IN THE

Supreme Court of Virginia

RECORD NO. 090537

CARDELL LAMONT AVENT,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

Charles C. Cosby, Jr., Esq.
Virginia State Bar No. 16566
BOONE, BEALE & COSBY
27 North 17th Street
Richmond, VA 23219
(804) 780-0311
(804) 648-6211 (Fax)
Email: cccosby@verizon.net

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

Appellant's Opening Brief.....2

Nature of the Case and Material Proceedings.....3

Statement of Facts 5

Assignments of Errors 13

Questions Presented.....14

Law, Argument, & Authority.....16

Conclusion.....38

Certificate of Service.....39

TABLE OF AUTHORITIES

CASE LAW:

Barrett v. Commonwealth, 231 Va. 102, 105-106, 341 S.E.2d 190, 192 (1986).....31

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986).....20

Bunn v. Commonwealth, 21 Va. App. 593, 599, 466 S.E.2d, 744, 746, (1996).....25

Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515, 522 (1986).....19

Commonwealth v. Cary, 271 Va. 87, 101, 623 S.E.2d 906, 913 (2006).....29

Dupree v. Commonwealth, 272 Va. 496, 502, 635 S.E.2d 676, 680 (2006).....20

Girrantono v. Commonwealth, 220 Va.1064, 1074 266 S.E.2d 94, 100 (1980).....37

Gray v. Commonwealth, 233 Va. 313, 324, 356 S.E.2d 157,163 (1987).....18

Hodges v. Commonwealth 272 Va. 418, 436, 634 S.E.2d 680, 689 (2006).....24

Hunt v. Commonwealth, 25 Va. App. 395, 400, 488 S.E.2d 672, 674 (1997) 26

Hutchins v. Commonwealth, 220 Va. 17, 235 S.E. 2d 459 (1974) 32

Jackson v. Commonwealth, 266 Va. 423, 436, 587, S.E.2d 532, 542 (2003).....20

Johnson v. Commonwealth, 2 Va. App. 598, 602, 347 S.E.2d 163, 165 (1986).....23

McGhee v. Commonwealth, 219 Va. 560, 562, 248 S.E.2d 808, 810 (1978).....26

Midkiff v. Commonwealth, 250 Va. 262, 268-269, 462 S.E.2d 112, 116 (1995).....18

Odum v. Commonwealth, 225 Va. 123, 130, 301 S.E.2d 145, 149 (1983).....34

Proctor v. Commonwealth, 40 Va. App. 233, 578 S.E.2d 822 (2003).....36

Schneckloth v. Bustamonte, 412 U.S. 218, 225, 93 S.Ct. 2041, 2047 (1973).....18

Smith v. Commonwealth, 17 Va. App. 68, 71, 435 S.E.2d 414, 416 (1993).....24

Stoneman v. Commonwealth, 66 Va. 887,900, 1874 WL 5647, (1874).....28

Vlastaris v. Commonwealth, 164 Va. 647, 652, 178 S.E. 775, 776 (1935).....28

Yarborough v. Commonwealth, 217 Va. 971, 975, 234 S.E.2d 286, 290 (1977).....28

OTHER:

E. Cleary, McCormick on Evidence § 249 (3d ed. (1984).....23

Friend, Charles E., The Law of Evidence in Virginia §18-18, at 792 (6th ed. 2003).....23

Friend, Charles E., The Law of Evidence in Virginia §5-9, at 212 (6th ed. 2003).....35

IN THE SUPREME COURT OF VIRGINIA

CARDELL LAMONT AVENT, Appellant,

v. **RECORD NO. 090537**

COMMONWEALTH OF VIRGINIA, Appellee.

APPELLANT'S OPENING BRIEF

To the Honorable Chief Justice and Justices of the Supreme Court of Virginia:

COMES NOW your Appellant, Cardell Lamont Avent, hereinafter referred to as the defendant or Avent, by his counsel, on his appeal from the convictions in the Circuit Court of Brunswick County. The Court of Appeals by a three-judge panel denied the Petition for Appeal on February 26, 2009. The judgment in the Circuit Court consists of a certain judgment and sentence imposed upon him by the Honorable W. Allan Sharrett, Judge of the Circuit Court for Brunswick County on November 25, 2007. This proceeding below of which Avent now complains consists of a judgment of guilt to First Degree Murder and Use of a Firearm in Commission of a Murder, in violation of Virginia Code Sections 18.2-32 and 18.2-53.1, with a sentence of life in prison for murder and three years imprisonment for the use of a firearm charge in the commission of murder

conviction. This Honorable Court by an Order of July 22, 2009 granted the Petition for Appeal in this case.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Avent stood charged in the Circuit Court of Brunswick County on July 23, 2007, with First Degree Murder and Use of a Firearm in the commission of a Murder. He was arraigned on these charges on July 23, 2007, and pled not guilty. (App. 295, 296). Pre-trial motions were heard on May 3, 2007, and on May 25, 2007, and the defendant's Motions to Suppress were denied. (App.65-70), (App. 203-211). Prior to a jury being empanelled the defendant made a Batson objection which was overruled (App. 437, 444-447). The jury trial was from July 23 to July 26, 2007. Defense counsel moved for the introduction of evidence on the defendant's state of mind and the Court denied said motion. (App. 793, 809). The defendant made a motion to strike at the conclusion of the Commonwealth's case and renewed his motion to strike at the conclusion of all the evidence, which motions were also denied. (App. 912, 915-921). The defendant offered a self-defense instruction, which the Court refused to give and the defendant objected to the Court's ruling. (App. 921). Defense counsel made an objection during the Commonwealth Attorney's closing argument on

punishment and moved for a mistrial, which motion was denied. (App. 1044- 1045). The defense filed a post-trial motion for a new trial based on after-discovered evidence and a hearing was held on October 18, 2007, and the motion was denied. (App. 1069-1094). The sentencing was held on November 25, 2007, and the Court affirmed the jury's verdict and imposed the recommended punishment (App. 1114, 1115). Avent's Petition for Appeal to the Court of Appeals was denied on February 26, 2009.

