VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 16th *day of* December, 2008.

Meloni Thomas, Appellant,

against Record No. 0202-08-2
Circuit Court Nos. CR05000204-00 and CR05000204-03

Commonwealth of Virginia, Appellee.

From the Circuit Court of Brunswick County

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is denied for the following reasons:

I. Appellant was convicted of first-degree murder and use of a firearm during the commission of a felony. She contends the trial court erred by denying her pretrial motions *in limine* and motion *ex parte* pursuant to Code § 19.2-389.

Appellant contends the trial court erred by denying her motions *in limine* made pursuant to Code § 19.2-389, requesting the production of prior criminal records and juvenile court records of the Commonwealth's witnesses and seeking to question witnesses about any juvenile adjudications of delinquency.

Code § 19.2-389 provides, in part:

> Upon an *ex parte* motion of a defendant in a felony case and upon the showing that the records requested may be relevant to such case, the court shall enter an order requiring the Central Criminal Records Exchange to furnish the defendant . . . copies of any records of persons designated in the order on whom a report has been made under the provisions of this chapter.

Appellant's motion *in limine* was based on speculation that any information obtained by the criminal records checks "may" disclose information that may be useful as impeachment evidence.

Appellant offered no specific information leading her to believe that any of the potential witnesses had a criminal record. Accordingly, the trial court did not err by ruling that appellant failed to show that any evidence disclosed by a criminal records check may be relevant to the case. "It is axiomatic that an appellant cannot establish reversible error by the trial court based on nothing more than speculation or conjecture." Reeves v. Commonwealth, 42 Va. App. 650, 663, 593 S.E.2d 827, 833 (2004).

Concerning the request for juvenile records, in general, "juvenile adjudications may not be shown as a general attack on credibility, i.e., as 'prior convictions,' [cf. Kiracofe v. Commonwealth, 198 Va. 833, 845, 97 S.E.2d 14, 22 (1957)] but may be shown to reveal bias [See Brandon v. Commonwealth, 22 Va. App. 82, 87, 467 S.E.2d 859, 861 (1996)]." Charles E. Friend The Law of Evidence in Virginia, § 4-4, at 138 (6th ed. 2003). Based on the record before this Court, appellant made no showing that any juvenile adjudication records of the potential witnesses would contain information concerning the witness' bias. Therefore, the trial court did not err by denying the motions *in limine* and *ex parte* motion. See Scott v. Commonwealth, 7 Va. App. 252, 261-62, 372 S.E.2d 771, 777 (1988) (holding that, in absence of a claim that the witness' prior adjudication involved accused, a showing of bias, prejudice or ulterior motive would not be involved).

II. Appellant argues the evidence is insufficient to support her convictions.

"On appeal, 'we review the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom.'" Archer v. Commonwealth, 26 Va. App. 1, 11, 492 S.E.2d 826, 831 (1997) (quoting Martin v. Commonwealth, 4 Va. App. 438, 443, 358 S.E.2d 415, 418 (1987)).

So viewed, the evidence proved that from February 2005 until May 2005, appellant lived with her father, William David Thomas, at his residence. After the two argued, appellant moved out and began living with her cousin, Freedom Bottoms, and Bottoms' daughter, Page Barham.

Bottoms testified that appellant discussed poisoning Thomas' food, stated she hated him, and discussed unsolved murders in Brunswick County. Barham explained appellant stated she would either

carry out the threats herself, or "could get someone to do it." Appellant also told Barham that she had broken into Thomas' house and shot at him. Appellant left Bottoms' house to move to Georgia on July 22, 2005. As she left, she told Bottoms that the "[n]ext time you hear of David Thomas, you will be reading about him in the paper."

Appellant's friend, Pam Weist, testified appellant told her she wished Thomas was dead. She also discussed an unsolved murder case with Weist.

John Bass, another friend, explained he met appellant in Roanoke Rapids, North Carolina, on or about August 7 or 8, 2005. Appellant told Bass that she had been arguing with her father, that she was on the run, and that she planned to see her father because he had some checks for her. Bass rented a room for appellant, registering it in his name. Bass also saw appellant with Cardell Avent, her co-defendant.

