IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 090518

MELONI THOMAS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

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MELONI THOMAS,

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BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

On September 20, 2007, a jury sitting in the Circuit Court of Brunswick County convicted Meloni Thomas of first degree murder as a principal in the second degree and use of a firearm. The judge sentenced the defendant on December 20, 2007 to prison terms of 35 years for the murder and three years for the firearms conviction. (App. 61-62).

On December 16, 2008, the Court of Appeals denied a petition for appeal. (App. 63-65). On February 17, 2009, a three-judge panel of that same court again denied the appeal. (App. 76). This Court granted a petition for appeal on July 22, 2009.

ASSIGNMENTS OF ERROR

1. **The Court of Appeals and the Trial Court erred in ruling that Defense Motions in Limine numbered nine and ten, and the Defense Ex Parte Motion pursuant to §19.2-389, Code of Va., regarding criminal record checks, including juvenile criminal records, of prospective Commonwealth witnesses were not required to be furnished to the Defense by the Commonwealth and also in denying the Defense the ability to question such witnesses as to juvenile convictions of felonies or moral turpitude misdemeanors for general impeachment purposes because the 5th Amendment due process guarantee, 6th Amendment right of confrontation and effective assistance of counsel guarantees, and 14th Amendment, as well as similar provisions of the Virginia Constitution, trump any preference for confidentiality of juvenile records.**

2. **The Court of Appeals and the Trial Court erred in overruling the Defense Motion to Strike at the conclusion of the Commonwealth's Case-in-Chief, the Defense Motion to Strike at the conclusion of all the evidence, the Defense Motion to Set Aside the Verdict, and in granting principal in the second degree and concert of action jury instructions over Defense objection, because the evidence was insufficient to convict Defendant of first degree murder under §18.2-32, and of use of firearm/murder under §18.2-53.1, Code of Va.**

3. **The Court of Appeals and the Trial Court erred in overruling the Defense Motion at the conclusion of the Commonwealth's Case-in-Chief to allow the case to proceed on an accessory after the fact murder theory and in refusing to grant a requested Defense instruction on that theory because the plain language of Va. Code §19.2-286 and Supreme Court of Virginia Rule 3A:17(c), as well as the legislative history behind Code §19.2-286, would plainly require a submission in the instant case to the jury on an accessory after the fact theory of liability and because the end result was inconsistent with Appellant's right to a fair trial.**

4. **The Court of Appeals and the Trial Court erred in denying the Defense Motion to Quash or Dismiss Indictment and in granting, over Defense objection, jury instructions permitting an inference of malice because the law as stated in these jury instructions 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 is unconstitutional.**

5. **The Court of Appeals and the Trial Court erred in disallowing Defense proposed *voir dire* questions numbered 17 and 28 because the same were within Code of Va. §8.01-358, Virginia Supreme Court Rule 3A:14, and resulted in a denial of due process, equal protection, effective assistance of counsel, and trial by impartial jury in violation of the 5th, 6th, and 14th Amendments of the U. S. Constitution and the equivalent guarantees of the Virginia Constitution.**

6. **The Court of Appeals and the Trial Court erred in overruling the Defense Motions to Strike for Cause prospective jurors David Heizer and Lois Finch because bias in favor of a government witness is grounds for a challenge for cause; and juror bias, whether presumed or proven, requires automatic**

reversal; and for the same grounds as set forth in number 5, *supra.*

7. **The Court of Appeals and the Trial Court erred in denying the Defense to refer to punishment ranges as to offenses in *voir dire* questioning of prospective jurors or in opening or closing argument because neither the Defense nor Prosecution could effectively screen prospective jurors for peremptory or for cause challenges and for the same constitutional grounds as set forth in numbers 5 and 6, *supra.***

8. **The Court of Appeals and the Trial Court erred in overruling the Defense objection to the jury instruction regarding natural and probable consequences of one's acts. The inference in such jury instruction eliminates the burden of proof on the Commonwealth to prove every element of an offense beyond a reasonable doubt, and unconstitutionally shifts the burden of proof regarding a defendant's criminal intent.**

9. **The Court of Appeals and the Trial Court erred in overruling the Defense objection to the flight instruction and, after deciding to give that instruction, in denying the proffered flight instruction from the Defense because the granting of the proposed Commonwealth flight jury instruction was an improper comment on the evidence, drew specific attention to something in evidence, amounted to the functional equivalent of a directed verdict, and unconstitutionally shifted the burden of proof regarding a defendant's criminal intent.**

10. **The Court of Appeals and the Trial Court erred in overruling the Defense objection to the testimony of Officer Brian Roberts as to incriminating statements allegedly made by defendant not within the three written statements or two audio recorded statements furnished by defendant to the police authorities**

because mitigating or exculpatory portions of statements made by defendant outside the three written statements and two recorded statements did not come into evidence along with the selected portions of such statements being testified to by Officer Roberts, the end result being a fundamental unfairness in the trial.

11. The Court of Appeals and the Trial Court erred in denying the Defense request for the assistance of a private investigator because the same resulted in a denial of the 5th, 6th, and 14th Amendments guarantees of the U. S. Constitution and equivalent guarantees of the Virginia Constitution and Va. Code §19.2-163.

12. The Court of Appeals and the Trial Court erred in not sustaining the Defense request for a pre-trial ruling prohibiting the Commonwealth from using in the jury's presence the word "murder" other than in argument, as the same is conclusive, argumentative, should be properly restricted to only opening or closing arguments, was the ultimate issue with such testimony invading the province of the jury, resulting in fundamental unfairness of the trial.

13. The Court of Appeals and the Trial Court erred in allowing the Commonwealth to display to the jury and introduce into evidence autopsy photographs of the deceased and photographs portraying the condition of the body of the deceased because the prejudicial effect of displaying such photographs outweighed the probative value.

14. The Court of Appeals and the Trial Court erred by allowing statements attributed to the co-defendant, Cardell Avent, into evidence over Defense objection which tended to incriminate or inculpate defendant because the same violated the pre-trial ruling regarding same and resulted in a violation of 5th

Amendment due process, 6th Amendment right of confrontation, 14th Amendment, and the equivalent guarantees of the Virginia Constitution.

15. The Court of Appeals and the Trial Court erred in allowing the introduction into evidence by the Commonwealth in its Case-in-Chief and in its first closing argument of an alleged previous assault or assault and battery by appellant against the deceased because the prejudicial effect of this testimony and this argument outweighed its probative value and the same resulted in a violation of 5th Amendment due process, 6th Amendment right of confrontation and effective assistance of counsel, 14th Amendment, and the equivalent guarantees of the Virginia Constitution.

QUESTIONS PRESENTED

1. Whether the trial court erred in denying defense motions in limine numbered nine and ten, and the defense ex parte motion pursuant to §19.2-389, Code of Va., regarding criminal record checks, including juvenile criminal records, of prospective Commonwealth witnesses being furnished to the defense.

