VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 21st *day of* October, 2008.

Cardell Lamont Avent, Appellant,

against Record No. 2941-07-2
Circuit Court Nos. CR05000205-00 and CR05000205-01

Commonwealth of Virginia, Appellee.

From the Circuit Court of Brunswick County

Per Curiam

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

I. Appellant contends the trial court erred in denying his motion to suppress his statements to the police. "[I]n considering a trial court's ruling on a suppression motion, we view the evidence in the 'light most favorable to . . . the prevailing party below,' the Commonwealth in this instance, and the decision of the trial judge will be disturbed only if plainly wrong." Greene v. Commonwealth, 17 Va. App. 606, 608, 440 S.E.2d 138, 139 (1994) (quoting Commonwealth v. Grimstead, 12 Va. App. 1066, 1067, 407 S.E.2d 47, 48 (1991)).

On September 1, 2005, appellant was arrested in Arizona upon a warrant charging him with the unauthorized use of a vehicle. Major Brian Roberts and Investigator Kenneth Washburn of the Brunswick County Sheriff's Department traveled to the jail in Navajo County, Arizona, to question appellant about the murder of William Thomas, whose dead body was discovered in an outbuilding near his Brunswick County home on August 17, 2005.

On September 3, 2005, police officers brought appellant to an interview room in the jail facility to talk to Roberts and Washburn. Appellant was not restrained, and the room was a comfortable

temperature. Roberts and Washburn identified themselves, told appellant they were investigating Thomas' death, and appellant was a suspect in the case. Washburn advised appellant of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). Appellant signed a waiver form indicating he understood his rights but wanted to talk to the police. Roberts explained to appellant the various degrees of murder and the associated penalties, as well as possible defenses.[1]

Appellant did not complain of any physical discomfort, and he was given drinks upon request. During the interview appellant appeared alert and sober, and conversed with the officers in a coherent manner. Appellant was allowed to take breaks during the interview, and he used the toilet located in the interview room. Previously, appellant had experience with law enforcement officers during an investigation for an assault.

After talking with appellant for thirty to forty-five minutes, Roberts indicated that he "got disgusted" about what he felt were the lies appellant was telling them and left the room. However, before leaving, Roberts did not yell at appellant, threaten him, or touch him.

After Roberts left he room, Washburn discussed appellant's rights with him once again. Appellant made verbal, then written, statements admitting he struck Thomas in the face with the barrel of a shotgun three to five times, resulting in Thomas' death. Washburn also made a tape recording of appellant's verbal statement. The entire interview process lasted about four hours.

Washburn met with appellant at the jail again on the morning of September 4, 2005. Washburn began by advising appellant of his Miranda rights. Appellant signed and dated the waiver form a second time. Appellant asked if he needed an attorney. Washburn replied that he could not answer the question as it was a decision appellant had to make for himself. Appellant indicated that he wanted to continue to talk to Washburn. Using a question and answer format, Washburn interrogated appellant regarding

[1] Roberts and Washburn denied that Roberts told appellant that if he did not cooperate and give a statement to the police, he would be charged with capital murder and receive the death penalty or a sentence of life in prison.

Thomas' killing to clarify appellant's statements of the previous day. The September 4, 2005 questioning lasted for about two hours.

At the suppression hearing, appellant stated that on September 3, 2005, Roberts became angry, slammed his hand on the table, and threatened appellant with a capital murder charge if he did not cooperate. Appellant said he became afraid because Roberts said appellant would be sentenced to life in prison or death. Appellant testified that as a result of Roberts' statements, he decided to cooperate and make a statement to the police. Appellant acknowledged that he understood his rights, but claimed he did not execute the waiver form until after he had already made a statement to the police.

Appellant contends his statements to the police were involuntary because the police threatened him with a capital murder charge and the death penalty if he did not cooperate. In determining whether a statement was made voluntarily,

> "[w]e must [independently] determine whether, in light of the totality of the circumstances, including not only the details of the interrogation, but also the characteristics of the accused, the statement was the product of an essentially free and unconstrained choice by its maker, or whether the maker's will was overcome and his capacity for self-determination critically impaired."

