IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 13166

MICHAEL ARMIN GARDNER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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MICHAEL ARMIN GARDNER,

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BRIEF OF THE COMMONWEALTH

STATEMENT OF THE CASE

A grand jury of the Circuit Court of Arlington County indicted the defendant, Michael Armin Gardner, for the aggravated sexual batteries of C.K., C.R., and M.G., three minor females. In addition, the defendant was indicted for the object sexual penetration of M.G. The offense involving C.K. occurred on June 16, 2011, and the

offenses involving C.R. and M.G. occurred on June 18, 2011. (App. 580-581,1047).

Prior to trial, by order entered August 19, 2011, the trial court granted the Commonwealth's motion to join the four sexual offenses in one proceeding. (App. 7, 245-246). A jury trial commenced on April 23, 2012. On May 2, 2012, the jury found Gardner guilty of the aggravated sexual battery and object penetration of M.G, and the aggravated sexual battery of C.R. The jury could not reach a verdict as to the aggravated sexual battery charge related to C.K. The court declared a mistrial over the defendant's objections as to that offense. (App. 2038-2039).

The trial court sentenced Gardner in accordance with the jury's verdicts. The court sentenced Gardner to twelve years of imprisonment for the object sexual penetration of M.G and six years for the aggravated sexual battery of M.G. (App. 77-78, 81-82). The court imposed four years of imprisonment for the aggravated sexual battery of C.R. (App. 79-80).

By order dated March 20, 2013, a judge of the Court of Appeals of Virginia denied the petition for appeal. (Record No. 1831-12-4) (App. 83-96). A three judge panel of the Court of Appeals of Virginia

denied Gardner's petition for rehearing by order entered June 21, 2013. (App. 97). By order of November 21, 2013 this Court refused Gardner's petition for appeal, however, by order entered January 22, 2014, this Court granted an appeal on Gardner's petition for rehearing.

ASSIGNMENTS OF ERROR

The Defendant asserts the following assignments of error:

I. "The Court of Appeals Erred by Finding Joinder Was Appropriate Under Rule 3A:10(c) Despite the Nonexistence of a Common Plan or Scheme."

II. "The Court of Appeals Erred By Excluding Gardner's Character Evidence On The Trait Of Being Sexually Assaultive."

III. "The Court Of Appeals Erred By Upholding Admission Of Dr. Perlin's Testimony, Despite His Reliance Upon Evidence Not Admitted At Trial, And By Finding The Commonwealth Established A Proper Chain Of Custody For Those Materials."

IV. "The Court Of Appeals Erred By Holding That The Trial Court Did Not Intrude On The Jury's Deliberations, Requiring A Partial Verdict To Be Returned, And Declaring A Mistrial, Thereby Depriving Gardner Of His Right To Have One Jury Decide His Case."

V. "The Court of Appeals Erred By Finding That A.G.'s And D.R.'s Testimony Regarding Third-Party Actions Was Not Improper Victim Testimony."

(Def. Br. at 1-2).

STATEMENT OF FACTS

On Friday, June 17, 2011, the defendant's daughter, E.G., celebrated her tenth birthday. (App. 347, 587,1043-1044). In celebration of the birthday, she hosted several girls at the defendant's home for a slumber party. (App. 587, 352). Among those present were C.K., M.G., and C.R. (App. 352-354).

The C.K. Offense

One day prior to E.G.'s slumber party, on the night of Thursday, June 16, 2011, C.K. and E.G. spent the night together in E.G.'s bedroom, at the Gardner home, without any of the other girls who would later attend the slumber party. (App. 1044, 1048-1049). At the defendant's trial, C.K. described E.G. as her best friend from the first to fourth grade. (App. 1043). She had been to the Gardner home more than ten times. (App. 1043).

On June 16, 2011, C.K. slept on the floor of E.G.'s bedroom on a mattress, while E.G. slept beside her on the floor on a makeshift bed fashioned from couch pillows. (App. 121-123, 1053, 1089). Within E.G.'s bedroom, the place prepared for E.G. to sleep was positioned closer to the entrance of the room, while C.K.'s mattress was closer to the dresser and closet. (App. 165, 1059, 1090, 1122).

As C.K. prepared for bed that evening, she dressed in underwear and green pajama pants with a long t-shirt that came down to about her thighs. (App. 1056-1057, 1112-1113). At some point in the evening, around 10:00 or 11:00 p.m., the girls were ready to go to bed. (App. 1057). However, on that particular evening there was an electrical storm. (App. 1057, 1059). E.G. was afraid of the lightning and thunder. (App. 1061, 1092). She exited her bedroom to seek out the defendant, asking him to return with her to her room to comfort her during the storm. (App. 1061, 1093). The defendant's bedroom was located on the same floor, just a few steps beyond E.G.'s room, on the opposite side of the home's second floor hallway. (App. 1053-1055).

C.K., who remained behind, saw the defendant return with E.G. (App. 1061, 1094). Though the lights in E.G.'s room were off, the hallway light was illuminated. (App. 1094). Upon entering, Gardner lay down beside E.G., who occupied a space on the floor between the defendant and C.K. Thus, E.G. was situated between the defendant and C.K. (App. 1094, 1097). Eventually, E.G. calmed down and became sleepy, at which point the defendant left the room. (App.

1097). However, a few minutes later, a loud crash of thunder woke E.G., and she again called out for the defendant. (App. 1062, 1098).

When Gardner returned, rather than occupying his previous position beside E.G., he walked around, past the foot of the beds the girls fashioned on the floor, and up to the side occupied by C.K. Therefore, at the time of his second entrance into the room, C.K. occupied a position between E.G. and the defendant. (App. 1062, 1100, 1102). At trial, C.K. confirmed she discerned it was, in fact, the defendant who had returned because he was illuminated by the flashes of lightning visible through E.G.'s window. (App. 1058, 1062).

As Gardner lay down beside C.K., he began a pattern of touching her under her clothing. He started by rubbing her stomach for a few minutes, then he began to touch her breasts for a while. Next, he returned to rubbing her stomach, and, after a few minutes, he began to rub her vagina. Gardner then began the same pattern all over again: stomach; breasts; stomach; vagina. (App. 1062-1064, 1103-1104). Gardner rubbed each spot for about two minutes, before moving to the next. (App. 1105). C.K. estimated the incident lasted for about 45 minutes. (App. 1104).

At one point, in an effort to avoid the defendant's touch, C.K. rolled from her back to her stomach, however the defendant began to touch her "bottom" and her back, which made her even more uncomfortable. (App. 1065, 1104). When she returned to her back, Gardner began to touch her again, and continued the earlier pattern seven additional times, before leaving E.G.'s room. (App. 1067, 1104).

