IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 1000202

ANTHONY DALE CRAWFORD

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee

BRIEF FOR THE COMMONWEALTH

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BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

After a five-day jury trial in the Circuit Court for the City of Charlottesville, Anthony Dale Crawford, the defendant, was convicted of the following offenses committed against his estranged wife: abduction with intent to defile, rape, capital murder, grand larceny and attending firearm

offenses. He was sentenced to serve a total of two life terms plus 67 years in prison. Final judgment was entered on June 5, 2007. (App. 16-17).

On appeal to the Court of Appeals, Crawford contended that the trial court erred in (1) denying his motion to suppress Sarah Crawford's statements, which were submitted to the JDR court in conjunction with her application for a civil preliminary protective order and (2) failing to grant his motion to strike the charges of abduction with intent to defile and rape, since there was insufficient evidence to support these offenses.

On December 23, 2008, a divided panel of the Court of Appeals reversed all of Crawford's convictions with the exception of his conviction for grand larceny. See Crawford v. Commonwealth, 53 Va. App. 138, 670 S.E.2d 15 (2008).

The Commonwealth petitioned the full Court of Appeals for rehearing en banc, and on January 27, 2009, the Court granted the Commonwealth's petition and stayed the mandate of the panel opinion. The full court disagreed with Crawford and the analysis of both the panel majority and dissent, and affirmed all of Crawford's convictions. Crawford v. Commonwealth, 55 Va. App. 457, 470, 686 S.E.2d 557 (2009)

On May 17, 2010, this Court granted Crawford's petition for appeal.

ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in holding that an affidavit in support of an *ex parte* petition for a civil protective order is not "testimonial" within the meaning of Confrontation Clause cases, in violation of Anthony Crawford's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

2. The Court of Appeals erred in holding that the principle of forfeiture by wrongdoing" applies to permit extra-judicial statements in cases that arise in domestic relations contexts, even without specific proof in this case that the defendant killed the victim to silence her or to keep her from testifying against him, in violation of Anthony Crawford's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

3. The Court of Appeals erred in holding the Court Appeals is not bound by the trial court's ruling and the prosecutor's concession that the affidavit was "testimonial."

4. The Court of Appeals erred in applying the "right result/wrong reason" doctrine to uphold the convictions.

5. The Court of Appeals erred in failing to address the appellant's argument that the evidence was insufficient to sustain convictions of abduction with intent to defile and rape.

STATEMENT OF FACTS

On Thursday, November 18, 2004, John and Irene Powers ("the Powers") had dinner with their 33-year-old daughter, Sarah Crawford ("Sarah") at a local restaurant in Manassas, Virginia. When they left the restaurant that night at about 8:30 pm, it would be the last time that they

would see their daughter alive. Twelve hours later Sarah would be dead, and her husband Anthony Dale Crawford ("Crawford"), would be wanted for her murder. The Powers had a "very close" relationship with their daughter and saw her frequently. Sarah and her mother talked on the phone often. During dinner, Sarah told her parents of the latest events in her life, including her job as an office manager for a television production company. Sarah mentioned to her mother that she had a hair appointment Saturday morning and on Saturday afternoon, she had plans to go on a date with a man she recently met. Sarah was, according to her mother, "really very happy" that night. (App. 916-920, 933-934).

Sarah had every reason to be happy. She had a good job with a small, close-knit company that she enjoyed and found fulfilling. She had gastric bypass surgery in the summer of 2002 and reached her goal of losing 150 pounds. In addition, Sarah had just gotten a raise and moved into her own apartment. And, most significantly, Sarah had recently decided to end her relationship with her abusive husband, Crawford. Sarah and Crawford had been married since 1999, and had been together for several years before that. They had no children. The couple had a troubled history, and Sarah was growing increasingly fearful of her

husband. In October of 2004, Sarah and Crawford separated. (App. 931-932, 946-950).

Following their separation, Sarah expressed to a number of friends and co-workers that she was afraid that Crawford might physically harm her. This concern caused her to make a number of significant changes in her life. She found a new apartment in a rural area that her mother described as “wooded, desolate,” and “well-hidden.” She chose the apartment because it had a long driveway, so that she could “make a phone call” or “get out” if she saw someone coming. (App. 598-599).

On October 29, 2004, Sarah and her parents went to Crawford's apartment to pick up a few of Sarah's things. Sarah asked her colleague, Tohry Petty, for tickets for Crawford to a sporting event to get him out of the apartment because she was “afraid of an incident” arising from her move. However, Crawford was present in the apartment when Sarah and the Powers arrived. (App. 579, 587-588). As Sarah expected, Crawford was hostile toward her, refused to allow her to take any of her belongings, and, ultimately, called the police. (App. 548-555).

When the police arrived, they asked Crawford to calm down and to allow Sarah to take her things. However, despite the police officer's request, Crawford's hostile behavior toward Sarah continued. According to

the police officer, as Sarah packed up her belongings, Crawford approached her and whispered something in her ear. The officer could not determine what Crawford said to Sarah, but the officer testified that “it was something that obviously upset [Sarah],” because she “immediately stood up and stepped back away from [Crawford].” Sarah then asked Crawford to repeat what he said and asked if Crawford was threatening her. (App. 562). The officer ordered Crawford to back away from Sarah; however, he had to repeat this command several times before Crawford complied. At one point, Mrs. Powers heard Crawford tell Sarah, “You'll pay for this.” (App. 914).

Eventually, the police officers left the apartment, but, sensing that things might not remain peaceful, they waited in the parking lot. After the officers left, Sarah mentioned that she wanted a side table that her parents had given her, and she asked Crawford to unlock the bedroom door so she could retrieve it. Instead of unlocking the door, Crawford said that he would get the table. Mr. Powers was packing up some of Sarah's belongings, when he heard Crawford say, “Here's your god-damned table” and the table “came flying over [Mr. Powers'] right shoulder and . . . landed near the sofa and broke . . . .” (App. 548-555). At that point, the Powers called the police and the same officers immediately responded. The police stayed

until Sarah and her family finished packing her things, and then followed them for about a mile to make sure that they got away safely. (App. 548-555).

