IN THE

Supreme Court of Virginia

RECORD NO. 131166

MICHAEL ARMIN GARDNER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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SUPREME COURT OF VIRGINIA

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MICHAEL ARMIN GARDNER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

APPELLANT'S BRIEF

Michael Armin Gardner appealed the decision of the Court of Appeals entered June 21, 2013, concerning legal errors made by the trial court during Gardner's seven-day jury trial in Arlington County, Virginia. This Court granted Gardner's Petition for Rehearing, and allowed an appeal on the assignments of error described below.

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. Preserved at J.A. 228-42, 249-55, 964; Sup. Ct. Pet. for Appeal at 11-16; Sup. Ct. Pet. for Rehrg. at 2-3.

II. The Court of Appeals erred by excluding Gardner's character evidence on the trait of being sexually assaultive. Preserved at J.A.

1118-24; Sup. Ct. Pet. for Appeal at 20-22; Sup. Ct. Pet. for Rehrg. at 5-6.

III. The Court of Appeals erred by upholding admission of Dr. Perlin's testimony, despite his reliance on evidence not admitted at trial, and by finding the Commonwealth established a proper chain of custody for those materials. Preserved at J.A. 956, 967-68, 985, 1034; Sup. Ct. Pet. for Appeal at 17-20; Sup. Ct. Pet. for Rehrg. at 3-5.

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. Preserved at J.A. 2018, 2054; Sup. Ct. Pet. for Appeal at 24-29; Sup. Ct. Pet. for Rehrg. at 7-9.

V. The Court of Appeals erred by finding that Angela Garcia's and Daniel Rice's testimony regarding third-party actions was not improper victim testimony. Preserved at J.A. 2054-55, 2060; Sup. Ct. Pet. for Appeal at 22-24; Sup. Ct. Pet. for Rehrg. at 6-7.

STATEMENT OF CASE

Gardner was charged with one count of aggravated sexual battery as to C.R., C.K., and M.G.,[1] and one count of object sexual penetration as to M.G. concerning conduct on two separate dates: June 16 and 18, 2011.

On August 18, 2011, the trial court granted the Commonwealth's motion to join all four charges for one trial. J.A. 7, 245-46. On April 23, 2012, Gardner's eight-day jury trial on four charges concerning three different complainants began.

[1] All complainants were minors and are referred to by their initials throughout.

The jury returned a verdict May 2, 2012, finding Gardner guilty of aggravated sexual battery and object penetration of M.G, as well as aggravated sexual battery of C.R. The court, *sua sponte* and over objection, declared a mistrial as to the charge concerning C.K. J.A. 2038-39.

On September 7, 2012, the court denied Gardner's post-trial motions and imposed a sentence totaling 22 years, a $15,000 fine, and a three-year period of post-release supervision. Gardner appealed to the Court of Appeals, but was denied relief.[2] Gardner timely filed his appeal to this Court, and the appeal was ultimately granted . J.A. 97A.

STATEMENT OF FACTS

By June 2011, Gardner had battled through cancer that almost took his life and left him with a disabled right arm. He had no criminal record and not a single suggestion of grooming or seduction of children. His life history contained no indication of inappropriateness with children that could predict he would ever do what the girls' alleged.

During trial, Gardner took the stand and adamantly denied all allegations. A substantive defense was presented, including anticipated

[2] *Per curiam* decision entered March 20, 2013. Request for rehearing denied June 21, 2013.

character evidence related to credibility and the lack of offense-specific conduct. However, the trial court greatly limited this evidence, *see infra* 19-24, significantly weakening the strength of Gardner's defense.

I. JOINDER OF COMPLAINANTS' CASES

C.K.'s Allegations (June 16, 2011)

On June 16, 2011, C.K. was at the Gardner's home and planned to sleepover over with E.G., Gardner's daughter. Gardner was in his bedroom, unaware C.K. was there.

C.K. alleged Gardner entered E.G.'s room wice in the late evening hours on Thursday, June 16, 2011. Each time Gardner entered only after E.G. had asked him to comfort her during the severe thunderstorm. J.A. 193, 1098. Gardner was next to his daughter on the first visit to E.G.'s room and nothing improper happened.