The following day, appellant called Bass and asked if he could cash checks for her. Bass met with appellant, deposited the checks in his account, and gave her cash. Appellant arrived in her car with Avent and her children.

On August 17, Thomas' body was located in a chicken coop behind his house. He had been shot and bludgeoned.

Appellant contacted her friend Tami Rose and explained she was driving to Arizona, where Rose lived. Appellant and Avent traveled to Arizona and resided with Sharon Parish. Rose later relocated to California and when she learned about Thomas' murder, she contacted the police and informed them of appellant's whereabouts.

Following her arrest, appellant made several inconsistent statements to the police. She initially denied any involvement in the crimes and later admitted that she was present when Avent shot and beat Thomas. She also admitted helping Avent destroy evidence. She explained she and Avent broke into Thomas' house and that Avent produced a firearm when Thomas refused to give appellant her checks.

She stated she watched as Avent shot and beat her father. Appellant and Avent left the scene and traveled to North Carolina where she met with Bass to cash her checks. Thereafter, they fled to Arizona.

A defendant is equally liable as a principal in the second degree if he "intended his words, gestures, signals, or actions to in some way encourage, advise, or urge, or in some way help the person committing the crime to commit it." Ramsey v. Commonwealth, 2 Va. App. 265, 269, 343 S.E.2d 465, 468 (1986). "The prosecution must prove that the accused did or said something showing his consent to the felonious purpose and his contribution to its execution. . . . [H]e must share the criminal intent of the actual perpetrator or be guilty of some overt act." Hall v. Commonwealth, 225 Va. 533, 536, 303 S.E.2d 903, 904 (1983) (citation omitted). "'[P]roof that a person is present at the commission of a crime without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto . . . .'" Pugliese v. Commonwealth, 16 Va. App. 82, 93-94, 428 S.E.2d 16, 25 (1993) (quoting Foster v. Commonwealth, 179 Va. 96, 99-100, 18 S.E.2d 314, 316 (1942)).

In this case, the evidence demonstrated appellant arrived at Thomas' house with Avent. She had earlier stated to others her anger with her father and her plan to harm him. When Thomas did not surrender the checks, appellant watched as Avent shot and killed him. She neither attempted to stop Avent nor reported the crime afterwards. Instead, she aided Avent in destroying evidence before fleeing across the country with him. Appellant's actions and statements indicate she actively participated in the crimes and shared Avent's criminal intent.

The Commonwealth's evidence was competent, was not inherently incredible, and was sufficient to prove beyond a reasonable doubt that appellant was guilty of first-degree murder and use of a firearm during the commission of a felony.

III.. Appellant asserts the trial court erred by overruling her motion to allow the case to proceed on an accessory-after-the-fact theory and in refusing to grant a requested instruction on that theory.

The law is well established "that an accused cannot be convicted of a crime that has not been charged, unless the crime is a lesser-included offense of the crime charged." Commonwealth v. Dalton, 259 Va. 249, 253, 524 S.E.2d 860, 862 (2000). The crime of being an accessory after the fact is not a lesser-included offense of the crime of murder. Id. at 252-54, 524 S.E.2d at 862-63. "[B]efore a defendant can be tried and convicted of being an accessory after the fact, he must be charged with that offense. Unless such a charge is specifically made, neither the Commonwealth nor an accused is entitled to an accessory-after-the-fact instruction." Id. at 255, 524 S.E.2d at 863. Appellant was not charged with the crime of being an accessory after the fact to the crime of murder. To the contrary, she was charged with first-degree murder. Consequently, appellant was not entitled to an accessory-after-the-fact instruction, and the trial court did not err in refusing to instruct the jury on that principle or permitting the case to proceed on that theory, as urged by appellant.