Novak v. Commonwealth, 20 Va. App. 373, 386-87, 457 S.E.2d 402, 408 (1995) (quoting Goodwin v. Commonwealth, 3 Va. App. 249, 253, 349 S.E.2d 161, 163-64 (1986)). The voluntariness issue is a question of law requiring an independent determination on appeal. See Wilson v. Commonwealth, 13 Va. App. 549, 551, 413 S.E.2d 655, 656 (1992). In making that independent determination, however, "we are bound by the trial court's subsidiary factual findings unless those findings are plainly wrong." Id.

Relating to the voluntariness of a suspect's statement, the Supreme Court has held that "[a]bsent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." Colorado v. Connelly, 479 U.S. 157, 164 (1986). In considering the conduct of the police, we "must consider the interrogation techniques employed, including evidence of trickery and deceit, psychological pressure, threats or promises of

leniency, and duration and circumstances of the interrogation." Terrell v. Commonwealth, 12 Va. App. 285, 291, 403 S.E.2d 387, 390 (1991).

There was no evidence of coercion or mistreatment on the part of the police in the present case. Appellant acknowledged that he understood his rights, and he was not deprived of any physical comfort during the interrogation process. Both Roberts and Washburn, whom the trial court found credible, testified that Roberts did not threaten appellant with a capital murder charge if he did not make a statement. Accordingly, the trial court did not err in finding appellant's statements were voluntary, and in denying appellant's motion to suppress.

II. Pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), appellant objected to the prosecutor's exercise of peremptory strikes to remove African-Americans Frema Draughn and Chiquita Easter from the jury panel. On appeal, appellant contends the trial court erred in denying his motion to invalidate the two peremptory strikes.

After a criminal defendant raises a Batson challenge to the prosecutor's exercise of peremptory strikes,

> the burden shifts to the prosecutor to articulate a racially neutral explanation for striking the jurors in question. Batson, 476 U.S. at 96-97. If the court determines that the proffered reasons are race-neutral, the defendant should be afforded an opportunity to show why the reasons, even though facially race-neutral, are merely pretextual and that the challenged strikes were based on race. United States v. Joe, 928 F.2d 99, 103 (4th Cir. 1991). But, ultimately, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. Batson, 476 U.S. at 98. On appeal, the trial court's findings will not be reversed unless they are clearly erroneous. Hernandez v. New York, 500 U.S. 352, [369] (1991).

James v. Commonwealth, 247 Va. 459, 461-62, 442 S.E.2d 396, 398 (1994).

In response to appellant's objections, the Commonwealth provided its reasons for striking both jurors. Draughn indicated her son recently had been stopped by the police after he admittedly had been smoking marijuana. Draughn also indicated having close ties with St. Paul's College, as her father had been a member of the security staff there. The prosecutor stated there had been friction between his

office and the college because of the criminal prosecution of several students. Moreover, there had been problems with security personnel at the college, including the arrest of the chief of security for "sex crimes." Easter was struck because she appeared to be asleep during the *voir dire* examination. On her juror questionnaire, Easter indicated she was "disabled." Moreover, Easter had faced multiple civil lawsuits claiming she owed money.

The trial court found the Commonwealth's reasons for exercising peremptory strikes against Draughn and Easter were facially race-neutral. Appellant made no showing that the Commonwealth's explanations were pretextual and based solely on race. Therefore, the trial court did not abuse its discretion in rejecting appellant's Batson challenge and finding appellant failed to prove purposeful discrimination on the part of the Commonwealth in the selection of the jury.

III. Before the incident resulting in Thomas' death, appellant was the boyfriend of Meloni Thomas (Meloni), Thomas' daughter. At trial, appellant proffered his own testimony that, prior to Thomas' death, Meloni told appellant, an African-American, that Thomas had said he did not like for her to date African-American men, nor did he approve that her children were of mixed race. Appellant further proffered that Thomas told Meloni, in appellant's presence, he did not want appellant in Thomas' home. The trial court sustained the Commonwealth's objection to the evidence, finding it was hearsay and irrelevant. Appellant challenges this ruling on appeal.

