VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 27th day of October, 2016.

Robert Justin Baker, Appellant,

against Record No. 151120
Court of Appeals No. 2109-14-1

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, for the reasons set forth below, the Court is of opinion that there is no error in the judgment that is the subject of this appeal.

On the evening of Friday, September 20, 2013, Kristin Jarman (Jarman), who was the girlfriend of Robert Justin Baker (Baker), called People for the Ethical Treatment of Animals (PETA) to report that Baker's dog, Majesty, had been hit by a car.

Jarman told PETA volunteer Kendall Bryant (Bryant) that Majesty could not move her back legs and sent Bryant photographs of the dog, which were introduced at trial. Jarman testified that she knew at the time that "[Majesty's] leg was definitely broken" and "[s]he definitely needed to have her leg looked at."

Upon reviewing the photographs and based on Jarman's description of Majesty's condition, Bryant told Jarman that "this sounded severe" and to take Majesty to a veterinarian the next morning. She directed Jarman to a veterinarian located within a mile of Baker's house. Jarman told Bryant that she and Baker had $150 available for Majesty's treatment, and Bryant told Jarman that PETA would contribute additional funds so that Majesty could be seen by a veterinarian.

The next day, September 21, 2013, PETA employee Jessica Cochran (Cochran) visited Baker's home around 2 p.m. to follow up regarding Majesty's condition. Upon arriving, Cochran met Baker's mother sitting in the front yard with Majesty, who was described as a 50-

pound female pit bull laying on the grass, "unable to get up," and with "several wounds on her, and she had some discharge coming from her rectum."

Cochran advised Baker, his mother, and Jarman that Majesty was "in a very serious situation, and she needed to go the vet immediately," "that they needed to seek emergency veterinary care," and "that it was very urgent for the dog to get care then."

Cochran told Baker he needed to take the dog to the veterinarian or have her euthanized "right away," and offered to have PETA euthanize the dog. Cochran also called Acredale Animal Hospital (Acredale) to arrange for an examination, X-rays and pain medication, and said that PETA would provide $100 toward the veterinary costs. Cochran stated that $100 "would cover the cost of the exam fee and some pain medication [for Majesty]."

Baker and Jarman took Majesty to Acredale on the afternoon of September 21, 2013, but Acredale did not admit or examine Majesty because "it was too late in the day" and Majesty's "injuries were severe enough that they . . . would have to transfer her to the emergency vet."

On November 7, 2013, seven weeks later, two Animal Control officers from the Portsmouth Police Department responded to a call about Majesty. Majesty had not received any veterinary care since she was hit by the car on September 20. Upon seeing that Majesty "was unable to walk at all, and had sores on her legs from dragging herself," the officers seized Majesty and took her to Cove Veterinary Hospital, where she was examined by Dr. Kelly Watham (Dr. Watham).

After taking full body X-rays of Majesty and examining her, as well as reviewing the photographs taken by the Animal Control officers, Dr. Watham determined that Majesty had a broken vertebra and leg, in addition to a substantial urinary tract infection and bloody urine from being unable to fully urinate due to her spinal cord injury. Dr. Watham concluded that the "nature of these injuries is that she would not be able to walk or move and would be in severe pain," and that these injuries were "readily apparent." Dr. Watham euthanized Majesty "due to the severity of her injuries and the degree of suffering."

On February 6, 2014, a grand jury indicted Baker for a felony violation of Code § 3.2-6570 for "maliciously depriv[ing] any companion animal of necessary food, drink, shelter or

emergency veterinary treatment."[1]

On August 11, 2014, the Circuit Court of the City of Portsmouth held a bench trial during which Baker and nine other witnesses testified and six exhibits were placed into evidence. The Commonwealth presented evidence consistent with the facts set forth above.

Baker moved to strike at the conclusion of the Commonwealth's evidence on the ground that the evidence was insufficient to establish that he maliciously deprived Majesty of emergency veterinary care. The court denied this motion.

