

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of February, 2016.*

Sheila Juanita Somerville, s/k/a  
Shelia Juanita Somerville, Appellant,

against Record No. 150386  
Court of Appeals No. 0543-14-2

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that the Court of Appeals did not err when it ruled that the evidence before the Circuit Court of the City of Fredericksburg (“trial court”) was sufficient to find Somerville guilty of two counts of malicious use of a noxious gas to cause bodily injury in violation of Code §§ 18.2-29 and 18.2-312. Therefore, we will affirm the judgment.

On August 13, 2013, Michael Houdin (“Houdin”), a loss prevention manager at Rugged Warehouse located within the City of Fredericksburg, observed Sheila Juanita Somerville, s/k/a Shelia Juanita Somerville, (“Somerville”) concealing merchandise from the store under her shirt and in her purse. When Somerville and another woman left the store, without paying for the merchandise, Houdin approached them and attempted to say “security.” Somerville sprayed Houdin with a substance from a handheld canister before he could identify himself. The majority of the spray hit Houdin directly in the right eye, but some of the spray also hit his face and shirt. Houdin testified that he was nearly incapacitated by the burning effects of the spray. Houdin chased Somerville into the parking lot of the store. When Houdin caught Somerville and attempted to restrain her, she again sprayed him in the face with the substance from the canister. She also told her companion to spray Houdin with a substance from another canister that she was holding. Eventually, Houdin and a coworker, Wayne Polk (“Polk”), took the canisters from Somerville and her companion and detained them until police arrived.

Emergency medical technicians flushed Houdin's eyes when they arrived at the scene. Although Polk smelled an odor emitted by the substance that Somerville sprayed on Houdin that caused him to cough "every now and then," he was not directly sprayed with the substance by either Somerville or her companion. He described his coughing as "just a natural reaction to . . . a smell that strong," and did not seek medical attention. Polk was not otherwise injured during the incident.

At trial, Houdin and Polk testified concerning the substance Somerville sprayed on Houdin and its effects. Houdin described the substance discharged by Somerville as a "spray," "mist," and "stream." He also interchangeably referred to the substance as "pepper spray," "OC spray," and "mace." Houdin testified that he previously had been sprayed with pepper spray as a part of the training required by his job. Polk testified that he identified the substance Somerville sprayed on Houdin as pepper spray by its strong smell. Photographs depicting Houdin's physical appearance shortly after Somerville was apprehended were admitted into evidence.

Officer Alexandra Cameron ("Cameron") of the Fredericksburg Police Department testified that she recovered two canisters of "pepper spray" following the incident. Although Cameron destroyed the actual canisters, she took a photograph of them and this photograph was admitted into evidence. One of the canisters contained a substance called "Police OC-17 Magnum." The other canister contained a substance called "Hot Pink" and indicated that it was produced by "Mace Personal Defense, Inc."<sup>1</sup>

Cameron testified that pepper spray burns on contact and causes "a very painful irritation" to the skin and eyes. Cameron also testified that pepper spray was a liquid material rather than a gas. Cameron, however, admitted that she was only familiar with pepper spray and that she did not know the difference between pepper spray and mace.

At the close of the Commonwealth's evidence, Somerville made a motion to strike the charges against her. Somerville argued that the Commonwealth failed to prove that the substance she sprayed on Houdin was a gas or that it created an odor that caused Houdin's injuries. The circuit court denied Somerville's motion. While the circuit court noted that the

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<sup>1</sup> The record does not show whether the substance contained in this canister was actual mace or a pepper spray manufactured by Mace Personal Defense, Inc., and the Commonwealth conceded in its closing argument to the jury that the evidence presented failed to establish the identity of this substance.

substance “was more liquid than gas,” it denied the motion to strike based on the strong odor the substance emitted that caused Polk to cough. Both parties rested without presenting additional evidence, and Somerville renewed her motion to strike on the same grounds. The circuit court again denied her renewed motion to strike. The jury convicted Somerville of the charged offenses, and she appealed her convictions to the Court of Appeals.

