IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 090537

CARDELL LAMONT AVENT,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

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CARDELL LAMONT AVENT,

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Appellee.

BRIEF FOR THE COMMONWEALTH

This first degree murder appeal asks the Court to address: the voluntariness of the defendant's statements to the police; a Batson challenge to the Commonwealth's peremptory jury strikes; the admissibility of purported state-of-mind testimony; self-defense and/or "hot blood"; the propriety of the Commonwealth's argument at the

penalty phase of the trial; denial of the defense motion for a new trial based on after-discovered evidence; and premeditation.

STATEMENT OF THE CASE

This appeal originated from final judgments entered against Cardell Lamont Avent in the Circuit Court of Brunswick County on December 20, 2007. A jury convicted Avent of first degree murder, in violation of Virginia Code § 18.2-32, and use of a firearm in the commission of murder, in violation of Virginia Code § 18.2-53.1. Consistent with the sentences fixed by the jury, the trial court sentenced Avent to life in prison plus three years. (App. 22-23, 26-27).

On appeal to the Court of Appeals of Virginia, Avent challenged his convictions, asserting that the trial court: (1) erred in failing to suppress his inculpatory statements on the ground that they were not voluntarily made; (2) abused its discretion in denying his Batson[1] motion; (3) abused its discretion in sustaining the Commonwealth's hearsay objection to his proffered testimony regarding statements his co-defendant had ascribed to the victim; (4) erred in denying his motion to strike on the ground that he acted in self-defense; (5) erred in refusing his proffered instruction on self-defense; (6) & (10) erred in refusing to

[1] Batson v. Kentucky, 476 U.S. 79 (1986).

convict him of voluntary manslaughter, which then would have rendered the use of the firearm conviction impossible as a matter of law; (7) erred in failing to grant a mistrial in light of what he contends was improper argument by the prosecutor; (8) erred in denying his motion for a new trial; and (9) erred in refusing to find that his voluntary intoxication negated any premeditation. The Court of Appeals denied the appeal, finding, inter alia, that Avent's statement was voluntary; he failed to meet his burden to show the Commonwealth's race-neutral reasons for her strikes were pretextual; the trial court's evidentiary ruling was not an abuse of discretion; Avent did not act in self-defense as a matter of law; he was not entitled to be convicted of voluntary manslaughter as a matter of law; he failed to demonstrate he was entitled to a new trial; and he was not entitled to an instruction on voluntary intoxication. Avent v. Commonwealth, 09 Va. App. UNP 2941072, No. 2941-07-2 (Oct. 21, 2008). (App. 29-42). A three-judge panel denied the appeal by order of February 26, 2009. (App. 43).

By order of July 22, 2009, this Court awarded Avent an appeal.

APPELLANT'S ASSIGNMENTS OF ERROR

1. THE COURT ERRED IN REFUSING TO GRANT THE MOTION TO SUPPRESS HIS STATEMENTS ON THE GROUND THAT THEY WERE NOT VOLUNTARY.

2. THE COURT ERRED WHEN IT DENIED HIS BATSON MOTION.

3. THE COURT ERRED BY REFUSING TO ALLOW IN EVIDENCE OF THE DEFENDANT'S STATE OF MIND AS IT PERTAINED TO THE DEFENSES OF VOLUNTARY MANSLAUGHTER AND SELF-DEFENSE.

4. THE COURT ERRED IN REFUSING TO GRANT HIS MOTION TO STRIKE ON THE BASIS THAT HE ACTED IN SELF-DEFENSE.

5. THE COURT ERRED IN REFUSING TO GRANT HIS SELF-DEFENSE JURY INSTRUCTION.

6. THE COURT ERRED IN FAILING TO FIND HIM GUILTY OF VOLUNTARY MANSLAUGHTER, AND IN FAILING TO THUS ACQUIT HIM OF THE USE OF A FIREARM.

7. THE COURT ERRED IN FAILING TO GRANT HIS MOTION FOR A MISTRIAL ON THE BASIS OF THE COMMONWEALTH'S "IMPROPER ARGUMENT" DURING THE PENALTY PHASE.

8. THE COURT ERRED IN DENYING HIS MOTION FOR A NEW TRIAL BASED ON AFTER-DISCOVERED EVIDENCE.

9. THE DEFENDANT SHOULD HAVE BEEN ACQUITTED OF FIRST DEGREE MURDER AS THE ELEMENT OF PREMEDITATION WAS NEGATED BY INTOXICATION.

10. THE COURT ERRED IN FINDING THE EVIDENCE OF PREMEDITATION SUFFICIENT.

APPELLANT'S QUESTIONS PRESENTED

1. DID THE COURT ERR IN REFUSING TO GRANT THE MOTION TO SUPPRESS HIS STATEMENTS ON THE GROUND THAT THEY WERE NOT VOLUNTARY?

2. DID THE COURT ERR WHEN IT DENIED HIS BATSON MOTION?

3. DID THE COURT ERR WHEN IT REFUSED TO ALLOW DEFENDANT TO PRESENT HEARSAY TESTIMONY REGARDING HIS STATE OF MIND AS IT PERTAINED TO THE DEFENSES OF VOLUNTARY MANSLAUGHTER AND SELF-DEFENSE?

4. DID THE COURT ERR IN REFUSING TO GRANT HIS MOTION TO STRIKE ON THE BASIS THAT HE ACTED IN SELF-DEFENSE?

5. DID THE COURT ERR IN REFUSING TO GRANT HIS PROFFERED SELF-DEFENSE INSTRUCTION?

6. DID THE COURT ERR IN FAILING TO FIND HIM GUILTY OF VOLUNTARY MANSLAUGHTER, AND IN FAILING TO THUS ACQUIT HIM OF THE USE OF A FIREARM?

7. DID THE COURT ERR IN FAILING TO GRANT HIS MOTION FOR A MISTRIAL ON THE BASIS OF THE COMMONWEALTH'S "IMPROPER ARGUMENT" DURING THE PENALTY PHASE?