Two days after the move and her encounter with Crawford at the apartment, Sarah went to the Prince William County Juvenile and Domestic Relations District Court (the "JDR court") and requested a preliminary protective order in order to prevent Crawford from having any further contact with her. (App. 1347-1348). The civil preliminary protective order obtained by Sarah against her husband, was *admitted into evidence without objection*. (1347-1348). The order stated it had been issued based upon the affidavit of Sarah Crawford which demonstrated sufficient evidence to establish probable cause of "family abuse." The order stated "family abuse" was any act involving violence or force resulting in bodily injury or the reasonable apprehension of bodily injury by Mrs. Crawford, the petitioner. (App. 1347-1348). Sarah's statements made in her application for the civil preliminary protective order were admitted into evidence over the defendant's objection that they were testimonial hearsay and, inadmissible under Crawford v. Washington, 541 U.S. 36 (2004). The court admitted the Sarah's statements under the "Forfeiture by Wrongdoing" doctrine. (App. 11, 1016-1017, 1041, 1345-1346). In the statement which

Sarah signed, she recounted past incidents in which Crawford forced her to have sex, and sexually abused her, threatened her life, and physically and verbally abused her. (App. 1345-1348). Significantly, the Commonwealth never mentioned the statements in open or closing argument except to rely on it as evidence that Sarah feared her husband.

In the few weeks that the protective order was in effect, Sarah continued to have contact with Crawford. Telephone records revealed that Crawford and Sarah communicated on several occasions between November 1 and November 18, 2004. Sarah also paid for Crawford to attend a trade school in Kentucky. (App. 657-659, 667, 1150, 1379, 1394, 1396).

As Sarah began to settle into her new life, she tried to take precautions for her own safety. In addition to renting her apartment in a remote location (App. 598-599, 935), Sarah chose the location of her desk at work because it overlooked the parking lot and allowed her to see if Crawford's vehicle was parked there. In addition, Sarah took a new route home every night after work. According to her supervisor, “[Sarah] would never go home the same way two days in a row because she didn't want someone to be able to follow her or know where she was going to be at

any particular time, so she would always choose a new way." Sarah also spoke to her parents several times each day. (App. 598-599).

During the day on Thursday, November 18, 2004, the day before she was killed, in an apparent effort to sever her last remaining ties with Crawford, Sarah prepared a document that purported to release her father from any liability on the lease for the apartment that she previously shared with Crawford. Due to Crawford's credit problems, Mr. Powers had co-signed the lease for their apartment. Sarah now wanted her father's name removed from the lease. Because her printer was broken, Sarah asked one of her supervisors to print out the release form on his printer that afternoon. A copy of that release was later recovered from her supervisor's computer. Before Sarah left work that day, she informed her supervisor that she would be late the following morning, Friday, but she expected to be at the office by 1:00 p.m. to prepare an expense check for a coworker traveling out of the country. Her employer was surprised when Sarah never made it to work on Friday, November 19, 2004. (App. 634, 669-671, 916-920).

That Friday morning, a hunter in Fauquier County found a box along the road that belonged to Sarah's employer. Sarah's supervisor testified that she was supposed to ship that box for him. The box had a small amount of Sarah's blood on it. (App. 657-659, 667, 1150). Later that day,

the Powers received a telephone call from a person who found Sarah's discarded cell phone lying in the grass near his driveway in Manassas. (App. 635). Worried for their daughter's well-being, the Powers made the first of several trips to Sarah's apartment that Friday evening. When they arrived, Sarah and her car were gone, and the apartment was dark. The only sign of life in the apartment was Sarah's pet cat, which came to the glass door and cried.

On the morning of Saturday, November 20, 2004, the Powers went back to Sarah's apartment. Sarah's car was still missing, and her cat was still at the door, crying. Mrs. Powers called Sarah's salon to see if she had arrived at her hair appointment on that morning and was told she had not. (App. 937, 943-945). The Powers made the 50-minute round trip from their home to Sarah's apartment three more times on Saturday. Each time they returned, Sarah's cat cried and clawed at the door. Each time Sarah was missing. The last time the Powers went to Sarah's apartment on Saturday evening was around 8:00 p.m. They found a bottle of wine at the door with a note that said, “Sarah, sorry I missed you. Call me to let me know you're okay.” Sarah had missed the date she was so happy about. (App. 645-646, 940-943).

On Sunday, November 21, 2004, the Powers were finally able to reach Sarah's landlord, who let them into her apartment. The first thing the Powers noticed was that her cat had no food or water. The Powers had taken care of Sarah's cat when she had gone out of town before, and it was uncharacteristic for Sarah to leave her pet unattended and without food or water. (App. 921, 923). After taking care of the cat, the Powers began looking around Sarah's apartment to try to determine what had happened. Mrs. Powers noted that all of Sarah's luggage was still in the apartment and that the clothes she had worn to dinner on Thursday were on the floor in front of her washing machine. Mrs. Powers went to Sarah's bedroom and noticed that there was a book, It's My Life Now: Starting Over After an Abusive Relationship or Domestic Violence, open to page fifty-nine lying face down on Sarah's bedside table entitled,. (App. 924-925, 1338).

In the early morning hours of November 22, 2004, the night manager of a motel in Charlottesville, Virginia found Sarah dead in one of the motel's rooms. (App. 365-366, 376-377). Sarah was stripped naked, and posed on her back in the bed in a “frog-like position.” A motel towel taped to her body concealed a fatal gunshot wound to the right side of her chest. (App. 398). The thermostat was set so the room was cold. (App. 398). There was a do-not-disturb sign placed on the outer door. (App. 1225).

An autopsy determined that Sarah had been shot; the bullet having passed through her right lung and severed her spinal cord, rendering Sarah paralyzed and unable to walk or struggle. The medical examiner testified that, without medical treatment, Sarah could have lived up to an hour following such an injury. (App. 727-728).

Investigators found Crawford's DNA in seminal fluid in Sarah's vagina and spermatozoa in Sarah's mouth and anus. In addition, investigators found Crawford's clothing, personal belongings, and fingerprints in the motel room. Cigarette butts in the motel room's ashtray contained Crawford's DNA, and a pill bottle bearing Crawford's name was also found in the room. (App. 420-426, 452-459, 464, 542, 809-816, 896-906, 892, 1157, 1224). The motel's clerk testified that Crawford arrived at the motel at 11:00 a.m. on Friday November 19, 2004. Crawford was driving Sarah's car at the time and parked in the farthest spot from the front desk. Crawford told the clerk that he had been driving all night and asked for a quiet room – the one in which Sarah's body was later discovered – which he paid for with a $100 bill. (App. 896-900).