2. Whether the trial court erred in overruling the defense motion to strike at the conclusion of the Commonwealth's case-In-chief, the defense motion to strike at the conclusion of all the evidence, and the defense motion to set aside the verdict, and whether the evidence was sufficient to convict defendant of first degree murder under §18.2-32 and of use of firearm/murder under §18.2-53.1, Code of Va., and in granting principal in the second degree and concert of action jury instructions over defense objection.

3. Whether the trial court erred in overruling the defense motion at the conclusion of the Commonwealth's

case-in-chief to allow the case to proceed on an accessory after the fact to murder theory and in refusing to grant a requested defense instruction on that theory.

4. **Whether the trial court erred in denying the defense motion to quash or dismiss indictment and in granting, over defense objection, jury instructions permitting an inference of malice.**

5. **Whether the trial court erred in disallowing defense proposed *voir dire* questions numbered 17 and 28.**

6. **Whether the trial court erred in overruling the defense motions to strike for cause prospective jurors David Heizer and Lois Finch.**

7. **Whether the trial court erred in denying the defense to refer to punishment ranges as to offenses in *voir dire* questioning of prospective jurors or in opening or closing argument.**

8. **Whether the trial court erred in overruling the defense objection to the jury instruction regarding natural and probable consequences of one's acts.**

9. **Whether the trial court erred in overruling the defense objection to the flight instruction and, after deciding to give that instruction, in denying the proffered flight instruction from the defense.**

10. **Whether the trial court erred in overruling the defense objection to the testimony of Officer Brian Roberts as to incriminating statements allegedly made by defendant not within the three written statements or two audio recorded statements furnished by defendant to the police authorities.**

11. **Whether the trial court erred in denying the defense request for the assistance of a private investigator.**

12. **Whether the use of the word "murder" by a Commonwealth witness resulted in fundamental unfairness and a denial of due process.**

13. **Whether the trial court erred in allowing the Commonwealth to display to the jury and introduce into evidence autopsy photographs of the deceased and photographs portraying the condition of the body of the deceased.**

14. **Whether due process was violated by the introduction into evidence in the Commonwealth's case-in-chief of statements attributed to co-defendant Cardell Avent.**

15. **Whether due process of law was violated by the introduction into evidence by the Commonwealth in its case-in-chief and in its first closing argument of an alleged previous assault or assault and battery by defendant against the deceased.**

STATEMENT OF FACTS

Defendant's Feelings About Her Father

In May of 2005, the defendant, Meloni Thomas, and her three young children came to live with Freedom Bottoms, who resided in North Carolina not far from the Virginia border and Brunswick County. (App. 481). The defendant and her father, William David Thomas, the homicide victim, "had had an argument for something and she was kicked out." (App. 481). Thomas told Bottoms she hated her father and talked about putting rat poison in his food. (App. 482). The defendant also told her that "[s]he

couldn't go back to Brunswick County because her dad had took [sic] a warrant out for her arrest or something." (App. 482). Thomas "made a statement that there had been four murders in Brunswick that had not been solved yet" and Bottoms replied, "[T]hat didn't mean that hers wouldn't be solved." (App. 482-83).

The defendant said that she had gone to her father's house twice in an effort to obtain child support checks.[1] (App. 483). Because her father was not there, she broke in but could not find the checks. (App. 483). She said her father had had the locks on the doors changed. (App. 483).

In July, when the defendant was leaving to travel to Georgia, Bottoms suggested that she contact her father to let him know where she was going. (App. 483). Thomas replied, "[N]ext time you hear of David Thomas, you will be reading about him in the paper." (App. 484).

Page Barham, Ms. Bottom's daughter, also heard the defendant say that she hated her father and wished him dead, that she was going to shoot him and was going to put rat poison in his food. (App. 488). The defendant told her that she had once broken into her father's house and had shot at him but had hit the pillow. (App. 489). The defendant told her that she

[1] In other places in record referred to as "welfare" checks.

would follow through on her threats or would get somebody else to do it. (App. 490).

Thomas also told Pamela Weist that her father was keeping her checks from her and that he had claimed that she had stolen his car. (App. 494-95). She said to Weist she wished her father dead and talked to her about a man in Brunswick with whom she had gone to school who had committed murders which had never been solved. (App. 495).

Thomas told Tara Jackson that her father had put a warrant out on her involving her grandmother's car and that he had stolen her welfare checks. (App. 499).

John Bass met with the defendant the day before the killing when she told him that she was going to obtain her checks. (App. 557-58). She said she and her father had been in a scuffle and that she was "running with a warrant on her." (App. 558).

The Crime

On August 9, 2005, the defendant, together with Cardell Lamont Avent, her boyfriend, and her three children traveled to her father's home. She and Avent left the children in the car and entered the victim's house without his permission through the back door. (App. 462). Avent was carrying his shotgun. (App. 462). They confronted the victim and asked for

the checks. (App. 462). When he replied that he would not give them the checks, Avent displayed the gun and told him to get the checks. (App. 462). The defendant and Avent then followed her father up the stairs to his bedroom where he got the checks from a "desk dresser." (App. 462). He handed the checks to Avent who gave them to the defendant. (App. 463). Avent then shot the victim with the gun and struck him in the head and face numerous times with the gun and his fists. (App. 463).

The two cleaned up the blood, threw the bloody sheets and other evidence down a well and Avent placed the victim's body in a shed behind the house. (App. 463-64).

Avent returned to the car where the defendant drove the car away. (App. 465).

The Flight

On the day of the killing Thomas met with John Bass in North Carolina and asked him to cash her checks. (App. 560). When they went to a bank together to cash the checks, she never asked for any help or claimed that she was being threatened. (App. 562). Because she appeared to be bothered by something, he asked her what it was, but she would not talk about it. (App. 562-63). Two weeks later she called him and

asked whether he had heard any news. When he said he had not, she replied "[N]o news, good news." (App. 565-66).

The defendant, Avent, and the children then fled to Arizona where they stayed with Tami Rose and Sharon Parrish. (App. 507-08). The defendant had spoken with Rose on the telephone and had "very adamantly wanted to leave Virginia, be gone, be away." (App. 511). After she arrived, she told Rose something bad had happened in Virginia, mentioned her father, shook her head and cried. (App. 511). Other than that one incident, Rose saw her express no other emotion or any sadness. (App. 512-13). Thomas said she wanted to "ditch" her car (App. 517), although it was a "really nice car." (App. 511). Rose observed that the defendant was the dominant party in the relationship with her boyfriend and that Thomas did not appear to be under any stress or duress. (App. 513).

