COURT OF APPEALS OF VIRGINIA

Record No. 0550-25-4

JACOB CARL BELOTTI
v.
COMMONWEALTH OF VIRGINIA

Present: Judges Malveux, Ortiz and Senior Judge Annunziata
Argued at Fairfax, Virginia

Opinion Issued November 24, 2026[*]

FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY
Petula C. Metzler, Judge

Collin Chayce Crookenden (Vanderpool, Frostick & Nishanian, P.C., on brief), for appellant.

Jason D. Reed, Senior Assistant Attorney General (Jay Jones, Attorney General, on brief), for appellee.

MEMORANDUM OPINION BY
JUDGE ROSMARIE P. ANNUNZIATA

A jury convicted Jacob Belotti of distribution of a controlled substance and felony homicide for the death of Dustin Lueker, who overdosed on drugs Belotti supplied at a party. On appeal, Belotti argues that the evidence was insufficient to convict him of felony homicide because the Commonwealth did not establish the requisite causal and temporal elements, nor did the Commonwealth disprove every reasonable hypothesis of innocence. He also argues that the circuit court erred in failing to instruct the jury on the issues of malice and accommodation; by allowing testimony about a text message in violation of the best evidence rule; discounting mitigating evidence when sentencing him; and rejecting a pre-trial plea agreement between him and the Commonwealth. For the reasons below, we affirm the judgment of the circuit court.

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

BACKGROUND[1]

We recite the facts "in the 'light most favorable' to the Commonwealth, the prevailing party in the trial court." *Hammer v. Commonwealth*, 74 Va. App. 225, 231 (2022) (quoting *Commonwealth v. Cady*, 300 Va. 325, 329 (2021)). In doing so, we discard any evidence that conflicts with the Commonwealth's evidence and regard as true all the credible evidence favorable to the Commonwealth and all inferences that can be fairly drawn from that evidence. *Cady*, 300 Va. at 329.

Dustin Lueker died, sprawled out on the floor of someone else's apartment, on a Saturday in February 2018. The previous night, Lueker hosted a party at his apartment. Shirell Harmon, Dustin Gram, and Sarah Bennajma attended Lueker's party. Harmon, who had never met Lueker before, "pretty much just talked to . . . Lueker the whole time." Lueker was "pretty drunk" when Harmon arrived at his apartment but sobered up as the night went on. Also present were Chukuemeka Mosa Chukuka and Belotti, one of Lueker's childhood friends.

Various partygoers drank and used cocaine until around midnight when "Belotti insisted that the party be moved to his house because he . . . wanted needles and he had a bag of needles at his house." The group split up between two cars, and Harmon and Lueker swapped numbers to text during the drive. When they arrived at Belotti's apartment, Harmon continued chatting with Lueker. She noticed that he "had some bruises on his arm," asked what they were from, and learned that "he had just started letting [Belotti] shoot him up with coke, that day or . . . a couple days prior." Concerned, Harmon told Lueker, "that's pretty bad . . . don't let him do that again." Harmon was an experienced drug user herself, having used fentanyl, heroin, and methamphetamine. Their conversation made Lueker curious of Harmon's "drug of choice," but she was reluctant to

[1] Portions of the record below were sealed by the circuit court. "To the extent that we mention facts found only in the sealed record, we unseal those specific facts, finding them relevant to our decision." *Daily Press, LLC v. Commonwealth*, 301 Va. 384, 393 n.1 (2022).

disclose it. "[I]t was nice not having somebody know that about [her] for once." Bennajma brought up heroin eventually, and Lueker expressed his desire to try heroin himself, despite Harmon's caution "that it ruins lives."

At some point, several members of the group—including Belotti, Lueker, and Harmon—went to a convenience store "to get cigarettes and stuff" and so Lueker could "take money out to buy some" heroin. Lueker gave Belotti the money, and, when they returned to Belotti's apartment, Harmon saw Belotti buy "some dope," a "white powdery substance," from Chukuka.[2] Harmon testified that she knew the heroin contained fentanyl because she "used it regularly" at the time and Chukuka's drugs were from "the same batch" she had bought before.

At the time, fentanyl "was being distributed in a combination of heroin, powder . . . or straight fentanyl," and roughly 90% of the heroin sent to the police laboratory for testing contained fentanyl. Belotti placed "a lot of" the powder in a spoon and started "making a shot" by adding water to the spoon and using a piece of cotton to filter out dust and other particulates as he drew the mixture into a syringe. Harmon, who knew what it was like to overdose, was concerned that Belotti had put "too much" powder in the spoon. After she expressed her concerns, Lueker asked whether she could shoot him up, but she refused and begged him not to do the drugs. She also "told [Belotti] not to do [so] because it [would] kill his friend." Belotti insisted that he knew what he was doing, but Harmon pushed back: "[N]o you don't . . . clearly you don't because that's fentanyl and he doesn't use so he has no tolerance." She was worried because Lueker "had never used dope before and the shot was huge. It would have killed all -- anybody, it would have killed me, and I was a regular user. It was too big, too strong." She told Lueker as much.

[2] At trial, Chukuka denied selling heroin to Belotti and claimed Belotti supplied the drugs himself.