On the second visit, C.K. alleged Gardner touched her under her clothing for a period of nearly 45 minutes. This occurred within feet of E.G. who was lying next to C.K.. The girls were only two doors from where E.G.'s brother was playing, and they were just across the hall from the master bedroom, where Mrs. Gardner was reading. J.A. 1104. C.K. also stated that Gardner, on the second visit to the room at E.G.'s request, walked over his daughter and laid on the floor next to C.K., away from E.G.

next to the bureau. *See* J.A. 121-22, 125-30, 160-69 (collectively showing layout/size of E.G.'s room).

In her statements to the police and preliminary hearing testimony, C.K. described the touching as a cyclical pattern alternating between her breasts, stomach, and vagina. J.A. 1103-1105. At trial, C.K. testified for the first time that she had rolled over onto her stomach, at which point her assailant touched her lower back and butt. J.A. 1107. C.K. had never disclosed this information to Detective Sonya Richardson and waited until the week before trial to inform the prosecutors. J.A. 1107. This occurred only after C.K.'s mother had discussed the allegations with C.K., J.A. 1109, despite demands by the police and prosecutors that she not do so.

M.G.'s and C.R.'s Allegations (June 18, 2011)

M.G. and C.R. were among seven girls at the slumber party at the Gardner home. The girls played throughout the house, ate in the kitchen, and used the Gardner's bathrooms and furniture as if it was their own home.

Gardner was at the early parts of the party, but not in the basement for activities, arranging beds, or watching movies. Gardner did not know where anyone was sleeping, including C.K. who had returned to the Gardner's home after the alleged June 16 incident. The sleeping area was

tight, with two girls on the L shaped couches and the others within inches of each other the floor. J.A. 7-26. By all accounts the room was very dark. J.A. 379, 424-25, 609, 663-65.

M.G. claimed she was touched by Gardner, in the dark basement, on June 18, 2011, during the pre-dawn hours of a slumber party. She described seeing the man carrying a laundry basket into the adjoining laundry room, and other inconsistent and inexplicable statements. J.A. 383. M.G. described the contact as touching of her "girl parts," which were rubbed side-to-side and back-and-forth. J.A. 380-81.

After the first time, the assailant left M.G. and went elsewhere. J.A. 381. When he returned, M.G. stated that the assailant once again put his hand on her girl parts and then touched his finger on her vagina. J.A. 112. All of this allegedly occurred in the Gardner's' basement, in the dark, from behind the couch filled with pillows and the girls' belongings.

C.R. also accused Gardner of touching her at the June 18 slumber party. She slept on an air mattress near the end of the couch and testified her assailant came directly to her sleeping area on five separate occasions, four of which involved touching. J.A. 608-618. M.G. never described the five trips up and down the stairs and touching of C.R. J.A. 383-84.

C.R. claimed she was touched on her vagina over her clothes. J.A. 109, 611-617. She was uncertain whether she was actually touched under her clothes that final time. J.A. 617. C.R. never claimed her vagina had been penetrated by her assailant. She stated the touching occurred in a circular motion, J.A. 612, and there was rapid tapping of her vagina. J.A. 612 At trial, C.R. added for the first time that, after the man left, she went upstairs two times. J.A. 627. M.G. never described C.R. getting up and leaving. *See* J.A. 345-495

The DNA evaluation of C.R.'s pajama bottoms revealed the presence of sperm on the inside crotch area, and the hem of one leg. The sperm was not Gardner's, but came from C.R.'s father instead. This was actual sperm and semen from C.R.'s father, and not only a limited "touch DNA" sample as attributed to Gardner. The explanation for that and possibility that C.R.'s father was an abuser was never investigated by anyone. J.A. 246A-246LL.

II. DNA EVIDENCE

Loynes's DNA Evaluation

Kelly Loynes was the Division of Forensic Science expert responsible for inspecting and developing the DNA profiles. *See* J.A. 815-16. Ms. Loynes used the recovered physical evidence to create DNA profiles that

could then be used for comparisons. Ms. Loynes did not exam such relevant areas as the M.G. sleeping bag zipper, which was allegedly manipulated by the assailant, despite having the ability to do so. J.A. 923-26

Ms. Loynes undertook her examination, and raised profiles, from both known and unknown contributors. Every sample in which Gardner was a possible contributor, in the opinion of Ms. Loynes, also included one or more unknown contributors. The samples were mixtures, including DNA profiles from Gardner, within his home and environment, as well as other unknown persons.