Sharon Parrish thought the defendant's relationship with Avent to be normal and did not believe Thomas was in distress, under duress, or being intimidated by Avent. (App. 520). There were at least two days when the defendant was alone with the children because Avent had gone to work. (App. 521). Parrish's house was only a quarter of a mile from the police station. (App. 522). When they were alone together, the defendant said nothing to Parrish about her boyfriend and did not appear to be afraid or

intimidated. (App. 522-23). To her also the defendant appeared to be the dominant personality in the relationship. (App. 523).

Parrish and Thomas took two long shopping trips of about an hour and a half without Avent, on one occasion taking all the children with them. (App. 523-24). When on one of the two trips, taken in Thomas' car, they were pulled over by a police officer, Thomas became quite scared. (App. 525). After the stop they ran out of gas and had to abandon the vehicle. (App. 527). Afterwards the defendant had no interest in regaining possession of the car. (App. 527).

The Arrest And Statements

On September 1, 2005, the defendant and Avent were arrested in Arizona. (App. 544). The defendant said nothing to the officers who arrested her or at the police station about any threats from Avent. (App. 546).

Three days later Major Brian Roberts and Captain Kent Washburn of the Brunswick County Sherriff's Department spoke with Thomas in Arizona. (App. 372). She first told them that she had not learned of her father's death until her arrest, saying she had not seen him since May. (App. 377-78). She claimed that she had gone from Atlanta to North Carolina to Arizona without entering Virginia. (App. 377-79).

When confronted with statements made by one of her children, Thomas admitted that she had lied and had, in fact, gone to her father's house on August 7. (App. 381-82). She said that he was home, gave her the checks, and they left. (App. 382).

After further questioning, she said that after having given her the checks, the victim had ordered her out of the house and used racial epitaphs towards Avent and her. (App. 382). Avent had then told her to go to the car and she had done so. (App. 382). She waited there for 20 minutes until Avent came out and, when he told her to drive away, she slid over and Avent drove away. (App. 383). Her first written statement contained that last version of events. (App. 395-98).

The defendant then gave her first recorded statement in which she said that her father had not allowed Avent onto the property, had told her to leave, and pushed her out the door and onto the ground. (Commonwealth's Exhibit 6). She said that Avent then told her to get into the car and that he was going to get the checks. After an hour she went into the house and discovered blood on the back porch and other places in the house. Avent then told her to put the blankets into the well. She had not seen the gun and did not ask where her father was. (Commonwealth's Exhibit 6).

When the police returned to speak with her on the next day, she acknowledged additional lies. (App. 400-01). At that time a second audio tape was recorded. She said that they had entered the back door and called for the victim who then insulted them. Avent pulled the gun, telling the victim to get the checks. They went upstairs were an argument occurred and the victim gave her the checks upstairs. The defendant said that she was going down the stairs when she heard the shot and saw her father on the ground beside the bed. She observed Avent hitting the victim with the gun in the head to the point that the gun broke. Avent said that he would kill her if she didn't help get the victim out of the house. She couldn't do it, so he dragged the victim out by himself. She then checked on her children, helped clean up the blood, threw the blanket down the well and drove away. (Commonwealth's Exhibit 7).

On September 6 the defendant gave another statement to Captain Washburn. At that time she signed a written statement consistent with her previous audio taped statement. (App. 441-43). She also gave an additional question and answer statement setting forth essentially the same facts, but adding that she was present and observed the shooting and beating. (App. 463). She also said that the beating had lasted a couple of minutes. (App. 463).

Defendant's Testimony

The defendant testified at trial and first denied the various statements about her hatred for her father and her ideas about killing him. (App. 742, 743, 745). She said Freedom Bottoms was wrong when she said Thomas had spoken about four unsolved murders, claiming she had been speaking about just one. (App. 744). She admitted that she said that she hated her father and wished him dead. (App. 744).

She testified she had gone to her father's house with Avent and had entered through the back door. (App. 750). Avent was wearing a hooded sweatshirt, although it was August. (App. 781). She testified to the encounter, to Avent's pulling the gun and demanding the checks. (App. 763). She added that this time Avent had told her to follow them upstairs. (App. 754). She said that she had turned around and was starting down the stairs when she heard the shot go off. (App. 755). She heard them arguing, saying that her father had called Avent "a stupid 'N.'" (App. 756). She said, however, at that point the father was very scared. (App. 756). She went upstairs, saw her father fall, and saw Avent beating him. (App. 756). She claimed she asked him, "[W]hy he was doing it, that's my dad." (App. 757). Avent told her to shut up or she would be next. (App. 757). She went to the car for ten minutes and when she returned, she did not see

her father's body and was told by Avent to help him clean up. (App. 760). Avent continued to threaten her as they drove away. (App. 764).

She also testified she was under constant threats from him on the way to Arizona saying:

> If I got away from him or said anything, that he would kill me. And there wasn't a time that he didn't keep at least one of my kids.

(App. 771). She said she had made her untrue statements to the police because of threats from Avent. (App. 774).

She admitted, however, that when she returned to the car immediately after the killing, she had started it up and moved it to the back of the house, so that she was alone with the children and could have left. (App. 787-88). She said that thereafter for three weeks she had that "panicky wanting-to-get-away feeling" until she was arrested. (App. 788).

She testified that Avent had told her to give the version of events under which she had remained in the car the entire time during the killing. (App. 817-88).

ARGUMENT

I. THE TRIAL COURT PROPERLY REFUSED TO REQUIRE THE COMMONWEALTH TO DISCLOSE CRIMINAL RECORDS OF THE COMMONWEALTH'S WITNESSES.[2]

Thomas sought an order requiring the Commonwealth to provide her with the criminal records of several witnesses for the Commonwealth, including both adult and juvenile records. She relied in part on Virginia Code § 19.2-389. The trial court properly refused her request first because the defendant was not entitled to use juvenile court records to impeach and had made no showing that those records would show bias. The court refused the request as to the adult records because Thomas had not demonstrated that the criminal records would be relevant as required by the statute.

Although the defendant argues that she should have been given all of the witnesses' criminal records, she concedes first that under the established case law she is not entitled to cross-examine witnesses by

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[2] Throughout her brief the defendant seeks to incorporate trial court arguments by reference. "We will not consider these arguments since they must be made in the appellate briefs. See Mickens[v. Commonwealth], 247 Va. [395,] at 401 n.4, 422 S.E.2d [678,] 683 n.4 [(1994)], and Jenkins v. Commonwealth, 244 Va. 445, 460-61, 423 S.E.2d 360, 370 (1992) . . . (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).

using juvenile court adjudications. (Def. Br. 14). This concession is consistent with the case law. Kiracofe v. Commonwealth, 198 Va. 833, 844-45, 97 S.E.2d 14, 22 (1957); Bostic v. Commonwealth, 31 Va. App. 632, 635, 525 S.E.2d 67, 68 (2000). (Def. Br. 14).

Thomas contends she should have been provided the adult records of several Commonwealth's witnesses under Virginia Code § 19.2-389 (App. 14), which 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.