As Gardner touched C.K., she could see that E.G. remained sleeping. (App. 1063). At some point Gardner asked C.K. if what he was doing felt good, to which she answered no. (App. 1065). After Gardner left, C.K., who was "shocked" by what had occurred, lay for a few minutes before ultimately falling asleep. (App. 1067). When she arose the next morning, she did not relate the night's events to anyone, because she was "scared and embarrassed." (App. 1068).

The M.G. and C.R. offenses

On the following day, Friday, June 17, 2011, E.G. prepared to celebrate her 10th birthday. In addition to E.G., seven girls slept over at the Gardner home that night. (App. 1565). Among them were C.K., C.R. and M.G. (App. 1565).

After playing games and enjoying pizza and birthday cake, the girls settled down in the Gardner home's basement, where they changed into their pajamas and watched two movies before going to bed. (App. 411-415, 592, 653-654). A large combination sofa and loveseat, configured in the shape of the letter "L," occupied the basement. (App. 104-108, 597-598). On the evening of the slumber party, M.G. occupied one part of the couch, while C.K. prepared to sleep on the other. (App. 371, 599). The remaining girls, including C.R., slept near the couch on air mattresses. (App. 142, 371-372, 600, 1127, 1128). E.G. and another girl, occupied a double mattress in front of the couch, between it and the television. (App. 672, 1127). C.R. slept on an air mattress alone just beside and slightly behind the end of the couch on which M.G. slept. This location was closest to the stairs leading from the basement to the upper floor. (App. 143-144, 660, 685-686).

That evening C.R. dressed for bed in pajamas with a monkey pattern, without underwear. (App. 588-589, 657). At some point near the beginning of the second movie, she fell asleep. (App. 606). Then, during the night, she woke when she felt the bottom of her blanket being moved. (App. 608). Though it was dark in the basement, C.R.

noted she could see in the room due to light from its windows. (App. 607). When she looked to see who had adjusted her covers, she saw the defendant, and thanked him. (App. 609, 668). C.R. then heard the defendant leave the basement, going back up the stairs. (App. 609).

Before C.R. could resume sleeping, Gardner returned to the basement a few minutes later. (App. 609-610, 669). Crouching down at C.R.'s feet, the defendant lifted her blanket, and, using one hand, he rubbed and tapped his fingers on her vagina over her pajamas. (App. 611-612, 669). C.R., confused and scared by this, did not know what to do, and remained silent. (App. 613). After touching her in this manner, the defendant again retreated up the stairs, leaving the basement a second time. (App. 613). As this occurred, C.R. could see from her vantage point the clock displayed on the cable box connected to the basement television. She knew the defendant touched her at approximately 4:10 a.m. on Saturday, June 18, 2011. (App. 614).

Shortly after this second encounter with C.R., when he first began to touch her vagina, the defendant returned again to the basement a third time. He again began to touch her in the same manner. (App. 614). After some time, Gardner again left the

basement, climbing the stairs. (App. 616, 670). However, a few minutes later, the defendant returned for yet a fourth trip to the basement, where he began to touch C.R.'s vagina for a third time. (App. 616-617, 670). Only when she rolled over did the defendant stop, at which point he went from C.R's bed, which was located beside and slightly behind the couch, around to the back of the couch to the side on which M.G. lay. (App. 143-144, 617, 693-694).

Once the defendant had gone behind the couch, C.R. noticed the defendant's daughter, E.G., had raised her head. (App. 617, 671). In an effort to attract E.G.'s attention, C.R. whispered her name a few times, but she did not respond. (App. 672).

M.G. had fallen asleep on the couch, inside her sleeping bag, which was zipped up "almost all the way." (App. 374, 378-379). She woke in the night when she heard the sound of the sleeping bag unzipping. (App. 379). Although the room was dark, M.G. noted there was a little light "coming from somewhere." (App. 379). Looking to see who had unzippped her sleeping bag, she saw the defendant. (App. 379). He was behind the couch. (App. 143-144, 379).

Gardner unzipped M.G.'s sleeping bag, opening it up. He then held up both the waistband of her pajama pants and her underwear.

(App. 361-363, 380). At trial, M.G. described how the defendant then touched her "girl parts," which she identified as her vagina. (App. 100, 388). She indicated that Gardner rubbed his hand "back and forth" and "side to side" on her vagina. (App. 380-381). Uncertain what to do, she simply pretended to remain asleep. (App. 381).

Ultimately, Gardner stopped, leaving M.G. and returning to C.R. (App. 381, 693-694). When the defendant came to C.R. once again, on this occasion he not only lifted the covers, but began to pull back C.R.'s pajama waistband. (App. 617). As he began to touch her under the pajamas, she opened her eyes, demonstrating to Gardner that she was, in fact, awake. (App. 617, 695-696). Gardner then touched C.R.'s arm, asking if she was okay, which she answered in the affirmative. (App. 618-619).

M.G. testified at trial she saw the defendant go toward C.R., after he touched M.G. the first time. (App. 381). Moreover, at trial she testified she could hear the defendant pulling C.R.'s pajama waistband. (App. 382). After the defendant left C.R., he returned to M.G. a second time. (App. 382). He again lifted the waistband of her pajama bottoms and underwear, and inserted his finger into her

vagina. (App. 382). Ultimately, the defendant left the basement. (App. 383).

ARGUMENT

I. The Court of Appeals Did Not Err in Affirming the Trial Court's Decision to Join the Offenses For Trial.

On appeal, Gardner argues the Court of Appeals of Virginia erred in affirming the trial court's determination to join his offenses for trial in one proceeding. (Def. Br. at 15). He maintains the Court's analysis failed to properly weigh the requirement that the offenses form part of a common scheme or plan, focusing only upon whether justice required separate trials. (Def. Br. at 15). He attacks the record evidence relied upon by the Court of Appeals in support of its conclusion, asserting the absence of either a common plan or scheme to support joinder. (Def. Br. at 16, 21-22). He contends the presentation of evidence concerning the offense of June 16, 2011 with that of June 18, 2011 prejudiced him at trial, as it suggested he must be guilty of some of the charges, given the number and severity of accusations against him. (Def. Br. at 22).

Standard of Review

"A circuit court's determination whether a defendant may be tried for multiple offenses in a single trial is a matter submitted to that

court's sound discretion." Scott v. Commonwealth, 274 Va. 636, 644, 651 S.E.2d 630, 634 (2007). "Therefore, unless the circuit court abused its discretion in ordering a single trial for multiple offenses pending against a defendant, the circuit court's decision will be affirmed on appeal." Id.