Perlin's DNA Opinion

Dr. Perlin, an outside expert from Cybergenetics, a private Pennsylvania business, was responsible for calculating the likelihood that a particular individual contributed the DNA in a sample. J.A. 988. That is all he was hired to do, and he never examined the physical evidence. Only Loynes's report and testimony had been admitted into evidence prior to Dr. Perlin opining on the DNA statistics.

Yet, to form his opinion Dr. Perlin relied on other data, not admitted into evidence and never clearly identified. The data was sent electronically from an unidentified person, and did not include Loynes's report and

underlying work product. J.A. 1024-1025. This electronic data contained "data signals" used by Dr. Perlin's TrueAllelle machine to synthesize the data and create a visual explanation of it, which in turn allowed Dr. Perlin to form his opinion of whether Gardner could be excluded from the DNA contributions. J.A. 1021. The data packet he received was never introduced in any report, nor had Loynes testified about the contents of the data packet prior to Dr. Perlin giving his opinion testimony.

Chain of Custody

The Commonwealth never established an unbroken chain of custody for the electronically transmitted data. Dr. Perlin stated he "believed" Lisa Schiermeier-Wood "and her group in Richmond" sent Loynes's data to his office. J.A. 1030. However, he did not receive it directly, and could not describe any details about the transmission process. J.A. 1020, 1023-24, 1031.

Ms. Loynes never explained who sent what to whom, or how. *See* J.A. 805-938. The extent of her testimony on this issue was "this data for the statistical analysis was outsourced to a private lab in Pittsburgh, Pennsylvania." J.A. 908. Dr. Perlin testified that Ms. Loynes did not directly send him the data. J.A. 1020, 1023-24, 1031.

The Commonwealth never called Ms. Schermeier-Wood, or anyone else with "her group in Richmond," to ascertain how Dr. Perlin received the data he used to compile his results, nor did the Commonwealth call anyone from Dr. Perlin's office who directly received the data. Dr. Perlin used these data signals, which were not otherwise admitted into evidence, to conclude that the samples did not include mixtures for unknown contributors, contrary to Ms. Loynes's testimony, and that Gardner was the contributor.

III. CHARACTER EVIDENCE

Gardner offered testimony from Katherine Allan, the Falls Church Public Works director, and Laurie Ombrembt, an attorney in the Department of Justice. Both women knew Gardner's community intimately and knew his reputation for appropriate contact with children. The testimony sought to be introduced was based on their knowledge that they had never heard any question raised about Gardner's reputation for inappropriate contact with children.

The Commonwealth objected to this reputation evidence, arguing that the only relevant inquiry was into Gardner's reputation for truthfulness, adding that it was doubtful that the witnesses could address Gardner's

reputation before the alleged crimes. Contrary to applicable Virginia law, the court barred the testimony.

Gardner's credibility was a significant factor for the jury's consideration. It was also crucial to establish that Gardner had no reputation for improper conduct with children. This evidence would have been introduced by credible character witnesses with the knowledge of these traits.

IV. JURY DELIBERATION

Deliberations began on May 1, 2012, and lasted about two hours. Deliberations resumed on May 2 at approximately 9:45 a.m., *see* J.A. 2022, until late morning. At that point, the jury sent out a note stating, "We have reached a unanimous verdict on three of the four counts. We cannot reach a unanimous verdict on the fourth count. What do we do?" J.A. 2018.

Given the jurors' note, the court discussed with counsel whether partial verdicts should be received, whether an Allen Charge should be issued, or whether the jury should simply be told to continue deliberating. J.A. 2020. Judge Kendrick made it evident that receiving a partial verdict "[wa]s the proper thing to do." J.A. 2023.

Thereafter, Judge Kendrick, over defense counsel's objection, called only the foreperson to question him about the jurors' deliberations on the

fourth charge. J.A. 2026. When asked whether further deliberations would be beneficial, the foreperson – without consulting any other jurors – stated, "I don't know. I mean, I think – I think we've deliberated. I think we've raised a lot of issues, and I think, you know, we're not – there's still a differentiation in view." J.A. 2027.