The argument with Belotti intensified, escalating into a nearly 30-minute shouting match until Belotti kicked Harmon and her friends out of his apartment. "I know what I am doing," he told her as she left. "You guys can go." Still concerned, she made a last-ditch plea to Lueker to dissuade him from making a catastrophic decision. After she got into the car, she texted him, "Please don't do that whole thing, maybe I want to see you again some time." Lueker never replied.

Belotti finished mixing the drug in the spoon, tied off Lueker's arm, and "beg[a]n to shoot him up." After two or three seconds, Lueker "fell out."[3] When Lueker slumped over on the floor Chukuka "jumped back and . . . started to call 911." But before the call went through, Belotti "told [him] to hang up the phone," assuring him that Lueker would be fine and "the police could not be there." Belotti began "smacking" Lueker and "trying to splash him with water" to awaken him. Lueker just made a noise that "sounded like he was snoring." Chukuka texted Bennajma to see if she could return with her friends and some Narcan. When Bennajma did not respond, Chukuka went home.

Harmon awoke Saturday afternoon and saw that Lueker had not responded to her last message. She was concerned, so she tried calling him without success. Bennajma's attempts to reach Belotti yielded no better results. Harmon even called several hospitals in the area, but none had admitted Lueker. On Sunday, Harmon and Bennajma finally reached Chukuka[4] and asked after Lueker. Chukuka claimed that Lueker "fell out," but then "woke up, ate breakfast and then went back to sleep." That night, however, Harmon saw Facebook posts sharing that Lueker had died.

Furious, Harmon and Bennajma called Belotti. Harmon pressed him on what happened after she left, reminding him that she told him he would kill his friend if he injected Lueker with the

[3] To "fall out" is a colloquial term meaning "over intoxicated and passing out."

[4] Harmon initially testified that this conversation was with Belotti. On cross-examination, however, she clarified that it was with Chukuka, explaining that "this was a long time ago."

drugs. Belotti responded, "Fuck you, bitch" and hung up. She wanted to call the police, but her friends dissuaded her. Instead, she contacted Lueker's brother and told him that she had been there that night. Detective Robin Hyatt contacted Harmon about a week later.

Belotti finally summoned help on Sunday, February 25, and Officer Derek Vacco went to his house. Vacco found Lueker "[o]n his back laying on the floor to the right of the door." He was unresponsive and cold to the touch; he had no pulse and was apneic. Rigor mortis had set in, and blood was pooling at Lueker's extremities. After listening for a heartbeat, an EMT confirmed that Lueker was dead.

Belotti told officers that he and Lueker had been "on a bit of a bender" since Friday but decided to call it a night at 1:30 p.m. on Saturday. He went to his bedroom while Lueker slept on the living room floor. He claimed to have heard Lueker "snoring in that position" at around 7:00 p.m., and it was not until 3:00 p.m. on Sunday that he found Lueker unresponsive and called the police. While he acknowledged that the pair had been drinking heavily, he repeatedly denied any drug use. Officers did not find evidence of drug use at the scene, but Officer Daniel Carton thought it was "unusual" that the living room, where Lueker's body was found, was "fairly tidy" while the rest of the house was not: "In my opinion, it looked like the living room area had been cleaned up or straightened." Lueker's body was transported to the Office of the Chief Medical Examiner for an autopsy.

Dr. Jocelyn Posthumus, an assistant chief medical examiner for the Commonwealth of Virginia, conducted Lueker's autopsy on February 26, 2018. She discovered a fresh needle puncture on the inside of Lueker's left elbow, indicative of intravenous drug use. After drawing a blood sample, she concluded that "the cause of death [wa]s acute combined fentanyl, morphine, cocaine and ethanol poisoning." The amount of fentanyl in Lueker's system alone was sufficient to cause his death, the remaining substances were not. Lueker's autopsy did not reveal heroin in his

system, but Dr. Posthumus explained at trial that heroin metabolizes into morphine and 6-acetylmorphine, the latter having a half-life of approximately ten minutes. So, any heroin injected into Lueker's body would show up as morphine—which was found in Lueker's system—on the toxicology report. A straw with cocaine residue also was recovered from Lueker's body.

Dr. Posthumus was unable to determine Lueker's time of death. She testified that in some opioid or opiate overdoses, the body experiences "agonal breathing," where the brain attempts to overcome the central nervous system depressant and get the body to breathe, creating "a very distinct snore-like gasping, breathing sound." This agonal breathing is "an indication of imminent death" and can last up to an hour.

Meanwhile, officers learned from Lueker's mother that friends of Lueker and Belotti were sharing online that "Lueker had been shot up with narcotics and that's what led to his death." So, Detective Hyatt, from the Narcotics Task Force, led the investigation. Detective Hyatt interviewed Chukuka several times, and his story about the events leading up to Lueker's death kept changing. He initially told Hyatt that Lueker was fine—"[h]e was up, he was walking, he had bought a beer"—when Chukuka left Belotti's house and denied ever witnessing Belotti shoot up Lueker. He was adamant about this latter point: "let me make this clear . . . [Belotti] is not my best friend so I'm not going to be sitting here and try to protect him, but at the same time, I'm not going to sit here and make up." Chukuka denied reports that efforts were made to revive Lueker, claiming, "everybody just making up stories that . . . never happened."

