IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 122178

CHRISTOPHER BURKEEN,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

KATHERINE QUINLAN ADELFIO
Assistant Attorney General
VA State Bar No. 77214

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071
(804) 371-0151 (fax)
oagcriminallitigation@oag.state.va.us

TABLE OF CONTENTS

STATEMENT OF THE CASE 1
ASSIGNMENT OF ERROR 2
STATEMENT OF FACTS 3
ARGUMENT 7
THE TRIAL COURT DID NOT ERR IN FINDING SUFFICIENT EVIDENCE TO PROVE THE DEFENDANT INTENDED TO MAIM, DISFIGURE, DISABLE, OR KILL THE DEFENDANT. 7
Standard of Review 7
Sufficiency to Prove Intent to Maim, Disfigure, Disable, or Kill 8
CONCLUSION 22
CERTIFICATE OF TRANSMISSION AND SERVICE 23

TABLE OF AUTHORITIES

Page

CASES

Burkeen v. Commonwealth,
Record No. 2566-11-1, 2012 Va. App. LEXIS 384
(Va. App. Nov. 27, 2012) 2, 13, 14

Cavazos v. Smith,
___ U.S. ___, 132 S. Ct. 2 (2011) 8

Cobb v. Commonwealth,
152 Va. 941, 146 S.E. 270 (1929) 8

Coleman v. Johnson,
___ U.S. ___, 132 S. Ct. 2060 (2012) 8

Commonwealth v. Hudson,
265 Va. 505, 578 S.E.2d 781 (2003) 7

Dawkins v. Commonwealth,
186 Va. 55, 41 S.E.2d 500 (1947) 10, 11

Ellis v. Commonwealth,
281 Va. 499, 706 S.E.2d 849 (2011) 9

Fletcher v. Commonwealth,
209 Va. 636, 166 S.E.2d 269 (1969) ..... passim

Ingram v. Commonwealth,
192 Va. 794, 66 S.E.2d 846 (1951) 10

Jackson v. Virginia,
443 U.S. 307 (1979) 8

Johnson v. Commonwealth,
53 Va. App. 79, 669 S.E.2d 368 (2008) ..... passim

Lee v. Commonwealth,
135 Va. 572, 115 S.E. 671 (1923) 10, 21

M'Whirt's Case,
44 Va. (3 Gratt.) 594 (1846) 15

Nobles v. Commonwealth,
218 Va. 548, 238 S.E.2d 808 (1977) 9

Roark v. Commonwealth,
182 Va. 244, 28 S.E.2d 693 (1944)..... 10, 11, 18

Shackleford v. Commonwealth,
183 Va. 423, S.E.2d 683 (1945).....passim

Simon v. Commonwealth,
58 Va. App. 194, 708 S.E.2d 245 (2011) 9

State v. John,
72 S.W. 525 (Mo. 1903).....11

Sullivan v. Commonwealth,
280 Va. 672, 701 S.E.2d 61 (2010).....7, 8

Tran v. Commonwealth,
Record No. 2565-02-4, 2004 Va. App. LEXIS 195
(Va. App. Apr. 27, 2004) 20, 21

Viney v. Commonwealth,
269 Va. 296, 609 S.E.2d 26 (2005).....7

Williams v. Commonwealth,
278 Va. 190, 193, 677 S.E.2d 280, 282 (2009).....8

Williams v. Commonwealth,
13 Va. App. 393, 412 S.E.2d 202 (1991) 16, 18

Wilson v. Commonwealth,
249 Va. 95, 452 S.E.2d 669 (1995).....9

Worrell v. Commonwealth,
Record No. 2451-09-1, 2010 Va. App. LEXIS 497
(Va. App. Dec. 21, 2010) 19, 20

Wright v. Commonwealth,
245 Va. 177, 427 S.E.2d 379 (1993).....9

OTHER AUTHORITIES

Section 18.2-51, Code of Virginia 1, 8, 11, 20

IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 122178

CHRISTOPHER BURKEEN,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

On August 22, 2011, the Circuit Court for the City of Newport News ("trial court") convicted the defendant, Christopher Burkeen ("defendant" or "Burkeen"), of malicious wounding, in violation of Code § 18.2-51. (App. 2-6). By final order dated December 12, 2011, the trial court sentenced the defendant to twenty years in prison with eighteen years suspended. (App. 4-6).