The trial court, over objection, decided to accept the verdicts as to the three unanimous verdicts. J.A. 2028. Once the three verdicts were received, the trial court released the jurors for lunch. J.A. 2032. It was the court's position prior to lunch that an Allen charge would be given to the jurors when they returned. J.A. 2033-35.

After returning from lunch, Instead of permitting further deliberations, the court, *sua sponte* and over defense counsel's objection, declared a mistrial on the C.K. related charge. J.A. 2037-39.

V. SENTENCING

During sentencing, the Commonwealth presented victim impact testimony that included statements from Angela Garcia (M.G.'s mother) and Daniel Rice (C.R.'s father). Though brief, the testimony was emotional. *See* J.A. 2048-66.

Mrs. Garcia testified, "[a]s parents, it has been inordinately difficult to silently endure the inaccurate reporting by the local media during the

ongoing prosecution." J.A. 2054. She also testified that "we were very aware of the attempt by the [defense] to provide untrue statements and release personal information in order to affect public opinion." J.A. 2055.

Mr. Rice testified that "[Gardner] had a choice, and [C.R.] has repeatedly come back to that many times, and to endure the revictimization that *the whole court process does – not just the testifying. When the local paper* tries to insinuate that her father has hurt her is in itself --." J.A. 2060 (emphasis added). The court sustained an objection to this testimony, but did not instruct the jurors to disregard it. J.A. 2060.

After hearing the victim impact testimony, the jury fixed sentences totaling 22 years and fines totaling $15,000.

STANDARDS OF REVIEW

The abuse of discretion standard of review applies to all the issues presented here except for victim impact testimony issue. *Prieto v. Commonwealth* 278 Va. 366, 386 (2009) (jury verdict); *Anderson v. Commonwealth*, 274 Va. 469, 478-79 (2007) (chain of custody); *Scott v. Commonwealth*, 274 Va. 636, 644 (2007) (joinder); *Byrdsong v. Commonwealth*, 2 Va. App. 400, 408 (1986) (character evidence). Abuse of discretion occurs when "reasonable jurists could not differ" on the issue. *Tynes v. Commonwealth*, 49 Va. App. 17, 21 (2006).

The victim impact testimony issue calls for statutory interpretation of the victim impact statute. Statutory interpretation is reviewed *de novo*. *See Wright v. Commonwealth*, 275 Va. 77, 80-81 (2008).

INTRODUCTION

From the outset to the conclusion, law enforcement targeted Gardner as the only suspect and built a case to support this theory, despite Gardner's productive lifestyle as a community contributor and beloved family man with no criminal history. The failure of the investigation to consider the collaboration of the complainants or explore inconsistent evidence stacked the decks against Gardner. Combine with the foregoing the joinder of unrelated incidents, and Gardner was thereby placed on a trajectory toward conviction. The result was an unfair, unsound trial.

At trial, the refusal of the trial judge to independently make his own decision on joinder, erroneous evidentiary rulings, and the inexplicable violence done to the sanctity of the jury deliberation process assured a conviction. Whether looked at individually or in sum, the errors assigned in this appeal should result in a reversal of these convictions. Due process and fairness demands no less.

ARGUMENT

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.

A. Legal standards

Joinder is only proper if the offenses to be joined constitute a common plan or scheme. *Scott*, 274 Va. at 645-46. A "common scheme" consists of "crimes that share features idiosyncratic in character, which permit an inference that each individual offense was committed by the same person or persons." *Id.* at 645. "Common plan" crimes are those "that are related to one another *for the purpose* of accomplishing a particular goal." *Id.* at 646 (emphasis added). Crimes which are merely similar are not properly joined. *Brown v. Commonwealth*, 37 Va. App. 507, 514 (2002).

B. The evidence did not establish a common scheme or plan.

The Court of Appeals erred in affirming joinder of the offenses because it ignored the common scheme or plan prong of the joinder test. The intermediate court focused on whether the evidence was admissible at separate trials, which addressed only the question of whether justice required separate trials – the first prong of the joinder analysis. J.A. 85; (pg. 3 of per curiam opinion; citation to Pet. for Appeal in COA re: joinder).