The Court of Appeals affirmed Somerville’s convictions finding “we cannot conclude that the substance Somerville sprayed on Houdin was pepper spray rather than mace. Therefore, Cameron’s testimony concerning the physical composition of pepper spray did not establish that the substance Somerville used in this case was a liquid rather than a gas.” Somerville v. Commonwealth, Record No. 0543-14-2 (Feb. 10, 2015) (slip op. at 6). The Court of Appeals found that its previous decisions in Floyd v. Commonwealth, 31 Va. App. 193, 522 S.E.2d 382 (1999) (holding evidence at trial showed pepper spray was a “caustic substance” within the meaning of Code § 18.2-52) and Corado v. Commonwealth, 47 Va. App. 315, 623 S.E.2d 452 (2005) (holding pepper spray was a “caustic substance” within the meaning of Code § 18.2-52 as a matter of law) did not control the outcome of this case because “the substance Somerville sprayed on Houdin could have been mace rather than pepper spray.” Somerville, slip op. at 8. The Court of Appeals concluded that “the classification of a substance as a ‘caustic substance’ under Code § 18.2-52 [did] not preclude a classification of the same substance as a noxious gas under Code § 18.2-312.” Id.

Code § 18.2-312 states:

If any person maliciously release or cause or procure to be released in any private home, place of business or place of public gathering any tear gas, mustard gas, phosgene gas or other noxious or nauseating gases or mixtures of chemicals designed to, and capable of, producing vile or injurious or nauseating odors or gases, and bodily injury results to any person from such gas or odor, the offending person shall be guilty of a Class 3 felony.

If such act be done unlawfully, but not maliciously, the offending person shall be guilty of a Class 6 felony.

Nothing herein contained shall prevent the use of tear gas or other gases by police officers or other peace officers in the proper

performance of their duties, or by any person or persons in the protection of person, life or property.

“When the sufficiency of the evidence is challenged on appeal, we review the evidence in the light most favorable to the prevailing party at trial, in this case the Commonwealth, and accord to it all inferences fairly drawn from the evidence.” Grimes v. Commonwealth, 288 Va. 314, 318, 764 S.E.2d 262, 264 (2014). “We will not set aside a trial court’s judgment unless it is ‘plainly wrong or without evidence to support it.’” Id. (quoting Code § 8.01-680). “To the extent that the issue before us involves statutory interpretation, it is a question of law reviewed de novo on appeal.” Id. “Although penal statutes are to be strictly construed against the Commonwealth, . . . a defendant is not ‘entitled to a favorable result based upon an unreasonably restrictive interpretation of [a] statute.’” Id. (quoting Ansell v. Commonwealth, 219 Va. 759, 761, 250 S.E.2d 760, 761 (1979)).

Mist is defined as “a suspension of a finely divided liquid in a gas” or a “mixture”. Webster’s Third New International Dictionary 1446 (1993). The evidence at trial showed that the jury heard Houdin and Polk’s testimony describing the substance as a mist. Polk also testified that he coughed from the strong odor resulting from the mist even though he was not directly sprayed with the substance. The jury could reasonably infer that the substance used by Somerville was an “other noxious or nauseating gases . . . designed to, and capable of, producing vile or injurious or nauseating odors or gases” and that bodily injury resulted therefrom. Code § 18.2-312. While Somerville could have been charged under the provisions of Code § 18.2-52<sup>2</sup>, we cannot say that the provisions of Code § 18.2-312 do not apply to the specific facts of this case.

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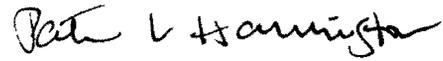
<sup>2</sup> Code § 18.2-52 states:

“If any person maliciously causes any other person bodily injury by means of any acid, lye or other caustic substance or agent or use of any explosive or fire, he shall be guilty of a felony and shall be punished by confinement in a state correctional facility for a period of not less than five years nor more than thirty years. If such act is done unlawfully but not maliciously, the offender shall be guilty of a Class 6 felony.”

This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of the City of Fredericksburg.

A Copy,

Teste:

A handwritten signature in black ink, appearing to read "Peter L. Harrington". The signature is written in a cursive style with a large initial "P".

Clerk