"We review a trial court's evidentiary rulings applying an abuse of discretion standard. We will not overturn a trial court's exercise of its discretion in determining whether to admit or exclude evidence on appeal unless the evidence shows that the trial court abused its discretion." Riverside Hospital v. Johnson, 272 Va. 518, 529, 636 S.E.2d 416, 421 (2006).

Hearsay is defined as "an out-of-court statement offered to prove the truth of the matter asserted." Garcia v. Commonwealth, 21 Va. App. 445, 450, 464 S.E.2d 563, 565 (1995) (*en banc*).

"When offered for the truth of the matters asserted, unless the statement falls within one of the many exceptions, such evidence is not admissible." Strohecker v. Commonwealth, 23 Va. App. 242, 253, 475 S.E.2d 844, 850 (1996).

Appellant argues Thomas' out-of-court statements were not hearsay because they were offered to demonstrate appellant's state of mind at the time of the altercation with Thomas, and were not intended to prove the truth of the matters asserted in the statement. Generally, out-of-court statements may be admissible "to show the state of mind which the statement induced in the hearer. Technically, these statements are not hearsay at all, since they are introduced to show the effect that they had on another person, and not to prove that what was said was true." Charles E. Friend, The Law of Evidence in Virginia § 18-18(9), at 791-92 (6th ed. 2003).

Even assuming, *arguendo*, that Thomas' statements were not hearsay, appellant was nonetheless required to establish the evidence was relevant. See Bunting v. Commonwealth, 208 Va. 309, 314, 157 S.E.2d 204, 208 (1967) (irrelevant evidence is inadmissible). "Evidence is relevant if it has any logical tendency to prove an issue in a case." Goins v. Commonwealth, 251 Va. 442, 461, 470 S.E.2d 114, 127 (1996).

Appellant's awareness that Thomas did not approve of appellant's relationship with Meloni and did not want appellant in the home had no tendency to prove any issue in the case. Thomas' known dislike of appellant did not prove that he acted in self-defense, or in the heat of passion, when he beat Thomas to death with the shotgun. Accordingly, the trial court did not abuse its discretion in excluding this evidence.

IV. Appellant contends the trial court erred in denying his motion to strike on grounds that he killed Thomas in self-defense. "On appeal, 'we review the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom.'" Archer v. Commonwealth, 26 Va. App. 1, 11, 492 S.E.2d 826, 831 (1997) (quoting Martin v. Commonwealth, 4 Va. App. 438, 443, 358 S.E.2d 415, 418 (1987)).

On August 17, 2005, police officers found Thomas' partially decomposed body in an old chicken coop near his home. There were bloodstains and blood spatters in numerous places inside Thomas' house. On the floor near the bedroom doorway was a tooth. Inside the well on the property was a shirt with bloodstains and a hole in the chest area. Also in the well were bloodstained bedding and pieces of a shotgun.

The police developed appellant and Meloni as suspects in the killing. When the police questioned appellant after his arrest in Arizona, he said that at some time between August 7 and 11, 2005, he, Meloni, and her three children had driven to Thomas' home to collect her welfare checks. Meloni entered the house alone. Appellant, who was waiting in the car with the children, heard arguing and went into the house. As soon as appellant was inside, Thomas hit him and he fell to the floor. Thomas put his hands around appellant's neck and began choking him. Appellant said that he was in fear for his life. Appellant was wiggling, trying to escape. Thomas released the chokehold and went upstairs. Appellant followed behind him "to see what he was doing." Appellant also said he followed Thomas because he "was mad . . . [Thomas] had choked [him], and [he] wanted to tell [Thomas] that he was wrong for hitting [him] and tell [Thomas] why [he] was down there . . . ."

When appellant reached the second floor, Thomas struck him with a board a few times. Appellant pulled out a gun and fired it once because he wanted to stop Thomas' attack. Thomas ran at appellant again, so appellant struck him with the gun. Thomas continued to fight, so appellant hit him in the face with the barrel of the gun three to five times. Meloni then came upstairs.