Baker testified that Majesty was "messed up" and "I know she needed treatment." He also testified that although Majesty had not received any veterinary care, he tried to have Majesty seen by veterinarians before the officers arrived on November 7, 2013, and that he loved his dog and had personally provided her care after her injury. Baker also testified that he was trying to get money to pay for Majesty's treatment when the officers seized her in November. He believed Majesty would not be seen by a veterinarian without "a certain amount of money," which he did not have.

Baker renewed his motion to strike at the conclusion of the trial. The court denied this motion, and convicted Baker of felony cruelty to animals under Code § 3.2-6570. It sentenced him to two years' incarceration and ordered the sentence to run concurrently with his earlier-imposed three-year sentence for a probation violation.

Baker appealed to the Court of Appeals of Virginia (Court of Appeals) on the ground that the evidence failed to prove he maliciously deprived his dog of emergency veterinary treatment. On June 25, 2015, the Court of Appeals denied Baker's petition for appeal by per curiam order, concluding that "[t]he record supports the trial court's conclusion that [Baker] acted maliciously." On March 25, 2016, this Court granted Baker an appeal to determine whether the Court of Appeals erred in affirming the circuit court.

The felony animal cruelty statute under which Baker was convicted states, in relevant part:

> Any person who: . . . (iv) maliciously deprives any companion animal of necessary food, drink, shelter or emergency veterinary treatment . . . and has been

[1] Baker has not challenged his conviction under any of the elements in this offense other than the requirement of malice.

> within five years convicted of a violation of this subsection or subsection A,[2] is guilty of a Class 6 felony if the current violation or any previous violation of this subsection or subsection A resulted in the death of an animal or the euthanasia of an animal based on the recommendation of a licensed veterinarian upon determination that such euthanasia was necessary due to the condition of the animal.

Code § 3.2-6570(B).

On brief and in oral argument, Baker concedes or does not contest that all elements of this offense but one—malice—were established by the evidence. Namely, he agrees that: (1) Majesty was a "companion animal;" (2) Baker had the requisite prior conviction for cruelty to animals; (3) his actions deprived Majesty of the emergency veterinary treatment she needed; and (4) Majesty was euthanized due to her condition in November of 2013 on the recommendation of a licensed veterinarian.

"Emergency veterinary treatment" means "veterinary treatment to stabilize a life-threatening condition, alleviate suffering, prevent further disease transmission, or prevent further disease progression." Code § 3.2-6500. Because Code § 3.2-6570 punishes a deprivation of care, an omission can constitute the criminal act. Because the element of malice distinguishes a misdemeanor deprivation of emergency veterinary treatment (subsection A) from a felony deprivation of such treatment (subsection B), something more than simple deprivation is needed to establish a felony offense. Baker claims that even viewing the evidence in the light most favorable to the Commonwealth, it is insufficient to support the circuit court's finding that he deprived Majesty of emergency veterinary treatment because of malice.

The meaning of malice under Code § 3.2-6570(B)(iv) is a question of statutory interpretation reviewed *de novo*. *See Washington v. Commonwealth*, 272 Va. 449, 455, 634 S.E.2d 310, 313 (2006). However, "whether a defendant acted with malice is generally a question to be decided by the trier of fact." *Pugh v. Commonwealth*, 223 Va. 663, 667, 292 S.E.2d 339, 341 (1982). "If reasonable men might differ as to the factual conclusion to be drawn from the evidence, or if the conclusion is dependent upon the weight to be justly given the testimony, [the court's] finding of fact may not be disturbed by this court." *Crump v. Gilliam*,

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[2] Subsection A of Code § 3.2-6570 concerns misdemeanor animal cruelty offenses.

