COURT OF APPEALS OF VIRGINIA

Present: Judges Bray, Annunziata and Senior Judge Hodges
Argued at Norfolk, Virginia

CALVIN LEE BLAND

v. Record No. 2065-94-1 MEMORANDUM OPINION* BY JUDGE ROSEMARIE ANNUNZIATA

COMMONWEALTH OF VIRGINIA DECEMBER 12, 1995

FROM THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS
Randolph T. West, Judge

George B. Pavek III, for appellant.

Eugene Murphy, Assistant Attorney General (James S. Gilmore, III, Attorney General, on brief), for appellee.

Following a jury trial on August 22, 1994, the appellant, Calvin Lee Bland ("Bland"), was convicted of second degree murder and the use of a firearm in the commission of a felony. He was thereafter sentenced to forty years imprisonment for the murder and three years for the firearm offense. On appeal, Bland argues (1) that the evidence was insufficient to convict him of second degree murder; and (2) that the trial court erred, failing to instruct the jury on the elements of involuntary manslaughter.

Bland contends for the first time on appeal that his conviction was contrary to the evidence. Bland failed to move the trial court to strike the evidence either after the Commonwealth concluded its case or after Bland concluded his, nor

*Pursuant to Code § 17-116.010 this opinion is not designated for publication.

did Bland move the court to set aside the verdict. Accordingly, Bland is barred from raising his sufficiency of evidence claim on appeal. See Parnell v. Commonwealth, 15 Va. App. 342, 349, 423 S.E.2d 834, 838-39 (1992); McQuinn v. Commonwealth, 20 Va. App. 753, 755, 460 S.E.2d 624, 625 (1995).

Furthermore, Bland failed to object to the instruction of the court which omitted involuntary manslaughter as an alternative finding the jury could make. Rule 5A:18 bars this Court from reviewing objections which a party fails to make on time, when the occasion arises. Marlowe v. Commonwealth, 2 Va. App. 619, 621, 347 S.E.2d 167, 168 (1986).

Bland urges the Court to apply the ends of justice exception to Rule 5A:18 and to consider the issue on appeal despite his failure to object. However, the "ends of justice" exception to Rule 5A:18 applies only when the record "affirmatively shows that a miscarriage of justice has occurred, not when it merely shows that a miscarriage might have occurred." Mounce v. Commonwealth, 4 Va. App. 433, 436, 357 S.E.2d 742, 744 (1987).

Here, the jury was properly instructed that malice is the state of mind which results in the intentional doing of a wrongful act to another without justification and that malice can be inferred from the deliberate use of a deadly weapon. The evidence is undisputed that Bland shot an unarmed man from close range with a high caliber weapon after which he fled the scene and hid the murder weapon. As such, even if failing to give an

involuntary manslaughter instruction was erroneous, the record does not affirmatively show that a miscarriage of justice occurred. The evidence was sufficient to convict Bland of second degree murder beyond a reasonable doubt.

Accordingly, Bland's convictions are affirmed.

Affirmed.