8. DID THE COURT ERR IN DENYING HIS MOTION FOR A NEW TRIAL BASED ON AFTER-DISCOVERED EVIDENCE?

9. SHOULD HE HAVE BEEN ACQUITTED OF FIRST DEGREE MURDER AS THE ELEMENT OF PREMEDITATION WAS NEGATED BY INTOXICATION?

10. DID THE COURT ERR IN FINDING THE EVIDENCE OF PREMEDITATION SUFFICIENT?

STATEMENT OF FACTS

Avent shot the victim, William David Thomas, Jr. (Thomas), in the chest and then brutally beat him to death with the barrel of the shotgun. (App. 694, 1120, 1136). The beating was so ferocious that Avent "literally obliterated" Thomas's skull and did not stop until the gun fell to pieces and he "could not beat [Thomas] any further because he ran out of energy." (App. 696-98, 701-02, 860, 1092, 1136). Avent and his girlfriend, Meloni Thomas (Meloni), the victim's daughter, then dragged Thomas's lifeless body out to a chicken coop, covered him with a car fender and some insulation, closed the door and fled to Arizona. (App. 101, 468-69, 498-99, 574, 581-86, 898).

The evidence established that on August 9, 2005, Meloni, accompanied by Avent and her three young sons, drove to Thomas's home in Brunswick County so that Meloni could collect her welfare checks, which had been sent to her father's house. (App. 834-35, 1133, 1145). When they arrived, Meloni entered the house through a window on the porch. (App. 1122). Avent retrieved a Winchester shotgun from the trunk of the car and entered the home through the back door. (App. 1119, 1121, 1123). What happened after Avent was inside was disputed.

The forensic evidence established that Thomas suffered a gunshot wound to the right side of his chest and his right arm while he stood in the far corner of his upstairs bedroom. (App. 639, 673-75, 686-87, 696, 703). The gunshot wound, which did not penetrate any vital organs, was not necessarily lethal and Thomas remained mobile; although he suffered a fractured right forearm. (App. 697-98, 705-06, 1136). Indeed, Thomas made it across the room to the threshold of the hallway, where he suffered massive blunt force trauma to his face as he lay on the floor. (App. 675-79, 679-80, 687, 712-14, 1136). The injuries to Thomas's head were "rapidly lethal." (App. 705).

Avent testified he entered the Thomas home because he heard Thomas and Meloni arguing. (App. 835, 1133). Once inside, Avent claimed, Thomas immediately attacked him, hitting him in the face and then choking him for 10-15 seconds after he fell to the floor. (App. 838, 840-42). Thomas then got up, said "I've got something for you" and went upstairs. (App. 842, 1133). At trial, Avent said he followed Thomas because he feared Thomas was going to get a gun; however, he told Washburn he followed Thomas "slow[ly] to see what he was doing" and because he "was mad." (App. 842, 1128, 1133).

According to Avent, when he got upstairs, Thomas hit him in the head with a board repeatedly, causing his head to bleed. (App. 848-49). Avent claimed that he told Thomas he "wasn't there to fight" he just wanted to get Meloni out of the house. (App. 843, 849-50). Angered that Thomas continued to hit him, Avent "just pulled out the shotgun, turned [his] head" away from Thomas and shot him in the chest. (App. 854).

Notwithstanding the gunshot wound, Avent claimed Thomas charged him, "still running and swinging the board." (App. 857). Avent then hit Thomas "in the back hard," knocking him to the floor. (App. 857). While Thomas lay on the floor, Avent hit him "three to five times" in the face with the barrel of the shotgun. (App. 857, 1120, 1129). Avent said he then "blacked out" for a split second because he "overheated" while beating Thomas. (App. 860). At that point, Meloni began hitting Thomas with the gun and said, "That's what death looks like, bitch." (App. 860, 1121). Meloni and Avent dragged Thomas's body out to the chicken coop where they concealed it; returned to the house and cleaned various items in an effort to "get rid of evidence"; and then drove first to North Carolina and eventually to a "remote" part of northern

Arizona, arriving on August 13, 2005. (App. 468, 581, 624, 861-62, 1123, 1128-29, 1145).

When Brunswick County Sheriff's Deputies went to Thomas's home on August 17, 2005, to conduct a welfare check, they found the grisly scene. (App. 465). Upon arrival, they smelled "a really horrific odor" of something rotting, which was so strong they could not immediately pinpoint the source. (App. 466-67, 478-79). After unsuccessfully searching the house, they began to search the outbuildings. (App. 467). They located Thomas's body when Major Brian Roberts approached the chicken coop and was "swarmed" by green flies. (App. 468). After removing several items stacked just inside the door, "a head of a human being was exposed and flies just swarmed. The ground was covered in them, like a pool of maggots." (App. 469, 479).

Thomas's body was so badly decomposed that the deputies were not able to identify him. (App. 470, 472, 479, 699-700). Thomas's "face almost looked like it melted off or rotted off." (App. 471, 724, 1136, 1140). The damage to Thomas's skull was so extensive, the medical examiner had to consult with a forensic anthropologist to confirm the

cause of death. (App. 695). Ultimately, Thomas was identified through dental records. (App. 473, 728, 1136, 1145).

Police collected significant evidence from the scene including: two teeth; pieces of the shotgun and wood fragments from the butt; a t-shirt with blood stains and a hole in the chest, bedding and pieces of the gun that had been dumped down a well on the property. (App. 481-84, 608-09, 614, 629, 632, 639-43). The investigation soon turned to Meloni and Avent, who were identified as persons of interest. (App. 497). A Crime Solvers tip led them to Arizona, where Meloni and Avent were arrested by local authorities, pursuant to Virginia warrants on September 1, 2005. (App. 497-98, 577, 582-83, 586-88).

Lieutenant Washburn and Major Roberts flew to Arizona on September 2, 2005, and met with Meloni and Avent at the local jail on September 3, 2005. (App. 474-75, 499). After being advised of his Miranda rights, Avent agreed to speak with Washburn and Roberts, ultimately giving Washburn several statements in which he admitted killing Thomas but claimed, as recited above, that he acted in self-defense. (App. 500-04, 1118-34). At trial, Avent embellished his account to include claims that he heard “a loud bang” before he entered Thomas’s home; that Thomas used a racial slur when he initially

assaulted Avent; and that Avent had been drinking and smoking marijuana on the morning of the killing. (App. 844-47).

MATERIAL PROCEEDINGS BELOW

The Brunswick County grand jury indicted Avent for first degree murder and use of a firearm in the commission of murder. (App. 2).