IV. Appellant contends the trial court erred by granting jury instructions permitting an inference of malice. She acknowledges that existing Virginia law permits the instructions, but contends the instructions tend "to cause the jury to ignore contrary evidence, unlawfully permits a conviction to be had based upon a presumption rather than proof, and unlawfully shifts the burden of proof to an accused, and are unconstitutional."

It is well established that "[m]alice 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).

Furthermore, "the Due Process Clause does not prohibit the use of a permissive inference as a procedural device that shifts to a defendant the burden of producing some evidence contesting a fact that may otherwise be inferred, provided that the prosecution retains the ultimate burden of proof beyond a reasonable doubt." Dobson v. Commonwealth, 260 Va. 71, 74-5, 531 S.E.2d 569, 571 (2000). Accordingly, we find no merit to appellant's contention.

V. Appellant asserts the trial court erred by refusing his proposed *voir dire* questions 17 and 28.

Appellant sought to ask the jury panel during *voir dire* the following two questions: "Does the existence of that indictment [against appellant] have any effect on anyone's opinion of the guilt or innocence of Meloni Thomas?" and "If any one of you were my client, would there be any reason why you would not want yourself on the jury?"

> The questions propounded by counsel must be relevant . . . and the trial court must, in its discretion, decide the issue of relevancy, subject to review for abuse. The test of relevancy is whether the questions relate to any of the four criteria set forth in [Code § 8.01-358]. If an answer to the question would necessarily disclose, or clearly lead to the disclosure of the statutory factors of relationship, interest, opinion or prejudice, it must be permitted. Questions which go beyond this standard are entirely within the trial court's discretion.
>
> A party has no right, statutory or otherwise, to propound any question he wishes, or to extend *voir dire* questioning *ad infinitum.* The court must offer a party a full and fair opportunity to ascertain whether prospective jurors "stand indifferent in the cause," but the trial judge retains the discretion to determine when the parties have had sufficient opportunity to do so.

LeVasseur v. Commonwealth, 225 Va. 564, 581, 304 S.E.2d 644, 653 (1983), cert. denied, 464 U.S. 1063 (1984) (citations omitted).

We conclude from our review of the record that the trial court did not abuse its discretion because the relevant questions which appellant proposed were either permitted or were adequately covered by other questions to the jurors. Appellant was therefore afforded a full and fair opportunity to ascertain whether the prospective jurors stood indifferent in the cause.

VI. Appellant argues the trial court erred in refusing to strike two prospective jurors for cause.

"On appeal, a trial judge's decision to seat a juror is entitled to great deference, and the decision will not be overturned unless the error is manifest." Griffin v. Commonwealth, 19 Va. App. 619, 622, 454 S.E.2d 363, 365 (1995).

Three prospective jurors answered affirmatively when they were asked during *voir dire* whether they would give greater weight to the testimony of a police officer over another witness because of the officer's official status.

When the court asked if they would arbitrarily believe a police officer who was also a defendant, two of the prospective jurors acknowledged that they could consider all of the circumstances in weighing an officer's credibility. The third still hesitated, and the court struck that prospective juror for cause.

> It is not uncommon to discover during *voir dire* that prospective jurors have preconceived notions, opinions, or misconceptions about the criminal justice system, criminal trials and procedure, or about the particular case. Even though a prospective juror may hold preconceived views, opinions, or misconceptions, the test of impartiality is whether the venireperson can lay aside the preconceived views and render a verdict based solely on the law and evidence presented at trial.

Id. at 622, 454 S.E.2d at 365.

In denying appellant's motion to strike the other two jurors for cause, the trial court noted it "listened carefully to the answers of all three of the witnesses," and noted two of them had demonstrated they could render a verdict fairly and would not give undue weight to an officer's testimony. The record supports the court's conclusion. We find no error with the court's denial of appellant's request to strike the two jurors for cause.

VII. Appellant contends the trial court erred by denying his request to refer to the range of punishment for the charged offense during *voir dire* and in opening and closing arguments.