Charlottesville police began to search for Crawford. As part of that investigation, the police contacted Crawford's relatives and learned that he

was staying with extended family in Jacksonville, Florida. His behavior during his visit was “normal.” (App. 960-964).

The Charlottesville police informed Jacksonville authorities that there was an outstanding arrest warrant for Crawford for the murder of his wife. Crawford was arrested in Florida driving Sarah's car, a maroon Hyundai. Sarah's car was seized and sealed for evidentiary purposes. (App. 966-969). The Charlottesville police later processed the car for evidence. The driver's window of the vehicle was broken, and the police found Sarah's blood on both the driver's and rear seats. The police found gunshot residue in the car and a box of ammunition in the trunk. (App. 496-498, 503, 1163). The evidence also showed that approximately two weeks before Sarah was murdered, the defendant bought a gun that could have been used in the shooting, although that gun was never recovered because he disposed of it. (App. 866-874, 893-894, 1330, 1334). Crawford also bought the bullets found in the trunk of Sarah’s car. (App. 494, 500, 1284).

Crawford waived his Miranda rights and made a statement to the Florida police during a custodial interview. The interview was videotaped, and the recording was admitted into evidence at trial. During the interview, Crawford claimed that Sarah had picked him up early Friday morning at his

house. He said they had planned to go to Charlottesville for the weekend to attempt to reconcile. After an hour to an hour and a half drive, they arrived in Charlottesville at about 8:30 in the morning. Sarah was driving, and he was in the passenger's seat. Crawford said they drove directly to a McDonald's and got breakfast. Without any explanation as to why, Crawford then stated that he pulled out his .38, revolver planning to commit suicide. Crawford said he had the gun cocked and his finger on the trigger when Sarah grabbed for the weapon. While they were wrestling over the gun, it went off and the bullet hit Sarah. Crawford claimed the shooting was an accident, telling the police "she basically did it to herself," and the last thing she said was, "I love you." (CW Exhibit 97; Video). Crawford then said that he pulled Sarah into the back seat and drove to a nearby hotel and rented a room. He left Sarah's body on the bed and her clothing in the room and "took off and headed south." Significantly, Crawford never offered any explanation for leaving Sarah's body undressed in the position in which it was found, nor for failing to seek medical help for Sarah. Likewise, he offered no explanation as to why his semen was found in her vagina and his sperm was found in her mouth and anus.

A jury subsequently convicted Crawford of capital murder, abduction with intent to defile, rape, grand larceny, use of a firearm in the commission of a murder, and use of a firearm in the commission of abduction.

ARGUMENT

I. THE VICTIM'S STATEMENTS IN THE APPLICATION FOR A CIVIL PRELIMINARY PROTECTIVE ORDER WERE ADMISSIBLE AS "NONTESTIMONIAL" HEARSAY; AND, EVEN ASSUMING HER STATEMENTS WERE IMPROPERLY ADMITTED, ANY CONCEIVABLE ERROR IS HARMLESS BEYOND A REASONABLE DOUBT BECAUSE OTHER PROPERLY ADMITTED EVIDENCE ESTABLISHES THE SAME FACTS AND THE EVIDENCE OF GUILT WAS OVERWHELMING. (Assignments of Error 1-4).

A. Background

The victim's affidavit for a preliminary protective order was admitted at trial based upon the "forfeiture by wrongdoing doctrine". When denying Crawford's motion to suppress the statements contained in the affidavit, the trial court found that Crawford "ha[d] forfeited his Sixth Amendment right to confront [Sarah's] testimony because he intentionally procured her unavailability to testify." In reaching this conclusion, the trial court stated that, "[t]o apply the forfeiture by wrongdoing doctrine, this [c]ourt must find by a preponderance of the evidence . . . that [Crawford] is responsible for [Sarah's] unavailability as a witness and therefore forfeited his right to

assert the Confrontation Clause to suppress the statements contained in the affidavit[].” Crawford, 55 Va. App. 457, 471, 686 S.E.2d 557 (2009).

“The Confrontation Clause of the Sixth Amendment provides: ‘In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.’” Davis v. Washington, 547 U.S. 813, 821 (2006) (quoting U.S. Const. amend. VI). In Crawford v. Washington, the Supreme Court of the United States held that the Confrontation Clause barred “the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” 541 U.S. at 53-54. That said, the Supreme Court has acknowledged two common law exceptions to a defendant's right of confrontation, which were well established and known to the framers of the Sixth Amendment: dying declarations and forfeiture by wrongdoing. Id. at 56 n.6, 62.

While this appeal was pending, the Supreme Court decided Giles v. California, 554 U.S. ___, 128 S. Ct. 2678, 2683 (2008). In Giles, the Court discussed both the history and applicability of the doctrine of forfeiture by wrongdoing as it pertains to a defendant's Sixth Amendment right to confrontation. “Forfeiture by wrongdoing” is a common-law doctrine that “permitted the introduction of statements of a witness who was ‘detained’ or

‘kept away’ by the ‘means or procurement’ of the defendant.” Id. at ___, 128 S. Ct. at 2683 (citations omitted). In other words, where a defendant has caused a witness to be unavailable to testify, he forfeits his constitutional right to confront that witness. After examination of the history of forfeiture by wrongdoing, the Supreme Court stated in Giles that the doctrine only applied “when the defendant engaged in conduct designed to prevent the witness from testifying.” Id. Thus, under the doctrine of forfeiture by wrongdoing, “unconfronted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying.” Id. at ___, 128 S. Ct. at 2684.

Significantly, in that portion of Justice Scalia's opinion in Giles supported by a majority of the justices, the Supreme Court left open the possibility that a defendant's intention to prevent testimony might be inferred from the surrounding circumstances, such as in a case of ongoing domestic violence:

> Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution — rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or

> threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry . . . .
>
> Id. at ___, 128 S. Ct. at 2693.