The defendant did not show with respect to any particular witness or witnesses or in general how the records might be relevant to her case. The court properly denied her motion for that reason and the Court of Appeals found that denial proper because the defendant "offered no specific information leading her to believe that any of the potential witnesses had a criminal record." (App. 64).

II. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THE DEFENDANT'S GUILT OF HER CRIMES.

The defendant claims the evidence was insufficient to prove her guilt. The record, however, fully establishes that she acted in concert with Avent in killing her father.

Standard Of Review

Since the defendant challenges the sufficiency of the evidence, that evidence must be viewed in the light most favorable to the Commonwealth and the Commonwealth must be given all reasonable inferences fairly deducible therefrom. Dowden v. Commonwealth, 260 Va. 459, 461, 536 S.E.2d 437, 438 (2000). The fact-finder's verdict should not be disturbed unless it was plainly wrong or without evidence to support it. Viney v. Commonwealth, 269 Va. 296, 299, 609 S.E.2d 26, 28 (2005); Jackson v. Commonwealth, 267 Va. 178, 204, 590 S.E.2d 520, 535 (2004).

Principal In The Second Degree

Code § 18.2-18 provides that, in the case of every felony (with the exception of certain murders), a principal in the second degree "may be indicted, tried, convicted and punished in all respects as if a principal in the first degree." In such cases, " '[a] principal in the first degree is the actual perpetrator of the crime,'" whereas " '[a] principal in the second degree, or

an aider and abettor as he is sometimes termed, is one who is present, actually or constructively, assisting the perpetrator in the commission of the crime.'" Muhammad v. Commonwealth, 269 Va. 451, 482, 619 S.E.2d 16, 554 (2005) (quoting Jones v. Commonwealth, 208 Va. 370, 372, 157 S.E.2d 907, 909 (1967)).

However, to constitute a principal in the second degree, a person's

> actual participation in the commission of the crime is not necessary. The test is whether or not he was encouraging, inciting, or in some manner offering aid in the commission of the crime. If he was present lending countenance, or otherwise aiding while another did the act, he is an aider and abettor or principal in the second degree.

Id. at 482, 611 S.E.2d at 554-55 (quoting Jones, 208 Va. at 372-73, 157 S.E.2d at 909).

Generally:

> proof that a person is present at the commission of the 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, lent to it his countenance and approval, and was thereby aiding and abetting the same.

Foster v. Commonwealth, 179 Va. 96, 100, 18 S.E.2d 314, 316 (1942) .

Concert Of Action

While "lack of intent is usually a defense to a conviction as a principal in the second degree," it is not where "there is concert of action and the resulting crime, whether such crime was originally contemplated or not, is a natural and probable consequence of the intended wrongful act." McMorris v. Commonwealth, 276 Va. 500, 506, 666 S.E.2d 348, 351 (2008).

Thomas Acting In Concert With Avent Aided And Abetted Him

Thomas argues the Commonwealth did not prove she knew in advance that the murder would be committed. "The Commonwealth can, and most often must, present circumstantial evidence to prove that a defendant aided or abetted in the commission of a crime." Id. at 506, 666 S.E.2d at 351. Here, the circumstances fully establish Thomas' guilt and her hypotheses of innocence do not flow from the evidence presented.

She was, of course, present when the murder was committed and stood by without intervening while Avent beat her father to death. She had previously expressed to others her hatred of her father and her intent to kill him herself or to get someone else to do so. She arrived unexpectedly at her father's house to obtain checks he was withholding from her. He had forbidden her to enter the house and obtained a criminal warrant against her. She concedes that, having been told to leave the house, she did not.

When Avent pulled out the gun, she followed him and her father upstairs to take the checks from him against his will. She conceded she helped Avent dispose of evidence.

Her claim that she did everything she did under duress is belied by her failure to reveal the crime when she had several opportunities to do so. She also admitted she and her children were alone in the car after the killing and, instead of fleeing and informing the police, she merely moved the car from the front of the house to the back as Avent had directed her to do. The factfinder could reasonably infer that Avent would not have given her such an opportunity to escape if he had any inkling that she was not a cooperating partner in the offense.

Her intent to kill was demonstrated by several statements made to acquaintances that she wished her father dead, would kill him and had attempted to shoot him. Knowing her father would resist her efforts to obtain the checks, she entered with Avent carrying a sawed-off shotgun and demanded the checks. A reasonable outcome to the victim's likely resistance was that Avent would shoot him.

Moreover, as this Court has said in another case:

> In any event, the trial court was not bound to credit the testimony of Morris, a convicted felon. . . . And, upon finding Morris's testimony unworthy of belief, the trial judge could draw the reasonable inference that Morris testified falsely "in an effort

> to conceal his guilt." Covil v. Commonwealth, 268 Va. 692, 696, 640 S.E.2d 79, 82 (2004) (citing Emmett v. Commonwealth, 264 Va. 364, 372, 569 S.E.2d 39, 45 (2002)). The judge could also "consider whatever [he] concluded to be perjured testimony as affirmative evidence of guilt," Wright v. West, 505 U.S. 277, 296 (1992).

Morris v. Commonwealth, 269 Va. 127, 133-34, 607 S.E.2d 110, 114 (2005) (other citation omitted).

Thomas lied throughout her interaction with the police, at first saying she knew nothing of her father's death until forced to admit her lies. She continually sought to limit her involvement. Similarly, her claims of duress were belied over and over by her failure to leave the scene with her children when she could have left or to say anything to anybody on the numerous occasions when she could have done so safely.

As the Court of Appeals concluded:

> [T]he 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.

(App. 66).

III. THE TRIAL COURT PROPERLY REFUSED AN INSTRUCTION ON ACCESSORY AFTER THE FACT.

The defendant argues that the trial court should have granted an instruction on accessory after the fact. The trial court properly determined that that instruction was not available under controlling authority of this Court.

This Court specifically held in Commonwealth v. Dalton, 259 Va. 249, 524 S.E.2d 860 (2000), that such an instruction can be given only where the defendant has been charged with that offense. The Court determined that accessory after the fact is not a lesser included offense of murder. Id. at 254, 524 S.E.2d at 862-63. The trial court was bound by Dalton.

IV. THE TRIAL COURT PROPERLY GRANTED THREE CHALLENGED MALICE INSTRUCTIONS.

The defendant challenges jury instructions permitting the jury to infer malice from a deliberate, willful, and cruel act, from the deliberate use of a deadly weapon and from an unlawful killing. All three of these instructions are fully supported by Virginia case law.

The defendant challenges the inference of malice from "any deliberate willful and cruel act against another" and the inference of malice from deliberate use of a deadly weapon.