> [I]n a non-capital case, neither the defendant nor the Commonwealth has a constitutional or statutory right to question a jury panel about the range of punishment that may be imposed upon the defendant. Questions about the range of punishment are not relevant to any of the factors prescribed in Code § 8.01-358, those factors being relationship to the parties, interest in the cause, the formation of any opinions about the cause or bias, or prejudice therein. [Such] questions . . . will only result in speculation by jury panel members.

Hill v. Commonwealth, 264 Va. 315, 319, 568 S.E.2d 673, 676 (2002). Accordingly, the trial court did not err in prohibiting questions relating to punishment.

VIII. Appellant argues the trial court erred in granting the Commonwealth's proffered instruction regarding the natural and probable consequences of one's acts.

The court instructed the jury as follows: "You may infer that every person intends the natural and probable consequences of his acts."

As noted above, "the Due Process Clause does not prohibit the use of a permissive inference as a procedural device that shifts to a defendant the burden of producing some evidence contesting a fact that may otherwise be inferred, provided that the prosecution retains the ultimate burden of proof beyond a reasonable doubt." Dobson, 260 Va. at 74-75, 531 S.E.2d at 571. Thus, we find no error with the court's instruction.

IX. Appellant contends the trial court erred by granting the Commonwealth's flight instruction and rejecting her own.

"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.'" Darnell v. Commonwealth, 6 Va. App. 485, 488, 370 S.E.2d 717, 719 (1988) (quoting Swisher v. Swisher, 223 Va. 499, 503, 290 S.E.2d 856, 858 (1982)). "When granted instructions fully and fairly cover a principle of law, a trial court does not abuse its discretion in refusing another instruction relating to the same legal principle." Stockton v. Commonwealth, 227 Va. 124, 145, 314 S.E.2d 371, 384 (1984).

Appellant proffered the following instruction:

> If a person leaves a place where a crime was committed, this creates no presumption that the person is guilty of having committed the crime. However, it is a circumstance which you may consider along with the other evidence.
>
> In your consideration of the evidence of flight, you should consider that there may be reasons for that which are fully consistent with innocence. Those may include fear of being apprehended, unwillingness to confront the police, reluctance to appear as a witness, or being under duress or threat.

Instead, the court granted the following:

> If a person leaves a place where a crime was committed, or flees to avoid detection, apprehension or arrest; this creates no presumption that

> the person is guilty of having committed the crime. However, it is a circumstance which you may consider along with the other evidence.

The granted instruction fully and accurately covered the principle of law. Accordingly, we find no error with the court's decision.

X. Appellant contends the trial court erred by allowing Officer Brian Roberts to testify about appellant's unrecorded statements.

Following her arrest, appellant made a series of statements to the police. Some of the interviews were recorded, and she provided several written statements. Roberts testified regarding statements appellant made to him that were neither recorded nor included in appellant's written statements to the police. Appellant was provided Roberts' notes prior to trial which included the statements about which he testified at trial.

"A statement made by a defendant constitutes a party admission, admissible not only for impeachment, but also as substantive evidence." Bynum v. Commonwealth, 28 Va. App. 451, 459, 506 S.E.2d 30, 34 (1998).

The fact that the statements were not recorded or included in appellant's written statements is simply irrelevant to the issue of their admissibility. Roberts testified appellant made the statements, and defense counsel was provided with Roberts' notes prior to trial. Accordingly, we find no error with the court's admission of the statements.

XI. Appellant argues the trial court erred by denying her request for the appointment of a private investigator.

Upon request, the Commonwealth is required to "provide indigent defendants with the 'basic tools of an adequate defense,' and . . . in certain circumstances, these basic tools may include the appointment of non-psychiatric experts." Husske v. Commonwealth, 252 Va. 203, 211, 476 S.E.2d 920, 925 (1996) (quoting Ake v. Oklahoma, 470 U.S. 68, 77 (1985)). "[A]n indigent defendant seeking the appointment of an expert has the burden of showing a particularized need therefor." Barnabei v. Commonwealth, 252 Va. 161, 171, 477 S.E.2d 270, 276 (1996).