Meloni and appellant took Thomas' body out of the house and concealed it in a shed. Meloni cleaned up the house. Meloni, appellant, and her children then drove to North Carolina, where she met a friend and cashed her checks. Then, they drove to Arizona.

William Gormley, a medical examiner who attended Thomas' autopsy, testified that blunt force injury to the head caused Thomas' death. Thomas' right forearm was broken. Multiple small fragments

of metal were in his chest and right forearm. Gormley concluded that Thomas had been wounded in the arm and chest by a shotgun. Thomas also had sustained a cracked rib.

During the summer before Thomas' death, appellant and his friend, George Hicks, fired a shotgun in the woods near appellant's home. At the time of his arrest, however, appellant told the police he had never fired a shotgun.

Appellant and Meloni met John Bass in North Carolina, and Bass agreed to cash Meloni's checks. Bass observed no signs of injury to appellant at that time. Nor did any of the witnesses who saw appellant at his arrival in Arizona a few days later, or at the time the police apprehended him, notice that appellant had any injuries.

At trial, appellant testified that he entered Thomas' house on the day of his death after hearing Meloni and Thomas arguing, followed by a loud banging sound. Even though he claimed to have no intention of shooting or hurting Thomas, appellant brought a shotgun with him. Using his hand and fist, Thomas hit appellant on the side of the face. Appellant claimed that Thomas said, "N****r, what are you doing in my house." Thomas continued to strike appellant as he fell to the floor. Thomas put both hands around appellant's throat and started to choke him. Appellant testified that he was both afraid Thomas was going to hurt him and angry because of the racial slur. Thomas released appellant after choking him for ten to fifteen seconds.

Thomas said, "I've got something for you." Thomas turned, went through a doorway, and started up the stairs. Appellant said he feared Thomas was going to retrieve a gun, so he followed Thomas to tell him he did not want to fight and wanted to get Meloni and leave. Appellant said he did not retreat to the car because Meloni's children were waiting there, and he did not want to endanger them.

Appellant testified that when he reached the top of the stairs, Thomas struck him in the back of the head with a board. Appellant used his arms to protect his face and head. Thomas continued to strike appellant, and appellant became more and more angry. Appellant pulled out the shotgun and, from a ten

yard distance, shot at Thomas. Thomas continued to come at appellant with the board. Appellant hit Thomas with the gun, then continued to strike him with the gun barrel after Thomas fell to the floor.

Appellant claimed he lost consciousness for a few seconds, then Meloni entered the room. Meloni hit Thomas with the gun and held a sharp object to his neck. Because he was afraid, appellant helped Meloni take the body downstairs and clean the house.

Appellant further stated that before he went to Thomas' house with Meloni, he had smoked marijuana and consumed a quart of beer. Appellant said he felt high and intoxicated at the time of the incident.

Appellant contends the trial court erred in refusing to strike the evidence on grounds that appellant acted in self-defense. "Self-defense is an affirmative defense which the accused must prove by introducing sufficient evidence to raise a reasonable doubt about his guilt." Smith v. Commonwealth, 17 Va. App. 68, 71, 435 S.E.2d 414, 416 (1993).

> A claim of self-defense may be either justifiable or excusable; if it is either, the accused is entitled to an acquittal. See Bailey v. Commonwealth, 200 Va. 92, 96, 104 S.E.2d 28, 31 (1958). "Justifiable homicide in self-defense occurs [when] 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." Id. (emphasis added). "If an accused 'is even slightly at fault' at creating the difficulty leading to the necessity to kill, 'the killing is not justifiable homicide.'" Smith, 17 Va. App. at 71, 435 S.E.2d at 416.

Lynn v. Commonwealth, 27 Va. App. 336, 353, 499 S.E.2d 1, 9 (1998), aff'd, 257 Va. 239, 514 S.E.2d 147 (1999).

> "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."

Id. (quoting Bailey, 200 Va. at 96, 104 S.E.2d at 31).