The transcripts in this case are listed below and the relevant portions have been placed in the Appendix and are referred to by reference to the Appendix:

May 3, 2007,	Motions Hearing 1	1Tr.
May 25, 2007	Motions Hearing 2	2Tr.
July 23, 2007	Jury Trial (Day 1 of 4)	3Tr.
July 24, 2007	Jury Trial (Day 2 of 4)	4Tr.
July 25, 2007	Jury Trial (Day 3 of 4)	5Tr.
July 26, 2007	Jury Trial (Day 4 of 4)	6Tr.
October 18, 2007	Motions Hearing 3	7Tr.
November 25, 2007	Sentencing Hearing	8Tr.

The victim, Mr. William David Thomas, Jr. will hereafter be referred to as "the victim" or "Mr. Thomas" and the co-defendant, Meloni Thomas, will be referred to as "Meloni."

STATEMENT OF FACTS

The Commonwealth's evidence is that the victim, William David Thomas, Jr. was shot and beaten at his home in Brunswick County. His body was discovered on August 17, 2005, in an outbuilding near his home in a state of decomposition. (App. 465, 469, 473). The Brunswick County Sheriff's Department did a crime scene investigation. (App. 480). The body was recovered at the scene, and in the house, blood was found in the bathtub, on the downstairs' floor, and on the steps; blood spatter was found upstairs in the victim's bedroom. Blood stains were on the bedroom wall, on the bed, and underneath the mattress. (App. 466,480). Police recovered a piece of wood, two human teeth, two pieces of metal that appeared to be a spring and a metal pin from the bedroom. (App. 480).

The defendant and Meloni Thomas, the victim's daughter, were developed as suspects and arrested in Arizona. (App. 475-476). The evidence was that Meloni Thomas went to her father's house to obtain her welfare checks on the date that he was killed. (App. 571, 834). Those checks were discovered to have been later cashed by John Bass in Roanoke, North Carolina. Mr. Bass advised that he met with Meloni Thomas and the defendant on August 9, 2005, and that Meloni asked that

he cash some checks for her. (App. 571). He says he saw the defendant but did not see any injuries on him. (App. 572).

Investigator Washburn testified that the defendant told him when he entered the house that a struggle ensued between him and victim. (App. 505). The defendant's handwritten statement to Investigator Washburn, written on September 3, 2005, stated that he, Meloni Thomas, and her kids, Rayshawn, D.J., and Jaum, went to her father's house (the Thomas residence) to pick up checks. (App. 505). Meloni went inside to get the checks and the defendant stayed in the car. (App. 505). When the defendant heard arguing coming from the house, he went inside. (App. 505). He was hit by Melon's father, Mr. Thomas, once he entered the house and fell to the floor while still being hit. (App. 505). When he looked up from the floor, Mr. Thomas put his hands around his neck and started choking him. (App. 505). He was afraid for his life and started wiggling trying to get away. (App. 505). Mr. Thomas stopped choking the defendant and went upstairs. The defendant followed behind him slowly to see what he was doing. (App. 505). When the defendant got upstairs, he was hit with a board a few times and was afraid for his life. (App. 506). He turned his head away and at the same time pulled out a gun and shot one time, not noticing where he was shooting.(App. 506). He wanted Mr.

Thomas to stop hitting him. (App. 506). When he turned back around after firing the first shot, he saw that Mr. Thomas was still running towards him. (App. 506). He then took his gun and hit Mr. Thomas until he stopped hitting him. (App. 506) Meloni then came upstairs. (App. 506). The defendant was scared. (App. 506). Both he and Meloni dragged Mr. Thomas outside the house and to the shed. (App. 506). Lieutenant Washburn also documented the defendant's statements in a question-and-answer-format. (App. 509). The defendant stated that he used a single barrel shotgun in the fight he had with Thomas. (App. 511). When asked why he followed Mr. Thomas upstairs, he stated that he was angry from just being choked and wanted to tell Mr. Thomas that he was wrong for hitting him but he kept getting hit (App. 512). He did not know what Mr. Thomas was doing while he was upstairs but once he got up there, Mr. Thomas swung a board at him and kept swinging (App.513). Lieutenant Washburn said he did not find such a board at the scene. (App. 553). Lieutenant Washburn testified that he did not see any visible injuries to the defendant's head or neck where the defendant pointed. (App. 522, 557). The Lieutenant did note that the defendant had a bruise on his left arm and a mark on his left leg. (App. 522).

Mr. George Hicks, a former schoolmate of the defendant, testified that during the summer the defendant showed him a shotgun with a shortened barrel (App. 554-561). They both fired the gun in the woods (App. 562). Ms. Tami Rose, who allowed Meloni Thomas and the defendant to stay in her place in Arizona, said she did not see any injuries on the defendant (App. 578). She admitted she did not pay any particular attention however to his body. (App. 579).

Officer Reeder Nez, who is a criminal investigator in Arizona, arrested the defendant and Meloni Thomas in September of 2005 in Arizona. (App. 582). He got three or four feet from the defendant and did not observe any injuries on him (App. 588).

