the Chevrolet stopped. An officer went to Mann's home, collected the cartridge casing, and—without consulting any detective working on the case—determined that it had no evidentiary value and submitted it for destruction. Detective Martin learned of Mann's report during his preparation for Mabry's trial.

The trial court heard argument on the motion at Bankston-Burke's sentencing hearing. The Commonwealth stipulated that the evidence was discovered after trial and that Bankston-Burke could not have discovered it before trial in the exercise of reasonable diligence. The trial court found that the after-discovered evidence would not be merely cumulative or collateral, but it ultimately denied the motion, finding that the evidence would not change the outcome at a new trial. Bankston-Burke now appeals.

ANALYSIS

A. *Sufficiency of the Evidence*

“When an appellate court reviews the sufficiency of the evidence underlying a criminal conviction, its role is a limited one.” *Commonwealth v. Garrick*, 303 Va. 176, 182 (2024). “[W]e affirm the trial court’s judgment ‘unless it appears from the evidence that the judgment is plainly wrong or without evidence to support it.’” *Pulley v. Commonwealth*, 74 Va. App. 104, 123 (2021) (quoting *Poole v. Commonwealth*, 73 Va. App. 357, 363 (2021)). “In such cases, ‘[t]he Court does not ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.’” *McGowan v. Commonwealth*, 72 Va. App. 513, 521 (2020) (alteration in original) (quoting *Secret v. Commonwealth*, 296 Va. 204, 228 (2018)). “Rather, the relevant question is whether ‘*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *Vasquez v. Commonwealth*, 291 Va. 232, 248 (2016) (quoting *Williams v. Commonwealth*, 278 Va. 190, 193 (2009)).

Bankston-Burke was convicted of violating Code § 18.2-19, which makes it a felony to act as an accessory after the fact to a homicide. “At common law, an accessory after the fact ‘is a person who knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon.’” *Suter v. Commonwealth*, 67 Va. App. 311, 319 (2017) (quoting *Wren v. Commonwealth*, 67 Va. (26 Gratt.) 952, 955 (1875)). Thus, to convict an individual as an accessory after the fact, the Commonwealth must prove three elements: (1) the predicate felony was completed; (2) the accused knew the felon was guilty; and (3) the accused “receive[d], relieve[d], comfort[ed], or assist[ed] the felon.” *Id.* (quoting *Commonwealth v. Dalton*, 259 Va. 249, 253 (2000)).

Bankston-Burke argues that the Commonwealth failed to prove that the predicate felony—first-degree murder—was completed. Specifically, she contends that the Commonwealth failed to prove the elements of premeditation and malice. We disagree.

In Virginia, a “willful, deliberate, and premeditated killing . . . is murder of the first degree.” *Rhodes v. Commonwealth*, 238 Va. 480, 485 (1989) (alteration in original) (quoting Code § 18.2-32). “To prove premeditated murder, the Commonwealth must establish: (1) a killing; (2) a reasoning process antecedent to the act of killing, resulting in formation of a specific intent to kill,” i.e., premeditation; “and (3) . . . malicious intent.” *Betancourt v. Commonwealth*, 26 Va. App. 363, 372-73 (1998) (quoting *Archie v. Commonwealth*, 14 Va. App. 684, 689 (1992)).

“To premeditate means to adopt a specific intent to kill, and that is what distinguishes first and second degree murder.” *Rhodes*, 238 Va. at 485 (quoting *Smith v. Commonwealth*, 220 Va. 696, 700 (1980)). “When proof of premeditation is the subject of a sufficiency challenge, evidence showing that the premeditation was only slight or momentary is sufficient to sustain the conviction.” *Jackson v. Commonwealth*, 267 Va. 178, 204 (2004). “Premeditation and formation of an intent to

kill seldom can be proved by direct evidence.” *Rhodes*, 238 Va. at 486. “A combination of circumstantial factors may be sufficient.” *Id.*

The evidence here was sufficient to establish premeditation. Surveillance footage showed that Bankston-Burke’s Volkswagen overtook the Chevrolet and, within seconds, the occupant of the Volkswagen opened fire. Thorne was shot four times and photographs of the Chevrolet show that the vehicle was shot at least seven times. There was no evidence of provocation, nor was there any evidence that the shots fired from the Volkswagen were fired in self-defense. It was thus reasonable for the factfinder to conclude that the shooter, in deciding to pursue and overtake the Chevrolet, had time to think and intended to kill and thus acted with premeditation. *See Morris v. Commonwealth*, 17 Va. App. 575, 578 (1994) (“[E]vidence of a mortal wound inflicted by a deadly weapon with little or no provocation creates an inference from which the trier of fact may conclude that the killer acted with premeditation.”).