In this case, the Commonwealth presented no direct evidence that Crawford acted with the intent to prevent Sarah from testifying against him, nor did the trial court find that the circumstantial evidence of domestic abuse was sufficient to support an inference that Crawford intended to prevent Sarah from seeking redress for, or protection from, such abuse through the courts. By not considering Crawford's intent, the trial court incorrectly applied the forfeiture by wrongdoing doctrine, as it was defined in Giles. Thus, the trial court erred in its analysis for admitting the affidavit on that basis. However, for the reasons that follow, the trial court reached the correct decision by admitting the affidavit, albeit for the wrong reason.

B. The Court should decide if the statement was nontestimonial.

It is the Commonwealth's position on appeal that the victim's statements in the affidavit for the protective order were "nontestimonial" and thus their admission was not controlled by the decision in Crawford v. Washington, 541 U.S. 36 (2004), and did not violate the Confrontation Clause.

This Court has repeatedly said, "We do not hesitate, in a proper case, where the correct conclusion has been reached but the wrong reason

given, to sustain the result and assign the right ground." Robbins v. Grimes, 211 Va. 97, 100, 175 S.E.2d 246, 248 (1970); see also Frye v. Commonwealth, 231 Va. 370, 389, 345 S.E.2d 267, 281 (1986); Thims v. Commonwealth, 218 Va. 85, 93, 235 S.E.2d 443, 447 (1977); Morrison v. Bestler, 239 Va. 166, 177, 387 S.E.2d 753 (1990). See Bolden v. Commonwealth, 275 Va. 144, 147, 654 S.E.2d 584, 585 (2008) (contrary to defendant's assertion, sufficiency of the evidence examination on appeal is not limited to the evidence mentioned by a party in trial argument or by the trial court in its ruling).

In Whitehead v. Commonwealth, 278 Va. 105, 115, 677 S.E.2d 265, 272 (2009) this Court observed:

> An appellate court may affirm the judgment of a trial court when it has reached the right result for the wrong reason. However, [t]he rule does not always apply. . . . [T]he proper application of this rule does not include those cases where, because the trial court has rejected the right reason or confined its decision to a specific ground, *further factual resolution is needed before the right reason may be assigned* to support the trial court's decision. Harris v. Commonwealth, 39 Va. App. 670, 675-676, 576 S.E.2d 228, 231 (2003), Blackman v. Commonwealth, 45 Va. App. 633, 642-643, 613 S.E.2d 460, 465 (2005) ("an appellee may argue for the first time on appeal any legal ground in support of a judgment so long as it does not require new factual determinations.") We agree with these holdings by the Court of Appeals.

Id. See also Wright v. Commonwealth, 278 Va. 754, 760 n.3, 685 S.E.2d 655, 659 n.3 (2009) (noting that "[a]lthough the record reflects that the

Commonwealth apparently 'conceded' that the statute contained a nexus requirement, the issue is a question of law which is not subject to a concession binding on this Court"); see United States v. Hairston, 522 F.3d 336, 340 (4th Cir. 2008) (recognizing "the government's concession of error is not binding on this court, and, to be sure, we would never do so if the issue were a pure question of law").

C. The statement was nontestimonial.

Prior to the holding in Crawford v. Washington, the Confrontation Clause had not been construed to bar the admission of an unavailable witness' hearsay statement against a criminal defendant if the statement bore sufficient "indicia of reliability" either by falling within a "firmly rooted hearsay exception" or by "a showing of particularized guarantees of trustworthiness." Ohio v. Roberts, 448 U.S. 56, 66 (1980). In Crawford v. Washington, the Supreme Court rejected the Roberts analysis and held that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability [of the witness] and a prior opportunity for cross-examination." 541 U.S. at 68; accord Hodges v. Commonwealth, 272 Va. 418, 428-29, 634 S.E.2d 680, 685 (2006).

Now, under Crawford, the question whether admission of a hearsay statement against a criminal defendant violates the Confrontation Clause

turns on whether the statement is "testimonial" in nature. See Anderson v. Commonwealth, 274 Va. 469, 478, 650 S.E.2d 702, 707 (2007) (in Confrontation Clause challenges since Crawford, the inquiry has been whether a hearsay statement is testimonial).

The Supreme Court declined to provide a comprehensive definition of the term "testimonial" in Crawford, but it did state that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." 541 U.S. at 68; see also Davis v. Washington, 547 U.S. 813, 821 (2006) (holding that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency [but] [t]hey are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and the *primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution*") (emphasis added). See Magruder v. Commonwealth, 275 Va. 283, 294-295, 657 S.E.2d 113 (2008).

Critically, both Crawford and Davis involved some level of *interrogation* by *law enforcement personnel*. Further, in explaining the

distinction between testimonial and nontestimonial statements, the Supreme Court in Davis held:

> *Statements are nontestimonial* when made in the course of police interrogation under circumstances objectively indicating that the *primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency*. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822. Although the Supreme Court of the United States recently stated that affidavits "fall within the 'core class of testimonial statements'" subject to the Confrontation Clause, it is significant that the Court did not go as far as to hold that all affidavits are *per se* testimonial. Melendez-Diaz v. Massachusetts, 557 U.S. ___ 07591, ___, 129 S. Ct. 2527, 2532 (2009). In fact, neither Melendez-Diaz, nor any other case from the Supreme Court, has overruled or limited the applicability of the primary purpose test set forth in Davis.

In the instant case, neither the police nor the prosecutor was involved in the civil process of obtaining a preliminary protective order. Further, the "primary purpose" of the statements made by the victim was not to establish or prove past events potentially relevant to later *criminal prosecution*. Rather, it is undisputed that Sarah made the statements for the purpose of obtaining a preliminary protective order precluding the

defendant from coming near the victim in order to "protect the health and safety of the petitioner."

Virginia Code § 16.1-253.1 provides, in pertinent part, that:

> Upon the filing of a petition alleging that the petitioner is or has been, within a reasonable period of time, subjected to family abuse, the court may issue a preliminary protective order against an allegedly abusing person *in order to protect the health and safety of the petitioner* . . . . The order may be issued in an ex parte proceeding upon good cause shown when the petition is supported by an affidavit or sworn testimony before the judge or intake officer.