Chukuka stuck to that version of events across multiple interviews but admitted at trial that he "did not disclose the full story" to the police "out of fear." Only after he was arrested and charged with, among other things, distribution of a Schedule I or II controlled substance in connection with Lueker's death did he disclose witnessing Belotti inject Lueker. Chukuka accepted

a plea agreement that limited his punishment to time served, conditioned on his continued cooperation with the Commonwealth and truthful testimony against Belotti.

Belotti was charged with distributing a Schedule I or II controlled substance, conspiracy to distribute a Schedule I or II controlled substance, and felony homicide. In 2023, consistent with a plea agreement reached with the Commonwealth, Belotti entered an *Alford*[5] plea to the charge of distribution of a controlled substance. The agreement would have placed Belotti on probation for three years and required him to pay restitution towards Lueker's funeral expenses and make monthly donations to drug awareness charities. After the three years had elapsed, the matter would be dismissed and Belotti would be eligible to seek expungement. The Commonwealth informed the court that the plea agreement was reached with Lueker's mother's blessing "to have some finality in this case that has been pending for five years."

The circuit court found that Belotti entered his plea knowingly and voluntarily. But it deferred a decision on the plea until after reviewing the presentence investigation report, victim impact statements, and the applicable discretionary sentencing guidelines. The court ultimately rejected the agreement, finding that it did not fit the crime of distribution. The case was set for trial.

Before trial, Belotti moved to exclude evidence of a text message from Chukuka to Bennajma the night Lueker died. The text message asked whether Bennajma could return to Belotti's house with Narcan. The text message was not available to be shown at trial because Bennajma had since passed away and her phone could not be "dumped." Chukuka's phone had been discarded several years earlier. Belotti argued that the best evidence rule[6] required the

[5] "An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

[6] *See* Va. R. Evid. 2:1002.

Commonwealth to produce the text message if it was going to be discussed at trial. The Commonwealth argued that an exception to the best evidence rule applied because the original messages had been lost or destroyed. The circuit court granted Belotti's motion in part and denied it in part. The Commonwealth was permitted to "mention" a text message being sent but only Chukuka, who sent the text message, could testify to its contents.

After the Commonwealth's case-in-chief, Belotti moved to strike the evidence, arguing that: (1) the Commonwealth had not established the elements for conspiracy; and (2) Harmon and Chukuka's testimony was inherently incredible. The circuit court struck the conspiracy count but found that the Commonwealth had made a prima facie case for the remaining two counts. Belotti renewed his motion to strike at the close of the case, which the trial court denied.

Relevant to this appeal, the circuit court instructed the jury as follows concerning Lueker's death:

> The defendant is charged with the crime of felony homicide. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:
>
> 1) That the defendant killed Dustin Colburn Lueker; and
>
> 2) That the killing was accidental and contrary to the intention of the defendant; and
>
> 3) That the killing was caused by acts performed in the commission of distribution of a schedule I/II substance as that crime is separately defined; and
>
> 4) That the killing and distribution of a schedule I/II substance were parts of one continuous transaction and closely related in time and place.
>
> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty.
>
> If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty of felony homicide.

Jury Instr. 12.[7] After receiving all the court's instructions and hearing closing arguments, the jury convicted Belotti on both counts.

Eight months after the jury returned its verdict, Belotti moved to set it aside; or, alternatively, for a mistrial. He had replaced his trial counsel and argued for the first time, inter alia, that the jury should have been instructed on malice. The trial court ruled that no error occurred and the evidence was sufficient to sustain the convictions. In December 2024, ahead of sentencing, Belotti again substituted his counsel. His new counsel filed a second motion to set aside the verdict after Belotti was sentenced, now raising the argument, again for the first time, that the circuit court failed to instruct the jury on the principle of accommodation and accommodation as a lesser included crime of distribution. Once again, his motion was denied.

At Belotti's sentencing hearing, Lueker's brother and mother testified about their loss. Lueker's brother testified that Lueker's death left him depressed and put "a big strain on family relationships, marriage, work-life," and he was constantly reminded that his brother was "not there and he's never going to be there again. So it's just really hard." Lueker's mother described her son has having "a big heart for human life" and willing to "help anybody when they were down." His death had "devastated [her] life" because "there is no pain like losing a child." She felt that Belotti had "shown no remorse" for what happened. In turn, several of Belotti's friends and family testified about his positive impact on his community. Belotti also testified, expressing his remorse to Lueker's family for their loss, and sharing that the loss of his best friend had impacted him deeply. The Commonwealth asked the court to sentence Belotti within the recommended sentencing

[7] Belotti's proposed instruction on the elements of felony homicide was almost identical to the Commonwealth's, except in that Belotti sought to specify that the controlled substance he was accused of distributing was heroin. It did not define "malice" nor list it as an element of felony homicide.

guidelines range.[8] Belotti requested "a short period of incarceration and . . . strict probationary guidelines."