Trooper Steven Kean of the Virginia State Police, who is on the police dive team, responded to the victim's residence. (App. 604). The police dive team found in the well at the house parts of a Winchester firearm. (App. 609). Special Agent John Polak of the State Police testified to various items recovered at the crime scene, such as a plastic cup with blood, a bottle of lemon all purpose cleaner and teeth (App. 613-614). One tooth was found on the threshold going into the victim's bedroom and another was found in the bedroom. (App. 615). He also recovered swabs of blood from the bedroom wall. (App. 620).

Various forensic scientists testified. James Bullock, a forensic scientist with the state, related that gun parts were found in the well from a Winchester shotgun and that a T-shirt recovered at the crime scene had damage consistent with the discharge of a shotgun. (App. 638-639). Jean Hamilton, another forensic scientist, testified for the Commonwealth, and indicated that the victim's blood was found on various items in the house and was found upstairs and downstairs. (App. 656). Also Marjorie E. Harris, a blood pattern analyst, testified as to the blood stains found in the bedroom. (App. 669-688).

Dr. William Gormley, the assistant medical examiner, related a number of injuries to the victim, such as shotgun pellets, bone fractures, contusions, and blunt injury to the face (App. 705-709). The cause of death was blunt force injuries to the head (App. 705).

The defendant testified to the following: He and Meloni Thomas went to the victim's house so that Meloni could get her checks. (App. 834). He was not sure what kinds of checks they were but thought they were welfare checks. (App. 835). Meloni went into the victim's house while he stayed in the car with her three children. (App. 835). He had been in the car for about 10 or 15 minutes when he heard Meloni and the victim arguing and a loud bang from inside the house. (App. 835, 836). The defendant went

into the house to get Meloni before she got herself into trouble. (App. 838). As soon as he entered the house he was hit and attacked. (App. 838). The victim was hitting him in his face with his fists and his hands. (App. 839, 840). The victim said "Nigger, what are you doing in my house" while he was hitting the defendant. (App. 840). When the defendant was hit, he fell to the ground and continued to get hit by the victim two or three times to the side of his face and head (App. 840, 841). The victim then began choking the defendant with both hands while the defendant was lying on his back (App. 841). The defendant testified, "[I]t put fear in me. I was scared and I was mad at the same time because I was afraid that he was going to really hurt me as far as being a racial slur. I was afraid he was really going to hurt me, and I was mad at the same time because he was attacking me just because of the color of my skin. So, I was afraid and mad at the same time." (App. 841, 851). The defendant was choked for around 10 to 15 seconds. (App. 842). Mr. Thomas released the defendant and said "I got something for you" and went up the stairs. (App. 842). The defendant thought that Mr. Thomas was going to get a gun. (App. 842). The defendant testified that he knew the kids were in the car, "so, I wasn't going to go out to the car and put the kid's life on the line, so I knew that wasn't an option." The defendant told the victim that he wanted to get Meloni and

go and that he wasn't there to fight. (App. 841). The defendant had smoked marijuana and drank a 32-ounce beer before 12:00pm, which was 30-35 minutes before he went to the victim's house. (App. 845). He was high and intoxicated while at the victim's house when he was assaulted but didn't know how high he was. (App. 847).

When the defendant went upstairs, Mr. Thomas hit him with a board in the back of the head (App. 848). He put his arms up to block the victim's blows. (App. 849). Again, as the victim was hitting him, the defendant stated that he was not there to fight and that he just wanted to get Meloni and leave. (App. 850). The defendant had a shotgun with him when he went into the house. (App. 850). "I got scared, so I got the gun; I just wanted to protect myself." (App. 853). The defendant said he had knots and swelling on both arms and to his left leg. (App. 853). He pulled out his shotgun and fired because he got mad that the victim kept hitting him and he was afraid for his life. (App. 854) He turned his head away when he shot and after shooting he saw that the victim was coming towards him with the board again. (App. 549). He stated that he did not intend to kill the victim when he shot the gun and that he really "wasn't thinking at all" because he was too afraid and mad to think. (App. 857). The victim continued to swing the board and hit the defendant, which made him

"madder and madder" and he hit the victim one hard time causing him to fall to the floor. (App. 857). The defendant hit the victim with the barrel of his gun. (App. 857). The victim was on the floor and was moving and trying to fight and the defendant hit him with the gun. (App. 859). The defendant suffered an injury to his leg but wasn't sure at what point in the fight he received the injury. (App. 859). Meloni entered the room saying "Get him, Get him." (App. 860). The defendant got overheated and blacked out and fell to the floor. (App. 860). When he woke up, seconds later, the defendant saw that Meloni had grabbed the gun and started hitting the victim with the gun herself. (App. 860). Meloni stood over the victim and said, "That's what death looks like, bitch" and held a knife to the victim's neck. Both he and Meloni dragged the victim outside. (App.863). The defendant took the board that the victim hit him with, the knife, and a part of the shotgun barrel from the home because he was scared. (App. 862). Meloni drove them to North Carolina thereafter and then to Arizona. (App. 863). The defendant stated that the swelling and knots on his body had gone down by the time he was questioned by the police in Arizona three or four weeks later. (App. 847).

ASSIGNMENT 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. (App. 276-281).
2. The Court erred when it denied defense counsel Batson motion. (App. 444-449).
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. (App. 809).
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. (App. 912-920).
5. The Court erred in refusing to grant the defense counsel's self-defense jury instruction. (App. 920)
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. (App. 915, 1115).