The accused's "fear alone does not excuse the killing; there must be an overt act indicating the victim's imminent intention to kill or seriously harm the accused." Smith, 17 Va. App. at 71-72, 435

S.E.2d at 417. "'There must be . . . some act menacing present peril . . . [and] [t]he act . . . must be of such a character as to afford a reasonable ground for believing there is a design . . . to do some serious bodily harm, and imminent danger of carrying such design into immediate execution.'" Commonwealth v. Sands, 262 Va. 724, 729, 553 S.E.2d 733, 736 (2001) (quoting Byrd v. Commonwealth, 89 Va. 536, 539, 16 S.E. 727, 729 (1893)). In addition,

> [a] person only has the privilege to exercise reasonable force to repel the assault. "The privilege to use such force is limited by the equally well recognized rule that a person 'shall not, except in extreme cases, endanger human life or do great bodily harm.' . . . [T]he amount of force used must be reasonable in relation to the harm threatened." Diffendal v. Commonwealth, 8 Va. App. 417, 421, 382 S.E.2d 24, 26 (1989).

Foote v. Commonwealth, 11 Va. App. 61, 69, 396 S.E.2d 851, 856 (1990).

The evidence supports the trial court's conclusion appellant did not act in justifiable or excusable self-defense when he killed Thomas. Appellant could have extricated himself from the altercation and protected himself from death or great bodily harm had he simply left the home when Thomas went upstairs. However, appellant, armed with a shotgun, chose to follow Thomas. Appellant said he was angry at Thomas and wanted to tell Thomas he had been wrong. The altercation then continued, resulting in appellant pulling out his shotgun and wounding Thomas. Appellant beat Thomas with the shotgun barrel until Thomas was dead. In light of these facts and circumstances, the trial court did not err in denying the motion to strike and refusing to find appellant acted in self-defense.

V. Appellant contends the trial court erred in refusing his proposed instruction permitting the jury to find he acted in justifiable self-defense.[2] "A reviewing court's responsibility in reviewing jury instructions is 'to see that the law has been clearly stated and that the instructions cover all issues which

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[2] Appellant's proposed instruction stated:

> If you believe that the defendant was without fault in provoking or bringing on the difficulty, and if you further believe that the defendant reasonably feared, under the circumstances as they appeared to him, that he was in danger of being killed or that he was in danger of great bodily harm, then the killing was in self defense, and you shall find the defendant not guilty.

the evidence fairly raises.'" Darnell v. Commonwealth, 6 Va. App. 485, 488, 370 S.E.2d 717, 719 (1988) (quoting Swisher v. Swisher, 223 Va. 499, 503, 290 S.E.2d 856, 858 (1982)). "In determining whether to instruct the jury on a lesser-included offense, the evidence must be viewed in the light most favorable to the accused's theory of the case." Lea v. Commonwealth, 16 Va. App. 300, 305, 429 S.E.2d 477, 480 (1993).

A finding of justifiable self-defense requires that appellant was without fault in provoking or bringing on the difficulty. See Lynn, 27 Va. App. at 353, 499 S.E.2d at 9. According to appellant's own testimony, however, he followed Thomas upstairs even though he could have simply left the house. Appellant, who was armed with a shotgun, testified that he was angry with Thomas. Appellant first shot Thomas, then beat him to death. Because a scintilla of evidence did not support appellant's jury instruction on self-defense, see Bunn v. Commonwealth, 21 Va. App. 593, 599, 466 S.E.2d 744, 746 (1996), the trial court did not err in refusing it.

VI. and X. Upon instructions permitting acquittal or conviction of first-degree murder, second-degree murder, or voluntary manslaughter, the jury found appellant guilty of first-degree murder. Appellant contends the trial court erred in refusing to find him guilty of voluntary manslaughter.[3]

In Turner v. Commonwealth, 23 Va. App. 270, 276, 476 S.E.2d 504, 507 (1996), aff'd, 255 Va. 1, 492 S.E.2d 447 (1997), this Court found that in convicting the defendant of first-degree murder, the jury found the defendant acted with malice and premeditation. Voluntary manslaughter requires heat of passion upon reasonable provocation. Heat of passion cannot coexist with malice. See Barrett v. Commonwealth, 231 Va. 102, 106, 341 S.E.2d 190, 192 (1986). Reasonable provocation cannot coexist with premeditation. See Turner, 23 Va. App. at 277, 476 S.E.2d at 508.