On March 13, 2007 and April 3, 2007, respectively, Avent filed motions to suppress evidence, alleging that his arrest was illegal and that his statements were not voluntary. (App. 7-11). Following a hearing on May 3, 2007, the trial court held the arrest was not illegal and the pre-arrest detention was constitutionally reasonable under the circumstances. (App. 203-10).

On May 25, 2007, the trial court conducted a separate hearing on the voluntariness of Avent's custodial statements. The officers testified they met with Avent at the Navajo County jail in Holbrook, Arizona on September 3, 2005. (App. 216, 229-30). Avent was not restrained in any way, had had his dinner, was offered a soda and had bathroom facilities available to him; his demeanor was "calm" and "pleasant." (App. 220, 222-23, 230, 234, 257-58, 264). Avent appeared alert and sober and was able to converse with the officers. (App. 230, 250).

The officers explained to Avent why they were there and the status of their investigation. (App. 217-18, 226-28, 231-33, 249, 259). Avent was then advised of his Miranda rights, which were read from a form "line-by-line, word-for-word." (App. 218, 224-25, 228, 231, 233, 235, 244). Avent acknowledged he understood his rights, agreed to speak with the officers and signed the waiver form. (App. 218-19, 226, 231-32, 1118). Avent then made several statements, including a total of three written statements, one in his own handwriting. (App. 233, 1133-34).

Avent asserted that notwithstanding he received and understood the Miranda warning, his statements were involuntary because one officer "threatened" that he would be charged with capital murder if he did not cooperate, while a second officer promised leniency for his cooperation. (App. 258-62, 265). Avent conceded, however, that neither officer touched him or yelled at him. (App. 267-68). Avent further testified that he had ***already*** determined he would cooperate before the officer made the purported threat; that he "agreed to talk to them . . . to get everything off my chest." (App. 265).

Both officers testified that neither had made any threats or promises to Avent. (App. 227-28, 244, 246, 250). Major Roberts, whom Avent stated made the threat, and Lieutenant Washburn, both denied

that Roberts told Avent that he would be charged with capital murder if he did not cooperate. (App. 227-28, 245-46, 251). Major Roberts stated that he called Avent "a liar" and then left the room; he had no further contact with Avent. (App. 220-21, 228, 872-73). Lieutenant Washburn, who took all the statements from Avent, stated he never had any discussions with Avent about the death penalty. (App. 246). Indeed, Washburn stated that "[m]e and Mr. Avent were all right; we didn't have no problems." (App. 235).

After hearing all the testimony, the trial court found Avent was properly advised of his Miranda rights at the beginning of the interview. (App. 276-77). The trial court, in denying the motion to suppress, determined that Avent's statements were the product of an unconstrained choice and expressly rejected the claim that any threats or promises were made to Avent to coerce his cooperation. (App. 278-81).

The parties appeared for trial on July 23, 2007. After extensive *voir dire*, six members of the venire were struck for cause. (App. 301-29, 342, 354-55, 383, 387, 392, 415). In addition, the trial court denied the Commonwealth's motion to strike venireman Meredith for cause and Avent's motion to strike venireman Walker for cause. (App. 336, 371). The parties then exercised their peremptory strikes. (App. 426-36).

Before the panel was sworn, Avent asserted a Batson motion, challenging the Commonwealth's exercise of her peremptory strikes, all of which were against African-Americans. (App. 437). The trial court found the defense had met its initial burden to make a prima facie case of purposeful discrimination; thus, the burden shifted to the Commonwealth to provide race-neutral reasons for her strikes. (App. 438, 444). The Commonwealth provided detailed reasons for each strike. (App. 438-42). The trial court then reviewed the Commonwealth's reasons in turn and determined the reasons offered by the Commonwealth were "facially valid" and not pretextual. (App. 445-46). Accordingly, the trial court overruled the Batson motion and the jury was sworn. (App. 447, 450).

At the conclusion of the Commonwealth's case in chief, Avent moved to strike the charges on the grounds that he acted in self-defense and that there was no evidence of premeditation. (App. 730). Avent further argued, in the alternative, that the evidence established only voluntary manslaughter because he acted under heat of passion. Further, that because the case was one of voluntary manslaughter, the gun charge failed as a matter of law. (App. 731). The trial court overruled the motion to strike on all grounds. (App. 733-38).

Before Avent presented his case, which consisted entirely of his own testimony (App. 832-903), the trial court was asked to make a threshold admissibility ruling on a "state-of-mind" exception to the hearsay rule. The proffered hearsay was: prior to the date of the offense, Meloni had told Avent that Thomas "did not like her dating black guys, nor that she had mixed children." (App. 793). The trial court held the testimony was inadmissible hearsay because it was: irrelevant, tangential and the Commonwealth had no opportunity to cross-examine Thomas regarding veracity or context. (App. 809-10).

At the conclusion of all the evidence, Avent renewed his motion to strike, again asserting self-defense, lack of premeditation and that, in the alternative, only the question of voluntary manslaughter should go to the jury and that, accordingly, the firearm charge should be dismissed as a matter of law. (App. 912-15). The trial court held that by Avent's own testimony he had not acted in self-defense as a matter of law. Specifically, the trial court found Avent could not claim justifiable homicide because he was not without fault once he followed Thomas upstairs to his bedroom. (App. 916-17). Further, Avent could not claim excusable homicide because he did not retreat, although an exit was plainly available to him; he made no good faith effort to abandon the

fight; his fear was not reasonable; and he used greater force than was necessary to repel any threat. (App. 917-20). For these same reasons, the trial court held that Avent was not entitled to a proffered jury instruction on self-defense as a matter of law. (App. 20, 921).

The trial court further found that the evidence was sufficient for the question of premeditation to go to the jury and that by Avent's own testimony, his voluntary intoxication was "not such as to render him incapable of premeditation." (App. 920). Likewise, the trial court found that the questions of first and second degree murder were factual questions for the jury. (App. 921).

Once the trial court instructed the jury, counsel presented their closing arguments. The Commonwealth urged a verdict of first degree murder (App. 966-1001), while Avent argued for a finding of voluntary manslaughter. (App. 1002-15). The jury convicted Avent of first degree murder and use of a firearm while committing murder, recommending a sentence of life for the murder and three years for the firearm offense. (App. 19, 21-23, 1028).

Prior to sentencing, Avent filed a motion for new trial based on after-discovered evidence. (App. 24-25). The trial court heard evidence and argument on the motion on October 18, 2005. (App. 1065). The

trial court, having heard the new evidence, determined that is was not material. (App. 1093).