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. (App. 1045).

8. The Court erred by denying the defense counsel's motion for a new trial based on after-discovered evidence. (App. 1089-1094).

9. The defendant should have been acquitted of first degree murder as the element of premeditation was negated by intoxication. (App. 920).

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. (App. 1115).

QUESTIONS PRESENTED

1. Did the Court err in refusing to grant the defense counsel's Motion to Suppress his statements on the grounds that they were not voluntary? (App. 276-281). (Error 1)

2. Did the Court err when it denied defense counsel's Batson motion? (App. 444-447). **(Error 2)**

3. Did the Court err 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? (App. 809). **(Error 3)**
4. Did the Court err in refusing to grant the defense counsel's Motion to Strike on the basis that the defendant acted in self-defense? (App. 912-920). **(Error 4)**
5. Did the Court err in refusing to grant the defense counsel's self-defense jury instruction? (App. 920). **(Error 5)**
6. Did the Court err in failing to find the defendant guilty of voluntary manslaughter and, in failing to thus, acquit him of use of a firearm? (App. 1115). **(Error 6)**
7. Did the Court err in failing to grant the defense counsel's motion for a mistrial on the basis of improper argument at the penalty phase by the Commonwealth? (App. 1045). **(Error 7)**
8. Did the Court err by denying the defense counsel's motion for a new trial based on after-discovered evidence? (App. 1089-1094). **(Error 8)**

9. Did the Court err when it did not acquit the defendant of first degree murder as the element of premeditation was negated by intoxication? (App. 920). **(Error 9)**

10. Did the Court err when it found that there was sufficient evidence to find defendant premeditated, as to support a conviction for first degree murder? (App. 1115). **(Error 10)**

LAW, ARGUMENT, & AUTHORITY

I. The Court erred in refusing to grant defense counsel's Motion to Suppress on the grounds that his statement was not voluntary. (App. 276-281). (Error 1)

The following evidence was set forth at the Motion to Suppress hearing on the issue of the voluntariness: The Commonwealth's evidence was that the defendant was detained in the state of Arizona on a murder investigation (App. 385-390). Major Roberts and Lieutenant Washburn from Brunswick County interviewed the defendant at the Arizona Jail (App. 216. He was advised, they indicated, of his Miranda rights (App. 218). He did not appear to be intoxicated and was never deprived of physical comforts. He was initially interviewed on September 3, 2005, and then again on September 4, 4005. (App. 223-224). The deputies explained to

him why he was in custody and the defendant initialed each line of the rights waiver form (App. 223-226). He was explained different degrees of murder. (App. 226). Major Roberts called the defendant a liar and then left the interview room (App. 220). Roberts, however, denied telling the defendant if he did not cooperate and did not give statements he would charge him with capital murder or that he would be looking at the death penalty (App. 227-228). He did explain to the defendant that the death penalty is one of the punishments for capital murder (App. 228).

Lieutenant Washburn said the defendant appeared sober, alert, and was able to converse clearly (App. 229-230). Washburn related that the defendant gave him a statement over a three and a half to four hour period (App. 234). Washburn said the defendant was comfortable, he was given breaks, drinks, and allowed to use the restroom (App. 234). The defendant gave verbal, written and recorded statements (App. 239-242). Washburn denied telling the defendant if he gave a statement he would see that he was charged only with something like manslaughter. Washburn stated that Major Roberts did not threaten the defendant with the death penalty (App. 245-246). Washburn said he made no threats or promises to the defendant (App. 246-247).

The defendant testified that Major Roberts got mad in the interview room and slammed his hand down. (App. 260). He claimed that Roberts said if he didn't cooperate with him that he was going to charge him with capital murder and that's a life or death sentence. The defendant said he was scared by this, and this influenced his decision to talk to the police. (App. 260-263). The standard of review of determining whether the defendant's confession is voluntary is ultimately whether the statement is the " 'product of an essentially free and unconstrained choice by its maker,' or whether the maker's will has been overborne and his capacity for self-determination critically impaired.' " See Midkiff v. Commonwealth, 250 Va. 262, 268-269, 462 S.E.2d 112, 116 (1995) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 225, 93 S.Ct. 2041, 2047 (1973)). In determining whether an accused's will has been overborne, a court must look at the totality of the surrounding circumstances, including the accused's background and experience and the conduct of the police. See Gray v. Commonwealth, 233 Va. 313, 324, 356 S.E.2d 157, 163 (1987).

In that regard, the defendant was held in the Navajo jail for unauthorized use of a vehicle and as a person of interest in a homicide for two nights. (App. 217). He was interrogated in at least two sessions--one

averaging three and a half to four hours and the other around two hours. (App. 234-250). Given that he had been in jail for several days and was threatened with capital murder charges, he believed that he must cooperate with the police in order to avoid maximum punishment. Typically, an accused's past criminal experience has been used to show that he understood the procedural aspects of Miranda rights. See Gray, supra. at 324. The defendant advised that although he had been read Miranda rights from a previous criminal charge, he had not been Mirandized and questioned in this manner. (App. 256-271). It is the defendant's position that he was pressured to cooperate with the police because he was scared due to the conduct and statement of the questioning officers. His cooperation should not be construed as compliance to the interrogation but rather as an exchange of information for lesser punishment. This conduct arguably falls under coercive police activity due to the duration of time that the defendant was held and questioned, and the threatening remarks that were made to him. See Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515, 522 (1986) (stating that "coercive police activity is a necessary predicate to the finding

that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment.")