The defendant appealed the judgment, arguing the evidence was insufficient to show he acted with the intent to maim, disfigure, disable, or kill. (App. 7). The Court of Appeals granted the appeal. Following briefing and oral argument, a panel of the Court of Appeals affirmed the conviction on November 27, 2012, finding the evidence was sufficient to support the trial court's decision. Burkeen v. Commonwealth, Record No. 2566-11-1, 2012 Va. App. LEXIS 384 (Va. App. Nov. 27, 2012). The Court of Appeals subsequently denied the defendant's petition for a rehearing *en banc*. Burkeen v. Commonwealth, Record No. 2566-11-1 (Va. App. Dec. 18, 2012).

Burkeen appealed the decision of the Court of Appeals to this Court, which granted the appeal.

ASSIGNMENT OF ERROR

The defendant assigns the following error:

> **The Court of Appeals erred when it found that the evidence was sufficient to prove intent to maim, disfigure, disable, or kill where the defendant struck the victim with a single blow with his bare fist.**

(Appellant's Br. at 2).

STATEMENT OF FACTS

Early in the morning of December 31, 2009, the victim exited a Newport News bar where he had spent the previous several hours playing pool. (App. 35-36, 45-46). As he stood outside the bar waiting for a ride home, the defendant approached and engaged the victim in conversation. (App. 35-36). Burkeen, who was 6 feet tall and weighed 180 pounds, told the victim he had seen him playing pool and asked the victim to remove his pool stick from its case so Burkeen could see it. (App. 36-37, 82). At trial, the victim testified that at this point in the conversation, Burkeen "seemed like a nice guy." (App. 37, 50).

After the victim allowed Burkeen to handle the stick, Burkeen asked the victim how much it cost. (App. 37). The victim informed him the stick cost $230. (App. 37). Burkeen, while holding the stick, responded, "[N]o, you'll take $200 for it." (App. 38, 47). The victim replied that the stick was worth $230 and, in any event, it was not for sale. (App. 38, 47). Again, the defendant said, "No, You'll take $200 for it." (App. 38). The victim again replied, "No, I won't." (App. 38).

As the victim reached to reclaim his pool stick, the defendant let go of the stick and punched the victim's left eye. (App. 38, 47-49) The dazed victim dropped the stick. (App. 38, 48). "Blood poured out of [the victim's]

nose, went all over [his] shoes and it poured all over the concrete in front of [him]." (App. 38, 49).

While the victim was bent over and holding his face in an attempt to staunch the flow of blood, the defendant yelled in the victim's face and ear. (App. 38-39, 49-50, 53-54). He called the victim a "bitch" and "cuss[ed] out" the victim. (App. 38). The defendant further told the victim "he would kick [the victim's] ass and take [his] stick if he wanted to." (App. 38, 50). According to the victim, Burkeen also used other "fighting words." (App. 38). The defendant informed the victim he was in the Army and could benchpress two hundred pounds. (App. 39). When a woman said, "Chris, what are you doing?", the defendant responded, "That's right, Chris, that's my name, remember it, bitch . . . ." (App. 39).

Keith Taylor intervened before the defendant could strike the victim again. (App. 39-40). The defendant was standing over the victim with his arm pulled back and his fist balled when Taylor stepped between the men with his back to Burkeen. (App. 53-55). The defendant struck Taylor multiple times in the back of head. (App. 40, 55). In response to the blows, Taylor fell and curled up in the fetal position. (App. 40, 55).

Burkeen continued to punch Taylor after he fell to the ground and only stopped attacking Taylor when the victim told another man to call the

police. (App. 40-41). At the mention of the police, the defendant ran from the bar's parking lot. (App. 40-41).

As a result of the attack, the victim suffered a black eye, a broken nose, and a broken orbital bone. (App. 41, 64). Reconstructive surgery was necessary to repair the victim's orbital bone. (App. 43, 64). During the surgery, the plastic surgeon returned the fractured bones to their previous anatomical positions, or as close as he could get them to their former positions. (App. 64-65). A prosthetic sheath held the broken bones together. (App. 44, 64, 65). But for the surgery, the victim's face would have sagged, similar to a stroke victim's face, by the time he was fifty years old. (App. 44). Finally, Dr. John Pitman, who was qualified at trial as an expert witness in the field of plastic surgery, testified that the victim's injury was "very significant" and "significant" force is required to break the orbital bone. (App. 66, 67).