After considering the evidence, the trial court sentenced Belotti to a total of 40 years in prison, with all but 15 years and 5 months suspended. Belotti appeals, challenging the sufficiency of the evidence to sustain the felony homicide conviction. He also asserts that the trial court erred by: (1) failing to instruct the jury on the issues of malice and accommodation; and (2) admitting uncorroborated testimony regarding the contents of the text message. Finally, Belotti challenges the rejection of his plea agreement, as well as his ultimate sentence.

ANALYSIS

I. Sufficiency of the Evidence

"When presented with a sufficiency-of-the-evidence challenge in criminal cases, we review the evidence in the 'light most favorable' to the Commonwealth, the prevailing party in the trial court." *Commonwealth v. Barney*, 302 Va. 84, 96 (2023) (quoting *Commonwealth v. Hudson*, 265 Va. 505, 514 (2003)). Accordingly, the Commonwealth benefits from "all reasonable inferences deducible from the evidence" and "[t]he only relevant question is . . . whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Commonwealth v. Wilkerson*, 304 Va. 92, 100 (2025) (alterations in original) (quoting *Commonwealth v. Garrick*, 303 Va. 176, 182 (2024)).

This deference recognizes that the factfinder, who had the opportunity to see and hear witnesses, is best situated to reach conclusions on matters of witness credibility and interpret the evidence to determine what it believes happened. *Barney*, 302 Va. at 97; *Commonwealth v. Taylor*, 256 Va. 514, 518 (1998). We consider the evidentiary record holistically, and "[w]hile no single

[8] The discretionary range was from 15 years and 5 months to 25 years and 9 months, with a midpoint of 20 years and 7 months.

piece of evidence may be sufficient, the combined force of many concurrent and related circumstances . . . may lead a reasonable mind irresistibly to a conclusion." *Commonwealth v. Moseley*, 293 Va. 455, 463 (2017) (alterations in original) (quoting *Muhammad v. Commonwealth*, 269 Va. 451, 479 (2005)).

"The killing of one accidentally, contrary to the intention of the parties, while in the prosecution of some felonious act other than those specified in §§ 18.2-31 and 18.2-32, is murder of the second degree . . . ." Code § 18.2-33. Despite its expansive language, the statute's reach is limited by two inquiries: (1) "whether defendants committed the predicate felony with malice," and (2) "whether the accidental killing occurred within the res gestae of the predicate felony." *Flanders v. Commonwealth*, 298 Va. 345, 357 (2020). The first inquiry recognizes that the statute does not depart from the "ancient common law" of murder, for which malice was and continues to be an essential element. *Heacock v. Commonwealth*, 228 Va. 397, 403 (1984); *Flanders*, 298 Va. at 357. The second "requires that there be a connection between the predicate felony and the death, giving effect to the statutory requirement that the death occur 'while in the prosecution of' the underlying felony." *Flanders*, 298 Va. at 359 (quoting Code § 18.2-33); *see also Hickman v. Commonwealth*, 11 Va. App. 369, 371-72 (1990). A killing is within the res gestae of the underlying felony when it "is so closely related to the felony in time, place, and causal connection as to make it a part of the same criminal enterprise." *Commonwealth v. Montague*, 260 Va. 697, 701 (2000) (quoting *Haskell v. Commonwealth*, 218 Va. 1033, 1044 (1978)).

Belotti contends the Commonwealth did not present sufficient evidence to satisfy either prong. With regards to the first, he argues that the Commonwealth failed to present evidence of ill will or intentional wrongdoing on the part of Belotti. Regarding the second, he argues that the Commonwealth failed to prove that his distribution of heroin and fentanyl caused Lueker's death because Dr. Posthumus did not opine on the specific substance that caused Lueker's death. He also

attacks the temporal relationship between the injection and Lueker's death, asserting that the several hours between the former and the latter violated the felony homicide requirement that the death be contemporaneous with the underlying felony act. Finally, Belotti argues that the Commonwealth failed to disprove every reasonable hypothesis of innocence. He attacks Chukuka's testimony as inherently incredible and asserts that, without it, the Commonwealth failed to disprove the possibility that Lueker administered the controlled substances to himself or imbibed other substances after being injected. We disagree.

A. Implied Malice

"Implied malice 'exists where a defendant lacks the deliberate intent to kill, but the circumstances of the defendant's actions are "so harmful that the law punishes the act as though malice did in fact exist."'" *Flanders*, 298 Va. at 358 (quoting *Watson-Scott v. Commonwealth*, 298 Va. 251, 256 (2019)). "In determining whether malice may be implied from conduct, we look for actions reflecting 'a species of reckless behavior so willful and wanton, so heedless of foreseeable consequences, and so indifferent to the value of human life that it supplies the element of malice.'" *Id.* (quoting *Watson-Scott*, 298 Va. at 256).