II.The Court erred when it denied defense counsel's Batson motion. (App. 444-447).

In Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), the United States Supreme Court ruled that a prosecutor's use of peremptory challenges may not be used to exclude jurors based solely on their race. The prosecutor must articulate a neutral explanation related to the particular case and then the trial court will have the duty to determine if the defendant has established purposeful discrimination. See Id; Jackson v. Commonwealth, 266 Va. 423, 436, 587, S.E.2d 532, 542 (2003). This explanation must not be a "pretext for unconstitutional discrimination." See Dupree v. Commonwealth, 272 Va. 496, 502, 635 S.E.2d 676, 680 (2006).

Defense counsel objected to the Commonwealth's strike of African-American potential jurors. (App. 437). It should be noted that the Commonwealth struck five African-Americans. (App. 438). Defense counsel points to the strike of potential juror number three, Ms. Draughn, wherein the Commonwealth advised that she was struck because her son

was recently stopped by the police but not arrested and her father has some affiliation with Saint Paul's college. (App. 440). The Commonwealth noted it had "friction" with the college, that it had to prosecute some of its students, and that it had problems with the security staff there. (App. 440). Defense counsel countered that marijuana possession by her son has nothing to do with Ms. Draughn and the fact that she has an affiliation with a college has no bearing (App. 443).

Defense counsel also complained of the strike of Chiquita Easter, wherein the basis of the strike was that she appeared to be sleeping during *voir dire*, that she has some type of disability, and that she had been sued multiple times in civil matters and owed money. (App. 441). Defense counsel countered that she could be cautioned to pay attention and her civil problems and owing others money would not affect her ability to serve as a juror. (App. 443). The Court ruled that the strikes were not discriminatory. (App. 447).

III.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. (App. 809).

Defense counsel contends that the statements made by the victim to his daughter and later relayed to the defendant and statements made by the victim to Meloni in his presence are admissible as it affects the defendant's state of mind during the altercation between him and the victim. Defense counsel argues that this information provided to the defendant supports defendant's claims of voluntary manslaughter, heat of passion, and self-defense. Defense counsel proffered the following testimony:

Meloni Thomas told the defendant that her father didn't like black people, that he didn't approve of her dating black men, and that he didn't approve of her kids being of mixed races. (App. 1054). Also, the defendant previously heard the victim telling Meloni that he wasn't allowed down there [in reference to the victim's home] and that he did not like the defendant because of the color of his skin. (App. 1057). The defendant was called the "N" word and assaulted and choked when he entered the victim's home. (App. 794). "This angered him due to the insult, which combined with the information Meloni had given him about her father not approving of her dating black guys and not liking that she had mixed children, this created anger and fear in him, What was going through the defendant's mind at that point..." (App. 812). The Court, over the objection

of the defense counsel, refused to admit this evidence. (App. 812, 815). Note: there was a verbal proffer by the defense counsel and defendant testified out of the presence of the jury as a proffer. (App. 793-App.894; App. 1054-1057).

A statement made by a declarant is "admissible for the purpose of showing the probable state of mind thereby induced in the hearer, such as being put on notice or having knowledge, or motive, or good faith of the subsequent conduct of the hearer, or anxiety, when relevant and material." Johnson v. Commonwealth, 2 Va. App. 598, 602, 347 S.E.2d 163,165 (1986) (citing E. Cleary, McCormick on Evidence § 249 (3d ed. 1984)). Also Friend, Charles E., The Law of Evidence in Virginia § 18-18, at 792 (6th ed. 2003) states:

> "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 what was said was true. Thus for example, threats made by a third party to the accused were admissible to show the mental state and the intent of the defendant. In this situation, it is the *fact that the threats were made* that is significant; whether or not they were *true*—i.e., that the person making the threats would have carried out the threats—is immaterial. Therefore, evidence of the making of the threats is not hearsay at all, and the evidence is admissible without resort to any hearsay exception." Friend, *supra,* § 18-18, at 792.

Although the victim's statements in this case were not uttered directly to the defendant, they should be viewed alongside the victim's statements and assaultive actions upon the defendant, in order to grant the trier-of-fact complete access to the defendant's state of mind. Furthermore, the statements were not offered for the truth-of-the-matter asserted, or in other words, to establish that the victim was a racist but that the defendant perceived him to be one. Once, the defendant was called the "N" word, hit, and choked at the door of the victim's home, his state of mind should be viewed in light of his perception that the victim "did not like black people" and the defendant's relationship with his daughter was not approved. The defendant testified that he was mad and scared at the same time during his altercation with the victim. (App. 841). There is a nexus between the statements that the defendant previously overheard or that was related to him by Meloni and the attack on his person by Mr. Thomas, which created the anger and fear in the defendant's mind. (App. 894). *See* Hodges v. Commonwealth 272 Va. 418, 436, 634 S.E.2d 680, 689 (2006) ("Generally, statements made by a crime victim that show the victim's state of mind are admissible as an exception to the hearsay rule, provided the statements are relevant and probative of some material issue in the case."). Therefore, the statements of the victim to his daughter are relevant and a material issue in

this case, in particular to defendant's mental state, as to reasonable provocation, heat of passion, and self-dense claims.

IV.The Court erred in refusing to grant the defense counsel's Motion to Strike on the basis that the defendant acted in self-defense. (App. 912-920).

The defendant notes that the defendant stated that he was assaulted by the victim who used a racial slur against him, that he was injured, and that he acted to protect himself from death or great bodily harm. (App. 839-842). The Court ruled that there was insufficient evidence to support a claim of justifiable or excusable self-defense (App. 920). The Court also as part of its ruling found that the defendant had used more force than was reasonably necessary. The Court noted counsel's exception to its rulings (App. 924).See argument on court's failure to grant self-defense instruction, issue number V below, which further elucidates this issue.