The parties appeared for sentencing on November 25, 2007. (App. 1096). After presenting the testimony of family members, Avent asked the trial judge to impose a sentence lower than that fixed by the jury; he argued his youth and lack of a significant criminal record. (App. 1100-07). The Commonwealth noted the brutality of the murder and Avent's active role in it, his lack of remorse and his history of violence in urging the trial court to impose the jury's sentence. (App. 1107-10).

The trial court imposed the sentence fixed by the jury. (App. 26-27, 1114). Avent moved to set aside the verdicts and orders of conviction, incorporating the grounds he stated in support of his motions to strike, which the trial court overruled. (App. 1115). This appeal followed.

ARGUMENT

1. AVENT'S STATEMENTS TO THE POLICE WERE VOLUNTARY.

Avent was not entitled to have his incriminating statements suppressed because no Fifth Amendment violation occurred in this case. Therefore, this Court should affirm.

As the United States Supreme Court has repeatedly emphasized, suppression is a drastic and costly remedy; it is applied only as a "last resort" to deter police misconduct. Hudson v. Michigan, 547 U.S. 586, 591 (2006); Colorado v. Connelly, 479 U.S. 157, 166 (1986); United States v. Leon, 468 U.S. 897, 907 (1984); see also Herring v. United States, 555 U.S. ___, ___,129 S. Ct. 695, 700 (2009) (noting that the exclusionary rule is not a personal right).

Coercive police activity is a ***necessary predicate*** to the finding that a confession is not constitutionally "voluntary." Connelly, 479 U.S. at 167 (emphasis added) (noting due process focus on claims founded on the Fifth Amendment privilege against compulsory self-incrimination). Accordingly, "cases in which a defendant can make a colorable argument that a self-incriminating statement was compelled despite the fact that the law enforcement authorities adhered to the dictates of Miranda are ***rare***." Dickerson v. United States, 530 U.S. 428, 444 (2000) (emphasis added).

Assessing whether a confession is voluntary requires an examination of the totality of the circumstances to determine whether the statement is the "product of an essentially free and unconstrained choice by its maker," or whether "a defendant's will was overborne" by the

circumstances surrounding the giving of a confession. The due process test takes into consideration the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." Dickerson, 530 U.S. at 434; Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973); Jackson v. Commonwealth, 267 Va. 178, 191, 590 S.E.2d 520, 527 (2004)

"While the question of whether a statement is voluntary is ultimately a legal rather than a factual one, ***subsidiary factual determinations*** are entitled to a presumption of correctness." Jackson, 267 Va. at 191, 590 S.E.2d at 527 (citation omitted) (emphasis added). Moreover, "[w]hether the will of an accused has been overborne by the conduct of the interrogators is a question of fact to be determined by the trial court from the totality of all the surrounding circumstances." Jones v. Commonwealth, 228 Va. 427, 441, 323 S.E.2d 554, 561 (1984).

The record establishes that Avent made a voluntary confession for his own reasons; that he decided for himself to cooperate "to get everything off my chest." (App. 265, 270). Although Avent continues to maintain that his confession was the result of "coercive" police conduct, the trial court's factual findings preclude such a legal conclusion. Indeed, the question of whether any threat or promise was made to Avent at the

Navajo County jail has been conclusively determined adversely to him. (App. 278-81).

After hearing and seeing extensive testimony from the officers and Avent, the trial court made factual determinations, which are binding in this Court. Jackson, 267 Va. at 191, 590 S.E.2d at 527. First, the trial court determined the officers advised Avent of his Miranda rights prior to any interrogation; likewise he executed the wavier form, which he initialed "in seven different places," prior to any interrogation. (App. 276-77).

Specifically addressing the question of voluntariness, the trial court examined Avent's personal characteristics and found that Avent was not "extremely youthful"; he suffered no physical, mental, emotional or cognitive disabilities; he was able to read and write and was "a man of at least average intelligence." (App. 278-79). Next, the trial court considered the circumstances of the confession, finding the room in which the interrogation occurred was comfortable; Avent had slept, so he was not tired; he was not hungry; the officers offered him something to drink; he was permitted to relieve himself, if necessary; Avent was not under the influence of alcohol or drugs or anything that would prohibit his understanding. (App. 279). Finally the trial court reviewed the officers'

conduct and found there had been neither a threat of the death penalty nor a promise of leniency. (App. 281).

Furthermore, the trial court found that Washburn's statement that it is best to cooperate was not coercive. (App. 280). Such statements provide "no evidence of any promises of leniency, any force, any threats, any intimidation, any coercion, or any deprivation of the defendant's physical or mental needs." Jackson, 267 Va. at 190, 590 S.E.2d at 526-27 (statement that officer was "here for you" did not render statement involuntary); see also Harrison v. Commonwealth, 244 Va. 576, 584 n.2, 423 S.E.2d 160, 165 n.2 (1992) (promises of leniency generally do not render a defendant's statement involuntary); United States v. Sanabria, 882 F.2d 645, 650 (2d Cir. 1989) ("It is not improper to mention the situation which the defendant faced and the advantages to him if he assisted the government.") (internal citations and quotations omitted).

Similarly, the trial court held that it was "only fair" to explain to Avent status of the investigation and the nature of the possible charges. (App. 280-81). "[A]ccurate representations" by the police of a suspect's "predicament" do not render his subsequent statements involuntary. United States v. Gallardo-Marquez, 253 F.3d 1121, 1124 (8th Cir. 2001) (defendant told "he was going to jail for life").

Avent has not met his burden to overcome the presumption that the trial court's subsidiary factual findings were correct. In light of those findings, he cannot meet his legal burden to demonstrate that his capacity for self-determination was overborne. Therefore, the trial court properly overruled the motion to suppress and this Court should affirm.

2. NO BATSON VIOLATION OCCURRED.

Avent has not established that the Commonwealth's peremptory strikes were merely pretextual. Accordingly, there is no error in the trial court's ruling and this Court should affirm.

> Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried, the Equal Protection Clause forbids the precutor to challenge potential jurors solely on account of their race.

Batson v. Kentucky, 476 U.S. 79, 89 (1986) (citation omitted). "When a defendant raises a challenge based on Batson, he must make a prima facie showing that the peremptory strike was made on racial grounds." Jackson v. Commonwealth, 266 Va. 423, 436 587 S.E.2d 532, 542 (2003); Yarbough v. Commonwealth, 262 Va. 388, 394, 551 S.E.2d 306, 309 (2001).