Analysis

Pursuant to VA. SUP. CT. RULE 3A:10 (c), when a defendant is charged with more than one offense, a court may order that the defendant be tried in a single trial "for all offenses then pending against him, if justice does not require separate trials and (i) the offenses meet the requirements of Rule 3A:6(b) or (ii) the accused and the Commonwealth's attorney consent thereto." Under Rule 3A:6(b), two or more offenses may be joined in a single indictment "if the offenses are based on the same act or transaction, or on two or more acts or transactions that are connected or constitute parts of a common scheme or plan." See also Scott, 274 Va. at 644, 651 S.E.2d at 634-5.

The Offenses Were Connected

As a threshold matter, the defendant's argument concerning joinder focuses only upon one of the avenues rendering joinder

permissible. He argues, "[j]oinder is only proper if the offenses to be joined constitute a common plan or scheme." (Def. Br. at 5). This statement is incorrect. Though the Scott Court limited its analysis to determining whether the charged offenses in that case constituted a common plan or scheme as contemplated under Rule 3A:6(b), the Court did so only because the Commonwealth's argument in support of joinder was limited to that single argument. There was no assertion in Scott the offenses were "connected." Id. at 644, 651 S.E.2d at 634-35.

There was no such limitation in the instant case. Here, the Commonwealth clearly articulated its belief that the offenses were connected and represented a common scheme:

> We would suggest the two that occurred on the same night . . . should be joined . . . . We would suggest that these are actually two or more acts or transactions that are connected or constitute part of a common scheme or plan. They are based on the same act or transaction.
>
> We suggest that the third disclosure [that of C.K.], which is really the first in time, is connected and constitutes part of a common scheme or plan, more specifically, a common scheme in this matter.

(App. 221).

In granting the Commonwealth's motion, the trial court in this case did not articulate a specific ground upon which it found joinder

appropriate, noting simply that it found the cases should be joined under the rules of the Supreme Court of Virginia, and that the defendant had presented no argument he would be prejudiced by doing so. (App. 246).

Though the Court of Appeals, in its *per curiam* order affirming the trial court's joinder decision, did not articulate the specific basis for doing so, that court nevertheless recited the relevant law governing both the determination as to whether the offenses were sufficiently ***connected*** to satisfy Rule 3A:6(b), as well as whether the offenses constituted a ***common scheme*** under the rule. (App 84). The Court of Appeals noted simply, "[U]pon review of the circumstances in this case, the trial court did not abuse its discretion in overruling [Gardner's] objection to consolidate for trial the charge involving C.K. with the charges involving M.G. and C.R." (App. 86).

Significantly, the defendant has failed to assign error to the Court of Appeals' affirmance of the joinder determination based upon the "connectedness" of the offenses. Assignment of Error #1 references only "common plan or scheme."

The offenses at issue in the instant case are "connected" as contemplated under Rule 3A:6(b) and represent a common scheme

as this Court defined that term in Scott. There is no merit to the defendant's contention the Court of Appeals erred in so concluding.

In Satcher v. Commonwealth, 244 Va. 220, 421 S.E.2d 821 (1992), this Court had occasion to consider the "connected" test of Rule 3A:6(b).[1] In Satcher, two women were assaulted within a few yards of the same location during a time span of about one half hour. Id. 244 Va. at 229, 421 S.E.2d at 827.

The evidence in that case was that just before 7:00 p.m. on March 31, 1990, D.A. was riding her bicycle on the secluded bicycle path running past the Air Force Association building in the Rosslyn section of Arlington County. This location was shielded from the view of vehicular and pedestrian traffic passing along an adjacent portion of Lee Highway by a "sound barrier" wall, which rose approximately fifteen to twenty feet high. Id. at 225, 421 S.E.2d at 825. Shortly after making eye contact with Satcher, who walked by on the path, D.A. was pulled off her bicycle from behind, and dragged into a ditch running alongside the path. Id. at 226, 421 S.E.2d at 825. Satcher repeatedly beat her head and face and succeeded in pulling her

[1] The Satcher Court found joinder appropriate on the basis of "connectedness" as well as common scheme or plan. Id. 244 Va. at 229, 421 S.E.2d at 827.

"pants part way down." Id. A passer-by interrupted the assault and Satcher fled. D.A.'s purse was found in a nearby parking lot. Id.

On the same date at 7:10 p.m., A.B. left her apartment to attend a birthday party being thrown for her. Id. The bicycle path was a five minute walk from her apartment, and would have led her directly to the Rosslyn metro station, from which she could have traveled to Crystal City and the location of her party. Id. She never appeared at the party, and the police later found her body early the next morning in a stairwell of the Air Force Association building. Id. One of her shoes was found on the bicycle path and her purse was later discovered in the same parking lot as that of D.A. Id. at 227, 421 S.E.2d at 825. The money had been taken from both purses. Id.

It was against the backdrop of these facts that the Satcher Court focused upon the "time, place, and means of commission" to determine the two offenses were connected as contemplated under Rule 3A:6(b), such that the use of a single trial for both crimes was appropriate. Id. Of the offenses, the Satcher Court noted:

> In each instance, the victim was brutally beaten and partially disrobed. The criminal intent of the assailant - to commit rape and robbery- was the same in both situations. The purse of each victim was stolen, and the two purses were found in approximately the same location, with only money missing from both.

Id. at 229, 421 S.E.2d at 827.

Similarly, the Court of Appeals in Yellardy v. Commonwealth, 38 Va. App. 19, 561 S.E.2d 739 (2002) found joinder appropriate under both the "connected" prong of Rule 3A:6(b) and the "common scheme or plan" prong of that rule. In Yellardy two individuals were robbed in the James River Park in Richmond. Id. at 21, 561 S.E.2d at 741. The first was robbed on August 4, 2000 along a path in the park, where Yellardy accosted him, demanding his money. When Yellardy was not satisfied with the amount, he menaced the victim with a rock, demanding more. Id.

Then, on August 8, 2000, Yellardy encountered an individual who was sitting, eating his lunch, in his parked car in the parking lot of the James River park. Yellardy reached in through the open car window to punch the man. When the man exited, Yellardy demanded his money, threatening him with a rock. When the man handed over some bills, Yellardy was unsatisfied with what he received, and demanding more, he threw the rock at the victim. Id. at 22-23, 561 S.E.2d at 741.

Citing Satcher, the Yellardy Court considered time, place, and means of commission, in determining whether the offenses were

connected for purposes of Rule 3A:6(b). The Yellardy Court found the following circumstances persuasive as to the resolution of whether the offenses were connected: the fact that both offenses transpired in the same area of the same park; that single males at lunch time were both targeted; that the means of intimidation was identical; that in each instance the defendant demanded additional money after the victims first complied; and the defendant used the somewhat uncommon weapon of a rock to accomplish the offenses. Id. at 24-25, 561 S.E.2d at 742. Moreover, the Court held:

> Although the two events are not so inextricably connected such that the proof of one requires proof of the other, the proof of the identical methods used to commit the two robberies tends to prove the identity of appellant as the person who committed both offenses. Evidence of both charges also tends to prove that the confrontation was a robbery rather than homosexual encounters, which appellant contended at trial.