In Commonwealth v. Sanchez, 268 Va. 161, 597 S.E.2d 197 (2004), the Supreme Court set forth the "particularized need" test as follows:

> It is the defendant's burden to demonstrate this "particularized need" by establishing that an expert's services would materially assist him in preparing his defense and that the lack of such assistance would result in a fundamentally unfair trial. We made clear in Husske and subsequent cases that "mere hope or suspicion that favorable evidence is available is not enough to require that such help be provided." Whether a defendant has made the required showing of particularized need is a determination that lies within the sound discretion of the trial court.

Id. at 165, 597 S.E.2d at 199 (citations omitted). In this context, "[t]herefore, we will not disturb the decision of the trial court unless it is plainly wrong or without evidence to support it." Downing v. Commonwealth, 26 Va. App. 717, 723, 496 S.E.2d 164, 167 (1998).

In this case, appellant sought to be provided with the services of a private investigator in order to locate certain possible witnesses, the names of whom the Commonwealth had provided to appellant's counsel. "[T]he Commonwealth is under no duty to disclose the names of potential witnesses, except where the potential witness has exculpatory evidence." Moreno v. Commonwealth, 10 Va. App. 408, 415, 392 S.E.2d 836, 841 (1990) (citations omitted). As the Commonwealth was not required to disclose even the names of the witnesses, appellant failed to demonstrate a particularized need for a private investigator. Accordingly, we find no abuse of discretion with the court's denial of appellant's request.

XII. Appellant asserts "the use of the word 'murder' by a Commonwealth witness resulted in fundamental unfairness and a denial of due process."

Appellant contends the word "murder" is "conclusive, argumentative, and should be properly restricted to only opening and closing arguments." On appeal, he complains of only a single use of the word "murder" during trial. Trooper Steven Klein testified he spoke with another officer who stated "that they were currently investigating a murder[.]" Appellant reasons that "[w]hether or not a murder had occurred was the ultimate issue and this testimony invaded the province of the jury." Appellant provides no support for his argument, and we know of none.

Appellant was charged with murder, and Klein's use of the word during his testimony merely stated the fact that Thomas' death was being investigated as a murder. We find no error with the court's denial of appellant's motion to restrict the use of the word to opening and closing statements.

XIII. Appellant contends the trial court erred in admitting autopsy photographs and photographs portraying the condition of Thomas' body.

"Admission of graphic photographs rests within the discretion of the trial court so long as they are relevant and accurately portray the scene of the crime or the condition of the victim." Bailey v. Commonwealth, 259 Va. 723, 739, 529 S.E.2d 570, 579 (2000). The autopsy photographs were relevant to explain the clinical illustrations of the victim's wounds in the autopsy report. Moreover, it is self-evident that all these photographs tended to establish the method, maliciousness, and degree of atrociousness of the crime. Walton v. Commonwealth, 256 Va. 85, 91-92, 501 S.E.2d 134, 138, cert. denied, 525 U.S. 1046 (1998). Accordingly, we find no abuse of the trial court's discretion in the admission of any of these photographs.

XIV. Appellant argues "due process was violated by the introduction into evidence in the Commonwealth's case-in-chief of statements attributed to co-defendant Cardell Avent."

Prior to trial, appellant sought to prevent the Commonwealth from introducing any statements made by Avent. The Commonwealth agreed not to introduce such statements. During trial, Roberts testified that Avent's comments were inconsistent with appellant's account of the events. He also testified that in her statement to the police, appellant reported that she spoke with Avent after learning of her father's death and that Avent said to her: "We didn't do it, [Thomas] was a piece of shit, that he took care of it, but he never said, yes, he did it."

Roberts' testimony that appellant's statement was inconsistent with Avent's account of the events did not include any remarks actually made by Avent. Regarding the other reference to Avent's statements, the statements were not introduced for the truth of the matters asserted. Instead, Roberts merely testified about appellant's own statement to the police. Hearsay involves out-of-court statements

offered for the truth of the matter asserted. The hearsay rule does not apply to statements offered into evidence for reasons other than to prove the truth of the matter asserted. We find no error with the court's admission of the testimony.