"Once a prima facie case is put before the court, the burden shifts to the prosecution to produce race-neutral explanations for striking the juror. The defendant can then argue that the prosecution's explanations were purely a pretext for unconstitutional discrimination." Juniper v. Commonwealth, 271 Va. 362, 407, 626 S.E.2d 383, 412 (2006) (internal quotations and citation omitted).

The trial court has the "unique opportunity to observe the demeanor and credibility of potential jurors during *voir dire*, and therefore [this Court] afford[s] the trial court's determination whether the Commonwealth's explanation is race neutral great deference. We will not reverse the trial court's decision unless it is clearly erroneous." Id. at 408-09, 626 S.E.2d at 413 (internal quotations and citation omitted).

Here, the trial court accepted that Avent had made a prima facie showing of purposeful discrimination. (App. 438, 444). Accordingly, the burden shifted to the Commonwealth to provide race-neutral reasons for its strikes. (App. 438, 444).

In response, the Commonwealth proffered specific, detailed, race-neutral reasons for each of peremptory strike. (App. 438-42). Avent then argued that the Commonwealth's reasons were not "valid." (App. 442-44). The trial court reviewed each explanation in turn and

determined it was a race-neutral, facially valid explanation. (App. 444-46). The trial court further held that "the defense has not met its burden of persuading the Court that the strikes were, in fact, from a cache of purposeful discrimination." (App. 446-47).

Avent appears to challenge only the strikes of Frema Draughn and Chiquita Easter. (Def. Br. at 20-21). The Commonwealth proffered that it struck Frema Draughn because it had "two concerns." (App. 439). First, Draughn's son had recently been found with marijuana in his car. (App. 439-40). Second, she had an affiliation with the local college and the Commonwealth's Attorney's office had experienced "a lot . . . of friction" with the college in pursuing prosecutions against some students and also with the security staff. (App. 319, 440). The defense countered that these concerns "had nothing to do with" Draughn. (App. 442-43). The trial court found the Commonwealth's reason was facially valid. (App. 445).

Chiquita Easter was struck because "she appeared to be sleeping" in the jury box during the selection process. (App. 440-41). In addition, the Commonwealth was aware that Easter had been sued in civil matters "multiple times" and owed money to "multiple organizations." (App. 441). Finally, Easter had indicated she had some sort of disability but it was

unclear what that disability was. (App. 441). Avent ***conceded*** that Easter was, in fact, sleeping; but suggested that she could be admonished about the need to be wakeful and attentive. (App. 443). In finding the Commonwealth's explanation for the Easter strike valid, the trial court observed that "either party is entitled to consider that the juror hasn't made it through the jury selection process without falling asleep could be a problem." (445-46).

Avent has not suggested how the trial court's rulings were clearly erroneous; accordingly, this Court should affirm. Juniper, 271 Va. at 409, 626 S.E.2d at 413.

3. AVENT'S PROFFERED TESTIMONY WAS IRRELEVANT, INADMISSIBLE HEARSAY.

The admissibility of evidence is within the broad discretion of the trial court, and its ruling thereon will not be disturbed on appeal in the absence of an abuse of discretion. Coe v. Commonwealth, 231 Va. 83, 87, 340 S.E.2d 820, 823 (1986).

Avent contends the trial court erred in excluding his proffered testimony that Meloni told him, sometime prior to the incident, that Thomas "did not like her dating black guys, nor that she had mixed children." (App. 793, 1054) In addition, Avent was present when

Thomas told Meloni that Avent did not belong at his (Thomas's) house. (App. 793). After an extensive proffer and argument, the trial court ruled the statements were inadmissible because they were: hearsay, irrelevant, tangential and the Commonwealth had no opportunity to cross-examine Thomas regarding veracity or context. (App. 809-10, 1055).

Avent argued, as he now asserts on appeal, that this proffered testimony was not hearsay because it was not offered for the truth; but simply to show his state of mind when he entered Thomas's house on August 9, 2005. (App. 796-97, 810-12; Def. Br. 22-24). More precisely, Avent asserted that his knowledge of this alleged statement—whether actually true or not—confirmed in his mind that Thomas was a racist, which created "hot blood" when Thomas purportedly attacked him when he entered Thomas's house. (App. 797-800).

Avent, however, cites no authority for the proposition that his belief (whether justified or not) that the victim was a racist can create reasonable provocation, heat of passion or self-defense. Furthermore, he has failed to address the trial court's alternative rulings that the proffered evidence was irrelevant, tangential and improper because the Commonwealth had no opportunity to cross-examine Thomas. (App.

809-14). Because Avent has not established the trial court abused its discretion, this Court should affirm.

4. AVENT DID NOT ACT IN SELF-DEFENSE; THUS THE TRIAL COURT PROPERLY DENIED HIS MOTION TO STRIKE AND HIS PROFFERED JURY INSTRUCTION.

Avent's own testimony plainly established he did not act in self-defense as a matter of law. Therefore, the trial court properly refused both his motion to strike and his proffered jury instruction on self defense.

A. Motion to Strike

Self-defense is an affirmative defense to a charge of murder, and in making such a plea, a "defendant implicitly admits the killing was intentional and assumes the burden of introducing evidence of justification or excuse that raises a reasonable doubt in the minds of the jurors." McGhee v. Commonwealth, 219 Va. 560, 562, 248 S.E.2d 808, 810 (1978). "When asserting an affirmative defense, . . . the burden is on the defendant to present evidence establishing such defense to the satisfaction ***of the fact finder***." Riley v. Commonwealth, 277 Va. 467, 480, 675 S.E.2d 168, 175 (2009) (unconsciousness defense) (emphasis added).