Id. at 25, 561 S.E.2d at 742.

Though cast in the context of an attack upon whether the joined offenses demonstrated a common scheme, Gardner contends the offenses lacked sufficient similarities to support joinder. (Def. Br. at 17-19). To the extent such an argument may be applied to an analysis of the application of the "connected" prong of Rule 3A:6(b), he is nevertheless in error.

Gardner argues the offenses shared in common only the age of the victims and the timing of the offense. (Def. Br. at 17). Under these circumstances, he likens the instant case to that of Berton v. Commonwealth, 13 Vap UNP 1388124 (2013) (Record No. 1388-12-4), the unpublished opinion in which the Court of Appeals found joinder impermissible based upon an absence of similarities. Significantly, however, in Berton, the assignment of error, like that of the instant case, was limited solely to the question of whether "the crimes shared a common scheme or plan, or whether justice required two trials." Id. 13 Vap UNP 1388124 (slip op. at 8). Berton, like Scott, is simply inapposite to the necessary analysis under the "connectedness" prong of Rule 3A:6(b).

The instant case, like that of Satcher and Yellardy, demonstrated a union in the time, place, and means of commission of the defendant's offenses. The charged offenses took place as young girls slept over with Gardner's 10-year-old daughter on successive nights in the defendant's own home, representing a connection in both time and place. Though greater than the half hour at issue in Satcher, it surely represented a smaller time span than was at issue in Yellardy. With respect to each victim, Gardner accomplished the

offenses by exploiting the victim at a time when there would be little interference due to the lateness of the hour and the isolation of the victim relative to anyone who could render assistance.

When the defendant re-raised his objection to joinder at the close of the Commonwealth's evidence, the trial court overruled the objection, and stated the defendant thought all of the victims were sleeping, other members of the home were sleeping at the time of the offense against C.K, and the victims were all touched in the same place. (App. 1196-1198). The defendant faults the Court of Appeals for relying upon these findings in affirming joinder. (Def. Br. at 16). The defendant, however, did not object to these findings in the trial court. (App. 1196-1198). Nor did Gardner assign error to these findings in his appeal to the Court of Appeals. See Petition for Appeal, Record 1831-12-4, filed January 3, 2013. See also Revised Petition for Appeal Record 1831-12-4, filed January 4, 2013. Significantly, moreover, he failed to assign error to the Court of Appeals adoption of those findings in the assignments of error presented in this Court. See Stevens v. Commonwealth, 283 Va. 296, 304 n.1, 720 S.E.2d 80, 84 n.1 (2012) (finding the appellant's argument that the Court of Appeals erred in its reliance upon a factual

conclusion was waived for purposes of appellate review, where the appellant failed to assign error to that holding).

Regardless of whether the evidence demonstrated the defendant's wife was not in fact sleeping, or that the victims themselves only feigned sleep, the evidence nevertheless demonstrates each victim was paralyzed with fear and uncertainty over the very shocking nature of such an unexpected violation, such that they were functionally silenced and unable to call for aid. The nature of Gardner's predation, focusing on the young girls at a time when they were most vulnerable, guaranteed such a result.

Similarly, the fact that Gardner succeeded in violating M.G. in a more profound way than he molested C.R. and C.K. does not change the fact that he engaged in the same pattern with each victim, fondling their vaginas under the covers, while they were ostensibly asleep or falling asleep. Thus, consistent with the jurisprudence of Satcher and Yellardy the "time, place, and means of commission" were such as to render the offenses ***connected*** for purposes of Rule 3A:6(b).

The Offenses Constituted a Common Scheme

"'[C]ommon scheme' describes crimes that share features idiosyncratic in character, which permit an inference that each individual offense was committed by the same person or persons as part of a pattern of criminal activity involving certain identified crimes." Scott, 274 Va. at 645, 651 S.E.2d at 635. In the instant case, Gardner maintains the offenses at issue were similar in only general ways, and thus failed to demonstrate the type of idiosyncratic features that permitted a finding they were part of a pattern of criminal activity perpetrated by the same offender. (Def. Br. at 19-20). However, the instant case is materially distinguishable from the facts at issue in Scott that failed to support a conclusion they formed part of a common scheme.

The evidence in Scott failed to establish the location of the nine robberies sought to be joined relative to one another. Id. at 647, 651 S.E.2d at 636. In addition, the record failed to establish that a common weapon was employed in the offenses, or that unusually threatening remarks uttered by the robber served to link the crimes. Id. Moreover, the evidence failed to identify a particular uniformity among the victims. Id. To the contrary, the evidence established only

that people in an indeterminate area of the same city over a period of four months were robbed, while standing alone outside their homes in the late evening hours. Id. at 646, 651 S.E.2d at 636.

Similarly, in Berton, upon which the defendant relies, there was an absence of sufficiently idiosyncratic evidence to permit an inference they were part of a pattern of criminal activity perpetrated by the same offender. However, Berton involved the commission of distinct offenses by differing means. Moreover, the offenses were committed more than two years apart. Id. 13 Vap UNP 1388124 (slip op. at 8-9).

The instant facts are far more similar to those at issue in Spencer v. Commonwealth, 240 Va. 78, 393 S.E.2d 609 (1990). There, the offenses were found to be sufficiently idiosyncratic where each demonstrated the same means of ingress to the building in which the crime was committed, victims of similar appearance, occurrence at the same time of the week, and commission in the same manner. Id. at 87-91, 393 S.E.2d at 615-17.

Likewise, here the evidence indicates uniformity among the victims, who were all pre-teen girls who were staying overnight in the defendant's home as guests of his young daughter. Moreover, there

was a uniformity in the means by which the offenses were committed. In each instance, Gardner took advantage of the lateness of the hour, and its isolating effect on his victims to molest them, free from any hindrance or interruption. Finally the offenses were linked in time, occurring over a period of slightly more than twenty-four hours. In light of all these many circumstances, the Court of Appeals did not err in finding the trial court did not abuse its discretion in finding the evidence so idiosyncratic as to permit an inference that the offenses were part of a pattern of criminal activity perpetrated by the same offender.

Justice Did Not Require Separate Trials

The defendant's argument appears limited to the assertion that the absence of a common scheme or plan rendered the Court of Appeals affirmance of joinder in error. His assignment of error does not allege that joinder was improper because justice required separate trials.