> Strickler assigns error to the court's granting Instruction 6, which told the jury that malice could be "inferred from any

> deliberate willful and cruel act against another, however sudden," and Instruction 7, which stated that the jury "may infer malice from the deliberate use of a deadly weapon unless, from all the evidence, you have a reasonable doubt as to whether malice existed." Citing Sandstrom v. Montana, 442 U.S. 510 (1979), Strickler argues that these instructions either established an unconstitutional conclusive presumption against him or had an impermissible burden-shifting effect.
>
> We considered and rejected the same argument in R.B. Smith v. Commonwealth, 239 Va. 243, 263-64, 389 S.E.2d 871, 802, cert. denied, 498 U.S. 881, 111 S. Ct. 221 (1990), and we adhere to that ruling.

Strickler v. Commonwealth, 241 Va. 482, 495-96, 404 S.E.2d 227, 235-36 (1991); see also Satcher v. Commonwealth, 244 Va. 220, 257, 421 S.E.2d 821 (1992).

Thomas' challenge to the inference of malice from an unlawful killing has also been rejected by this Court.

> [N]either the Due Process Clause nor Mullaney [v. Wilbur, 421 U.S. 684 (1975)] prohibits the use of presumptions or inferences as procedural devices to shift to the accused the burden of producing some evidence contesting the otherwise presumed or inferred fact. . . . In this context, due process requirements are satisfied if the evidence necessary to invoke the presumption or inference is sufficient for a rational juror to find the presumed or inferred fact beyond a reasonable doubt. Mullaney, id. And, with specific reference to the prosecution's burden concerning the issue of malice in a homicide case, the Court in Mullaney recognized that it is permissible to require the accused to produce "'some evidence' indicating that he acted in the heat of passion before requiring the prosecution to negate this element by proving the absence of passion beyond a reasonable doubt." Mullaney 421 U.S. at 701-02, n. 28.

> We believe that the presumption of second degree murder employed in Virginia is the type procedural device permitted by Mullaney. In our opinion, neither the presumption nor the resulting burden imposed upon the accused has the effect of shifting from the prosecution the ultimate burden of persuasion upon the critical issue of malice or its corollary, the absence of heat of passion.

Hodge v. Commonwealth, 217 Va. 338, 341-42, 228 S.E.2d 692, 695 (1976) (other citation omitted); Pugh v. Commonwealth, 223 Va. 663, 667, 292 S.E.2d 339 (1982) (reaffirming Hodge).

V. THE TRIAL COURT PROPERLY REFUSED TWO OF DEFENDANT'S VOIR DIRE QUESTIONS.

Thomas argues the trial court erred in refusing two of her proposed voir dire questions. Those questions were either improper or fully covered by other questions asked of the jury.

Thomas submitted a list of 29 proposed voir dire questions. (App. 32-34). She says the following were improperly denied:

> 17. Meloni Thomas has been indicted, which indictment was based on evidence presented by the Commonwealth alone and none by the Defense. Does the existence of that indictment have any effect on anyone's opinion of the guilt or innocence of Meloni Thomas? Would it cause anyone in any way to doubt the presumption of innocence the accused is afforded?
>
> 28. If any of you were my client, would there be any reason you would not want yourself on this jury?

(App. 33, 34).

The trial court allowed the statement and the second question set forth in question 17. (App. 264). The defendant said that the disallowed question went to opinion. (App. 265). With respect to question 28 Thomas said it addressed opinion and bias. (App. 266). The court ruled that "the questioning by the Court and other questioning which it has allowed the defense more than adequately deals with the issues of opinion, bias and prejudice." (App. 266).

> A defendant does not have a right to propound any question he wishes, and "trial courts are not required to allow counsel to ask questions which are so ambiguous as to render the answer meaningless," Buchanan [v. Commonwealth], 238 Va. [389,] 401, 384 S.E.2d [757,] 764 [(1989)]. Instead, voir dire questions must relate to the four statutory factors of relationship, interest, opinion, or prejudice. See Code § 8.01-358 ("counsel for either party shall have the right to examine under oath any person who is called as a juror . . . to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein").

Green v. Commonwealth, 266 Va. 81, 96-97, 580 S.E.2d 834, 843 (2003).

The disallowed question in 17 was fully covered by other questions asked by the court:

> Do you understand and can you agree with the principle, one of the foundations of our laws, that the defendant is presumed to be innocent?
>
> Do you understand and can you agree with the principle in our law that the Commonwealth must prove the defendant's guilt beyond a reasonable doubt?

(App. 283-84).

The vague question 28 which could have generated clearly speculative and irrelevant responses was better presented in the court's own questions:

> Are you aware or sense any bias or prejudice either against the Commonwealth or the accused?
>
> Do anyone of you know of any reason whatsoever why you cannot give a fair and impartial trial, both to the Commonwealth and to the accused, Meloni Thomas, based solely on the law which I will give you and the evidence you will hear?

(App. 283, 284).

VI. THE TRIAL COURT PROPERLY ALLOWED TWO JURORS TO SIT DESPITE CLAIMS THAT THEY WOULD GIVE TOO MUCH DEFERENCE TO POLICE TESTIMONY.

The defendant argues that jurors David Heizer and Lois Finch should have been struck for cause because of the manner in which they said they would treat police testimony. After additional questioning and a review of the full record, the trial court properly found that the two could sit as impartial jurors.

Prospective jurors, David Heizer and Lois Finch, initially responded affirmatively when defense counsel asked whether anyone "would give greater weight to the testimony of a police officer than to that of another

witness or the accused simply because of the officer's official status." (App. 294). When questioned individually, Heizer stated

> I'm not sure I understood to question exactly, but I would tend to feel that a police officer would not, because they are used to being in that kind of situation and used to testifying, that they would be more comfortable in giving a correct answer, whereas other people may not be able to give a correct answer or a truthful answer, I guess.
>
> I would hope, and I think that it's the case, that most police officers are basically honest and won't be swayed by other factors, and sometimes I think people are, you know, other people aren't.

(App. 297). He then admitted, however, it's possible for a police officer to be mistaken "either by telling a lie or by making a mistake." (App. 297). He then said that in a case of disputed testimony between a police officer and another, he would not believe a police officer automatically merely because he was a police officer. (App. 298). He responded affirmatively when asked whether it was "fair to say that you would listen to all the evidence from every witness that took the stand (inaudible) and any other evidence presented, and consider that all together before you reach the verdict." (App. 298). Heizer concluded as follows:

> Again, I would not believe a police officer because he was a police officer. I'm not sure what you're asking me. I would not believe a police officer simply because he's a police officer. The only thing I was saying is that all other things being equal, and you have two people that have different testimonies, I would probably lean toward the police officer simply because I

> would hope that most police officers, it's their job to be impartial.

(App. 302).

Juror Finch also stated that she believed a police officer could lie or make mistakes. (App. 304). She said that she would not automatically believe a police officer, but would consider all the other facts and circumstances. (App. 305). In response to defense questioning, she said she had no predisposition to believe police testimony. (App. 306). The only reason for her initial response was that it was her "thought that he was supposed to tell the truth, and he's upholding the law. That was just my thought behind that." (App. 307).