Avent contends that the trial court erred in denying his motion to strike the evidence regarding first and second degree murder. He argues that because he claimed to the officers (and subsequently testified) he killed the victim in self-defense, the evidence was legally insufficient to prove premeditated murder. (Def. Br. at 25). In other words, he contends the trial court should have determined the factual issues of the affirmative defense and the credibility of the witnesses as a matter of law, without presenting those matters to the jury for consideration. Manifestly, this is not the proper office of a motion to strike. Instead, a motion to strike should only be granted where, as a matter of law, the evidence is insufficient to establish the necessary elements of the charged crime. In granting or denying such a motion, the trial court does not determine the credibility of the witnesses or the weight of the evidence; those questions are solely for the jury. Remington v. Commonwealth, 262 Va. 333, 352, 551 S.E.2d 620 (2001) ("question whether a defendant is guilty of a premeditated killing of the victim is usually a jury question."); Clozza v. Commonwealth, 228 Va. 124, 134, 321 S.E.2d 273, 279 (1984) (same). As set forth more fully below, the evidence amply supported the jury's conclusion that Avent

premeditated the murder and the trial court did not err in overruling the motion to strike.

B. Jury Instruction

Avent also contends the trial court erred in refusing his proffered self-defense jury instruction. (Def. Br. 25-31). The trial court properly determined that, even viewing the evidence in the light most favorable to Avent, he was not entitled to a self-defense instruction as a matter of law.

A jury instruction "is proper only if supported by ***more*** than a scintilla of evidence. If the instruction is not applicable to the facts and circumstances of the case, it should not be given. Thus, it is ***not*** error to refuse an instruction when there is no evidence to support it." Commonwealth v. Sands, 262 Va. 724, 729, 553 S.E.2d 733, 736 (2001) (emphasis added); see also Commonwealth v. Cary, 271 Va. 87, 100, 623 S.E.2d 906, 913 (2006) (same). In determining whether the proffered instruction was supported by more than a scintilla of evidence, the Court views the evidence in the light most favorable to the proponent of the instruction. Sands, 262 Va. at 729, 553 S.E.2d at 736.

> "Justifiable homicide in self-defense occurs where a person, ***without any fault*** on his part in provoking or bringing on the difficulty, kills another under reasonable apprehension of

> death or great bodily harm to himself. Excusable homicide in self-defense occurs where the accused, although in some fault in the first instance in provoking or bringing on the difficulty, when attacked ***retreats as far as possible***, announces his desire for peace, and kills his adversary from a reasonably apparent ***necessity*** to preserve his own life or save himself from great bodily harm."

Yarborough v. Commonwealth, 217 Va. 971, 975, 234 S.E.2d 286, 290 (1977) (citations and internal quotations omitted; emphasis added); see also Buchanan v. Commonwealth, 238 Va. 389, 409, 384 S.E.2d 757, 769 (1989) (trial court properly denied second degree instruction based on defendant's testimony he killed because he got "mad").

Avent's proffered jury instruction addressed only justifiable homicide in self-defense, specifically requiring the jury to find he "was ***without*** fault in provoking or bringing on the difficulty." (App. 20). However, no evidence supported that view of the case; thus, Avent was not entitled to the instruction as a matter of law. Cary, 271 Va. at 100, 623 S.E.2d at 913; Sands, 262 Va. at 729, 553 S.E.2d at 736.

Even accepting as true Avent's claim that Thomas attacked him as soon as he entered the home,[2] Avent stated that Thomas ***ceased*** his assault, said "I got something for you," turned around, walked through the kitchen door and went upstairs. (App. 842). Avent then ***followed***

[2] Of course, Avent conceded he was armed with a deadly weapon when he did so. (App. 851, 1121).

Thomas upstairs because, he said, he feared Thomas was going to get a gun. (App. 842, 896-97). Avent told Washburn, however, that he did not know what Thomas was doing upstairs and that he followed Thomas because he "was mad." (App. 875, 1128, 1133). He also added repeatedly, however, that part of the reason he followed Thomas was that he "was mad." (App. 841-42, 854, 857, 1128). Avent said he did not run because he "didn't think about it." (App. 897). Even taking Avent's testimony as true, at that very moment Avent formed the intent to follow Thomas and kill him.

The trial court correctly ruled that Avent was not entitled to claim justifiable homicide in self-defense because he was not without fault in bringing on the difficulty. (App. 916-17, 1091-93). Specifically, that when Thomas went upstairs, "the assault had been broken off, the defendant followed the deceased from the altercation, and it was at that point, in the Court's opinion that he lost his right to plead justifiable self-defense. (App. 917). Commonwealth v. Vaughn, 263 Va. 31, 35, 557 S.E.2d 220, 223 (2002) (prior altercation had ended; defendant became aggressor).[3]

[3] "There must [also] be some overt act indicative of imminent danger ***at the time***." Sands, 262 Va. at 729, 553 S.E.2d at 736 (emphasis added). Here there was no imminent danger when Avent followed and shot

Avent's reliance on Cary is misplaced for two important reasons. First, Cary and the victim had had a "tumultuous relationship for more than 15 years," which was characterized by violent arguments. 271 Va. at 91, 623 S.E.2d 907. Second, and in stark contrast to the manner in which Avent and Meloni treated Thomas, "Cary instructed her son to call 911 and proceeded to apply pressure to the wound in [the victim's] chest." Id. at 92, 623 S.E.2d at 908. The trial court correctly refused Avent's proffered instruction.

5. THE EVIDENCE AMPLY ESTABLISHED THE KILLING WAS DELIBERATE AND PREMEDITATED.

"When examining a challenge to the sufficiency of the evidence, an appellate court must review the evidence in the light most favorable to the prevailing party at trial and consider any reasonable inferences from the facts proved." Viney v. Commonwealth, 269 Va. 296, 299, 609 S.E.2d 26, 28 (2005). Moreover, the judgment of the trial court is presumptively correct and "shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it." Code § 8.01-680; Viney, 269 Va. at 299, 609 S.E.2d at 28.

Thomas, who was standing 30 feet away and may have been retreating. (App. 854-56).

When considering a challenge to the sufficiency of the evidence, the reviewing court does not "ask itself whether ***it*** believes that the evidence at trial established guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) (citation omitted). Rather, the relevant question is whether "***any*** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. This deference applies not only to historical facts, but also to the inferences drawn from those facts. "It is within the province of the [fact finder] to determine what inferences are to be drawn from proved facts, provided the inferences are reasonably related to those facts." Commonwealth v. Hudson, 265 Va. 505, 514, 578 S.E.2d 781, 786 (2003).