In reviewing the joinder claim, the following commonalities were cited by the Court of Appeals to support its conclusion: 1) the complainants were all nine- or ten-year-old sleepover guests; 2) both incidents occurred at night; 3) both offenses occurred while others members of home were sleeping; 4) the complainants were sleeping when the offense occurred; and, 5) the complainants were touched in the same place. J.A. 85.

Initially, three observations made by the Court of Appeals do not accurately reflect the record. First, the complainants were not all asleep when their respective offenses began. C.K. testified that on June 16 "Gardner sexually assaulted me" before she ever fell asleep. J.A. 1061-62.

Second, not all of the home's occupants were asleep when the offenses began. On June 16, Mrs. Gardner checked on the girls while Gardner was with them, and then left to her nearby bedroom where she remained awake. J.A. 1450, 1534. Additionally, Emma's twin brother was two rooms away playing with Legos. J.A. 1451. Matthew Belvedere, another adult male resident lived in the house at the time with his young daughter.

Finally, the touching was not the same in each instance – not only in terms of what was touched, but how. C.K. testified the assailant touched C.K. on her back, buttocks, breasts, stomach, and vagina on June 16. J.A.

1061-63. This occurred in a pattern alternating among those parts of her body and lasted 45 minutes. J.A. 1104. There was no penetration. C.K. was also asked "Does it feel good?" J.A. 1066.

M.G. testified that on June 18 she was touched only on her vagina. J.A. 380-81 She further claimed her vagina was penetrated by the assailant's finger. J.A. 382. She was the only complainant to claim penetration. Nothing was said to her during the touching. No duration for the conduct was established.

C.R. testified that on June 18 her sleeping area was visited five times. She claimed she was touched four times on her vagina, but not touched on the first visit. The touching lasted a few minutes or less, was over the clothing, and nothing was said to her during that time. J.A. 612-18.

Stripping away the factually unsupported similarities, the Court of Appeals' holding rests on two factors in support of joinder – the time the offenses occurred and the age of the complainants. These are not examples of idiosyncrasies. Rather, the age and the timing of the offenses are characteristic of these types of offenses. In light of the recent rulings in *Berton v. Commonwealth*, 2013 Va. App. LEXIS 357 (Va. Ct. App. Dec. 3, 2013), and *Scott*, 274 Va. 636, the evidence cited by the Court of Appeals,

and relied upon by the trial court, could not support joinder under a common scheme or common plan theory.

In *Berton*, the defendant was charged with a number of serious crimes, including rape, sodomy, and aggravated sexual battery, in Arlington County, Virginia. The several charges stemmed from one event in September 2008 and one event in September 2010. The Commonwealth pointed to 14 similarities between the two event to support its joinder argument. Among the similarities noted by the Commonwealth were the age of the victims, the time the offenses occurred, the locations' similarities, and the nature of the act. *Berton*, 2013 Va. App. LEXIS 357 at 7. The trial court permitted joinder, but the Court of Appeals reversed, holding the trial court abused its discretion. *Id.* at 14.

Reversing joinder, the Court of Appeals noted that the similarities cited by the Commonwealth showed a marginal level of commonality. *Id.* at 13. It also observed that certain factors relied on by the Commonwealth were typical for the type of offense charged, including the manner of entry into the home, commission of the offense at night, the victims being home alone, and the presence of a condom during both offenses. *Id.*

What the Court of Appeals found more important were the differences between the two offenses. A condom was used in the first, but not second,

offense. The second offense involved rape and sodomy, but the first only involved masturbation. The sexual conduct was more aggressive during the second offense. A weapon was used in the second offense. There was no forced entry in the second offense. And, the offenses occurred two years apart. *Id.*

Similarly, in *Scott*, this Court found the trial court abused its discretion in joining 27 charges. This Court acknowledged proof of numerous similarities among the separate incidents, including types of targets, time of the offenses, isolation of the targets, use of a firearm, request for the personal identification number for bank accounts, locations of the offenses, types of threats made, number of assailants, and the assailant's appearance. *Scott,* 274 Va. at 640. Despite the commonalities, the Court held that joinder was improper under Rule 3A:10 because "[t]he absence of idiosyncratic features in the present record leaves a record showing only separate crimes of the same type that share features that are likely similar to numerous other robbery offenses." *Id.* at 647.