From the plain language of the statute it is clear that the "primary purpose" of the affidavit is not to initiate or further a criminal prosecution, but rather "to protect the health and safety of the petitioner" in a proceeding that is purely civil in nature. Id.[1] Thus, Sarah's statements in order to obtain the preliminary protective order were not testimonial. Davis, 547 U.S. at 822.

The victim's statements upon which the order was entered are no different than those statements Mrs. Crawford made to friends and coworkers which the defendant has conceded were not subject to the rule

[1] The argument of the Amicus Curiae that the affidavit would be used in a criminal prosecution is without merit. A violation of the protective order could result in contempt of court, but it would be the order itself, which was admitted without objection by the defendant, not the affidavit, which would be the subject of that proceeding. Another argument raised by the Amicus is that the transcript in a civil proceeding might be used in a criminal proceeding. Without mutuality of parties this would not be possible and the case relied upon by the Amicus appears to bear out this conclusion.

in Crawford. The statements were sworn in order to obtain the protective order. That fact does not make the statement testimonial because Mrs. Crawford was not making the statements with the intent to establish or prove past events potentially relevant to later criminal prosecution. Cf. Riner v. Commonwealth, 268 Va. 296, 322, 601 S.E.2d 555, 570 (2004).

Because the primary purpose of the affidavit was to obtain a civil, preliminary protective order, the statements contained therein were nontestimonial under Davis and, therefore, did not implicate Crawford's Sixth Amendment right to confrontation. 547 U.S. at 822. For that reason, the trial court's decision to admit the affidavit was not error.

C. Harmless Error

Finally, if error, the admission of the affidavit for the preliminary protective order was harmless beyond a reasonable doubt given the overwhelming and aggravated nature of other properly admitted evidence.

"When a federal constitutional error is involved, a reviewing court must reverse the judgment unless it determines that the error is harmless beyond a reasonable doubt." Clay v. Commonwealth, 262 Va. 253, 259, 546 S.E.2d 728, 731 (2001). In making that determination, the appellate court must consider, among other factors, "the importance of the tainted evidence in the prosecution's case, whether that evidence was cumulative, the presence or absence of evidence corroborating or contradicting the

tainted evidence on material points, and the overall strength of the prosecution's case." Lilly v. Commonwealth, 258 Va. 548, 551, 523 S.E.2d 208, 209 (1999) (citing Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)). See also Dearing v. Commonwealth, 260 Va. 671, 673, 536 S.E.2d 903 (2000); Pitt v. Commonwealth, 260 Va. 692, 695, 539 S.E.2d 77, 78 (2000), cert. denied, 121 S. Ct. 1616 (2001).

As the Supreme Court stated in Van Arsdall, "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." 475 U.S. at 681. See Jenkins v. Commonwealth, 244 Va. 445, 454, 423 S.E.2d 360, 366 (1992) (concluding that the admission of a defendant's confession was harmless error based on the Commonwealth's presentation of overwhelming evidence of guilt, which consisted of other confessions to close friends, fellow jail inmates, and investigators). It is well-established that violations of the Confrontation Clause, are subject to harmless error review, and the defendant does not suggest otherwise. See Crawford, 541 U.S. at 76 (Rehnquist, C.J., concurring in the judgment).

In this case, the defendant admitted that he shot Sarah, but he claimed it was an accident that occurred while they were on a romantic

getaway in an attempt to reconcile. He told the police that he was attempting to kill himself while they were in Sarah's car. Sarah supposedly reached for the gun, and it went off accidentally. The blood patterns in the car suggest that Sarah was shot by someone sitting in the passenger's seat while she was sitting in the driver's seat. The defendant also admitted that he then took his wife to the motel and left her there.

In any event, the evidence against Crawford was truly overwhelming. He admitted shooting Sarah. The issue was whether the shooting was accidental or premeditated murder. Here, the affidavit showed that the defendant and his wife were estranged and that she was afraid he might physically harm or even kill her. Yet, the evidence relied upon by the Commonwealth in the affidavit was largely cumulative of evidence presented through other sources.[2]

First, the protective order itself provides this evidence. The order, ***admitted without objection***, stated it had been issued based upon the affidavit of Sarah Crawford which demonstrated sufficient evidence to establish probable cause of "family abuse," defined in the order as "any act

[2] In support her argument that this evidence was not harmless, appellate counsel improperly refers to a juror's note which is sealed and contained in the record. (D. Br. 15; App. 21). The trial court denied a defense post-trial motion to examine the juror to ascertain whether the juror followed his oath and the trial court's instructions because the trial court determined it no longer had jurisdiction to do so. (App. 18-22).

involving violence or force resulting in bodily injury or the reasonable apprehension of bodily injury" by Sarah, the petitioner. (App. 1347-1348).

Sarah's statements in the protective order were also largely cumulative of other properly admitted evidence. Sarah was separated from her husband, obtained the protective order on November 1, 2004, which was less than three weeks before her death. (App. 1347-1348). On October 29, 2004, in the presence of police officers, Sarah and her parents went to the apartment where she had lived with her husband and removed her belongings, including her cat. (App. 548-555). As she did so, the officers noted the defendant stood over her and whispered to her, causing Sarah to say to him, "repeat what [you] said . . . are you threatening me?" (App. 562). Crawford's father heard the defendant tell his daughter, "You'll pay for this." Sarah was visibly upset by the defendant's statement. (App. 914).

Evidence was also introduced that Sarah told friends and co-workers about the abuse and that she was afraid her husband might harm her. (App. 588, 598-599). She took other steps to protect herself. Her employer and coworkers testified that she moved her office desk so she had a view of the parking lot to observe if the defendant was coming to the office. She moved into another apartment; its location was not disclosed to the

defendant and she selected that apartment because it was in a remote location and had a long drive way so she could see anyone approaching and have time to make a phone call and get out. (App. 588, 598-599).

Other evidence established the defendant's guilt. He bought a gun and bullets just a few weeks before the shooting. He chose to bring the gun to the "reconciliation" with his estranged wife. A box of bullets, with some bullets missing, was found in the trunk of Sarah's car. (App. 866-874, 893-894, 1330, 1334). The gun was not recovered because the defendant disposed of it. (App. 1281, 1307-1308).