Nevertheless, Gardner does assert "the comingling of evidence among the three complainant's cases in one trial helped secure convictions for three charges by suggesting Gardner must be guilty of

at least some of these accusations given the number and severity of the charges." (Def. Br. at 22).

Notwithstanding the defendant's argument in this regard, it is nevertheless well established:

> "Evidence of other offenses is admitted if it shows the conduct and feeling of the accused toward [the] victim . . . or if it tends to prove any relevant element of the offense charged. Such evidence is permissible in cases where the motive, intent or knowledge of the accused is involved, or where the evidence is connected with or leads up to the offense for which the accused is on trial. Also, testimony of other crimes is admissible where the other crimes constitute a part of the general scheme of which the crime charged is a part."

Commonwealth v. Minor, 267 Va. 166, 172, 591 S.E.2d 61, 65 (2004) (quoting Satcher, 244 Va. at 230, 421 S.E.2d at 828). In addition, "Evidence of other crimes is admissible in cases of disputed identity to prove the probability of a common perpetrator if the other crimes bear 'sufficient marks of similarity to the crime charged.'" Angel v. Commonwealth, 281 Va. 248, 267, 704 S.E.2d 386, 397 (2011) (quoting Turner v. Commonwealth, 259 Va. 645, 651, 529 S.E.2d 787, 791 (2000)).

At the time of the instant offenses, an adult male friend of the Gardner's, Matthew Belvedere, was staying in their home. (App. 495-496). The identity of the perpetrator of the offenses was at issue in

the case. Moreover, evidence of the offense against C.K. in the trial of the offenses of M.G. and C.R. served to establish the defendant's intent, his feelings toward the victims, and the absence of any mistake as it related to his touching of their vaginas. Kirkpatrick v. Commnowealth, 211 Va. 269, 272, 176 S.E.2d 802, 805 (1970). As a consequence, justice did not require separate trials for the offenses and the Court of Appeals did not err in affirming the trial court's determination to join the offenses in one trial.

II. The Court of Appeals Did Not Err in Affirming The Trial Court's Exclusion of the Defendant's Desired Character Evidence On The Trait of Being Sexually Assaultive or Inappropriate With Children.

On appeal, Gardner maintains the Court of Appeals of Virginia erred in affirming the trial court's determination to exclude proffered character evidence that sought to demonstrate the absence of any reputation for Gardner in the community for a substantive character trait at issue in the proceedings. (Def. Br. at 24). Specifically, in addition to testimony regarding Gardner's reputation for truthfulness, the defendant sought to elicit testimony from Laurie Ombrembt and Katherine Allen regarding his reputation for the absence of any

substantive character trait related to the abuse of children. In this regard, defense counsel asked Ombrembt:

> Do you know . . . what Mr. Gardner's reputation is, among those who know him well, for being someone who would be a good caretaker of children as opposed to someone who would harm or abuse or be neglectful of them.

(App. 1768). The Commonwealth objected, arguing the proffer failed to address the defendant's reputation at ***the time of the incident***. The trial court sustained the objection. (App. 1773).

The defendant then proffered that Ombrembt's testimony would have asserted:

> [T]here is no evidence of a negative sort that Mr. Gardner has been involved in any sort of abusive, physical, sexual neglectful behavior with children.
>
> That that is current and that that is including the time period of mid-June 2011 and the time frame leading up to that; that she has knowledge of that, of people's involvement with Mr. Gardner; that they have expressed that they allow and would allow her kids to be with him, to be supervised with him; and that they have no evidence, no indication, of any sort of bad conduct, sexual conduct, with minor child during that time. And she has never heard any of that.

(App. 1774).

Thereafter, the defendant sought to elicit testimony from Katherine Allen for a similar purpose. In light of the earlier exchange,

the defense simply sought to incorporate its earlier proffer as it related to Allen as well. (App. 1780).

Standard of Review

The admissibility of evidence rests within the discretion of the trial court. Midkiff v. Commonwealth, 280 Va. 216, 219, 694 S.E.2d 576, 578 (2010) (citing Coe v. Commonwealth, 231 Va. 83, 87, 340 S.E.2d 820, 823 (1986)). The trial court's decision will not be reversed in the absence of an abuse of discretion. See Id.

Analysis

"One accused of a crime is not limited solely to reputation evidence regarding truthfulness, but 'may offer evidence of his good character for the trait involved in the particular prosecution.'" Byrdsong v. Commonwealth, 2 Va. App. 400, 403, 345 S.E.2d 528, 530 (1986) (quoting Barlow v. Commonwealth, 224 Va. 338, 340, 297 S.E.2d 645, 646 (1982)). "[C]haracter is used as a synonym for *reputation*." Byrdsong, 2 Va. App. at 402, 345 S.E.2d at 529 (quoting Zirkle v. Commonwealth, 189 Va. 862, 871, 55 S.E.2d 24, 29 (1949)) (emphasis in original).

"[C]haracter . . . must be proven either by hearsay testimony, or negative testimony. Negative evidence of good character is admitted

on the theory that his reputation is presumed to be good where no slanderer has ever ventured even so much as to question it." Byrdsong, 2 Va. App. at 402, 345 S.E.2d at 529 (quoting Zirkle, 189 Va. at 871-72, 55 S.E.2d at 529-30) (internal quotations omitted).

"The accused, in order to establish good character, is not permitted to prove specific acts, custom or course of conduct." Argenbright v. Commonwealth, 57 Va. App. 94, 100, 698 S.E.2d 294, 297 (2010) (quoting Chiles v. Commonwealth, 12 Va. App. 698, 700, 406 S.E.2d 413, 414 (1991)). Character witnesses are only permitted "to summarize what they have heard in their community." Argenbright, 57 Va. App. at 100, 698 S.E.2d at 297 (quoting Weimer v. Commonwealth, 5 Va. App. 47, 54, 360 S.E.2d 381, 384 (1987)). With respect to substantive character evidence, it is the person's character at the time of the incident that is relevant. Reputation acquired after that time is not admissible. Gravely v. Commonwealth, 13 Va. App. 560, 564, 414 S.E.2d 190, 192-93 (1992) (citing Ginger v. Commonwealth, 137 Va. 811, 814-15, 120 S.E. 151, 152 (1923)).

In affirming the trial court, the Court of Appeals concluded the defendant's proffer "focused on the suggestion that [Gardner] had not been involved previously in any sort of abusive, physical, sexual, or

neglectful behavior with children and that these witnesses knew individuals who would allow [Gardner] to supervise their child." (App. 91). The Court of Appeals held that this proffer did not demonstrate Gardner's lack of a ***reputation*** for sexually abusing children prior to the offense. (App. 91). Rather, the court characterized the proffer as offering evidence of specific acts of conduct of the accused, (App. 91), which are impermissible as substantive character evidence. Argenbright, 57 Va. App. at 100, 698 S.E.2d at 297.