> [T]his Court must give deference to the circuit court's determination whether to exclude a prospective juror because the circuit court was able to see and hear each member of the venire respond to the questions asked. The circuit court is in a superior position to determine whether a prospective juror's answers during *voir dire* indicate that the juror would be prevented from or impaired in performing the duties of a juror required by the juror's oath and the court's instructions. This Court must consider the *voir dire* as a whole, and not simply the juror's isolated statements. And, we will not disturb the circuit court's refusal to strike a juror for cause unless that decision constitutes manifest error.

Wolfe v. Commonwealth, 265 Va. 193, 212, 576 S.E.2d 471, 482 (2003) (other citations omitted). Whether a juror is impartial is a pure question of historical fact. Wainwright v. Witt, 469 U.S. 412, 428 (1985).

In Mullis v. Commonwealth, 3 Va. App. 564, 351 S.E.2d 919 (1987), the Court of Appeals ruled that the trial court had ***not*** committed manifest error in qualifying four jurors who answered "yes" or "probably" when asked "if a police officer gives some testimony and a private citizen gives testimony that differs from what the officer said – are there any of you who would believe or have a tendency to believe the police officer as opposed to the private citizen?" Id. at 569, 351 S.E.2d at 922. The Court ruled that

> [t]he general abstract question put to the jurors, without more, made it difficult for them to give a meaningful answer and is a poor indication of the manner in which they would serve as jurors and evaluate any particular police testimony. Certainly their responses did not indicate to the trial judge who heard the entire voir dire and observed the prospective jurors that they would give ***unqualified credence to the testimony of a police officer. At most, their responses indicated that as an abstract proposition they would probably or would have a tendency to give some weight to the fact that a witness was a police officer in resolving credibility issues if all else were equal.***

3 Va. App. at 572, 351 S.E.2d at 924 (Emphasis added). The same is certainly true of the questions and responses at issue in this case. At most, the prospective jurors said that they would expect police officers to tell the truth because of their duty so that in the absence of any contradictory evidence they would believe the police officer. However, where the police

testimony was disputed, they would consider all of the evidence in making the required credibility determinations.

This Court ruled in O'Dell v. Commonwealth, 234 Va. 672, 694, 364 S.E.2d 491, 503 (1988), where the juror said, without qualification, that she would tend to believe the testimony of a police officer more than that of another person.

> Bias cannot be presumed solely because a prospective juror believes a police officer's training and experience in observing and recounting events might make the officer's account more accurate than that of an ordinary witness, provided the prospective juror does not ignore differing circumstances of observation, experience, and bias which may be disclosed by the evidence.

Similarly, in Smith, 239 Va. at 255, 389 S.E.2d at 877 (1990), and also in Waye v. Commonwealth, 219 Va. 683, 690, 251 S.E.2d 202, 206-07 (1979), this Court found no error in the retention of jurors who expressed an inclination to weigh a law enforcement officer's official status positively in deciding whether to believe him or her rather than believing the testimony of some other witness. That, essentially, is all the jurors here indicated they would do.

> With respect to prospective juror Moore, Smith objected to his selection on the sole ground that "he had a predisposition to believe testimony by police officers, to give that more weight than lay witnesses." . . .

> When asked whether he felt "that the testimony of a police officer carries more weight . . . than that of an ordinary citizen," Moore said: "That is a tough call." Continuing, he stated:
>
> > Police officers have always been in a high esteem and you always think that they are the ones that are being able to tell the truth more than an average citizen. But then, again, it is a preconceived notion that I have probably had for the majority of my life.
>
> Moore then replied in the negative when asked whether "that preconceived notion [would] interfere with [his] ability to weigh the evidence and render a fair and impartial decision . . . or would [he] automatically give more weight to the testimony of a police officer."

Smith, 239 Va. at 254-55, 389 S.E.2d at 877.

As the Court of Appeals concluded:

> In denying the 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.

(App.69).

Moreover, any error in not striking the jurors was harmless in light of the absence of any credibility issues involving the police witnesses. The defendant limited her attack on the Commonwealth's case to contradiction of several lay witnesses and challenges to their credibility. See Mullis, 3 Va. App. at 572, 351 S.E.2d at 924 (where "[t]he degree of impact which credibility issues played in the case as a whole was minimal and could have had very little significance on the jury's resolution of the case," it is not

manifest error to seat a juror who indicates that he would tend "to give some weight to the fact that a witness was a police officer in resolving credibility issues if all else were equal."); Barrett v. Commonwealth, 34 Va. App. 374, 381, 542 S.E.2d 23, 26 (2001)(citing Mullis for same proposition).[3]

VII. THE TRIAL COURT PROPERLY REFUSED TO PERMIT THE DEFENDANT TO INQUIRE ABOUT RANGE OF PUNISHMENT IN VOIR DIRE OR TO DISCUSS THAT ISSUE IN OPENING AND CLOSING STATEMENTS.

The defendant says that she should have been allowed to question the jury about the range of punishment for the charged offense in voir dire and then inform the jury of it during the guilt phase. Based upon the clear case law of this Court, the trial court properly refused to allow such questioning or discussion. As pointed out above, a defendant does have the right to voir dire the jury and to ask questions related to bias, interests, or prejudice.

> A defendant . . . however, does not have an unlimited constitutional or statutory right to propound any question to a jury panel. Rather, the questions propounded during *voir dire* must be relevant to the factors prescribed in Code § 8.01-358. .

[3] Thomas argues that juror Finch should also have been excluded because a relative had been the victim of a violent crime. (Def. br. 26). That claim is not included in the assignment of error. In any event, when questioned about that Finch said that it would not affect her "ability to be fair and impartial" (App. 287), and no further questioning on that issue was conducted.

> We hold that in 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. Rather, questions about the range of punishment during *voir dire* examination will only result in speculation by jury panel members. . . .

Commonwealth v. Hill, 264 Va. 315, 319-20, 568 S.E.2d 673, 676 (2002)(other citations omitted).

VIII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT IT MAY INFER THAT A PERSON INTENDS THE NATURAL CONSEQUENCES OF HER ACTS.

The defendant argues that the instruction permitting the inference that a person intends the natural consequences of her acts was improperly given. This Court's case law upholds the giving of such instruction.

> Schmitt argues that the trial court erred in instructing the jury that "[i]t is permissible to infer that every person intends the natural and probable consequences of his or her acts." Schmitt contends that this instruction effectively created an improper presumption that "negated or diminished the effect of the presumption of innocence." We disagree with Schmitt's argument.
>
> This instruction did not establish an improper presumption but merely stated a permissive inference. Kelly v. Commonwealth, 8 Va. App. 359, 374, 382 S.E.2d 270, 278 (1989). Unlike conclusive or burden shifting presumptions regarding a defendant's criminal intent, which are constitutionally invalid, the present instruction did not require the jurors to draw any

> inference or alter the Commonwealth's burden of proving Schmitt's criminal intent beyond a reasonable doubt.