Settled precedent makes clear that when "death results from ingestion of a controlled substance . . . the homicide constitutes murder of the second degree within the intendment of [Code] § 18.2-33 if that substance had been distributed to the decedent in violation of the felony statutes of this Commonwealth." *Heacock*, 228 Va. at 405; *see also Hylton v. Commonwealth*, 60 Va. App. 50, 57-58 (2012) (methadone); *Hickman*, 11 Va. App. at 371-72 (cocaine). Indeed, our Supreme Court has held that "as a matter of law, . . . the unlawful distribution of [a narcotic] is conduct potentially dangerous to human life." *Heacock*, 228 Va. at 404. Stated differently, unlawfully distributing a Schedule I or II controlled substance is conduct "so willful and wanton, so heedless of

foreseeable consequences, and so indifferent to the value of human life that it supplies the element of malice." *Flanders*, 298 Va. at 358 (quoting *Watson-Scott*, 298 Va. at 256).

In *Heacock*, the Supreme Court of Virginia upheld the distribution and felony homicide convictions of a defendant where he supplied cocaine to fellow partygoers, prepared a mixture of the drug in a spoon, and then watched as it was injected into the arm of a party guest who subsequently overdosed. 228 Va. at 401-02. It was immaterial that the defendant had not administered the narcotics to the victim himself. By supplying the drug and then "jointly prepar[ing] the narcotic mixture in a spoon," Heacock was a principal in the second degree who knew or should have known "that [the] injection of the narcotic . . . was inherently dangerous to human life." *Id.* at 403-04.

Considering this precedent, the evidence before the jury permitted it to conclude that Belotti's actions were "so willful and wanton, so heedless of foreseeable consequences, and so indifferent to the value of" Lueker's life that it supplied the element of malice. *Flanders*, 298 Va. at 358 (quoting *Watson-Scott*, 298 Va. at 256). Not only did Belotti prepare the heroin and fentanyl mixture for Lueker, he also personally injected the drugs into Lueker. And he did so despite the entreaties of an experienced drug user who knew the mixture he had prepared was too strong for the inexperienced Lueker. Undeterred by Harmon's grave warning that he "was going to kill his friend," Belotti persisted in conduct that was "heedless to [the] foreseeable consequences" and evinced indifference "to the value of human life." *Flanders*, 298 Va. at 358 (quoting *Watson-Scott*, 298 Va. at 256).

B. Res Gestae

Belotti next argues that the evidence did not establish Lueker's killing was within the res gestae of the underlying distribution of a controlled substance. He contends that the Commonwealth failed to prove Lueker's death was causally connected or temporally related to the

alleged distribution, first because Dr. Posthumus could not identify heroin or fentanyl as the proximate cause of Lueker's death, and second because several hours must have passed between Lueker's injection and his death. Yet the record contains ample evidence, viewed in the light most favorable to the Commonwealth, establishing both.

In *Heacock*, the Supreme Court held that the res gestae was established when the victim began overdosing shortly after ingesting the distributed narcotic—she was "experiencing periodic convulsions," not breathing well, and not responding to attempts to revive her. 228 Va. at 402. She died three days later from "acute intravenous cocainism." *Id.* at 402, 405. The several-day gap between the ingestion of drugs and the victim's death did not sever the temporal or causal relationship: the "cause and effect were proximately interrelated."[9] *Id.* at 405.

So too here. Chukuka testified that Belotti supplied and prepared the drugs before injecting Lueker with the mixture. Dr. Posthumus testified that her examination of Lueker's body revealed a single needle mark on Lueker's arm, which was consistent with Chukuka's testimony that Belotti tied off Lueker's arm before injecting the drugs. Harmon testified that she knew Belotti's heroin contained fentanyl and that she told him as much *before* he injected Lueker. The heroin was from "the same batch" she had previously purchased from the same supplier. She had once warned Chukuka, who originally bought the drugs, not to use that supplier "because it's fentanyl." Most

[9] Belotti attempts to distinguish *Heacock* on two grounds, arguing that it is inapposite because (1) the decedent immediately died, and (2) the defendant "also took steps to avoid being connected to" the death. These distinctions are wrong on several counts. First, it is simply incorrect that the victim in *Heacock* died immediately; she overdosed at the party but died three days later. 228 Va. at 402. Second, Heacock's efforts to avoid detection—fleeing the scene, collecting the drugs, and burying them in the woods—played no role in the Supreme Court's analysis of his culpability for felony homicide. *See id.* at 402, 405-06. But even if the attempted cover-up had been relevant to the Court's analysis, the record shows that Belotti also took affirmative steps to avoid detection. He stopped Chukuka from calling 911 when Lueker overdosed and did not call them until the next day. When the police arrived, the living room area where Lueker was found looked like it "had been cleaned up or straightened." Belotti also repeatedly denied that he or Lueker had been using drugs.

importantly, while trying to keep Belotti from injecting Lueker, she told him: "clearly you don't [know what you're doing] *because that's fentanyl* and [Lueker] doesn't use so he has no tolerance." (Emphasis added). The jury also learned that 90% of all heroin tested by forensic laboratories in 2018 was mixed with fentanyl. Lueker overdosed within *three seconds* of being injected and did not respond to Belotti's attempts to wake him. Instead, he made sounds consistent with Dr. Posthumus's description of "agonal breathing," an indication that death was "imminent." Lueker died at some point later that day; his body found on the living room floor where he "fell out."