Gardner characterizes the Court of Appeals' conclusion as an "incomplete and inaccurate view of the facts and law." (Def. Br. at 26). He contends that the proffers' contents were intended to be "foundational," so as to demonstrate that the "opinion to be offered was based on the observations and meaningful assessments of those in the community." (Def. Br. at 27). However, such an intent remained unspoken in the trial court. Though counsel asserted Ombrembt and Allen were aware of the assessment of Gardner by particular individuals as it related to their children, the defense failed to place this proffer into the larger context of community opinion. (App. 1774).

To the extent Gardner argues the proffer must be construed to reflect his reputation prior to the offenses, (Def. Br. at 27), the only

portion that may be read reasonably to reflect this earlier time period is the language of the first part of Ombrembt's proffer, where she stated there is no evidence of a negative sort that Gardner had been involved in any abusive or sexual behavior with children. (App. 1774).

Though this aspect of the proffer did indeed reference the relevant time period, i.e., prior to the offenses, it nevertheless failed to reference the perspective of the community rather than Ombrembt's and Allen's. Though the defendant likens this proffered testimony to that which was impermissibly excluded in Byrdsong, (Def. Br. at 27 n.5), the testimony at issue there was the absence of evidence of untruthfulness ***within the community***.

In Byrdsong, the statement of negative evidence improperly excluded involved the testimony of Mary E. Green, who taught with the accused. Byrdsong, 2 Va. App. at 404, 345 S.E.2d at 530. Asked what the reputation of the accused was for truthfulness, Green testified, "Well, of course, it came up after this case came up, but I can't pinpoint anybody ever having the need to discuss he was telling the truth before this came up." Byrdsong, 2 Va. App. at 407, 345 S.E.2d at 532.

The proffer in the instant case, unlike Byrdsong, asserted merely that such evidence was unknown to Ombrembt and by extension to Allen, through counsel's later adoption of the proffer. The phrase employed was, "that ***she*** has knowledge of that," without any reference to what was known to the community, or the absence of what was known by the community.

In light of the foregoing, the trial court did not abuse its discretion in excluding the defendant's desired testimony regarding substantive character evidence. Consequently, it cannot be said the Court of Appeals erred in affirming the trial court's determination.

III. The Court of Appeals Did Not Err In Affirming the Trial Court's Admission of the Testimony of Dr. Perlin.

Gardner argues the Court of Appeals erred in affirming the trial court's admission of testimony offered by Dr. Mark Perlin. The defendant contends that Perlin's opinion concerning the application of statistical analysis to evidence containing a mixture of DNA profiles was not based upon any facts admitted into evidence, and was, as a consequence, impermissible. (Def. Br. at 30-31). Moreover, the defendant argues that Perlin's testimony omitted vital links in the

chain of custody so as to render his opinion evidence inadmissible. (Def. Br. at 31-32).

Standard of Review

"The 'admission of expert testimony is in the sound discretion of the trial court.'" Dowdy v. Commonwealth, 278 Va. 577, 600, 686 S.E.2d 710 (2009) (quoting Payne v. Commonwealth, 277 Va. 531, 542, 674 S.E.2d 835, 841 (2009)).

Analysis

At trial, the Commonwealth presented Kelly Loynes, a forensic scientist with the Virginia Department of Forensic Science (DFS). Loynes testified as an expert forensic scientist. (App. 806, 812). As is relevant to the defendant's assignment of error, Loynes offered testimony regarding the scientific testing of the pajama bottoms and underwear of M.G. and C.R.'s pajama bottoms. (App. 816-857).

Specifically, Loynes testified regarding the processing of the clothing in an effort to recover samples of DNA material for testing. In so doing, for each area of the clothing tested, Loynes was able to develop a DNA profile, which was then compared against known samples taken from the defendant, houseguest Matthew Belvedere, C.R., M.G., and the girls' families. Loynes identified those individuals

who could be eliminated as contributors to the DNA profile, and those individuals who could not be eliminated as contributors to the DNA profile. (App. 824-856).

On cross-examination, Loynes was asked specifically about circumstances in which the known sample of individuals sought to be eliminated or included as contributors to DNA mixture, share DNA types. Under those circumstances, she was asked, how is it determined which individual is in fact the contributor, when scientific analysis of the DNA mixture reveals a common DNA type possessed by more than one subject. (App. 906). Loynes answered that statistical guidelines dictate the interpretation of the analysis under those circumstances, aiding in determining the probability of one contributor over another, where two or more people share common DNA types. (App. 907).

She added that the guidelines for dealing with the mixture interpretation and the application of statistical analysis were revised by DFS in 2010. (App. 907). At the time of her work in the instant case no new statistical method had been adopted, and "the data for the statistical analysis was outsourced to a private lab," which Loynes believed was located in Pittsburgh, Pennsylvania. (App. 908).

Dr. Mark Perlin, the Chief Scienist and Chief Executive Officer of Cybergenetics, a private Pittsburgh firm, testified as an expert in DNA forensic analysis and the interpretation of DNA evidence, and provided the necessary statistical analysis of the data collected by DFS. (App. 948, 951).

Perlin testified his laboratory analyzed samples, sent to him by DFS in the form of electronic data, which he explained was created as the end result of the scientific processing of DNA material by DFS. (App. 951-952). He noted when the DNA material was analyzed by DFS, it was processed through a DNA sequencer, which generated an electronic data file for the 15 STR loci, analyzable sub-units of DNA. He noted that an electronic data file would be created in this manner as a consequence of the scientific processing of any given sample. (App. 952).

In addition to the electronic data files associated with the samples, Perlin testified that DFS provided him with a draft report of DFS's analysis, dated September 7, 2011. (App. 954). The defense objected to Perlin's testimony, on the basis that the Commonwealth had not provided the defense with the September 7, 2011 draft report. (App. 954). In addition, the defendant argued the facts

supporting Perlin's opinion, the electronic material itself, was not in evidence. (App. 965-966).

The Commonwealth proffered that the September 22, 2011, report provided to the defendant contained the same information as that of the September 7, 2011 report, and that one report was merely a duplicate of the other. (App. 960). Moreover, the Commonwealth proffered that Perlin's expert opinion as to the mixture of DNA material on the tested samples was based upon the information contained in the later report, which was provided to Gardner. (App. 960). The Commonwealth further noted that Loynes testified her entire file was sent to Perlin. (App. 963, 978).