Sarah paid for the defendant to attend an out-of-state trade school, *which distanced him from her* and she was dating other men. When she was last seen alive by her parents in Manassas, Virginia on Thursday evening, November 18, 2004, she was happy. With the assistance of a co-worker she had prepared a document that afternoon for the defendant to sign releasing her father from liability on the marital apartment. (App. 916, 918, 920). Sarah took personal leave on Friday morning, November 19, 2004. She assured her employer that she would be in that afternoon to prepare an expense check for the coworker who was leaving the country on business, but to the surprise of her employer, she never reported for work. (App. 634, 669-671). Her cell phone records indicate two brief calls

to the defendant's cell phone in between which she purchased gas for her car at a station near where the defendant was living. (App. 657-659, 667, 1150).

Sarah Crawford's blood was found on the front driver's seat and back bench seat of her car, indicating she was shot in her vehicle. At 10:30 Friday morning, a box Sarah was supposed to ship for her employer was found on the side of the road in Fauquier County. Forensic testing showed Sarah Crawford's blood was on the box. (App. 657-659, 667). That same afternoon, a stranger reported that he had found Sarah's cell phone in his driveway located in Manassas. (App. 635). Further, Sarah's mother and father went to her apartment on Saturday morning. Sarah was not there and her car was missing. Her pet cat was locked in the apartment without food or water. Her mother said Sarah would never have left the pet in that condition. (App. 921, 923). Her luggage was found in her apartment. (App. 905). A book was lying open on her nightstand. The book was entitled, It's My Life Now: Starting Over After an Abusive Relationship or Domestic Violence. (App. 924, 1338).

Sarah Crawford failed to appear for a previously scheduled appointment with her hairdresser that Saturday morning after she disappeared on Friday. (App. 937, 943-945). She had a 3:00 p.m. date with

another man on that Saturday, but she was not at home when he arrived to pick her up. (App. 645-646). This evidence showed that Sarah had no intent to go with the defendant to Charlottesville in an attempt to reconcile. She was abducted from the start.

Finally, powerful evidence of abduction with intent to defile and rape was presented by the prosecution based on the manner in which the defendant left his wife in the hotel room. Sarah Crawford's body was found in the hotel room in Charlottesville. Her body had been stripped naked. She had been posed: her arms were folded across her waist and her legs were bent and splayed in a frog-like position. The gunshot to her arm was covered with a hotel room washcloth and taped in place. The defendant's semen was found in her vagina. Semen was found in three body orifices: Sarah's mouth, anus and vagina; there was *no* evidence that Sarah had agreed to oral and anal sodomy. There was no evidence of a struggle; Sarah was paralyzed from the time she was shot in her car.

Finally, the defendant was arrested in Florida after a week of "vacation" and visiting with relatives who said he behaved normally. He gave a statement to police in which he said he and his wife had gone to Charlottesville for the weekend to attempt to reconcile. He stated that they were in her car in the parking lot of a McDonald's restaurant when he

decided to shoot himself. He claimed the victim tried to grab the gun and it went off accidently. Thereafter, he did not call 911; he drove to a hotel, checked in, carried Sarah into the room and left her stripped naked with his semen in three body cavities.

Here the evidence based on what Crawford did from the time he took Sarah to the hotel demonstrates abduction with intent to defile and rape. Thus, even if the statement Sarah made to obtain the civil preliminary protective order violated the Confrontation Clause, the same information came into the evidentiary record without objection from multiple other sources. The aggravating circumstances surrounding the location and condition of Sarah's body rendered the admission of the affidavit harmless beyond a reasonable doubt. See Pitt v. Commonwealth, 260 Va. 692, 696, 539 S.E.2d 77, 79 (2000) (assuming that the trial court's decision to admit the hearsay statement of a co-conspirator violated the defendant's Sixth Amendment rights, but then holding the error was harmless beyond a reasonable doubt because "the evidence as a whole, excluding [the hearsay] statement, overwhelmingly proved that [the defendant] is guilty," and, therefore, "there was no reasonable possibility that [the] statement might have contributed to [the defendant's] conviction"); Greenway v. Commonwealth, 254 Va. 147, 154, 487 S.E.2d 224, 228 (1997) ("Improper

admission of evidence does not create reversible error when it is merely cumulative of other competent evidence properly admitted."). See also Doan v. Carter, 548 F.3d 449, 459 (6th Cir. 2008)(even if affidavit was both inadmissible hearsay and testimonial, admission of affidavit into evidence harmless as affidavit was merely cumulative of other evidence admitted); United States v. Williams, 429 F.3d 767, 774 (8th Cir. 2005) (assuming "that a Confrontation Clause error occurred," but holding "that the error in admitting [the hearsay] statement was harmless beyond a reasonable doubt," reasoning that "[t]he independent evidence . . . was so overwhelming" that the defendant's "conviction cannot be attributed to [the inadmissible] statement." (internal quotations omitted)).

II. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTIONS OF ABDUCTION WITH INTENT TO DEFILE AND RAPE.

The defendant's sufficiency argument is waived. In any event, when all the evidence is properly viewed in the light most favorable to the Commonwealth, the evidence was overwhelmingly sufficient to support the charges of abduction with intent to defile and rape.

A. Sufficiency Argument Waived by Counsel During Argument.

In this case, the jury found the evidence, including the Sarah's statements to obtain the civil preliminary protective order, sufficient to

sustain Crawford's convictions. Therefore, on appeal this Court must also consider Sarah's statements in any sufficiency analysis. However, during oral argument in the Court of Appeals, counsel for Crawford conceded that, if the affidavit were admissible, the evidence was sufficient to convict him of abduction with intent to defile and rape. This concession operated as a "waiver for purposes of Rule 5A:18 or as an express withdrawal of an appellate challenge to a trial court judgment. In either scenario, the [Court of Appeals] was entitled to accept the concession — not as a basis for deciding the contested issue of law, but as a basis for not deciding it." Crawford, 55 Va. App. 457, 481-482, 686 S.E.2d 557, 577 (2009). The Court of Appeals correctly determined the sufficiency issue did not need to be further addressed.