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[3] Appellant contends that had the trial court properly found appellant guilty of voluntary manslaughter, it would have been required to acquit him of using a firearm in the commission of murder. However, the jury was permitted to determine whether appellant was guilty of murder or voluntary manslaughter. Had the jury found appellant guilty of the lesser offense, it nonetheless could convict him of the firearm offense. See Tyler v. Commonwealth, 21 Va. App. 702, 707-08, 467 S.E.2d 294, 296 (1996).

Moreover,

> to constitute a wilful, deliberate and premeditated homicide, the intention to kill need not exist for any specified length of time prior to the actual killing. A 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.

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

The evidence proved appellant followed Thomas up the stairs during their altercation. With the shotgun he had brought with him, appellant took a shot at Thomas and wounded him. Appellant struck Thomas with the gun until he fell. Appellant continued to strike Thomas until he was dead. These facts and circumstances were sufficient to prove beyond a reasonable doubt that appellant was guilty of deliberate and premeditated murder rather than voluntary manslaughter.

VII. During closing argument at the penalty phase, the prosecutor argued the jury should consider "the danger [appellant] would pose if he wasn't in prison" because if sentenced to less than life, "then one day he's going to walk out of that prison cell, and he's going to come back in this society." Appellant objected and moved for a mistrial. Appellant appeals the trial court's refusal to grant a mistrial. "A trial court's ruling [that an argument was proper] will be permitted to stand unless it is made to appear probable that the party complaining has been substantially prejudiced by the objectionable remarks or arguments." Martinez v. Commonwealth, 10 Va. App. 664, 669, 395 S.E.2d 467, 470 (1990), aff'd, 241 Va. 557, 403 S.E.2d 358 (1991).

Appellant contends the prosecutor's comment appealed to the jurors' passions by exciting their personal interests in protecting their safety. See Hutchins v. Commonwealth, 220 Va. 17, 19, 255 S.E.2d 459, 460-61 (1979) (argument questioning whether the jury would suggest a sentence that would send a message for criminals to "'[c]ome on down. It's down here. It's yours for the picking. We don't care.'"). The prosecutor's statement in this case, however, "did not directly suggest any connection between the jurors and appellant's future criminal action." Teleguz v. Commonwealth, 273 Va. 458, 494, 643 S.E.2d 708, 730 (2007). The prosecutor did not suggest the jurors themselves would be victimized by appellant's criminal behavior if he was released from prison, but that his past behavior

should be punished to the greatest extent permitted. Accordingly, we find no substantial prejudice resulted from the prosecutor's remark, and do not disturb the trial court's refusal to grant a mistrial.

VIII. Appellant contends the trial court erred in denying his motion for a new trial based upon newly discovered evidence regarding allegations of violent acts committed by Thomas ten to twelve years before his death. A motion for a new trial based upon after-discovered evidence "is a matter submitted to the sound discretion of the circuit court and will be granted only under unusual circumstances after particular care and caution has been given to the evidence presented." Orndorff v. Commonwealth, 271 Va. 486, 501, 628 S.E.2d 344, 352 (2006). A moving party is required to establish that the evidence

> "(1) appears to have been discovered subsequent to the trial; (2) could not have been secured for use at the trial in the exercise of reasonable diligence by the movant; (3) is not merely cumulative, corroborative or collateral; and (4) is material, and such as should produce opposite results on the merits at another trial."

Id. (quoting Odum v. Commonwealth, 225 Va. 123, 130, 301 S.E.2d 145, 149 (1983)).

At a post-trial hearing, a local social worker testified that Thomas was reportedly abusive to his wife and had disciplined his young toddler sons using switches. Thomas' wife allegedly had been fearful of him. However, there was no indication that Thomas had a reputation in the community for violence. After Thomas' death, moreover, his former wife described Thomas as a good husband and father, and she had displayed a collection of photographs and memorabilia in his honor in her home.