Moreover, Dr. Posthumus testified that the cause of death was acute combined fentanyl, morphine, cocaine, and ethanol (alcohol) poisoning. She opined that the amount of fentanyl alone in Lueker's system was lethal. While the drug screen did not identify heroin, the presence of morphine could reflect heroin use considering the rate at which heroin breaks down into component elements within the body.[10]

Finally, it is immaterial that Lueker did not die immediately from his overdose. Code § 18.2-33 classifies felony homicide as the "killing of one accidentally" during the commission of a felony, and the "killing" of Lueker occurred when Belotti injected him with the fatal heroin and fentanyl mixture, not when he died. *See Woodard v. Commonwealth*, 61 Va. App. 567, 574 n.3 (2013) (noting the "killing" of a decedent occurred when he ingested a drug, not when he died from the overdose two days later). "[I]t is the *infliction* of the fatal wound, not the actual death, which

[10] Belotti argues that the Commonwealth failed to establish causation because Dr. Posthumus identified the cause of death as poisoning from a collection of substances, not just fentanyl. She also testified, however, that the amount of cocaine and morphine in Lueker's system, by themselves, were each "unlikely" to cause Lueker's death. The amount of alcohol definitively could not. Only the amount of fentanyl was sufficient to be lethal. While she acknowledged the possibility that other substances could have killed Lueker, she also explained why that was unlikely. The jury was entitled to rely on Dr. Posthumus's expertise to discount the role of the additional substances in Lueker's death.

must occur in the commission of the felony." *Id.* (emphasis added) (quoting Wayne R. LaFave, *Substantive Criminal Law* 462 n.96 (2d ed. 2003)). That fatal wound occurred as soon as Belotti injected Lueker with the narcotic mixture which he knew or had reason to believe would be fatal. The delay between the overdose and the death did not sever the temporal element necessary to establish the res gestae. *Heacock*, 228 Va. at 405.

The "combined force" of the autopsy results, together with Dr. Posthumus's testimony on the role of fentanyl in Lueker's death and Chukuka's testimony that Lueker "fell out" seconds after Belotti injected him with the narcotic mixture—all viewed in the light most favorable to the Commonwealth—could "lead a reasonable mind irresistibly to [the] conclusion" that the causal and temporal elements of felony homicide had been established. *Moseley*, 293 Va. at 463.

C. The Reasonable Hypothesis of Innocence & Inherent Incredibility

The reasonable hypothesis of innocence principle requires a criminal defendant be acquitted "when the evidence provides no *reasonable* basis for a factfinder choosing between two equally likely options: guilt, on the one hand, and innocence, on the other." *Cuffee v. Commonwealth*, ___ Va. ___, ___ (Apr. 16, 2026) (emphasis added). But "[s]o long as the factfinder's rejection of a proposed hypothesis as unreasonable is not arbitrary, the reasonable hypothesis of innocence principle provides no authority for an appellate court to invade the province of the factfinder." *Id.* (internal citation omitted). Belotti argues that the Commonwealth did not exclude every reasonable hypothesis of innocence because there were multiple plausible interpretations of the evidence in this case, including that Lueker administered the narcotics to himself. Still, the record supports the jury's verdict, so we may not supplant it based on a different view of the evidence.

The primary basis for Belotti's reasonable hypothesis of innocence argument is that the jury should have discounted Chukuka's eyewitness testimony as inherently incredible because his story was self-serving and changed over the course of the investigation into Lueker's death. But to be

"incredible," testimony "must be either so manifestly false that reasonable men ought not to believe it, or it must be shown to be false by objects or things as to the existence and meaning of which reasonable men should not differ." *Juniper v. Commonwealth*, 271 Va. 362, 415 (2006) (quoting *Cardwell v. Commonwealth*, 209 Va. 412, 414 (1968)). "The mere fact that a witness may have . . . given inconsistent statements during the investigation of a crime does not necessarily render the testimony unworthy of belief." *Id.* Rather, it is a "circumstance . . . appropriately weighed as part of the entire issue of witness credibility," which is left to the factfinder to resolve. *Id.*; *Fordham v. Commonwealth*, 13 Va. App. 235, 240 (1991) ("Prior inconsistent testimony is a factor in determining the credibility of a witness, but it does not automatically render the witness' testimony incredible."). The factfinder is also not required to accept or reject a witness's testimony wholesale. "[A] fact finder's evaluations of credibility . . . often include, as in this case, resolving conflicts in a single witness' testimony, accepting that part of the testimony it deems credible and rejecting the portion it deems incredible." *Commonwealth v. McNeal*, 282 Va. 16, 22 (2011).

Here, Belotti fully explored the contradictions in Chukuka's testimony, his potential bias against Belotti, incentives in cooperating with the Commonwealth, and his evolving story as the investigation into Lueker's death progressed. When considering the totality of the evidence, the jury elected to credit Chukuka's version of events. His testimony was "neither incredible nor so contrary to human experience" that this Court will supersede the jury's determination. *Fisher v. Commonwealth*, 228 Va. 296, 300 (1984).