The victim also testified at the trial, which was over 18 months after the offense, that his teeth did not "feel right," he had visible scars, his eyes were puffy from the scar tissue arising from the surgery, and he suffered headaches. (App. 44).

In convicting Burkeen of malicious wounding, the trial court found no provocation preceded the assault and the defendant delivered a "surprising

blow." (App. 106, 109). The trial court further rejected the defendant's suggestion that the victim's attempt to reclaim his pool stick could have been interpreted as an "aggressive action" by the defendant. (App. 106). It further found there was malice and an intent to "disable him or cause injury." (App. 107-09). The trial court noted the defendant punched, rather than pushed, the victim, and he struck the victim's eye, not his shoulder. (App. 107). The trial court specifically noted, "You don't smash someone in the eye socket and then express surprise that they're injured. That's a malicious disabling attack." (App. 109).

Prior to sentencing, the trial court denied the defendant's motion to vacate the conviction. (App. 122). Again, the trial court made factual findings:

> [If h]e hits them in such a way as to do this extent of damage, then in the Court's mind the [requisite] intent is there. He was not doing it to get his attention; he was not doing it to stun him. He was doing it to disable him in the Court's judgment."

(App. 122).

ARGUMENT

THE TRIAL COURT DID NOT ERR IN FINDING SUFFICIENT EVIDENCE TO PROVE THE DEFENDANT INTENDED TO MAIM, DISFIGURE, DISABLE, OR KILL THE DEFENDANT.

Standard of Review

When the sufficiency of the evidence is challenged on appeal, the Court views the evidence in the light most favorable to the Commonwealth, the prevailing party at trial, including drawing all reasonable inferences in the Commonwealth's favor from the facts proved. See Viney v. Commonwealth, 269 Va. 296, 299, 609 S.E.2d 26, 28 (2005). This Court must affirm the judgment of the trial court unless the judgment is "plainly wrong or without evidence to support it." Id. Appellate deference "applies not only to findings of fact, but also to any reasonable and justified inferences the fact-finder may have drawn from the facts proved." Sullivan v. Commonwealth, 280 Va. 672, 676, 701 S.E.2d 61, 63-64 (2010) (citation omitted). It is "the province of the [fact finder] to consider the testimony and the credibility of the witnesses to determine reasonable inferences from such evidence." Commonwealth v. Hudson, 265 Va. 505, 514, 578 S.E.2d 781, 786 (2003).

"An appellate court does not 'ask itself whether ***it*** believes that the evidence at the trial established guilt beyond a reasonable doubt.'"

Williams v. Commonwealth, 278 Va. 190, 193, 677 S.E.2d 280, 282 (2009) (emphasis in original) (quoting Jackson v. Virginia, 443 U.S. 307, 318-19 (1979)). Instead, the only "relevant question is, after reviewing the evidence in the light most favorable to the prosecution, whether ***any*** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Sullivan, 280 Va. at 676, 703 S.E.2d at 63 (emphasis added) (citing Jackson, 443 U.S. at 319); see also Coleman v. Johnson, ___ U.S. ___, ___, 132 S. Ct. 2060, 2062 (2012) (quoting Cavazos v. Smith, ___ U.S. ___, ___, 132 S. Ct. 2, 3 (2011) (reaffirming the Jackson standard)). Thus, "it is not for this court to say that the evidence does or does not establish his guilt beyond a reasonable doubt because as an original proposition it might have reached a different conclusion." Cobb v. Commonwealth, 152 Va. 941, 953, 146 S.E. 270, 274 (1929).

Sufficiency to Prove Intent to Maim, Disfigure, Disable, or Kill

"If any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall . . . be guilty of a Class 3 felony." Code § 18.2-51. "To be guilty under Code § 18.2-51, a person must intend to permanently,

not merely temporarily, harm another person." Johnson v. Commonwealth, 53 Va. App. 79, 101, 669 S.E.2d 368, 378 (2008) (citation omitted).

The defendant contends the trial court erred in convicting him of malicious wounding, because the evidence was insufficient to show he intended to maim, disfigure, disable, or kill the victim. This argument is without merit.