A. Sufficiency of the Evidence for Premeditation

"To premeditate means to adopt a specific intent to kill, and that is what distinguishes first and second degree murder." Remington, 262 Va. at 352, 551 S.E.2d at 632. Importantly, however, "[t]he intention to kill need not exist for any specified length of time prior to the actual killing; the design to kill may be formed ***only a moment*** before the fatal act is committed provided the accused had time to think and did intend to kill." Weeks v. Commonwealth, 248 Va. 460, 477, 450 S.E.2d 379, 390 (1994)

(citing Clozza, 228 Va. at 134, 321 S.E.2d at 279) (emphasis added). "[It] is necessary that the killing should have been done on purpose and not by accident or without design. . . . The exact state of the defendant's mind at the time of killing is the crucial factor in determining intent. It is the will and purpose to kill, not necessarily the interval of time, which determine the grade of the offense." Remington, 262 Va. at 352-53, 551 S.E.2d at 632 (internal citations and quotations omitted; alteration in original).

In deciding this question, the fact finder properly may consider "the brutality of the attack, and whether more than one blow was struck, the disparity in size and strength between the defendant and the victim, the concealment of the victim's body, and the defendant's lack of remorse and efforts to avoid detection." Epperly v. Commonwealth, 224 Va. 214, 232, 294 S.E.2d 882, 892 (1982) (citations omitted); see also Weeks, 248 Va. at 477, 450 S.E.2d at 390 (brutality of attack); Clozza, 228 Va. at 134, 321 S.E.2d at 279 (concealment of the victim's body, and defendant's efforts to avoid detection). "While none of these factors might be sufficient standing alone, in combination they are more than enough to support the [fact finder's] finding that the killing . . . was not only malicious, but also willful, deliberate, and premeditated." Epperly,

224 Va. at 232, 294 S.E.2d at 892. Here, the Commonwealth's evidence satisfied the Epperly factors.

Avent went to Thomas's home armed and, apparently unwelcome. (App. 851, 880, 1055, 1128). Meloni broke into the home through a window on the porch and Avent "went through the back door." (App. 1122-23). Once inside, Avent backed Thomas into the far corner of his own bedroom and shot him in the chest from the doorway. (App. 639, 673-75, 696, 703). Thomas was able to walk to the doorway, but Avent pushed him to the ground. (App. 675-79, 857). While Thomas lay prone in the doorway, bleeding profusely, Avent beat him in the face repeatedly with the barrel of the shotgun. (App. 679-81, 687, 857-59, 1120, 1129). Avent ceased his vicious attack only when the gun fell apart and he "blacked out" from the exertion. (App. 481-82, 614, 639-43, 860). The damage to Thomas's skull was so severe, the medical examiner had to consult with a forensic anthropologist to confirm the cause of death. (App. 695, 1136, 1140-42).

> Reasonably to be inferred from this sequence of events is that ***ample time*** elapsed for the accused to deliberate and meditate, at least for a matter of seconds, upon his design and purpose to kill the victim. Such an interval of time is sufficient to justify the trial court in finding premeditation as a matter of fact.

Giarratano v. Commonwealth, 220 Va. 1064, 1074, 266 S.E.2d 94, 100 (1980) (emphasis added).

After shooting Thomas and then bludgeoning him to death, Avent and Meloni made no attempt to summon help. Cf. Rhodes v. Commonwealth, 238 Va. 480, 384 S.E.2d 95 (1989) (holding evidence insufficient to establish premeditation where the defendant timely summoned help and made no efforts to conceal evidence or avoid detection). Instead, they dumped his body in the chicken coop, covered it up, and then tried to clean the house and made a conscious effort to "get rid of evidence." (App. 468, 861-62, 1123, 1128-29). They then fled to a "remote" area of Arizona and attempted to conceal their car by changing the license plates. (App. 581, 586-87).

Although the evidence established Thomas was taller than Avent, Avent was also significantly younger than Thomas. (App. 838, 1136) Cf. Walker v. Commonwealth, 272 Va. 511, 514, 636 S.E.2d 476, 477 (2006) (noting physical disparities between assailant and victim). Moreover, the jury had the opportunity to observe Avent closely and was in a position to determine his physical prowess.

Finally, Avent never has expressed even the barest hint of remorse for his vicious attack. Roberts and Washburn testified that he was "calm"

when they interviewed him and did not express any emotion at any time. (App. 475, 520-21). At trial, Avent quibbled with the prosecutor. Even at his allocution, Avent expressed no remorse but instead insisted he did not receive a fair trial. (App. 1113-14).

The totality of this evidence supported the jury's conclusion that Avent deliberately killed Thomas with premeditation.

B. Voluntary Manslaughter, Voluntary Intoxication and the Firearm

Given the jury's factual determination on the question of premeditation, Avent was not entitled to a directed verdict for voluntary manslaughter. Indeed, the jury was instructed on first degree, second degree and voluntary manslaughter. (App. 12). In convicting Avent of first degree murder, the jury necessarily determined that he was not acting under heat of passion, "hot blood," or reasonable provocation.

Furthermore, under Virginia law, mere intoxication does negate premeditation. Only when a person voluntarily becomes so intoxicated that he is incapable of deliberation or premeditation does voluntary intoxication constitute a defense. Wright v. Commonwealth, 234 Va. 627, 629, 363 S.E.2d 711, 712 (1988); Fitzgerald v. Commonwealth, 223 Va. 615, 631, 292 S.E.2d 798, 807 (1982). However, even in the face of

evidence of extreme intoxication from alcohol or drugs, the factfinder may find willfulness, premeditation and deliberation if there is proof that the defendant "was in full control of his faculties and knew exactly what he intended to do." Fitzgerald, 223 Va. at 631, 292 S.E.2d at 807; see also Giarratano, 220 Va. at 1073, 266 S.E.2d at 99 (same). Inasmuch as the jury plainly considered the question of his voluntary intoxication and necessarily rejected it, Avent may not relitigate that factual issue here.

Finally, because the evidence supported the jury's verdict of first degree murder, the trial court did not err in denying his motion to strike that charge. For all these reasons, this Court should affirm the jury's verdicts.

6. THE COMMONWEALTH'S ARGUMENT WAS NOT IMPROPER AND DID NOT PREJUDICE AVENT.

"A trial court has broad discretion in the supervision of opening statements and closing argument." O'Dell v. Commonwealth, 234 Va. 672, 703, 364 S.E.2d 491, 509 (1988). A decision regarding the propriety of an argument lies within the discretion of the trial court, because "often it is difficult to draw the line between proper and improper argument, and usually it is preferable, therefore, to leave to the trial court the task of deciding upon which side of the line a particular argument

may fall." Hutchins v. Commonwealth, 220 Va. 17, 21, 255 S.E.2d 459, 461 (1979).