Indeed, Belotti's argument that the jury acted arbitrarily rests entirely on his assertion that the jury *could* have chosen to disregard Chukuka's testimony, it *could* have constructed an alternate story that did not involve Belotti injecting Lueker with drugs, or it *could* have believed that Lueker awoke after being injected and consumed other drugs that ultimately took his life. In short, the jury could have believed Belotti's theory of the case. But "[m]erely because [the] defendant's theory of

the case differs from that taken by the Commonwealth does not mean that every reasonable hypothesis consistent with his innocence has not been excluded." *Miles v. Commonwealth*, 205 Va. 462, 467 (1964). "What weight should be given evidence is a matter for the jury to decide." *Id.* The record contained sufficient evidence allowing the jury to reject Belotti's hypothesis of innocence as unreasonable. Thus, its rejection of Belotti's alternative theory "was not arbitrary." *Cuffee*, ___ Va. at ___.

II. Admissibility of the Text Message

"Generally, the admissibility of evidence is within the discretion of the trial court and we will not reject the decision of the trial court unless we find an abuse of discretion." *Midkiff v. Commonwealth*, 280 Va. 216, 219 (2010). This deferential standard "requires a reviewing court to show enough deference to a primary decisionmaker's judgment that the [reviewing] court does not reverse merely because it would have come to a different result in the first instance." *Commonwealth v. Thomas*, 73 Va. App. 121, 127 (2021) (alteration in original) (quoting *Lawlor v. Commonwealth*, 285 Va. 187, 212 (2013)). "Only when reasonable jurists could not differ can we say an abuse of discretion has occurred." *Bista v. Commonwealth*, 303 Va. 354, 370 (2024) (quoting *Commonwealth v. Swann*, 290 Va. 194, 197 (2015)).

Belotti contends that the circuit court erred in allowing Chukuka to testify about a text message he sent Bennajma when the Commonwealth was unable to produce the original. The best evidence rule provides that "[t]o prove the content of a writing, the original writing is required." Va. R. Evid. 2:1002. An exception exists, however, when "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." Va. R. Evid. 2:1004(a). "The test of unavailability is proof with reasonable certainty." *Bradshaw v. Commonwealth*, 16 Va. App. 374, 380 (1993).

We have held that the unavailability test was met when text messages were "both lost and unattainable" because the sender did "not have that phone any longer" and there was "no evidence" suggesting that the absence of the messages was "the result of bad faith." *Dalton v. Commonwealth*, 64 Va. App. 512, 524-25 (2015); *see also* Va. R. Evid. 2:1004(a). The same is true here. The recipient of Chukuka's text message, Bennajma, had died by the time of trial, and officers were unable to do a forensic extraction of her phone. And, just like the sender in *Dalton*, Chukuka testified that he no longer had the phone he had owned when the relevant message was sent. 64 Va. App. at 516, 524-25. The record contains no evidence that the messages on Chukuka's phone were destroyed in bad faith, nor does Belotti allege bad faith. Indeed, Belotti's trial occurred nearly five years after the text message was sent. Applying *Dalton*, as the trial court did, we find there was no abuse of discretion in allowing Chukuka's testimony about the text message under Virginia Rule of Evidence 2:1004(a).

III. The Sentence was a Reasonable Exercise of the Trial Court's Discretion

When reviewing a circuit court's sentencing decision, an appellate court applies an abuse of discretion standard of review. *Cellucci v. Commonwealth*, 77 Va. App. 36, 45-46 (2023). This deference to the circuit court's judgment "rests on the venerable belief that the judge closest to the contest is the judge best able to discern where the equities lie." *Id.* at 46 (quoting *Minh Duy Du v. Commonwealth*, 292 Va. 555, 564 (2016)). "[W]hen a statute prescribes a maximum imprisonment penalty and the sentence does not exceed that maximum, the sentence will not be overturned as being an abuse of discretion." *Minh Duy Du*, 292 Va. at 564 (quoting *Alston v. Commonwealth*, 274 Va. 759, 771-72 (2007)).

Felony homicide "is punishable by confinement in a state correctional facility for not less than five years nor more than forty years." Code § 18.2-33. The same range applies to a conviction of distributing a Schedule I or II controlled substance. Code § 18.2-248(C). Belotti was convicted

of both, and his sentence for each was below the statutory maximum: 10 years, with 10 years suspended for distribution; and 30 years, with 14 years and 7 months suspended for felony homicide. Belotti's sentence fell well below the statutory maximum sentence, so his claim "necessarily fail[s]." *Minh Duy Du*, 292 Va. at 565.

Moreover, it was within the trial court's purview to weigh the mitigating circumstances of the case. *Khine v. Commonwealth*, 82 Va. App. 530, 558 (2024). Belotti argues that the circuit court did not adequately give him credit for his rehabilitative efforts or commitment to giving back to his local community since Lueker's death. But the trial court is not required to give an appellant's mitigating circumstances controlling effect. *Sheets v. Commonwealth*, 80 Va. App. 706, 718 (2024).

Balanced against Belotti's mitigating evidence was his culpability in the tragic events leading to Lueker's death. Despite repeated and strenuous warnings, Belotti injected Lueker with a lethal mixture of controlled substances. The record reflects that the trial court considered the mitigating testimony and evidence Belotti presented, as well as the victim impact statements from Lueker's family, and then, "in consideration of all the evidence," sentenced Belotti within the applicable statutory range. "Appellant's sentence was within the statutory range, and our task is complete." *Thomason v. Commonwealth*, 69 Va. App. 89, 99 (2018).

