

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 2nd day of November, 2017.

Commonwealth of Virginia, Appellant,

against Record No. 160828
Court of Appeals No. 0632-15-2

Cowarren Wiggins, Appellee.

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

The trial court convicted Cowarren Nathaniel Wiggins of felony child neglect in violation of Code § 18.2-371.1(B), possession with the intent to distribute more than one-half ounce of marijuana in violation of Code § 18.2-248.1, possession of a firearm by a convicted felon in violation of Code § 18.2-308.2, and possession of ammunition for a firearm by a convicted felon in violation of Code § 18.2-308.2. In his appeal of these convictions, the Court of Appeals reversed the conviction for felony child neglect on evidentiary sufficiency grounds. The Commonwealth now appeals that decision to this Court. Concluding there was sufficient evidence to support the felony child neglect conviction, we reverse that portion of the Court of Appeals' decision and reinstate the conviction.¹

I.

At Wiggins' bench trial, the Commonwealth presented the testimony of Investigator James Parker of the Dinwiddie County Sheriff's Department (DCSD). As Parker testified, the Virginia State Police (VSP) and the DCSD executed a search warrant for narcotics at Wiggins' residence, a small house located in Dinwiddie County. The VSP entered the house first and

¹ In the same unpublished three-judge panel opinion in which it reversed Wiggins' felony child neglect conviction, the Court of Appeals affirmed his conviction for possession with the intent to distribute. *Wiggins v. Commonwealth*, Record No. 0632-15-2, 2016 Va. App. LEXIS 139, at *7-16 (April 26, 2016). The Court of Appeals, by a *per curiam* order, denied Wiggins' appeal of his convictions for possession of a firearm by a convicted felon and possession of ammunition for a firearm by a convicted felon.

secured the scene. The VSP found Wiggins and his “four or five” year old son asleep in the house. Shortly thereafter, Parker and other DCSD officers entered the house, finding Wiggins and his son sitting on a couch in the living room, and Parker proceeded to search the premises. The house had two bedrooms, which were connected to the living room, along with the kitchen. The search revealed contraband throughout the house, including the son’s bedroom where his toys were located. In the living room, on the floor under the couch where Wiggins and his son were sitting, Parker discovered a loaded Bushmaster .223 assault rifle “with the serial number obliterated.” In the bedroom where Wiggins slept, Parker discovered a loaded Ruger .40 caliber handgun on the floor beside the bed, a bag containing Smith and Wesson .40 caliber bullets laying on top of the bed, \$1600 in assorted currency, two cell phones, and a .45 caliber bullet in a jewelry box. In the son’s bedroom, Parker discovered two holsters, an extra rifle magazine, gun clips, and other assorted firearms accessories. In the kitchen, Parker discovered “several baggies” containing marijuana located in a larger bag in a potato chip box on the floor.

After qualifying as an expert witness on the use and distribution of illegal narcotics, Parker further testified that the quantity and packaging of the marijuana found in Wiggins’ house were inconsistent with personal use. He also explained that the presence of the marijuana along with the handgun and bag of bullets within easy reach in Wiggins’ bedroom, the cash and cell phones also in Wiggins’ bedroom, and the assault rifle under the couch in the living room positioned for “quick retrieval,” were consistent with drug trafficking.

Investigators Shiflett and Poarch of the DCSD, who accompanied Investigator Parker in executing the search warrant on Wiggins’ house, also testified for the Commonwealth. Shiflett, as the one responsible for photographing and collecting the evidence found in the house, confirmed Parker’s discovery of the items referenced above. He also added the following details. The handgun and assault rifle found in the house were not only loaded but capable of being fired, and the rifle was equipped with a magazine containing 27 rounds of ammunition. A total of 20 bags of marijuana were collected from the potato chip box in the kitchen. A total of 11 .40 caliber bullets were in the bag on the bed in Wiggins’ bedroom. He further identified an additional box of American Eagle 10 millimeter bullets from one of the bedrooms. Investigator Poarch, who also qualified as an expert witness regarding the use and distribution of illegal narcotics, reiterated that the quantity and packaging of the marijuana found in the house were

inconsistent with personal use and consistent with distribution. In addition, it was stipulated that Wiggins was a convicted felon.