The common theme of *Berton* and *Scott* is that the Commonwealth must present qualitatively strong evidence exhibiting uniquely identifiable conduct before a common scheme is established. Here, the Commonwealth had to show that the factually unrelated conduct alleged on

June 16 and June 18 was so stylistically unique (i.e., idiosyncratic) that it led to the conclusion that the same assailant was responsible for both offenses.

However, the similarities (excluding the factual inaccuracies) cited by the intermediate appellate court in support of joinder rested on factors similar to those the *Berton* court found common to sexual assault cases – e.g., offense occurred at night, while two of the victims were asleep, and included touching of genitalia. These factors were not unique enough to lead to the conclusion that the same assailant was behind each offense in the present case. Absent this conclusion, one is left with two offenses of the same type which cannot be joined.

Furthermore, the Court of Appeals ignored qualitatively significant differences that undercut any common scheme. The following critical differences were ignored: 1) Gardner was called into Emma's room on June 16, but not into the basement on June 18; 2) the risks were different – on June 16, Robin Gardner was within earshot, as was Emma's brother. On June 18, the girls were outside of calling distance of any adults; 3) the household dynamics differed – on June 16 Gardner had no need to supervise or interact with C.K. until he was called in by Emma. On June 18, he was also celebrating Emma's birthday, had limited interactions with

the girls, and was somewhat involved in overseeing the participants; 4) the locations within the home differed – on June 16, Gardner was upstairs in Emma's bedroom with the door open, night light on, within a matter of feet of his master bedroom, where his wife was up waiting for him, and son's bedroom, where his son was playing.

On June 18, the girls were isolated in the partially submerged, unlit basement; and, 5) the parts touched, manner of touching, and verbal interactions with the girls differed between June 16 and 18, *see supra* at 13-14. In light of the marginal commonalities, these substantial differences, especially as it concerns the offense conduct, cannot be ignored and militate strongly against joinder.

If no common scheme existed, then a common plan had to be established. No common plan argument was ever made by the Commonwealth, *see* J.A. 4-6; J.A. 206-46, nor did the Court of Appeals find that the June 18 offenses depended on the completion of the June 16 offense. Moreover, the Commonwealth presented the June 18 offenses first at trial, *compare* J.A. 345 (M.G.'s testimony begins) *to* 578 (C.R.'s testimony begins); *to* J.A. 1041 (C.K.'s testimony begins), and no connection was made between the June 16 and 18 offenses during opening or closing statement by the Commonwealth. J.A. 1844-1909,

1993-2007. In light of the foregoing, the Commonwealth never presented this case as one that compelled joinder under the common plan rationale, and there is nothing about these independent offenses that suggests the June 16 offense had to be completed before the June 18 offenses could be attempted or completed.

The Court of Appeals adopted commonalities among the offenses that were incorrect in part, and which did not convey such unique offense characteristics that would make the conduct idiosyncratic. The Court of Appeals also failed to explain how the conduct established a common scheme or plan, focusing instead on whether the evidence was admissible in a separate trial (the first prong). Ignoring the second prong of the joinder test was error, and, because no common scheme or plan existed, joinder was improperly affirmed by the Court of Appeals.

There was prejudice flowing both ways – from the June 16 offense bleeding into the June 18 offenses and vice versa – as a result of the improper joinder. The comingling of evidence among the three complainants' 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. This is the sort of unfair prejudice the joinder rules seek to prevent by ensuring there is

truly idiosyncratic conduct at issue or that the crimes were strung together as part of a common plan to complete a later offense. Since that was not the case here, Gardner suffered serious, unfair prejudice throughout his trial.

II. The Court of Appeals erred by holding it was not error to exclude Gardner's character evidence on the trait of being sexually assaultive or inappropriate with children.