V.The Court erred in refusing to grant the defense counsel's self-defense jury instruction. (App. 921).

A defendant is entitled to have the jury instructed on the theories of the case that are supported by evidence. See Bunn v. Commonwealth, 21

Va. App. 593, 599, 466 S.E.2d, 744, 746, (1996). "Self-defense is an affirmative defense, which the accused must prove by introducing sufficient evidence to raise a reasonable doubt." Smith v. Commonwealth, 17 Va. App. 68, 71, 435 S.E.2d 414, 416 (1993). " 'In determining whether to instruct the jury of a lesser included offense [or affirmative offense], the evidence must be viewed in the light most favorable to the accused's theory of the case.' " Hunt v. Commonwealth, 25 Va. App. 395, 400, 488 S.E.2d 672, 674 (1997) (citation omitted). The defendant submitted sufficient evidence to warrant a self-defense jury instruction.

Generally, in making a claim of self-defense a defendant implicitly admits the killing was intentional and assumes the burden of introducing evidence of justification of or excuse that raises a reasonable doubt in the minds of jurors. See McGhee v. Commonwealth, 219 Va. 560, 562, 248 S.E.2d 808, 810 (1978). The defendant described Thomas' death as resulting in self-defense. He was hit by Thomas, once he entered the house and fell to the floor while still being hit. (App. 505). When he looked up from the floor, Thomas put his hands around his neck and started choking him. (App. 505). He was afraid for his life and started wiggling trying to get away. (App. 505). Also, when the defendant went upstairs, he was hit with a board a few times and was afraid for his life. (App. 506). He turned his

head away and at the same time pulled out a gun and shot one time, not noticing where he was shooting. (App. 506). He wanted Thomas to stop hitting him. (App. 506). When he turned back around after firing the first shot, he saw that Thomas was still running towards him. (App. 506). Thomas was swinging a board at him (App. 513). He then took his gun and hit Thomas until he stopped hitting him. (App. 506). He was trying to keep Thomas from coming at him (Appp. 513). They were both hitting each other at the same time. (App. 513).

Avent's testimony buttressed the above-related statements he had given to the police. He relates that Thomas attacked and choked him (App. 842). Thomas threatened Avent that he had something for him and went up the stairs (App. 842). Avent believed Thomas was going to get a gun (App. 842-843). Avent denied going upstairs to attack Thomas, but wanted to tell him he didn't want to fight and wanted to leave with his daughter. (App. 843). He was hit by Thomas by with a board when he got upstairs (App. 848). The board struck Avent in the back of the head and blood came from his head (App. 848). Avent fired the gun as he was afraid (App. 857). After he shot Thomas, Thomas still came towards Avent swinging the board and hit Avent in the arm. Avent swung back with the gun and kept hitting Thomas as he was so mad (App. 859). Avent got injured I thought may have

come from the actions of Thomas (App. 859). Meloni appeared and he heard a voice saying hit him (App. 860). After hitting Thomas with the gun, he blacked out for a while (App. 860). When he woke up Meloni was hitting Thomas with the gun and put a knife to his neck (App. 860). Avent did not know if she cut Thomas (App. 860),

The evidence presented during trial could raise a reasonable doubt in the mind of jurors as to justifiable homicide warranting a jury instruction of self-defense. The defendant was attacked at the door of the home and later attacked at the top of the stairs. The Supreme Court has noted that the "bare fear" of serious bodily injury, or even death, however well-grounded, will not justify the taking of human life. Stoneman v. Commonwealth, 66 Va. 887, 900, 1874 WL 5647 (1874). "There must [also] be some overt act indicative of imminent danger at the time." Vlastaris v. Commonwealth, 164 Va. 647, 652, 178 S.E. 775, 776 (1935). See also Yarborough v. Commonwealth, 217 Va. 971, 975, 234 S.E.2d 286, 290 (1977). The defendant was attacked twice in the home by the victim. He stated to the victim that he was not there to fight and only wanted to talk to him, yet he was still attacked (App. 841). The first overt act that occurred was initially when he entered the house and was hit and then choked while on the floor. (App. 505). Another overt act was when he was hit in the head by a board

and the victim was coming after him (App. 506). Undoubtedly, the fight moved from downstairs to upstairs between the defendant and victim; however this transition from one place to another should not negate defendant's self-defense claim. This is due to the fact that the defendant was without fault in bringing on the difficulty and reasonably feared for his life.

In Commonwealth v. Cary, 271 Va. 87, 101, 623 S.E.2d 906, 913 (2006), the Virginia Supreme Court noted that although the victim went into the bathroom between the first and second altercations that he had with the defendant, it was the victim's subsequent actions in light of the assault that warranted the defendant to receive a self-defense jury instruction. These subsequent actions included the victim refusing to leave and making threatening remarks along with coming towards the defendant. The Court ruled that a trier-of-fact could reasonably conclude that the victim, although 11 to 18 feet away from the defendant at the time of the shooting, was nonetheless advancing toward the defendant with an intent to resume his physical assault on the defendant. Id. In our case, the defendant was hit at the door and choked and was afraid for his life. The victim in our case proceeded to go up the stairs, just as the victim in Cary went to the bathroom, after his initial assault on the defendant stating "I got something