"'Intent is a state of mind that may be proved by an accused's acts or by his statements and that may be shown by circumstantial evidence.'" Wilson v. Commonwealth, 249 Va. 95, 101, 452 S.E.2d 669, 673-74 (1995) (quoting Wright v. Commonwealth, 245 Va. 177, 193, 427 S.E.2d 379, 390 (1993)). Circumstantial evidence of intent may include a person's statements and conduct, including "statements and conduct of an accused ***after*** the events that constitute the charged crime." Simon v. Commonwealth, 58 Va. App. 194, 206, 708 S.E.2d 245, 251 (2011) (emphasis added); accord Shackleford v. Commonwealth, 183 Va. 423, 427, 32 S.E.2d 683, 684 (1945) (considering statements after assault to determine intent). "[A] person is presumed to intend the immediate, direct, and necessary consequences of his voluntary act." Nobles v. Commonwealth, 218 Va. 548, 551, 238 S.E.2d 808, 810 (1977); accord Ellis v. Commonwealth, 281 Va. 499, 507, 706 S.E.2d 849, 853 (2011) ("It

is permissible for the fact finder to infer that every person intends the natural probable consequences of his or her actions.”).

In other words, “[t]he question of [a defendant’s] intent must be determined from the outward manifestation of his actions leading to usual and natural results, under the peculiar facts and circumstances disclosed. This determination presents a factual question which lies peculiarly within the province of the [fact finder].” Ingram v. Commonwealth, 192 Va. 794, 801-02, 66 S.E.2d 846, 850 (1951).

“Ordinarily, the fist is not regarded as a dangerous or deadly weapon.” Roark v. Commonwealth, 182 Va. 244, 250, 28 S.E.2d 693, 695 (1944) (citation omitted) (considering whether malice may be implied when single punch to the head lead to death of victim). Therefore “[u]nder ordinary circumstances an intent to maim may not be presumed from a blow with a bare fist.” Fletcher v. Commonwealth, 209 Va. 636, 640, 166 S.E.2d 269, 273 (1969) (citing Lee v. Commonwealth, 135 Va. 572, 578, 115 S.E. 671, 673 (1923)). “However, an assault with the bare fists may be attended with such circumstances of violence and brutality that an intent to kill will be presumed.” Roark, 182 Va. at 250, 28 S.E.2d at 695-96; see also Fletcher, 290 Va. at 640, 166 S.E.2d at 273 (same); Dawkins v. Commonwealth, 186 Va. 55, 63, 41 S.E.2d 500, 504 (1947) (stating “one

may permanently maim disfigure, disable, or kill with the fists, or knees, if the force is applied with violence and brutality"); State v. John, 72 S.W. 525, 527 (Mo. 1903) ("A strong brawny man will not be allowed to approach an unoffending citizen . . . and deal him a deadly blow with his fist in a vital part and when death, the natural consequence of his act, ensues, be heard to say that he merely intended to punish him."), quoted in Roark, 182 Va. at 251, 28 S.E.2d at 696.

In Dawkins, this Court rejected the appellant's argument that a malicious wounding could not be committed with a fist or foot:

> The defendant contends that since the words, "shoot, stab, cut, or wound," are specifically enumerated in Code, section 4402 [(prior Code § 18.2-51)], that the words following them, "or by any means causing bodily injury," should be limited to include only assaults with artificial weapons causing injuries of the kind first specified. Such a construction of the statute would exclude an assault made with nature's weapons. There is no merit in this contention.

Dawkins, 186 Va. at 63, 41 S.E.2d at 504.

In Shackleford, the victim attempted to intervene in an argument between Shackleford and his estranged wife. 183 Va. at 425, 32 S.E.2d at 683. Shackleford was "a strong, hale, heavy-set man" and the victim was a "frail woman 50 years of age." Id. at 426, 32 S.E.2d at 684. Shackleford said, "This is the third time that you have messed in my business and this time I will finish you." Id. at 425, 32 S.E.2d at 683. He then thrice struck

the victim with his fists, hitting her nose, eye, and the back of her ear. Id. He only stopped hitting the victim when his wife grabbed him, preventing further assault. Id.

After Shackleford's arrest, he was "mad and excited." Id. at 427, 32 S.E.2d at 684. He called his wife's relatives "a bunch of bastards." Id. Finally, he stated that he "not only struck [the victim] but that he 'followed up' the blow." Id.