As the trial court concluded, appellant failed to demonstrate that the information regarding Thomas' past was material and should produce opposite results at a new trial. The evidence did not make it more likely that appellant killed Thomas in self-defense or in the heat of passion. Therefore, the trial court did not abuse its discretion in denying appellant's motion for a new trial.

IX. Appellant argues the evidence proved he was intoxicated at the time of the killing and unable to premeditate. As the jury was properly instructed, however, "[w]hile a person who has become so intoxicated as to be unable to deliberate and premeditate cannot commit any class of murder that is

defined as a wilful, deliberate, and premeditated killing, mere intoxication from drugs or alcohol will not suffice to negate premeditation." Giarratano, 220 Va. at 1073, 266 S.E.2d at 99. Although appellant claimed to have consumed alcohol and drugs on the day of the killing, the evidence did not prove he "was so intoxicated as to render him incapable of committing a wilful, deliberate and premeditated act designed to kill" Thomas. Hatcher v. Commonwealth, 218 Va. 811, 814, 241 S.E.2d 756, 758 (1978). As noted above, appellant, having armed himself with a shotgun, followed Thomas upstairs. There, he shot Thomas and wounded him. Appellant used the gun to knock Thomas to the floor, then proceeded to beat him in the head. These facts and circumstances demonstrate the deliberate nature of appellant's actions and that he did in fact premeditate the killing. Accordingly, the trial court did not err in refusing to find appellant's intoxication negated the element of premeditation for first-degree murder.

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

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

This Court's records reflect that Charles C. Cosby, Jr., Esquire, is counsel of record for appellant in this matter.

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

Attorney's fee $400.00 plus costs and expenses

A Copy,
Teste:

Cynthia L. McCoy, Clerk

By: Marty K.P. King
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on **Thursday** *the* **26th** *day of* **February, 2009**.

Cardell Lamont Avent, Appellant,

against Record No. 2941-07-2
Circuit Court Nos. CR05000205-00 and CR05000205-01

Commonwealth of Virginia, Appellee.

From the Circuit Court of Brunswick County

Before Judges Kelsey, Haley and Senior Judge Bumgardner

For the reasons previously stated in the order entered by this Court on October 21, 2008, the petition for appeal in this case hereby is denied.

It is ordered that the trial court allow court-appointed counsel for the appellant an additional fee of $100 for services rendered the appellant on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses. In addition to the costs incurred in this Court's October 21, 2008 order, the Commonwealth shall also recover of the appellant the costs reflected in this order.

This order shall be certified to the trial court.

Additional costs due the Commonwealth
by appellant in Court of Appeals of Virginia:

Attorney's fee $100.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: Mary E. Rowe
Deputy Clerk

ASSIGNMENTS OF ERRORS

1. The Court erred in refusing to grant the defense counsel's Motion to Suppress his statements on the grounds that they were not voluntary. (2Tr. 65-70).
2. The Court erred when it denied defense counsel's Baston motion. (3Tr. 163-166).
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. (5Tr. 502).
4. The Court erred in refusing to grant the defense counsel's Motion to Strike on the basis that the defendant acted in self-defense. (5Tr. 605-613).
5. The Court erred in refusing to grant the defense counsel's self-defense jury instruction. (5Tr. 614)
6. The Court erred in failing to find the defendant guilty of voluntary manslaughter, and in failing to thus, acquit him of use of a firearm. (8Tr. 20).
7. The Court erred in failing to grant defense counsel's motion for a mistrial on the basis of improper argument at the penalty phase by the Commonwealth. (5Tr. 725).
8. The Court erred by denying the defense counsel's motion for a new trial based on after-discovered evidence. (7Tr. 25-30).
9. The defendant should have been acquitted of first degree murder as the element of premeditation was negated by intoxication. (5Tr. 613).
10. The Court erred when it found that there was sufficient evidence to find that the defendant premeditated, as to support a conviction for first degree murder. (8Tr. 20).