During the course of the legal argument over the admissibility of Perlin's testimony, the Commonwealth noted the defendant failed to comply with Va. Code § 19.2-270.5, which requires a defendant to provide notice at least ten days prior to trial, if he intends to object to the admissibility of evidence of DNA testing and DNA profile comparisons. (App. 974-975). The defendant did not dispute the Commonwealth's contention.

In overruling the defendant's objection as to the admissibility of Perlin's evidence, the trial court made a two pronged ruling. The court

first found that the Commonwealth established the facts upon which Perlin intended to rely in giving his testimony. In addition, the court found the defense failed to timely note its objections in accordance with Code § 19.2-270.5.[2] For both reasons, the Court overruled the defendant's objections as to Perlin's testimony. (App. 986-987). In affirming the trial court's decision, the Court of Appeals observed the defendant failed to timely file an objection required by statute. This holding provided an independent basis for affirming the decision. (App. 88). The Court's analysis of the merits of the defendant's argument merely provided an additional ground for concluding the trial court had not erred. (App. 88-90).

The Defendant Did Not Preserve For Appellate Review The Trial Court's Application of Code § 19.2-270.5 To Overrule His Objection

In the Court of Appeals, Gardner failed to assign error to the trial court's application of Code § 19.2-270.5 to serve as an independent basis for denying his objection to the admissibility of Perlin. See Petition for Appeal, Record 1831-12-4, filed January 3, 2013. See also Revised Petition for Appeal Record 1831-12-4, filed January 4, 2013. Moreover, he did not assign error in this Court to the

[2] The Court referenced Code § 19.2-271 in making this ruling, but the context of the earlier discussion makes clear the Court intended to reference Code 19.2-270.5. (App. 974-986).

Court of Appeals resolution of this assignment of error on that independent basis.

Gardner's failure to assign error to that portion of the Court of Appeals opinion affirming the determination of the trial court based upon Gardner's failure to timely file an objection as required under Code § 19.2-270.5, precludes consideration of its application in this Court. See Riner v. Commonwealth, 268 Va. 296, 309, 601 S.E.2d 555, 562 (2004) (finding issue waived under Rule 5:17(c), where assignment of error in this Court failed to challenge portion of Court of Appeals' judgment below applying Rule 5A:18 to preclude consideration of the same issue).

Moreover, to the extent the application of Code § 19.2-270.5 serves as an unchallenged separate and independent basis upon which to affirm the Court of Appeals determination the trial court correctly admitted Perlin's evidence, the Court should not reach the merits of the defendant's argument as to this assignment of error. See Lawlor v. Commonwealth, 285 Va. 187, 222, 738 S.E.2d 847, 867 (2013), cert. denied, 134 S.Ct. 427 (2013) (declining to reach merits of defendant's argument challenging conviction for capital murder in the commission of rape or attempted rape, based upon

alleged insufficiency of rape evidence, where an unchallenged separate and independent basis for affirming existed).

"[I]n situations in which there is one or more alternative holdings on an issue, the appellant's failure to address one of the holdings results in a waiver of any claim of error with respect to the court's decision on that issue." Johnson v. Commonwealth, 45 Va. App. 113, 116, 609 S.E.2d 58, 60 (2005) (internal quotations omitted). "If [the appellate court] were to hold otherwise, an appellant could avoid the adverse effect of a separate and independent basis for the judgment by ignoring it and leaving it unchallenged." Id. at 116-17, 609 S.E.2d at 60 (internal quotations omitted).

In light of the defendant's failure to assign error to the Court of Appeals' recognition that Gardner's failure to comply with the requirements of Code § 19.2-270.5 provides a separate and independent basis for permitting the testimony of Perlin, Gardner's assignment of error in this regard was waived.

Moreover, the defendant's argument that the information relied upon by Perlin was not in evidence, stems from his view of the electronic data as a separate entity, not contained in the September 22, 2011. However, Perlin's introductory testimony made clear that

the data was created as a consequence of the initial processing of the DNA material by DFS, once it comes out of the DNA sequencer. (App. 951-952). The September 22, 2011 report clearly identified the source material for the electronic file, highlighting as it does the various DNA profiles that were developed. (App. 114-118). The defendant errs in viewing the electronic file as an entity distinct from the source material and the process by which it was created. Consequently, the Court of Appeals did not err in construing that this material was properly moved into evidence through the testimony of Loynes.

Similarly, with respect to Gardner's arguments concerning the inadequacy of the chain of custody, the Commonwealth was required to establish only the vital links in the chain of custody. Branham v. Commonwealth, 283 Va. 273, 282, 720 S.E.2d 74, 79 (2012). Other gaps in the chain go to the weight of the evidence rather than its admissibility. Id. Here, Loynes' and Perlin's testimony established all of the vital links, from the time of their examination and data gathering, through the conveyance of the data files, and the identity of the individual in Richmond from whom the files were sent. (App.

908, 1030-1031). Consequently, the Court of Appeals did not err in affirming the trial court's resolution of this argument.

IV. The Court of Appeals Did Not Err In Affirming the Trial Court's Determination to Receive Partial Verdicts And Declare a Mistrial.

Gardner argues the Court of Appeals erred in affirming the trial court's determination to receive verdicts as to the offenses against M.G. and C.R., and to declare a mistrial as to the offense against C.K.

Standard of Review

"When a jury is unable to reach a unanimous verdict, it is within the sound discretion of the circuit court to determine at what point a mistrial should be granted because the jury is hung." Prieto v. Commonwealth, 278 Va. 366, 386, 682 S.E.2d 910, 920 (2009) (citing Smith v. Commonwealth, 239 Va. 243, 267, 389 S.E.2d 871, 884 (1990)).

> The circuit court is authorized to discharge the jury either when it appears that the jurors cannot agree on a verdict — are hung — or when there is a manifest necessity for such discharge. The power to discharge a jury is discretionary and the court must exercise this power carefully, according to the circumstances of the case. The object of the law is to obtain a fair and just verdict, and whenever it shall appear to the court that the jury impanelled cannot render such a verdict, it ought to be discharged, and another jury impanelled.

Prieto, 278 Va. at 386, 682 S.E.2d at 920 (internal citations and quotations omitted). "There is no general rule as to what facts and circumstances constitute such a necessity but the trial court is authorized by the statute to exercise its discretion in making the determination according to the circumstances of the case." Commonwealth v. Washington, 263 Va. 298, 312, 559 S.E.2d 636, 644 (2002) (quoting Turnbull v. Commonwealth, 216 Va. 328, 335, 218 S.E.2d 541, 546 (1975)).