In upholding the conviction, this Court noted the defendant was "a strong man" and found he made an "unprovoked and brutal attack" on a "defenseless woman," "striking at least three severe blows on her face and head with the express intention to 'finish' her." Id. at 427, 32 S.E.2d at 684. This Court further found the attack only ended because Shackleford's wife intervened. Id. Finally, this Court noted the defendant's statements after the assault did not suggest that he "made the attack on the impulse of the moment or that he regretted making the assault. On the contrary, his statements are evidence of express malice." Id.

In Fletcher, the defendant assaulted the sleeping victim, beating him in the face with his fists until "blood ran out of his eyes, nose, and mouth." 209 Va. at 638, 166 S.E.2d at 271. The victim "sustained cuts on his forehead, over the side of his mouth, and on his cheek." Id. He also

suffered a "blow-out fracture of the orbital floor with incarceration of muscle and the orbital tissue in the fracture." Id. A doctor testified the victim's injuries could have been caused by "a blow or blows with a fist." Id. at 636, 166 S.E.2d at 271-72. The victim testified that he did not wake up until the beating was complete and he was awakened by a blow to the face. Id. at 638, 166 S.E.2d at 271. This Court held the evidence showed that "the assault with the bare fist was attended with such circumstances of violence and brutality that an intent to maim, disfigure or kill may be presumed." Id. at 640-41, 166 S.E.2d at 273.

In affirming the conviction in the instant case, the Court of Appeals compared the facts to those in Johnson v. Commonwealth, 53 Va. App. 79, 669 S.E.2d 368 (2008). Burkeen, 2012 Va. App. LEXIS 384, at *4-5. In Johnson, the Court of Appeals affirmed a conviction for malicious wounding where the defendant delivered a single blow with a bare fist to the head of the victim, and the blow knocked the victim to the ground and resulted in a concussion and several cuts. 53 Va. App. at 87, 669 S.E.2d at 371-72.

The Court of Appeals stated in the instant case:

> Johnson emphasized that the attack on the victim was unprovoked and that the defendant struck his victim with sufficient force to inflict serious injury and with such momentum it caused both the defendant and the victim to fall to the ground. Johnson's statements both before and after the attack indicated "a premeditated attack."

Burkeen, 2012 Va. App. LEXIS 384, at *4 (citing Johnson, 53 Va. App. at 105, 669 S.E.2d at 380). Considering the sufficiency of the evidence in the instant case, the Court of Appeals held "the defendant's act of punching the victim in the face with great force and without provocation combined with the severity of the injuries and the statements after the attack, [was] sufficient evidence to permit the finding that the defendant acted with the intent to maim, disable, disfigure or kill." Id. at *5.

The Johnson Court found the totality of the circumstances demonstrated Johnson's intent. First, the attack was unprovoked, and the unsuspecting victim was defenseless and thus was more likely to suffer serious injury; "[t]he lack of provocation [was] significant evidence of an intent to seriously harm." Id. at 103-04, 669 S.E.2d at 380. Second, the Court of Appeals noted the victim's "significant" injuries and also that Johnson "employed [such] great force in striking" his victim that he fell to the floor as well, and the use of such force also "indicates an intent to severely harm." Id. at 104, 669 S.E.2d at 380. Furthermore, Johnson made statements after the attack that indicated the attack was premeditated and intended to punish the victim for perceived injustices. Id. Finally, the Court of Appeals held displays of contrition were relevant in determining a defendant's intent to permanently injure. It held, "[T]he level

of a defendant's braggadocio about a crime may rightly be expected to correlate with the level of harm anticipated and inflicted." Id. at 104 n.5, 669 S.E.2d at 380 n.5.

As the Court of Appeals held below, the circumstances of the instant case were sufficient for a finding of an intent to maim, disable or disfigure. The victim did nothing to provoke Burkeen's attack; he merely refused to sell Burkeen his pool stick at a reduced price. Because the victim did not expect an attack from the defendant, he was "'defenceless [sic]'" Id. at 104, 669 S.E.2d at 380 (quoting M'Whirt's Case, 44 Va. (3 Gratt.) 594, 611 (1846)), which made him "more likely to suffer serious wounds than someone having the opportunity to prepare for an attack." Id.; see also Fletcher, 209 Va. at 638, 166 S.E.2d at 271); Shackleford, 183 Va. at 426-27, 32 S.E.2d at 684. As Johnson held, "[t]he lack of provocation is significant evidence of an intent to seriously harm." 53 Va. App. at 104, 669 S.E.2d at 380.