Wiggins did not present any evidence in his own defense but moved to strike the Commonwealth's evidence. As to the charge of felony child neglect, defense counsel's argument consisted only of the assertion that "we don't know where the child was and we don't know where the items were." From defense counsel's arguments in support of the motion to strike the evidence on the other three charges for which Wiggins was being tried, it is apparent that the "items" defense counsel was referring to were the items of contraband described above that were discovered during the search of Wiggins' house. (A picture of these items, admitted into evidence as Commonwealth's Exhibit 5, is attached.) It is also apparent that defense counsel's assertion to the effect that the Commonwealth presented no evidence as to the specific location within the house of those items and of Wiggins' son was based on the fact that none of the DCSD investigators that testified at trial were in a position to state from personal knowledge exactly where those items and Wiggins' son were located within the house when the VSP first entered.

The trial court rejected this argument by the defense in challenging the felony child neglect charge both on the motion to strike and again during closing argument. The trial court found Wiggins guilty on this charge after concluding it was "logical to infer" that at the time the VSP entered Wiggins' house the subject items were located where the DCPD investigators found them—that is, the court concluded it was "implausible" to find that the VSP "went in and shuffled everything around before the [DCPD investigators] came and did the investigation."

Wiggins appealed his conviction of felony child neglect to the Court of Appeals on evidentiary sufficiency grounds. A three-judge panel of the Court of Appeals reversed the conviction in an unpublished opinion, stating that "[w]e are unprepared to say that a loaded firearm with a child in the home *standing alone* is enough to establish criminal culpability on the part of appellant." *Wiggins v. Commonwealth*, Record No. 0632-15-2, 2016 Va. App. LEXIS 139, at *15 (April 26, 2016) (emphasis in original).

II.

Under settled principles of appellate review, when considering the sufficiency of the evidence to sustain a conviction, an appellate court's examination "is not limited to the evidence mentioned by a party in trial argument or by the trial court in its ruling." *Du v. Commonwealth*,

292 Va. 555, 566, 790 S.E.2d 493, 500 (2016) (quoting *Perry v. Commonwealth*, 280 Va. 572, 580, 701 S.E.2d 431, 436 (2010)).² Rather, “[a]n appellate court must consider *all* the evidence admitted at trial that is contained in the record.” *White*, 293 Va. at 421, 799 S.E.2d at 499 (quoting *Perry*, 280 Va. at 580, 701 S.E.2d at 436) (emphasis in original); *see also Vasquez*, 291 Va. at 247, 781 S.E.2d at 929. Furthermore, the appellate court must view the evidence “in the light most favorable to the Commonwealth, the prevailing party in the circuit court,” and “accord the Commonwealth the benefit of all reasonable inferences deducible from the evidence.” *Rich v. Commonwealth*, 292 Va. 791, 799, 793 S.E.2d 798, 802 (2016) (quoting *Riley v. Commonwealth*, 277 Va. 467, 482-83, 675 S.E.2d 168, 177 (2009)). In other words, the appellate court has a “duty” to so view all the properly admitted evidence at trial that “tends to support the conviction,” *Carosi v. Commonwealth*, 280 Va. 545, 553, 701 S.E.2d 441, 466 (2010) (quoting *Carter v. Commonwealth*, 280 Va. 100, 104, 694 S.E.2d 590, 593 (2010)),³ and to uphold the circuit court’s judgment unless it is “plainly wrong or without evidence to support it.” *Commonwealth v. Moseley*, 293 Va. 455, 463, 799 S.E.2d 683, 686 (2017) (quoting Code § 8.01-680).

So viewed in its totality, the evidence in this case relevant to Wiggins’ charge of felony child neglect presented more for consideration than merely a child’s proximity to contraband—contrary to Wiggins’ argument to the trial court. For the same reason, the evidence was probative of more than merely a loaded firearm in a house in which a child was present.

Code § 18.2-371.1(B), under which Wiggins was convicted of felony child neglect, provides in relevant part: “Any parent, guardian, or other person responsible for the care of a child under the age of 18 whose willful act or omission in the care of such child was so gross, wanton, and culpable as to show a reckless disregard for human life is guilty of a Class 6 felony.” We have held that such recklessness may be found to exist when the evidence shows that the offender either knew or should have known that his wrongful conduct “subjects a child to a substantial risk of serious injury, as well as to a risk of death, because exposure to either type

² *See also Commonwealth v. White*, 293 Va. 411, 421 n.4, 799 S.E.2d 494, 499 n.4 (2017); *Vasquez v. Commonwealth*, 291 Va. 232, 247, 781 S.E.2d 920, 929 (2016).