Schmitt v. Commonwealth, 262 Va. 127, 145, 547 S.E.2d 186, 198-99 (2001).

IX. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE INFERENCE FROM FLIGHT.

The defendant argues that an instruction on flight was improperly given. The clear and convincing evidence of flight in this case justified that instruction.

Granted instruction 19 read:

> 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.

(App. 56).

> In Williams v. Commonwealth, 85 Va. 607, 614, 8 S.E. 470, 473 (1889), we held that evidence of a criminal defendant's flight to avoid prosecution is a circumstance that a jury may consider. Indeed, a well-established principle in this Commonwealth is that a suspect's acts to escape, or evade detection or prosecution for criminal conduct may be evidence at a criminal trial, and a jury may be instructed that it could consider such acts.

Turman v. Commonwealth, 276 Va. 558, 564, 667 S.E.2d 767, 770 (2008).

The reversal in Turman was based on the absence of any evidence of flight.

> Upon application of the aforementioned principles to the record in this case, we hold that the circuit court erred by instructing the jury on the defendant's purported flight. The record is simply devoid of more than a scintilla of evidence that Turman left the victim's apartment after the sexual acts had occurred because he sought to avoid detection, apprehension, arrest, or criminal prosecution.

Id. at 566, 667 S.E.2d at 771. That certainly cannot be said of this case where immediately after the crime the defendant drove first to North Carolina and then to Arizona and never told anyone about the murder. The instruction was appropriate here.[4]

X. THE TRIAL COURT PROPERLY ADMITTED THE DEFENDANT'S ORAL STATEMENTS TO THE POLICE.

The defendant argues that her oral statements to the police could not be admitted because not all of her statements were presented. The unavoidable limitation of the presentation of such oral statements was not error.

The defendant's effort to attach a principle applicable to written or recorded statements to unrecorded oral statements is unworkable. The only authority she cites is Boggs v. Commonwealth, 229 Va. 501, 331

[4] Thomas argues also that her version of the instruction should have been given instead. That instruction (App. 36), however, does not include any reference to flight, but limits its application to situations where "a person leaves a place where a crime was committed." That language was criticized in Turman, Id. at 566, 667 S.E.2d at 771, as an improper statement of the law.

S.E.2d 407 (1985), which involved only a written statement. Id. at 507, 517, 331 S.E.2d at 412-13, 419. Although it might well make sense to require the Commonwealth to offer the entire written document or the entire audio or videotape, it makes no sense to suggest that the Commonwealth had to present testimony of everything a suspect said during hours of unrecorded discussions.

Moreover, the defendant does not suggest what mitigating information was omitted. She did testify and could have told the jury what she thought was significant in her statements to the police. She did not do so and, thus, any error was clearly harmless. Since there was no proffer of the evidence allegedly improperly excluded, this Court cannot determine that any harm occurred. Holles v. Sunrise Terrace, Inc., 257 Va. 131, 135, 509 S.E.2d 494, 497 (1999).

XI. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A PRIVATE INVESTIGATOR.

The defendant says that she was entitled to a private investigator to help her find the names, addresses, and telephone numbers for witness identified to her by the Commonwealth. The trial court refused such appointment because Thomas did not show any particularized need.

Defense counsel knew the identity of the witnesses and did not want an investigator to interview them. (App. 160-61). He wanted help in finding them. However, as the Commonwealth pointed out two of the witnesses were related to the defendant and the other two were among her best friends. (App. 156-57).

The Due Process Clause of the Fourteenth Amendment of the United States Constitution requires that indigent defendants be provided with "the basic tools of an adequate defense." Husske v. Commonwealth, 252 Va. 203, 211, 476 S.E.2d 920, 925 (1996) (quoting Ake v. Oklahoma, 470 U.S. 68, 77 (1985)). "This Due Process requirement, however, does not confer a right upon an indigent defendant to receive, at the Commonwealth's expense, all assistance that a non-indigent defendant may purchase." Husske, 252 Va. at 211, 476 S.E.2d at 925. "Rather, the Due Process clause merely requires that the defendant may not be denied 'an adequate opportunity to present [his] claims fairly within the adversary system." Id. (quoting Ross v. Moffitt, 417 U.S. 600, 612 (1974)).

Husske held that "an indigent defendant who seeks the appointment of an expert witness, at the Commonwealth's expense, must demonstrate that the subject which necessitates the assistance of the expert is likely to be a significant factor in his defense, ***and*** that he will be prejudiced by the

lack of expert assistance." Husske, 252 Va. at 211-12, 476 S.E.2d at 925 (quotation omitted). To satisfy this burden, an indigent defendant must show a ***particularized need*** for state-funded expert assistance, not "mere[ly] hope or suspicion that favorable evidence is available." Id. at 212, 476 S.E.2d at 925 (quotation omitted). Thomas has not shown any abuse of discretion. Accord Green v. Commonwealth, 266 Va. 81, 580 S.E.2d 834 (2003)(affirming trial court's denial of capital murder defendant's request for investigator's assistance).

The Court of Appeals concluded:

> [A]ppellant 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 when the potential witness has exculpatory evidence." Moreno v. Commonwealth, 10 Va. App. 408, 415, 392 S.E.2d 836, 841 (1990) . . . 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.

In any event, any error was harmless. The defendant does not even identity the witnesses, does not say that their testimony was untrue and does not show how her counsel's having been able to interview them would have made any difference to the outcome of her trial.

XII. THE TRIAL COURT PROPERLY REFUSED TO PRECLUDE THE COMMONWEALTH FROM USING THE TERM MURDER OTHER THAN IN ARGUMENT.

Thomas says that the prosecution should have been prohibited from using the word murder except in argument. The trial court properly refused that motion. The defendant further asserts that the testimony of one of the Commonwealth's witnesses that he was investigating a murder (App. 570) was testimony on the ultimate issue and invaded the province of the jury. Such argument is untenable here.

It should first be recognized that there was no question in this case that a murder had occurred. The victim had been shot and then beaten to death with blows to the head. The defense did not suggest that self-defense or a lower degree of homicide was appropriate. Additionally, as the defendant herself points out, it was not the Commonwealth's Attorney who used the term but one of his witnesses. Apparently the defendant was seeking to have the Commonwealth's Attorney instruct each one of his witnesses never to use the word murder. There is no authority for such a requirement. In any case, where there was not the slightest question that a murder had occurred, any error was harmless.

XIII. THE TRIAL COURT PROPERLY REFUSED THE DEFENDANT'S OBJECTION TO PHOTOGRAPHS OF THE VICTIM.

The defendant challenges admission of photographs of the victim. Numerous cases support the trial court's action in admitting those photographs.