Furthermore, Burkeen, a large man, struck the victim with great force.[1] See Shackleford, 183 Va. at 426-27, 32 S.E.2d at 684 (considering size of the defendant in determining intent to maim, etc.). He broke both the victim's nose and orbital bone with "significant" force, causing a great deal of bleeding. The victim required reconstructive surgery to repair the damage done by the blow. On the day of trial, over 18 months after the beating, he still had a visible scar and puffiness from scar tissue on his face, he experienced an odd sensation in his teeth, and he continued to suffer from headaches. See Fletcher, 209 Va. at 638, 166 S.E.2d at 271 (convicting appellant of malicious wounding when he fractured the victim's orbital bone in addition to causing other injuries).

---

[1] The defendant notes on brief that there is no comparison of the defendant's and the victim's body sizes in the record. (Appellant's Br. at 8 n.1). The Court of Appeals has noted that a trial court has the ability to observe an attacker and his victim, when the record does not overtly reflect the sizes of the two individuals, in a consideration of the attacker's intent:

> The record does not reveal the respective sizes of the appellant and the victim. However, the trial court had the occasion to observe both men and their demeanor. It lay within its province to assess the two men and the circumstances surrounding the assault, and from those circumstances to infer the appellant's intent.

Williams v. Commonwealth, 13 Va. App. 393, 398, 412 S.E.2d 202, 205 (1991).

While Burkeen was not carried to the floor by the momentum of his punch as Johnson was, his boasts after striking the victim certainly indicate the defendant recognized and, in fact, reveled, in his own strength. His taunts regarding the Army and his ability to benchpress 200 pounds demonstrate he knew he was capable of inflicting great harm.

Additionally, Burkeen's actions before and after he punched the victim are evidence of his intent to maim or disable the victim. He lulled the victim into feeling a false sense of security as the men made small talk about the pool stick. Burkeen struck the victim only after the victim refused to sell him the pool stick. Then, while the victim was bent over and bleeding profusely, Burkeen yelled in his face, calling him "a bitch," threatening to further injure him, and telling the victim he would take the victim's stick if he wanted to. When a woman called him by name, Burkeen boasted, "That's right, Chris, that's my name, remember it, bitch . . . .", clearly unashamed of his actions.

These were all statements the trial court properly could consider in determining the defendant intended for the victim to suffer serious harm. See Shackleford, 183 Va. at 427, 32 S.E.2d at 684 (finding appellant's statement regarding wife's relatives and that he "followed up" his initial blow to victim were circumstances to consider when determining

Commonwealth established specific intent to maim, etc.); Johnson, 53 Va. App. at 104-05, 669 S.E.2d at 380; cf. Roark, 182 Va. at 246, 247, 252, 28 S.E.2d at 694, 696 (considering appellant's attempts to aid victim after blow in determining appellant did not intend to inflict serious bodily injury).

Finally, Burkeen was poised to continue striking the victim when Taylor intervened. Burkeen then attacked Taylor and would have continued this attack on Taylor if the victim had not told a bystander to call the police. In Shackleford, this Court found relevant that while Shackleford's attack on the victim lasted only briefly, only the intervention of the defendant's wife brought it to an end. 183 Va. at 427, 32 S.E.2d at 684. Similarly, in Williams, the Court of Appeals found relevant that an attack with bare fists "ended only with the arrival of the police." Williams, 13 Va. App. at 398, 412 S.E.2d at 205. The trial court was thus entitled to consider both Taylor's intervention, which prevented Burkeen from further striking the victim, and the defendant's continued brutality in attacking Taylor as evidence that he intended to permanently maim, disfigure, disable, or kill the victim.

Considering the unprovoked nature of the attack, coupled with the great force of the defendant's blow as evidenced by the victim's extensive injuries, and the defendant's willingness to continue to inflict violence on

the victim and anyone who attempted to protect the victim, there was sufficient evidence for the trial court to determine Burkeen intended to permanently maim, disfigure, disable, or kill the victim.