for you" (App. 842). The defendant proceeded up the stairs stating that he did not want to fight and only wanted to talk in response to the victim's threatening remarks, when he was met again with an assault from the victim. In Cary, the Court noted that "while the defendant cannot rely solely on the initial assault upon her as the 'overt act' that occasioned her to resort to self-defense, this evidence may not be entirely disregarded merely because the victim retired to the bathroom for approximately five minutes. Rather the victim's subsequent actions in this case are considered in light of that initial assault." Cary, at 102. Likewise this Court should consider the victim's subsequent acts of making threatening remarks, hitting the defendant, and coming towards him while they were upstairs in light of his initial assault of hitting and choking the defendant downstairs. These subsequent acts could cause a trier-of-fact to reasonably conclude that the defendant was acting in self-defense. The Court's ruling that the fact that the defendant went upstairs following after the victim made him the aggressor, and that the self-defense instruction would not be given is incorrect as it invades the province of the jury. (App. 918). Why the defendant went upstairs was for the jury to decide as well as whether Avent acted in self-defense acted with greater force than was necessary. The Court had reasoned that since the defendant went upstairs after the attack

downstairs that this made the defendant at fault (App. 916). Thus, the Court stated that the defendant "has lost its claim of justifiable self-defense." (App. 916). Defense counsel unsuccessfully argued that the defendant had gone upstairs to offer Mr. Thomas an "olive branch" (App. 913). Defense counsel argued that the defendant was without any fault, and that the retreat to the wall doctrine was not applicable in this case (App. 914). Defense counsel asserted that the defendant did not in any way reinstitute more violence when he went upstairs (App. 914). The defendant took the position on the refusal of the jury instruction that he had done nothing wrong either downstairs or upstairs and was himself attacked by Thomas and was entitled to the proffered jury instruction of justifiable self-defense (App. 923).

VI. 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. (App. 915, 1115).

"Manslaughter is the unlawful killing of another without malice. To reduce a homicide from murder to voluntary manslaughter, the killing must have been done in the heat of passion and upon reasonable provocation." Barrett v. Commonwealth, 231 Va. 102, 105-106, 341 S.E. 190, 192 (1986). The defendant in this case was attacked upon entering the victim's home

and called the "N" word. He stated that he was angry at the being called the "N" word and from being attacked and choked. The defendant's rage is mixed with fear and passion and not calculation and premeditation. The defendant testified that he was scared and mad at the same time. (App. 842, 851). He stated that he did not intend to kill the victim when he shot the gun and that he really "wasn't thinking at all" because he was too afraid and mad to think. (App. 857). His testimony that he was also acting out of self-defense does not conflict with his claim of provoked heat of passion. See Barrett at 103. The evidence clearly depicts the defendant was acting out of rage and heat of passion. Therefore he should have been convicted of voluntary manslaughter and acquitted of use of a firearm in the commission of a murder.

VII. The Court erred in failing to grant the defense counsel's motion for a mistrial on the basis of improper argument at the penalty phase by the Commonwealth. (App. 1044).

The Commonwealth Attorney's argument complained of is as follows: "Now the second thing that I'd ask that you consider, not only as punishment for him, but the second thing is to look at the danger he would pose if he wasn't in prison because if you do anything else less than life,

anything else, then one day he's going to come back in this society. I want to ask you..." Defense counsel contended that this argument is "improper and inappropriate," but the Court in denying the motion for a mistrial said that the Commonwealth ought to be able to argue restraint. (App.1045). The defense cites the case of Hutchins v. Commonwealth, 220 Va. 17, 235 S.E. 2d 459 (1974), in support of his objection. The Court in Hutchins, supra, stated that it is proper for the prosecutor to ask the jury to fix punishment in a particular case that will deter others from committing like offenses, but the request must not appeal to the jurors' passion by exciting their personal interests in protecting the safety and security of their own lives and property. Id at 20. The prosecutor's statement must not confuse the use of punishment and conviction for deterrent purposes. Conviction for an offense must be based solely upon evidence of guilt, and not upon considerations of deterrence. Failure to make this important distinction may result in substantial prejudice to a defendant. Counsel admits there may be a difference between Hutchins and the case in bar in that the Commonwealth's argument was at the penalty phase only. Yet the defendant maintains that the argument appealed to the jury's passion, and that the case should be remanded for new trial as to punishment.

VIII. The trial court erred in denying defense counsel's Motion for a New Trial based on after-discovered evidence. (App. 1089-1094)

The following evidence was set forth at the Motion for a New Trial hearing: Deborah Burkett, social work supervisor with the Brunswick County Department of Social Services, testified "a number of years ago that we [Social Services] had received a child protective service complaint concerning...a domestic disturbance where Mr. Thomas and then his second wife had been arguing, and there were issues about their two children as well." (App. 1073). The victim's wife felt fearful of him and expressed it to social services when they visited her home. (App. 1073). Also, the victim's wife had been accused him of beating his toddler boys with switches (App. 1073, 1076). The initial complaint was from somebody within the community who she had gone to. (App. 1073). Thomas's wife advised social services that he had abused her and social services assisted her in moving to federal housing in Brunswick County. (App. 1073). There are no records that date back to the complaint. (App. 1074). The records of the compliant have been expunged from the agency. (App. 1074). Child services believes the complaint may have been 10, 12 years ago. (App.1077). The victim's wife described Thomas as a good father to social services later on. (App. 1075). She mentioned being threatened, suffering

spousal abuse, and being fearful of the victim to social services from a number of years ago (App. 1075). The Commonwealth acknowledged that it discovered this information after the trial. (App. 1089).