And “[t]he authorities are replete with definitions of malice, but a common theme running through them is a requirement that a wrongful act be done ‘wil[l]fully or purposefully.’” *Essex v. Commonwealth*, 228 Va. 273, 280 (1984) (quoting *Williamson v. Commonwealth*, 180 Va. 277, 280 (1942)). Virginia law has “long defined malice as ‘the doing of a wrongful act intentionally, or without just cause or excuse, or as a result of ill will.’” *Shaw v. Commonwealth*, 304 Va. 217, 231 (2025) (quoting *Watson-Scott v. Commonwealth*, 298 Va. 251, 255-56 (2019)). “Malice may be either express or implied by conduct.” *Essex*, 228 Va. at 280. “Express malice is evidenced when ‘one person kills another with a sedate, deliberate mind, and formed design.’” *Id.* (quoting *Pugh v. Commonwealth*, 223 Va. 663, 668 (1982)). “Implied malice exists when any purposeful, cruel act is committed by one individual against another without any, or without great provocation.” *Pugh*, 223 Va. at 668.

Here, the surveillance footage shows that an occupant of the Volkswagen opened fire on the Chevrolet. *See Elliot v. Commonwealth*, 30 Va. App. 430, 436 (1999) (“The trier of fact may infer malice from the deliberate use of a deadly weapon unless the evidence raises a reasonable doubt whether malice existed.”). That individual fired multiple shots, and four of them struck Thorne. *See Watson-Scott*, 298 Va. at 258 (noting that “firing multiple shots from a handgun in the middle of a populous city is the very definition of an action flowing from” malice). Nor was there any evidence of provocation. It was thus reasonable for the factfinder to conclude that the Commonwealth proved malice.

Bankston-Burke argues that Thorne was shot in self-defense or in the heat of passion, but these theories were put before the factfinder and expressly rejected. “The issue upon appellate review is not whether ‘there is some evidence to support’ these hypotheses [of innocence].” *Hudson*, 265 Va. at 513. Rather, the question is “whether a reasonable [factfinder], upon consideration of all the evidence, could have rejected [Bankston-Burke]’s theories.” *Id.*

Here, the record supports the trial court’s rejection of her hypotheses of innocence. There were no shell casings recovered from the Chevrolet and there was no evidence of any bullet holes in the Volkswagen. There was no evidence that any occupant of the Volkswagen was shot. There was simply no evidence on the record to suggest that the occupants of the Chevrolet fired the first shots at the Volkswagen and that the occupant of the Volkswagen merely fired in self-defense. Thus, the trial court was not plainly wrong to conclude that the theories of self-defense and heat of passion were unsupported by the evidence. Instead, the record was sufficient to allow the trial court to conclude that the Commonwealth established that the predicate felony of first-degree murder was completed. Accordingly, we affirm the denial of Bankston-Burke’s motions to strike.

B. *Motion for New Trial Based on After-Discovered Evidence*

Bankston-Burke argues that the trial court abused its discretion by denying her motion for a new trial based on after-discovered evidence. She contends that the newly discovered evidence brought her theories of self-defense and heat of passion out of the realm of speculation. We disagree.

“Motions for new trials based on after-discovered evidence are addressed to the sound discretion of the trial judge, are not looked upon with favor, are considered with special care and caution, and are awarded with great reluctance.” *Odum v. Commonwealth*, 225 Va. 123, 130 (1983). A party seeking a new trial based on after-discovered evidence must establish that such evidence:

(1) appears to have been discovered subsequent to the trial; (2) could not have been secured for use at the trial in the exercise of reasonable diligence by the movant; (3) is not merely cumulative, corroborative or collateral; and (4) is material, and such as should produce opposite results on the merits at another trial.

Id.

The Commonwealth stipulated that Bankston-Burke established the first two elements and, at the sentencing hearing, the trial court found that she satisfied the third. The only issue on appeal is whether the after-discovered evidence is material and likely to produce a different result at a new trial. To satisfy this fourth element, the party seeking a new trial must “show in a clear and convincing manner ‘as to leave no room for doubt’ that the after-discovered evidence, if true[,] would produce a different result at another trial.” *Carter v. Commonwealth*, 10 Va. App. 507, 513 (1990) (quoting *Powell v. Commonwealth*, 133 Va. 741, 756 (1922)).

Upon review of the after-discovered evidence here, it is apparent that the trial court did not abuse its discretion by finding that Bankston-Burke failed to meet this standard. Though the proffered evidence establishes that the occupants of the Chevrolet fired shots at the Volkswagen,

it also establishes that the occupant of the Volkswagen fired first. In her amended statement, Tookes told detectives that Tucker opened fire only *after* shots were fired at their vehicle from the Volkswagen. Greer reported that though she saw occupants of both vehicles exchange gunshots, the occupant of the Volkswagen fired *first*. And the recovery of the unfired cartridge in Mann's driveway reveals nothing about which vehicle fired the first shot. In sum, the after-discovered evidence is still consistent with the fact that the occupant of the Volkswagen fired first. Thus, Bankston-Burke's contention that the evidence would bring her theory of self-defense out of the realm of speculation is incorrect. *See Jordan v. Commonwealth*, 219 Va. 852, 855 (1979) ("[A] person cannot rely upon a plea of self-defense in a case of homicide or assault when he himself was the aggressor and wil[l]fully brought on, without legal excuse, the necessity for the homicide or assault."). The trial court therefore did not abuse its discretion by finding that this evidence was not likely to produce a different result at another trial, and, accordingly, we affirm the denial of the motion for a new trial.

CONCLUSION

For the foregoing reasons, the trial court is affirmed.

Affirmed.