The defendant's reliance on the unpublished case Worrell v. Commonwealth, Record No. 2451-09-1, 2010 Va. App. LEXIS 497 (Va. App. Dec. 21, 2010), is misplaced. The circumstances in Worrell, where Worrell punched the victim, knocking him to the ground, and subsequently unidentified individuals beat the victim, are clearly distinguishable from the instant case. The Court of Appeals found "there was no concert of action or any proven nexus between the act of Worrell in initially punching [the victim] and the subsequent acts of the unknown persons who also assaulted [the victim]." Id. at *12. Accordingly, the Court of Appeals only considered Worrell's single blow in determining whether the evidence was sufficient to find Worrell intended to permanently injure the victim. Id. at *12.

The Court of Appeals found there was no evidence of any significant injury caused by the appellant's single blow. Id. at *13. The Court then found:

> Without any special evidence, such as was present in Johnson, of the nature, force, and results of the single blow delivered by Worrell, we cannot say that this isolated punch rose above the level of a blow that would be delivered in a typical fistfight or a

> boxing match. Furthermore, while there is evidence to support a finding that Worrell's assault on [the victim] was premeditated, there was no "repeated bragging" or later "vow[] to do the same thing again if given the opportunity," as there was in Johnson. See 53 Va. App. at 104-05, 669 S.E.2d at 380-81. There is simply insufficient evidence before us to support an inference that Worrell's single blow with his fist under these circumstances constituted unusual violence and brutality, beyond the realm of a typical punch, comparable to the particularly brutal and generally gruesome assaults we have previously found to support such an inference.

Id. at *13-14 (footnote omitted).

In the instant case, the victim's injuries directly resulted from the great force of the defendant's punch. Burkeen bragged about his assault and he continued to threaten the victim after the victim was bent over and bleeding. Moreover, Burkeen was poised to strike the victim again when Taylor intervened. Thus, Worrell is inapposite to the instant case.

Finally, Burkeen's assertion that Tran v. Commonwealth, Record No. 2565-02-4, 2004 Va. App. LEXIS 195 (Va. App. Apr. 27, 2004), causes "confusion," (Appellant's Br. at 7), is incorrect. The Court of Appeals held in Tran that the trial court erred in excluding the word "permanently" from a jury instruction articulating the elements of malicious wounding because "in order to sustain Tran's conviction under Code § 18.2-51, the Commonwealth had to prove Tran wounded the victim with the intent to kill or ***permanently*** maim, disfigure, or disable him." Id. at *8-9 (emphasis in

original). However, the Court of Appeals found the exclusion of "permanently" from the jury instruction was harmless because "a ***permanent*** disfigurement would be the natural and probable consequence" of stabbing an individual below the eye with a metal knife and fork with "sufficient force to cut and pierce the victim's skin and cause the wound to bleed." Id. at *13-14.

The Court of Appeals distinguished Lee, 135 Va. 572, 115 S.E. 671, noting that the Lee Court held the word "permanently" was necessary in the jury instruction in Lee's trial, because "the jury would have no basis upon which to infer from the use of a fist ***alone*** that the defendant intended to permanently disfigure the victim, because only 'some temporary disfigurement would naturally be expected, and would almost necessarily follow from such a blow.'" Tran, 2004 Va. App. LEXIS 195, at *12-14 (emphasis added) (quoting Lee, 135 Va. at 578, 115 S.E. at 673). As stated above, "an intent to maim may not be presumed from a blow with a bare fist," but the intent to maim or disable may be presumed if "circumstances of violence and brutality" accompany the blow. Fletcher, 209 Va. at 640, 166 S.E.2d at 273.

CONCLUSION

For these reasons, the judgment of the Court of Appeals of Virginia and the Circuit Court for the City of Newport News should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
Appellee herein.

By:_____
Counsel

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

KATHERINE QUINLAN ADELFIO
Assistant Attorney General
Virginia State Bar No. 77214

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071
(804) 371-0151 (fax)
oagcriminallitigation@oag.state.va.us

CERTIFICATE OF TRANSMISSION AND SERVICE

On June 14, 2013, the required copies of this brief were hand-delivered to the Clerk's Office of this Court for filing and an electronic copy of the brief was sent to the Court at scvbriefs@courts.state.va.us. Three copies were mailed to Robert J. Poggenklass, Esq., OFFICE OF THE PUBLIC DEFENDER, 2600 Washington Avenue, Newport News, VA 23607, counsel for the appellant.

The undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities and certificate, contains 4679 words.

The Commonwealth desires to present oral argument in this case.

_____
Katherine Quinlan Adelfio
Assistant Attorney General