In Clagett v. Commonwealth, 252 Va. 79, 472 S.E.2d 263 (1996), the Supreme Court stated that the admission of pictures of the body of a murder victim lies in "the sound discretion of the trial court and will be disturbed only upon a showing of a clear abuse of discretion. A graphic photograph is admissible so long as it is relevant and accurately portrays the scene of a crime." 252 Va. at 87, 472 S.E.2d at 268 (citation omitted).

Consistent with these principles, the Supreme Court in Bailey v. Commonwealth, 259 Va. 723, 529 S.E.2d 570 (2000), supra, found no error in a case where the defendant challenged the admission of four photographs of the crime scene and eight autopsy pictures of the victims as cumulative and unduly inflammatory. There, as here, Bailey relied, in part, on the fact that he had stipulated to the "manner of the child's death" as depicted by such other evidence as the autopsy report, thereby rendering the photographs cumulative and unduly prejudicial. 259 Va. at 739, 529

S.E.2d at 579. In words highly relevant to the case at bar, this Court concluded:

> Contrary to Bailey's assertion, his stipulation to "the manner of the child's death" did not render the crime scene and autopsy photographs cumulative or irrelevant. The autopsy photographs were relevant to explain the clinical illustrations of [the child's] wounds in the autopsy report. Moreover, it is self-evident that all of these photographs tend to establish the method, maliciousness, and degree of atrociousness of the crime.

Id. Thus, the trial court did not abuse its discretion in admitting any of the photographs.

XIV. THE TRIAL COURT PROPERLY ADMITTED TESTIMONY OF THE DEFENDANT'S NARRATION OF HER ACCOMPLICE'S STATEMENT.

The defendant argues that the trial court improperly allowed a police officer to say what she had told him about what Avent had said to her. Because the statement was not testimonial, no confrontation rights were involved and the statement was not hearsay.

When the police were questioning Thomas about when she learned of her father's death, she said that Avent's sister had called and told him about the death. Thomas said that she then asked Avent about his involvement in that death. The admitted statement was as follows:

> And he said that David, her father, was a piece of shit, that he took care of it, but he never said, yes, he did it.

(App. 390).

To the extent that the defendant is raising a confrontation challenge, the Confrontation Clause is not involved because the testimony is clearly non-testimonial. Davis v. Washington, 547 U.S. 813, 821 (2006). It cannot be argued seriously that a boyfriend's statement to his girlfriend is in any way testimonial hearsay. Hodges v. Commonwealth, 272 Va. 418, 434, 634 S.E.2d 680, 688 (2006).

Once confrontation is no longer involved, the only issue would be hearsay. However, the defendant does not appear to have raised such an objection. The original motion refers only to constitutional violations and cites Crawford v. Washington, 541 U.S. 36 (2004). (App. 11). At argument of the motion (App. 147-151) there is discussion of Crawford and Bruton v. United States, 391 U.S. 123 (1968), but again no reference to hearsay. (App. 147-151). When the issue came up at trial, the defendant repeated his objection to "any statement made by Cardell Avent." (App. 387). Defense counsel then said "My problem, as I see it, is that evidence is coming through comments allegedly made by Ms. Thomas, and I cannot cross-examine Cardell Avnet." (App. 389). In his assignment of error, the defendant again raises only constitutional claims. (Def. Br. 7). Clearly, only

the confrontation issue was raised and not a hearsay objection. The hearsay claim is barred by Rules 5:17(c) and 5:25.

Moreover, as the Court of Appeals ruled, no hearsay was involved because the statements were not offered to prove the truth of the matter asserted. (App. 73-74). Thomas does not contest this ruling. In any event, to the extent that statement could in any way be read as evidence that Avent had committed the murder, admission of the statement was harmless in light of the uncontested evidence that he had done so.

XV. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF PRIOR BAD ACTS.

The defendant argues that the Commonwealth improperly introduced evidence of a previous assault by the defendant against the victim and that the Commonwealth improperly commented on that evidence. This claim is waived and, moreover, the evidence was properly admitted and the Commonwealth's Attorney was entitled to comment on it during his closing argument.

Waiver

The Court of Appeals held that this claim was barred by Rule 5A:18 as not properly presented to the trial court. (App. 74). Thomas did not assign error to this determination and does not discuss it in his brief. Since that ruling provides an independent basis for affirmance under this claim,

this Court should not address the merits. The Court of Appeals was also correct in determining that no objection was properly made below and thus the claim is barred by Rule 5:25.

Evidence Admissible

Evidence that shows or tends to show a defendant has committed a prior crime generally is inadmissible to prove the crime charged. Such evidence implicating an accused in other crimes is inadmissible because it may confuse the issues being tried and cause undue prejudice to the defendant. Guill v. Commonwealth, 255 Va. 134, 138, 495 S.E.2d 489, 491 (1998) (citations omitted).

However, evidence of "other crimes" is relevant and admissible if it tends to prove any element of the offense charged. Thus evidence of other crimes is allowed when it tends to prove motive, intent or knowledge of the defendant. Guill, 255 Va at 138, 495 S.E.2d at 491. It is also "admissible when it 'shows the conduct or attitude of the accused toward his victim [; or] establishes the relationship between the parties.'" Ortiz v. Commonwealth, 276 Va. 705, 714, 667 S.E.2d 751, 757 (2008) (quoting Moore v. Commonwealth, 222 Va. 72, 76, 278 S.E.2d 822, 824 (1981)). A further requirement for admissibility of such evidence is that its probative value exceed its prejudicial impact. Guill, 255 Va. at 139, 495 S.E.2d at 492.

The court's weighing of these factors is subject to reversal only for an abuse of discretion. Pavlick v. Commonwealth, 27 Va. App. 219, 226, 497 S.E.2d 920, 923 (1998) (en banc).

Here, the defendant's assignment of error alleged error because "the prejudicial effect of this testimony and this argument outweighed its probative value." (Def. Br. 7). The incidental prejudicial value of evidence of an assault in a murder case was quite limited. On the other hand, the evidence was probative of Thomas' intent and motive in returning to her father's house with Avent armed with a shotgun. It also tended to establish the hostile relationship with her father which demonstrated that she could expect a violent confrontation with him. Together with her statements of hatred of her father and wishes that he were dead, the evidence showed that she would use violence to gain possession of her checks. The trial court properly found the balance to favor admission and the prosecutor could properly comment on the evidence.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals affirming the judgment of the Circuit Court of Brunswick County convicting the defendant of murder in the first degree and use of a firearm should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On September __, 2009, the required number of copies of this brief were hand-delivered to the Clerk of this Court and three copies were mailed to Jerry E. Waldrop, Esquire, 318 South Main Street, Emporia, Virginia 23847, counsel for the defendant.

_____
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