³ *See also Hamilton v. Commonwealth*, 279 Va. 94, 103, 688 S.E.2d 168, 173 (2010); *Commonwealth v. Jenkins*, 255 Va. 516, 521, 499 S.E.2d 263, 265 (1998).

of risk can endanger the child's life." *Jones v. Commonwealth*, 272 Va. 692, 698, 636 S.E.2d 403, 406 (2006) (quoting *Commonwealth v. Duncan*, 267 Va. 377, 385, 593 S.E.2d 210, 215 (2004)). In *Morris v. Commonwealth*, 272 Va. 732, 636 S.E.2d 436 (2006), we explained that, under Code § 18.2-371.1(B), "[g]ross negligence' is culpable or criminal when accompanied by acts of commission or omission of a wanton or willful nature, showing a reckless or indifferent disregard of the rights of others, under circumstances reasonably calculated to produce injury, or which make it not improbable that injury will be occasioned, and the offender knows, or is charged with the knowledge of, the probable result of his acts." *Id.* at 739, 636 S.E.2d at 440 (quoting *Barrett v. Commonwealth*, 268 Va. 170, 183, 597 S.E.2d 104, 111 (2004)).

In a sufficiency challenge to a felony child neglect conviction under Code § 18.2-371.1(B), an appellate court is thus required to consider the totality of the evidence in the record probative of the defendant's conduct and the risks of serious injury to the child, and view favorably all of the evidence and all of the reasonable inferences deducible from it that tend to support the conviction.

Here, our review includes consideration of the evidence regarding the location of Wiggins' son and contraband, most significantly the two loaded firearms and 20 bags of marijuana, within Wiggins' house, as defense counsel addressed in argument to the trial court. However, the Commonwealth's evidence was not limited merely to Wiggins' possession of contraband in the house where his child was present and the inferences to be considered from those circumstances. A review of the totality of the evidence also necessarily requires that we consider the significantly probative evidence, and all related inferences, establishing that Wiggins was engaged in illegal drug trafficking, which plainly tends to support his conviction of felony child neglect.

In *Jones*, involving a sufficiency challenge to a felony child neglect conviction, the defendant was also engaged in illegal drug trafficking, albeit with evidence of drug buys in her apartment. In upholding her conviction, we observed that the defendant's child was exposed to "a substantial risk of serious injury" whether from a police raid or from other dangers "inherent in the illicit drug trade." 272 Va. at 700-02, 636 S.E.2d at 407-08. The inherent dangers to which Wiggins exposed his son here were even greater. The police in *Jones* had gathered evidence indicating that weapons were present in the defendant's apartment, but there was no indication in the record that any were found at the time of the police raid. Here, the police found

Wiggins in possession of the two loaded firearms capable of being fired, and extra ammunition, positioned for his quick retrieval. See *Thomas v. Commonwealth*, 44 Va. App. 741, 755, 607 S.E.2d 738, 744 (2005) (acknowledging “the commonsense ‘relationship between the distribution of controlled substances . . . and the possession and use of dangerous weapons.’” (quoting *Logan v. Commonwealth*, 19 Va. App. 437, 445, 452 S.E. 2d 364, 369 (1994) (en banc)); see also *United States v. White*, 875 F.2d 427, 433 (4th Cir. 1989) (recognizing that firearms are “tools of the trade” in drug trafficking).

Based on our review of this record, we conclude that the totality of the evidence was sufficient for a “rational trier of fact [to] have found the essential elements of the crime” of felony child neglect “beyond a reasonable doubt.” *Williams v. Commonwealth*, 278 Va. 190, 193, 677 S.E.2d 280, 282 (2009) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)).

III.

The Court of Appeals erred in reversing Wiggins’ conviction for felony child neglect on evidentiary sufficiency grounds. Thus, we vacate that portion of the Court of Appeals’ decision, and reinstate the circuit court’s order of conviction for felony child neglect. See *Vaughn*, 279 Va. at 20-21, 688 S.E.2d at 283-84.

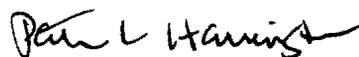
This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of Dinwiddie County.

JUSTICE GOODWYN, dissenting.

I respectfully dissent. I agree with the reasoning expressed by the Court of Appeals in its opinion, *Wiggins v. Commonwealth*, No. 0632-15-2, 2016 Va. App. LEXIS 139 (April 26, 2016), and I would affirm the judgment of the Court of Appeals in its entirety.

A Copy,

Teste:



Clerk



Commonwealth Exhibit No. 5
Dorchester Superior Court CR14-225
PWT
Judge Paul W. Cella
One (1) Photo