B. Sufficiency Issue Waived: Not included In Any Assignment of Error.

Crawford's Assignments of Error 1-4 discuss the admissibility of Sarah's statements made to obtain a preliminary protective order. Assignment of Error 5 states: "the Court of Appeals erred in failing to address Appellant's argument that the evidence was insufficient to sustain the convictions of abduction with intent to defile and rape."

> The purpose of assignments of error is to point out the errors with reasonable certainty in order to direct this court and

> opposing counsel to the points on which appellant intends to ask a reversal of the judgment, and to limit discussion to these points.

Harlow v. Commonwealth, 195 Va. 269, 271-72, 77 S.E.2d 851, 853 (1953). In Yeatts v. Murray, 249 Va. 285, 290-291, 455 S.E.2d 18, 22 (1995), Yeatts' assignment of error only challenged the alleged procedural failure to order an evidentiary hearing; it did not challenge the habeas court's substantive ruling on the merits of the ineffective assistance claims and citing Rule 5:17(c), this Court refused to consider the merits of the ineffective claims citing Rule. Id. at 290-291, 455 S.E.2d at 22. See also Jay v. Commonwealth, 275 Va. 510, 519, 659 S.E.2d 311, 316 (2008) (When an appellant fails to comply with Rule 5:17(c)(4), this Court treats the argument as waived).

Assignment of Error 5 does not address the merits of the sufficiency of the evidence itself; it simply attacks the lower court’s decision that Crawford had waived the issue. Accordingly, Crawford has waived his claim that the evidence was insufficient to support the convictions of abduction with intent to defile and rape. In any event, for the reasons stated below, this claim is without merit.

C. Standard of Review.

When a defendant challenges on appeal the sufficiency of the evidence to sustain his conviction, the appellate court has a duty to examine all the evidence, including purported illegally admitted evidence. Sprouse v. Commonwealth, 53 Va. App. 488, 493, 673 S.E.2d 481, 483 (2009) (citing Lockhart v. Nelson, 488 U.S. 33, 41 (1988)). See Bolden, 275 Va. at 147, 654 S.E.2d at 585-586 (citing Coles v. Commonwealth, 270 Va. 585, 587, 621 S.E.2d 109, 110 (2005); Commonwealth v. Presley, 256 Va. 465, 466, 507 S.E.2d 72 (1998); Commonwealth v. Jenkins, 255 Va. 516, 520, 499 S.E.2d 263, 265 (1998)). This examination is not limited to the evidence mentioned by a party in trial argument or by the trial court in its ruling. In determining whether there is evidence to sustain a conviction, an appellate court must consider *all* the evidence admitted at trial that is contained in the record. Id.

On appeal, "the evidence and all reasonable inferences flowing therefrom must be viewed in the light most favorable to the prevailing party in the trial court." Commonwealth v. Hudson, 265 Va. 505, 514, 578 S.E.2d 781, 786 (2003) (citations omitted). This principle requires this Court to "discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth *and all fair inferences that may be drawn therefrom."*

Craddock v. Commonwealth, 40 Va. App. 539, 542-43, 580 S.E.2d 454, 456 (2003) (citations omitted).

Moreover, a reviewing court does not "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." Rather, the reviewing court asks only whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318-19 (1979)) (emphasis in original), aff'd, 272 Va. 481, 634 S.E.2d 305 (2006). The appellate court asks only whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson, 443 U.S. at 319).

"Intent is the purpose formed in a person's mind which may, and often must, be inferred from the facts and circumstances in a particular case. The state of mind [or criminal intent] of an alleged offender may be shown by his acts and conduct." Ridley v. Commonwealth, 219 Va. 834, 836, 252 S.E.2d 313, 314 (1979) (citation omitted). Moreover, ***the mere possibility that the accused might have another purpose than that found by the fact finder is insufficient to reverse a conviction on***

appeal. Hancock v. Commonwealth, 12 Va. App. 774, 782-83, 407 S.E.2d 301, 306 (1992). Indeed, a person may commit a crime with more than one purpose, and the fact that the act is done with two or more specific objectives does not mean that the Commonwealth has failed to prove the specific intent to commit the charged crime. Thus, when the Commonwealth proves beyond a reasonable doubt that an accused has committed a criminal act with both a primary and a secondary purpose in mind, both or either of which purposes are criminal, the Commonwealth has met its burden of proving the element of specific intent. See Hughes v. Commonwealth, 18 Va. App. 510, 530-531, 446 S.E.2d 451, 469 (1994) (*en banc*).

Finally, "[c]ircumstantial evidence is not viewed in isolation. 'While no single piece of evidence may be sufficient, the "combined force of many concurrent and related circumstances, each insufficient in itself, may lead a reasonable mind irresistibly to a conclusion."'" Id. at 514, 578 S.E.2d at 786 (citations omitted). Indeed, evidence of flight — wherever it occurs — is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. See Illinois v. Wardlow, 528 U.S. 119, 124 (2000); Whitfield v. Commonwealth, 265 Va. 358, 362, 576 S.E.2d 463 (2003).

D. The Evidence is Sufficient to Prove Abduction with Intent to Defile and Rape.

To convict Crawford of abduction with the intent to defile, the Commonwealth needed to prove both that he intentionally abducted Sarah by "depriv[ing] his victim of her liberty," Brown v. Commonwealth, 230 Va. 310, 314, 337 S.E.2d 711, 714 (1985), and that he committed this act with the intention to sexually molest her, see Scott v. Commonwealth, 228 Va. 519, 525 n.2, 323 S.E.2d 572, 576 n.2 (1984). See Code § 18.2-48. Code § 18.2-61 defines rape, as relevant to these facts, as occurring when "any person has sexual intercourse with a complaining witness . . . and such act is accomplished . . . against the complaining witness's will, by force, threat or intimidation." Therefore, the Commonwealth had to prove two elements to convict appellant of rape: (1) that the defendant and Sarah had sexual intercourse and (2) that the act was against Sarah's will through the use of force, threat, or intimidation.

The evidence relied upon by the defense to show no abduction, no intent to defile and no rape was presented by the defendant in less than two pages of his brief. (D. Br. 20-21). Indeed, at trial it was largely the product of defense counsel's imagination.