XV. Appellant argues the trial court erred in permitting the Commonwealth to introduce evidence regarding a previous assault by appellant against Thomas.

During trial, several witnesses referenced statements made by appellant in which she stated her father had "took a warrant out for her arrest." Although appellant made a motion *in limine* seeking to prevent the introduction of any mention of such a warrant, the trial court did not rule on the motion. Furthermore, appellant made no contemporaneous objections to the testimony during trial.

"The Court of Appeals will not consider an argument on appeal which was not presented to the trial court." Ohree v. Commonwealth, 26 Va. App. 299, 308, 494 S.E.2d 484, 488 (1998). See Rule 5A:18. When a defendant raises an objection, it is his responsibility to obtain a ruling from the trial court. If the defendant fails to do this, then "there is no ruling for us to review on appeal." Id. at 308, 494 S.E.2d at 489. Accordingly, Rule 5A:18 bars our consideration of this question on appeal.

> Although Rule 5A:18 allows exceptions for good cause or to meet the ends of justice, appellant does not argue that we should invoke these exceptions. See e.g., Redman v. Commonwealth, 25 Va. App. 215, 221, 487 S.E.2d 269, 272 (1997) ("In order to avail oneself of the exception, a *defendant must affirmatively show* that a miscarriage of justice has occurred, not that a miscarriage might have occurred." (emphasis added)). We will not consider, *sua sponte*, a "miscarriage of justice" argument under Rule 5A:18.

Edwards v. Commonwealth, 41 Va. App. 752, 761, 589 S.E.2d 444, 448 (2003) (*en banc*).

XVI. Throughout his petition, appellant states the court's rulings prevented him from receiving effective assistance of counsel. We note that claims of ineffective assistance of counsel may not be raised on direct appeal. Code § 19.2-317.1, which allowed direct appeal of such claims under certain circumstances, was repealed in 1990. See 1990 Va. Acts, c. 74; Walker v. Mitchell, 224 Va. 568, 299 S.E.2d 698 (1983).

XVII. To the extent appellant "incorporates . . . its argument presented at the trial of this matter," at various places throughout her petition, we note we will not consider these arguments since they must be made in the appellate briefs. See Mickens v. Commonwealth, 247 Va. 395, 401 n.4, 442 S.E.2d 678, 683 n.4 (1994), and Jenkins v. Commonwealth, 244 Va. 445, 460-61, 423 S.E.2d 360, 370 (1992), cert. denied, 507 U.S. 1036, 113 S.Ct. 1862 (1993) (arguments made in trial court cannot be considered on appeal merely by reference thereto in appellate brief). Williams v. Commonwealth, 248 Va. 528, 537, 450 S.E.2d 365, 372 (1994) (refusing to address on appeal arguments that appellant attempted to "incorporate[] by reference" from trial transcripts).

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

The trial court shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. The Commonwealth shall recover of the appellant the costs in this Court and in the trial court.

This Court's records reflect that Jerry E. Waldrop, Esquire, is counsel of record for appellant in this matter.

Costs due the Commonwealth
by appellant in Court of
Appeals of Virginia:

Attorney's fee $600.00 plus costs and expenses

A Copy,

Teste: Cynthia L. McCoy
Clerk

VIRGINIA:

In the Court of Appeals of Virginia on **Tuesday** *the* **17th** *day of* **February, 2009.**

Meloni Thomas, Appellant,

against Record No. 0202-08-2
Circuit Court Nos. CR05000204-00 and CR05000204-03

Commonwealth of Virginia, Appellee.

From the Circuit Court of Brunswick County

Before Judges Kelsey, Petty and Senior Judge Bumgardner

For the reasons previously stated in the order entered by this Court on December 16, 2008, the petition for appeal in this case hereby is denied.

This order shall be certified to the trial court.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: Mary E. Rowe
Deputy Clerk