IV. Belotti Did Not Preserve His Remaining Challenges

"No ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." Rule 5A:18. The purpose of the rule "is to alert opposing counsel to the issue and to provide the trial court an opportunity to intelligently rule on the issue." *Commonwealth v. Carolino*, 303 Va. 399, 409 (2024). Thus, objections "must be both *specific* and *timely*." *Bethea v. Commonwealth*, 297 Va. 730, 743 (2019). Belotti did not meet

these requirements to preserve his remaining claims concerning the rejected plea and jury instructions.

A. Rejected Plea Agreement

Rule 3A:8(c) expressly vests the trial court with discretion to accept or reject a plea agreement. Here the trial court rejected the plea agreement in the exercise of its discretion and advised Belotti of this fact in open court. Rule 3A:8(c)(4). At a pre-trial hearing on the matter, the circuit court shared that it "d[id] not feel that the outcome proposed fits the crime of distribution," but invited counsel to "question [it] on [it's] reasoning." Neither Belotti nor the Commonwealth did so, nor did Belotti object to the circuit court's refusal to accept his plea agreement. Thus, his argument is waived. Rule 5A:18. Belotti does not invoke any of the exceptions to waiver under Rule 5A:18, "and we do not consider them *sua sponte*." *Spanos v. Taylor*, 76 Va. App. 810, 827-28 (2023).

B. Jury Instructions

Regarding the two jury instruction issues—on malice and accommodation—Belotti neither proffered the instructions he now claims were essential to the proper resolution of his trial, nor did he object to the Commonwealth's proposed instructions on similar grounds. Belotti did not proffer an instruction on any definition of malice, and his proposed instruction on the elements of felony homicide contained no mention of the same. And he did not advance an argument on the defense of accommodation at any point during his trial, much less offer a jury instruction on it. Those arguments were raised for the first time in his motions to set aside the verdict—nearly a year after the jury had rendered its verdict. When a party objects to a jury instruction for the first time on a motion to set aside the verdict, "the [trial] court *may* reconsider the instructions, although not objected to, and if they are found to be incorrect and calculated to mislead the jury, *may* set aside the verdict." *Boyd v. Weisberg*, 75 Va. App. 725, 737 (2022) (alteration in original) (quoting *Smith v.*

Combined Ins. Co. of Am., 202 Va. 758, 762 (1961)). As a result, "[e]ven if a party makes a motion to set aside the verdict, 'this does not save him from his failure to object to the instructions which submitted the issues . . . to the jury.'" *Miles v. Commonwealth*, 78 Va. App. 73, 82 (2023) (second alteration in original) (quoting *Boyd*, 75 Va. App. at 737); *see also Coppola v. Warden of Va. State Penitentiary*, 222 Va. 369, 371-72 (1981) (appellate review is precluded when a defendant fails "to interpose at trial a contemporaneous objection" to a given instruction). Thus, none of Belotti's arguments concerning the omitted instructions are preserved. Rule 5A:18.

Anticipating this outcome, at least concerning the accommodation instruction,[11] Belotti invites this Court to consider his arguments under the ends-of-justice exception, "a narrow exception that should be used sparingly." *Winslow v. Commonwealth*, 62 Va. App. 539, 546 (2013) (quoting *Alford v. Commonwealth*, 56 Va. App. 706, 710 (2010)). For the exception to apply, it is not enough for the appellant to be correct on the merits, "for if that were enough procedural default 'would never apply, except when it does not matter.'" *Alford*, 56 Va. App. at 710 (quoting *Delaney v. Commonwealth*, 55 Va. App. 64, 69 (2009)).

We apply "the ends-of-justice exception when the trial court convicts the defendant 'for conduct that was not a criminal offense'—that is, when the absence of a proper jury instruction *and* proof of an essential element makes it a legal impossibility for defendant to have committed a crime." *Id.* (quoting *Brittle v. Commonwealth*, 54 Va. App. 505, 514 (2009)). Alternatively, the exception can apply where the evidence "affirmatively prove[s] that an element of the offense did not occur." *Id.* (alteration in original) (quoting *Brittle*, 54 Va. App. at 514). As discussed above, neither circumstance exists here.

[11] Belotti does not address the Commonwealth's waiver argument on the malice instruction, and, as noted above, we will not consider exceptions to Rule 5A:18 sua sponte. *Spanos*, 76 Va. App. at 827-28.

"A reviewing court's responsibility in reviewing jury instructions is 'to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises.'" *Fahringer v. Commonwealth*, 70 Va. App. 208, 211 (2019) (quoting *Darnell v. Commonwealth*, 6 Va. App. 485, 488 (1988)). It is settled law in Virginia that the trial court is "not required to give an instruction *sua sponte*." *Mannix v. Commonwealth*, 31 Va. App. 271, 276 (2000) (quoting *Manetta v. Commonwealth*, 231 Va. 123, 127-28 n.2 (1986)). Thus, the ends-of-justice exception does not apply.

CONCLUSION

For the foregoing reasons, the circuit court's judgment is affirmed.

Affirmed.