In support of the contention that Sarah Crawford willingly accompanied the defendant on a sojourn to Charlottesville for a weekend

long reconciliation trip, the defense points to: (1) less than two weeks prior to her death Sarah Crawford paid her husband's tuition to attend a trade school *located in Kentucky*, (2) she withdrew the protective order, (3) the parties communicated by telephone on numerous occasions, she drove to the area where he lived in the morning hours leading up to her being shot, but the content of these conversations is unknown; and (4) there was no damage to her genitalia but she was paralyzed.

The issue upon appellate review is not whether "there is some evidence to support" a hypothesis of innocence. The issue is whether a reasonable jury, upon consideration of all the evidence, could have rejected Crawford's theories in his defense and found him guilty of abduction with intent to defile and rape beyond a reasonable doubt. Of course, upon appellate review, the issue of exclusion of reasonable theories of innocence is limited to those theories advanced by the accused at trial. Subject to the ends of justice exception, appellate courts do not entertain matters raised for the first time on appeal. Rule 5A:18; Rule 5:25.

In this case, Crawford did not testify; however, his pretrial statement was introduced. He made no statement about having consensual sex with his estranged wife. Crawford's "consensual sex" theory was advanced in counsel's argument to the jury. Thus, there is no evidence, even in the

defendant's statement, that he had consensual sex with this estranged wife. Interestingly and importantly, the defendant did not explain why he was allegedly attempting to take his own life after he and his estranged wife had purportedly engaged in consensual intercourse during the process of their reconciliation; the jury never heard during the defendant's statement how his wife got into the motel room, why she was stripped naked, why he left her posed like a frog, or an explanation for the presence of his semen inside her vagina, anus and mouth. He did not explain why he fled to Florida after the accidental shooting or why he left his wife to die in an air conditioned room with a "do not disturb" sign on the door. He did not explain why he did not seek medical attention for her.

There was a mountain of other evidence that the jury heard and could have considered in arriving at its unanimous verdicts that the defendant abducted, raped and defiled Sarah Crawford: during the October 29, 2004 moving out incident, Sarah's father heard the defendant tell his daughter, "You'll pay for this." Sarah was visibly upset by the defendant's statement. (App. 914). Mickey Stern testified that Sarah took several safety precautions to avoid an unexpected encounter with the defendant such as using a different route to drive to and from work everyday and moving her desk so she could see who was coming into the office. Tohry Petty testified

that Sarah asked for concert tickets to give to her husband so that he would be out of the house when she was removing her personal possessions because she was “afraid of an incident.” (App. 588).

The evidence proved that approximately two weeks before the murder, the defendant bought a gun that could have been used in the shooting, although no gun was ever recovered because he disposed of it. (App. 866-874, 893-894, 1330, 1334). He also bought bullets for the gun. (App. 1281, 1307-1308).

Additional evidence showed Sarah was abducted—she never intended to go on a reconciliation weekend with the defendant. Her luggage was found in her apartment. (App. 905). Sarah failed to appear for a previously scheduled appointment with her hairdresser on that Saturday morning. Sarah never contacted the man she was going on a date with to say she was suddenly leaving town and getting back with her estranged husband. She left her pet with no food and water. (App. 937, 943-945).

The defendant’s statement that he shot his wife accidently in Charlottesville is refuted by the physical evidence. More importantly, even if the shooting occurred in Charlottesville, he did not seek help. Instead he drove to a hotel, checked in, took Sarah to the room, stripped her naked,

posed her, penetrated her vagina, anus and mouth leaving his semen behind and left her to die. The evidence found in the hotel room demonstrates the intent to defile and rape. No evidence presented at trial suggests that the intercourse Crawford had with his estranged wife was consensual. He made no statement indicating he and his wife had consensual sex. According to his statement, they drove from Manassas to a McDonald's in Charlottesville, where his wife was shot.

Additionally, the defendant met his wife armed with a recently purchased gun, a fact inconsistent with his claim that he and his ex-wife were attempting to reconcile. Further the circumstantial evidence proved that he shot her before they left the Manassas area, as evidenced by the box with her blood on it found on the road side and her discarded cell phone. Nothing that occurred thereafter could be considered consensual.

The jury was entitled to evaluate the defendant's theory of innocence upon consideration of *all* the evidence and the reasonable inferences that flow from that evidence. It is clear that the jury rejected the theory as unreasonable. The evidence from the crime scene and the ensuing investigation was inconsistent with Crawford's theory of innocence. The jury was entitled to conclude that Crawford was lying to police and to reject

the limited explanation offered by Crawford and the consensual sex theory utilized during closing argument by his counsel.

Given the evidence presented in the case, which has already been discussed at length, the jury reasonably could infer that Sarah did not go with her husband willingly; she was abducted with the intent to defile. Also given the state of their relationship, the jury reasonably inferred that Sarah would not have consented to sexual relations with the defendant. The facts that Sarah telephoned her husband repeatedly on the days leading up to their "sojourn" to Charlottesville and had paid his tuition to attend trade school are simply not dispositive. The jury could have reasonably inferred that Sarah was attempting distance herself from her husband by paying for him to attend the trade school out of state and that she was "playing nice" to promote the severance of her marital ties with her husband. She had prepared a document for him to sign; she would need to arrange to meet him in order to sign it. The defendant also relied on the fact that the crime scene showed no evidence of a struggle and there were no bruises on Sarah Crawford's body. It was reasonable for the jury to infer that the rape occurred after Sarah had been shot in her car and was paralyzed. It simply cannot be said that *no* rational fact finder would have concluded the evidence was sufficient to support the convictions. At the very least the

evidence presented a jury issue on all the charges including abduction and rape.

CONCLUSION

For these reasons the judgments appealed from the Circuit Court for the City of Charlottesville should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

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CERTIFICATE OF TRANSMISSION AND SERVICE

On July 14, 2010, in compliance with Rule 5:26(c), the required number of copies of this brief, paper and electronic, were delivered to the Clerk of this Court by hand and email. Three copies of this brief were mailed to Samantha E. Freed, Esquire, 408 East Market Street, Suite 107, Charlottesville, VA and Steven D. Rosenfield, Esquire, 913 East Jefferson Street, Charlottesville, VA 22902, counsel for the appellant. Copies of this brief were also delivered to counsel via email.

_____

Leah A. Darron