190 Va. 935, 940-41, 59 S.E.2d 72, 74 (1950) (citations and internal quotation marks omitted). In addition, the circuit court as fact-finder may disbelieve the self-serving testimony of the accused. *Vasquez v. Commonwealth*, 291 Va. 232, 250-51, 781 S.E.2d 920, 931 (2016). In other words,

> [w]hether the evidence adduced is sufficient to prove [the elements of the crime] is a factual finding, which will not be set aside on appeal unless it is plainly wrong. In reviewing that factual finding, we consider the evidence in the light most favorable to the Commonwealth and give it the benefit of all reasonable inferences fairly deducible therefrom.

Lawlor v. Commonwealth, 285 Va. 187, 223-24, 738 S.E.2d 847, 868 (2013) (internal citations omitted).

The statute does not define, and this Court has not addressed, the element of malice in subsection (B)(iv), so we look to its common-law meaning. *See Houston v. Commonwealth*, 87 Va. 257, 262, 12 S.E. 385, 386 (1890) (holding that "if a statute employs a word or phrase which has already been used in the common law or in another statute, and has there acquired by construction an established meaning, it is to be understood in the meaning previously determined").

"Malice inheres in the doing of a wrongful act intentionally, or without just cause or excuse, or as a result of ill will. It may be directly evidenced by words, or inferred from acts and conduct which necessarily result in injury." *Dawkins v. Commonwealth*, 186 Va. 55, 61, 41 S.E.2d 500, 503 (1947). Here, there was no direct evidence of ill will.

"Generally, implied malice is equivalent to constructive malice; that is, malice as such does not exist but the law regards the circumstances of the act as so harmful that the law punishes the act as though malice did in fact exist." *Pugh*, 223 Va. at 668, 292 S.E.2d at 341 (1982) (finding implied malice when mother poured enough black pepper into her three-year-old child's mouth that the child's windpipe became blocked) (internal quotation marks omitted).

When analyzing the "circumstances of the act" here, the evidence weighed in the light most favorable to the Commonwealth is sufficient to sustain the circuit court's finding of malice. Baker knew that Majesty was "messed up" and "needed treatment," and multiple people told him that Majesty's condition was "severe" and "urgent," yet over a seven-week period, Baker failed

to obtain any veterinary care for her. Dr. Watham described Majesty's injuries as "readily apparent," and stated that Majesty suffered severe pain as a result of her injuries. Despite Majesty's apparent and severe injuries, after the telephone call with PETA on the night of September 20, 2013, Baker made no attempt to take Majesty to a veterinarian the next morning. He allegedly took Majesty to Acredale the next day, but only after Cochran came to his house on the afternoon of September 21, 2013 and urged him to get treatment for the dog. At that time, Baker and Jarman had $150 available for Majesty's treatment, PETA had offered an additional $100, and Cochran stated that the initial visit and some pain medication would only cost $100.

Even if Baker was turned away from Acredale because he got there too late on September 21, there is no explanation as to why he did not get veterinary care for Majesty during the subsequent seven-week period. Viewed in the light most favorable to the Commonwealth, there was no financial excuse for Baker depriving Majesty of emergency veterinary treatment that would at least have alleviated her suffering. The circuit court was entitled to disbelieve Baker's self-serving testimony about his attempts to seek veterinary treatment after September 21, 2013. Following the attempt to take Majesty to Acredale on September 21, 2013, the circuit court could reasonably infer, viewing the facts in the light most favorable to the Commonwealth, that Baker would have continued to let Majesty lay at home indefinitely in a painful, paralyzed state, "unable to walk at all, and [with] sores on her legs from dragging herself," because he did not obtain emergency veterinary treatment to alleviate her suffering. It was only the intervention of Animal Control seven weeks later, on November 7, 2013, that resulted in Majesty receiving any veterinary treatment. Evidence of Baker's unexplained seven-week delay in obtaining emergency veterinary treatment for a dog that was obviously severely injured and in pain was sufficient for the circuit court to find malice.

Accordingly, the judgment of the Court of Appeals is affirmed. Appellant shall pay to the Commonwealth of Virginia two hundred and fifty dollars damages.

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

A Copy,

Teste:

Patricia L Harrington

Clerk