The recognition that some arguments may be improper does not compel the conclusion that prosecutors may not argue their cases forcefully.

> Attorneys have every right to argue and comment on the testimony, the inferences and conclusions to be drawn therefrom and any discrepancy therein. This can be done as forcefully and ably as the abilities of the advocate permit, and at such length as the patience of the trial judge will tolerate. It is when counsel inject their own personal views or personal opinions that the argument becomes objectionable and improper.

Artis v. Commonwealth, 213 Va. 220, 227, 191 S.E.2d 190, 195 (1972).

The trial court properly instructed the jury at the outset of trial that "[o]pening statements and closing arguments . . . are intended to help you in understanding the evidence and applying the law, but they are not evidence." (App. 431). The jury is presumed to have followed this instruction. Muhammad v. Commonwealth, 269 Va. 451, 524, 619 S.E.2d 16, 58 (2005).

The Commonwealth's Attorney's purportedly improper argument was that the jury should sentence Avent to life because "if you do anything less than life, anything less, then one day he's going to walk out of that prison cell and he's going to come back in this society." (App.

1044). At a sidebar, Avent moved for a mistrial, arguing the Commonwealth Attorney's argument was improper. (App. 1044-45). The trial court denied the motion for a mistrial and ruled that given that "[o]ne of the four goals of sentencing is restraint and protection of society . . . the Commonwealth ought to be able to argue restraint." (App. 1045). The Commonwealth then resumed, "what's going to happen when he walks out of prison if you give him anything less than life imprisonment? What's going to happen when he walks out? What's going to happen . . . when he gets mad at the next person?" (App. 1045).

Avent was not entitled to a mistrial under these circumstances and did not ask for any curative instruction or other admonition. Significantly, this argument came only during the sentencing—and not the guilt—phase of the trial. Thus, unlike the situation this Court disapproved in Hutchins, the comment did not "create an atmosphere wherein a defendant may be ***convicted*** and punished, not just for the offense on trial, but to set an example to deter some unknown future criminal activity by some as yet unidentified outside criminal actor." 220 Va. at 20, 255 S.E.2d at 461 (emphasis added). The prosecutor properly focused attention on Avent's conduct and Avent's potential for violence based on his own brutal actions demonstrated by the evidence.

Here, the jury already had convicted Avent of first degree murder and the Commonwealth was merely arguing what it felt was the proper disposition for this defendant, given his history and the violence of the crime of conviction. Under these circumstances, the trial court did not abuse its discretion in denying the motion for a mistrial.

7. AVENT WAS NOT ENTITLED TO A NEW TRIAL.

"[M]otions for new trials based on after-discovered evidence are addressed to the sound discretion of the trial judge, are not looked upon with favor, are considered with special care and caution, and are awarded with great reluctance." Commonwealth v. Tweed, 264 Va. 524, 528, 570 S.E.2d 797, 800 (2002). In order to establish that he was entitled to a new trial the defendant has to prove that the evidence: (1) was discovered subsequent to the trial; (2) could not have been secured for use at the trial in the exercise of reasonable diligence; (3) was not merely cumulative, corroborative or collateral; and (4) was material, "such as should produce opposite results on the merits at another trial." Id. at 528-29, 570 S.E.2d at 800 (citations omitted).

The after-discovered evidence consisted of testimony from Debbie Burkett, a social work supervisor from the Brunswick County Department of Social Services. (App. 1071-79). Burkett testified that she recalled

that “a number of years ago,” perhaps ten to twelve, there had been some allegation—***which was not confirmed***—of the victim’s sons being beaten with switches and that Thomas’s then-wife, Lucy Thomas, was “fearful” of Thomas. (App. 1073, 1076-77). Burkett also recalled that her agency had helped Lucy Thomas secure federal housing in Lawrenceville, where she still lived. (App. 1074, 1077-78). Burkett stated she was testifying solely from memory because the records had been expunged. (App. 1074).

Burkett also testified, however, that other than the single complaint, Lucy Thomas maintained that Thomas was a good father. (App. 1075, 1078-79). Indeed, Burkett had been to Lucy’s home following the murder and found that Lucy had set up “almost like a shrine in memory and in honor of Mr. Thomas.” (App. 1078). After reviewing the trial evidence, the trial court ruled that “there is virtually no likelihood” the evidence would have produced the opposite result had it been presented to the jury. (App. 1091-93). Therefore, the trial court denied Avent’s motion. (App. 28, 1094).

Plainly this evidence, which was little better than gossip and therefore of questionable admissibility, did not shed any light on whether Avent acted in self-defense or under heat of passion years after the

agency incident. (Def. Br. at 36). The evidence does not establish either a specific act of violence or a general reputation for turbulence and violence between Avent and Thomas, which arguably might shed light on who was the aggressor on August 9, 2005. See Jordan v. Commonwealth, 219 Va. 852, 855, 252 S.E.2d 323, 325 (1979).

Moreover, the evidence was so remote to the events leading up to Thomas's death that its probative value was de minimus. Finally, the evidence affirmatively established that Lucy harbored no fear, resentment or animus toward Thomas. To the contrary, she had set up a "shrine in memory and in honor of Mr. Thomas" in her home. (App. 1078). Under these circumstances, the trial court properly concluded that even if the jury had heard this evidence, "there is virtually no likelihood that it would have produced the opposite result." (App. 1093).

CONCLUSION

The record as a whole makes plain that Avent acted on deliberation and premeditation; his statements to the police were voluntary and the trial court did not abuse its discretion in any manner during the conduct of the trial or in passing on the post-trial motion. Accordingly, the judgment of the Court of Appeals affirming Avent's convictions should be affirmed.

Respectfully submitted,

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CERTIFICATE OF TRANSMISSION AND SERVICE

On September 25, 2009, the required number of copies of this brief were hand-delivered to the Clerk of this Court and three copies were mailed to: **Charles C. Cosby, Jr., Esquire, Boone, Beale & Cosby, 27 North 17th Street, Richmond, Virginia 23219**, counsel for the appellant.

_____

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Courtesy copy: The Honorable Lezlie Green, Commonwealth's Attorney
The Honorable W. Allan Sharrett, Presiding Judge