Analysis

"[A] trial judge may not defeat a defendant's entitlement to 'the verdict of a tribunal he might believe to be favorably disposed to his fate' by declaring a mistrial before deliberations end, absent a defendant's consent or a 'manifest necessity' to do so." Blueford v. Arkansas, 132 S. Ct. 2044, 2053 (U.S. 2012) (Sotomayor, J. dissenting) (quoting United States v. Jorn, 400 U.S. 470, 486, 481, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971) (plurality opinion). "We have never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse--let alone to consider giving the jury new options for a verdict." Blueford, 132 S. Ct. at 2052.

After six days of proceedings, the jury began its deliberations on the seventh day shortly after lunch on May 1, 2011. (App. 2010-2011). At some point after 2:30 on May 2, 2011, the jury submitted a note to the court indicating it had reached a unanimous verdict as to three counts and could not reach agreement on the fourth. (App. 2018, 2022).

The court indicated a willingness to accept the unanimous verdicts and to give the jury an Allen charge as to the remaining count. (App. 2019). The defendant objected to the giving of an Allen charge, asking that they be allowed to deliberate longer, without being so charged. (App. 2019-2021). Ultimately, the trial court simply instructed the jury, "Please continue to try to reach a verdict." (App. 2022).

After a recess, the court inquired of the jury's foreperson whether a verdict was imminent regarding the fourth charge. (App. 2027). The foreperson indicated, "I don't think so. Not at this point." (App. 2027). The foreperson was not able to say if additional time would lead to a unanimous verdict, in light of the persisting "differentiation in view." (App. 2027). It was under these circumstances that the trial court received the three unanimous

verdicts and declared a mistrial as to the fourth charge. (App. 2029). Given the facts established by the record and the relevant jurisprudence, it cannot be said this determination constituted an abuse of discretion. The Court of Appeals did not err in so concluding.

V. The Court of Appeals Did Not Err in Affirming The Trial Court's Determination To Permit Victim Impact Testimony Concerning The Actions Of The Media

Gardner argues the Court of Appeals erred in affirming the admission of victim impact evidence, which touched upon the effect media coverage upon M.G. and C.R. The defendant argues that the evidence offered by A.G., M.G's mother, and D.R., the father of C.R., fell outside the scope of that which was permissible pursuant to Code § 19.2-299.1.

Standard of Review

The admissibility of victim impact evidence is "within the sound discretion of the trial court subject to the test of abuse of that discretion." Beck v. Commonwealth, 253 Va. 373, 384-85, 484 S.E.2d 898, 905 (1997).

Analysis

At sentencing, Gardner objected to A.G.'s testimony that it had been difficult to "silently endure the inaccurate reporting by the local media during the ongoing prosecution. (App. 2054). The defense did not object to any other aspect of A.G.'s testimony.

D.R. in his testimony spoke of what C.R. had to endure, related to the court case. He noted, " . . .[N]ot just the testifying. When the local paper tries to insinuate that her father has hurt her is in itself," at which point the defense objected. (App. 2060). The court expressed that this testimony was misplaced. (App. 2060). The defendant did not seek a cautionary instruction for the jury or move to strike D.R.'s testimony. The Commonwealth then directed D.R. that was as far as he could discuss this aspect of the impact, and that he should focus on its impact to C.R. (App. 2060). He answered that C.R. had read the story in the paper. (App. 2060).

Gardner argues, pursuant to Code § 19.2-299.1, that victim impact testimony must necessarily be limited to harm suffered as a result of the offense. (Def. Br. at 39). In support thereof, he relies upon Howell v. Commonwealth, 274 Va. 737, 652 S.E.2d 107 (2007), which construed Code § 19.2-305.1, limiting the availability of

restitution to those damages or losses caused by the defendant's direct acts. Id. at 741, 652 S.E.2d at 109. However, differences between the language employed in Code § 19.2-305.1 and that of Code § 19.2-299.1 demonstrate Howell is inapposite to the issue posed by Gardner.

Code § 19.2-305.1 speaks explicitly of the making of "restitution for any property damage or loss ***caused*** by the crime." In contrast, the enumerated factors upon which testimony may be given in Code § 19.2-299.1 are required merely to have ***resulted*** from the offense, rather than stemming from a direct causal relationship.

"[T]he general rule of statutory construction is to infer the legislature's intent from the plain meaning of the language used." Meeks v. Commonwealth, 274 Va. 798, 802, 651 S.E.2d 637, 802 (2007). "Thus, an undefined term must be given its ordinary meaning, given the context in which it is used." Id. (internal quotations omitted). "Furthermore, the plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction, and a statute should never be construed in a way that leads to absurd results." Id. (internal citations and quotations omitted).

Construing Code § 19.2-299.1 in the manner Gardner suggests would require reading into it a causation requirement conspicuously absent in the language adopted by the General Assembly. Doing so would violate the canons of statutory construction.

A.G.'s testimony regarding "inaccurate media coverage" correlated to her earlier statement about the need to keep M.G. away from sources of news that might report upon it, with its concomitant impact upon her avoidance of certain activities. (App. 2053-2054). Similarly, the testimony D.R. was permitted to offer regarded the media and its impact upon C.R., who had been exposed to it. (App. 2060).

The General Assembly "expanded the permissible scope of the Crime Victim and Witness Rights Act by establishing the victim's right to present victim impact oral testimony during the sentencing proceeding." Washington v. Commonwealth, 45 Va. App. 486, 490, 632 S.E.2d 625, 627 (2006) (quoting Rock v. Commonwealth, 45 Va. App. 254, 258, 610 S.E.2d 314, 316 (2005)). "The clear import of the Act is to preserve the right of victims of crimes to have the impact of those crimes upon their lives considered as part of the sentencing process, if that is their wish, and to protect their privacy thereafter."

Beck, 253 Va. at 384, 484 S.E.2d at 905. "[T]he circumstances of the individual case will dictate what evidence will be necessary and relevant, and from what sources it may be drawn." Id. at 384, 484 S.E.2d at 905.

This testimony fell within the ambit of the statute, such that the trial court did not abuse its discretion in permitting its admission to evidence and the Court of Appeals did not err in affirming that determination.

CONCLUSION

For the forgoing reasons, the Commonwealth asks this Court to affirm the judgment of the Court of Appeals and the Circuit Court of Arlington County.

Respectfully submitted,
COMMONWEALTH OF VIRGINIA
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CERTIFICATE OF TRANSMISSION AND SERVICE

On March 31, 2014, in compliance with Rule 5:26, the required copies of this brief were hand delivered to the Clerk's Office of this Court for filing and three copies were mailed to Peter D. Greenspun, Jonathan Shapiro, and Mikhail N. Lopez, counsel for the Appellant. In addition a copy of the brief was sent to the Court electronically to scvbriefs@courts.state.va.us, and a copy was served upon opposing counsel at pdg@greenspunlaw.com, js@greenspunlaw.com, and mnl@greenspunlaw.com.

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