In light of evidence regarding the victim's violent domestic behavior, a new trial should be issued. Defense counsel contends that it met its burden as set forth in Odum v. Commonwealth, 225 Va. 123, 130, 301 S.E.2d 145, 149 (1983), in establishing that this evidence was (1) discovered subsequent to trial, (2) could not have been secured for use at the trial in the exercise of reasonable diligence, (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.

It is undisputed that the evidence in question was received after the trial. (App. 1089). Defense counsel requested all Brady material from the Commonwealth and furthermore, specifically inquired about the criminal record or any information of specific acts of violence that Mr. Thomas had committed or any evidence of his reputation for violence. (App.1069). The Commonwealth provided specific information to the defense that did not contain the newly-found evidence. Defense counsel contends that although Child Protective Services was in existence before trial, the Commonwealth's in depth description in her response letter to the defense along with her

description of the extensive steps she took to respond to the defense request illustrated that the defense had exercised due diligence. The evidence is not merely cumulative because there was no evidence during trial of the victim's past violent behavior. A victim's past violent behavior is admissible on the issue of self-defense. See Friend, Charles E., The Law of Evidence in Virginia §5-9, at 212 (6th ed. 2003), stating "when the accused relies upon a plea of self-defense, alleging the victim was the aggressor, evidence of the character of the victim for turbulence, violence, aggressiveness...etc. may be introduced by the accused in support of self-defense."

The victim's prior behavior is essential to illustrate and possibly corroborate the defendant's claim that Mr. Thomas attacked him and was a violent person. There was evidence during trial that the victim called the defendant the "N" word and attacked him. A trier-in-fact, in light of evidence that the victim has been violent in the past, could better grasp that the victim would act in violence toward the defendant. This would certainly assist as to the defendant's argument for reasonable provocation, heat of passion, and self-defense.

IX.The defendant should have been acquitted of first degree murder as the element of premeditation was negated by intoxication. (App. 920).

The defendant related that he became intoxicated on 32 ounces of alcohol and had smoked a large "blunt" of marijuana by the time he got to the victim's house. (App. 845). He furthermore did not have a plan to kill the defendant but was attacked when he went into the victim's home. Defense counsel notes that the law in Virginia is that voluntary intoxication is a defense to first degree murder, where the intoxication makes him incapable of deliberating or premeditation. Proctor v. Commonwealth, 40 Va. App. 233, 245, 578 S.E.2d 822, 828 (2003).

The defendant acknowledges, however, here as well as in other arguments that relate to the sufficiency of the evidence that the evidence is viewed in the light most favorable to the Commonwealth.

X. The Court erred when it found that there was sufficient evidence to find that the defendant premeditated, to support a conviction for first degree murder. (App. 1115).

When the defendant went into the house the evidence shows that he just reacted to being assaulted and attacked. There is no evidence of

planning to kill Mr. Thomas other than the fact the defendant carries a gun into the house. To premeditate means to adopt a specific intent to kill. The intent to kill must come into existence at some time prior to the killing but need not exist for any particular length of time. Girrantono v. Commonwealth, 22 Va.1064, 1074, 266 S.E.2d 94, 100 (1980). A design to kill may be formed only a moment before the fatal act is committed, provided the defendant had time to think and did intend to kill. Id.

CONCLUSION

For the above-mentioned reasons, defendant respectfully requests that this Honorable Court reverse and dismiss the convictions or reduce the murder charge to voluntary manslaughter, or remand the charge or charges for a new trial, or provide a new trial on the penalty phase.

Respectfully Submitted,

CARDELL LAMONT AVENT

By: _____
Of Counsel

CHARLES C. COSBY, JR. (VSB #16566)
COUNSEL FOR APPELLANT
27 NORTH 17TH STREET
RICHMOND, VIRGINIA 23219
(804) 780-0311 (Office)
(804) 648-6211 (Facsimile)
cccosby@verizon.net

CERTIFICATE OF SERVICE

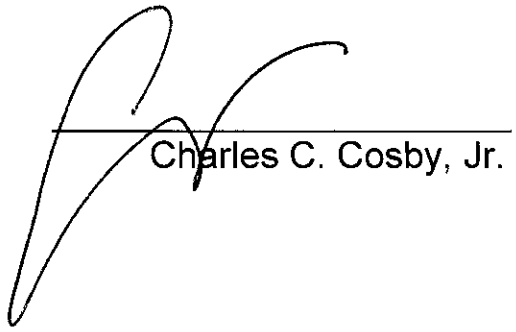
Appellant's counsel is Charles C. Cosby, Jr., Esquire, 27 North 17th Street, Richmond, Virginia 23219, telephone number (804) 780-0311. Counsel for the Appellee is Alice T. Armstrong, Esquire, Assistant Attorney General, 900 East Main Street, Richmond, Virginia 23219, telephone number (804) 786-2071; (804) 371-0151.

I hereby certify pursuant to Rule 5:26(d) and Rule 5:32(b) that (15) fifteen copies of the Appellant's Opening Brief and fifteen (15) copies of the Appendix were filed in the Supreme Court of Virginia Clerk's Office by hand, and three (3) copies of the Appellant's Opening Brief and three (3) copies of the Appendix were hand-delivered to Alice T. Armstrong, Esquire, Assistant

Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219 on this the 31st day of August, 2009.

The Appellant certifies that an electronic copy of the Brief and Appendix were filed with the Clerk of this Court contemporaneous with the Brief, by CD in PDF format.

Counsel for the Appellant has been appointed.



Charles C. Cosby, Jr.