Gardner's defense relied heavily on two separate elements of his character: his truthfulness, and separately, his reputation (or to be precise, the lack of a bad reputation), concerning sexual misconduct with children. The importance of this second aspect of his character cannot be overstated. Gardner stood accused of sexually abusing three young girls. Their testimony, while inconsistent and fractured, was emotional and compelling, and the joinder of the cases helped the Commonwealth drive the emotions home. Able to defend by denying the accusations,[3] his

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[3] In closing argument, the Commonwealth reminded the jury that the case rested on Gardner's word. *See* J.A. 1996 (where, addressing the claim that Gardner's hand was impaired by infection, the Commonwealth said: " . . . unless you believe Mr. and Mrs. Gardner, who, as Mr. Greenspun says, have a lot on the line here, okay.").

Confirming this view of the evidence, the Court said at sentencing, addressing Mr. Gardner about the jury: "They were very diligent and they listened to you, **and the only conclusion that you can reach after hearing all this is that your credibility was not worthy and that's why they found you guilty.**" J.A. 2237. (emphasis added)

reputation was his shield, something so weighty that "such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt. . . ." *Michelson v. United States*, 335 U.S. 469, 476 (1948) (internal citation omitted). Gardner was entitled to present this evidence, and the jury deserved to hear it.

To make matters worse, the difficult situation into which he was thrust was exaggerated by the need to defend against the unrelated allegations of *three* young girls in a single trial and the extra weight that placed on the scale, with just his denial on the other side.

To combat this, Laurie Ombrembt and Katherine Allan – solid citizens who knew him and his reputation in the community well – would have testified to Gardner's unquestioned reputation for not having assaultive or sexual contact with children. Counsel's proffer concerning both women unambiguously placed their testimony within the heartland of Virginia law:

> Your Honor, we would proffer, then, that Ms. Ombrembt . . . would testify that . . . that there is no evidence of a negative sort that Mr. Gardner has ever been involved in any sort of abuse, physical, sexual, neglectful behavior with children.
>
> * * *
>
> [T]hat 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 by him; and that they have no evidence, no indication of any sort of bad conduct, sexual conduct, with minor children during that time . . . . And she's never heard any of that.

J.A. 1774-75. The full testimony, course of objections, and the court's rulings, both as to this witness and to the subsequent witness (who was to provide similar reputation testimony), are set out at J.A. 1763-81.

In response, the Commonwealth argued that the only character trait which could be proven up by Gardner was his character for truthfulness. J.A. 1768, 1770-71. Inexplicably, the Court accepted that argument. The Commonwealth then retreated slightly, saying that it doubted the defendant could present evidence of the character trait of appropriate behavior with children existing at a time before the allegations. J.A. 1773. Despite the fact that the defense offered to do *precisely* that, the trial court erroneously barred the testimony. J.A. 1774.

The type of testimony sought from these witnesses, referred to as "negative" reputation evidence, is a well-recognized method of establishing a defendant's reputation for a trait in issue in the crimes charged. *Barlow v.*

Commonwealth, 224 Va. 338, 340 (1982); *see also Byrdsong*, 2 Va. App. 400.[4]

In its incomplete and inaccurate view of both the facts and the law, the Court of Appeals held that the trial court correctly barred Gardner's evidence because, "[t]here was no evidence that the witnesses discussed this characteristic prior to appellant being charged with the offenses." J.A. 91. The Court found that the trial court had not precluded such testimony concerning Gardner's character *prior* to the charges. J.A. 91. In addition, the Court found that the trial court had properly limited the character testimony because it constituted "specific acts" of the defendant, something the law does not allow. J.A. 91.

As stated in *Byrdsong*, "[a] character witness is allowed to summarize what he has heard *or not heard* in the community relating to the truthfulness or *other relevant traits* of an accused. . . ." 2 Va. App. at 406 (emphasis added). *Byrdsong* reversed a conviction where "important negative evidence" was excluded. The Court of Appeals held that the excluded negative character evidence (there, for truthfulness) "constitute[s] evidence which the jury could have weighed as proof that prior to the

[4] This longstanding principal is now codified as Virginia Rule of Evidence 2:404 ("Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes").

charges for which he was being tried no one had ever ventured to question the appellant's reputation. . . ." *Id.* at 407.

Excluding this proffered character testimony was precisely the kind of "semantical subtlet[y]" this Court cautioned against in *Barlow,* 224 Va. at 341. A fair reading of the proffer shows with no doubt that the proffered testimony embraced Gardner's reputation – not just *since* the alleged crimes – but for all prior time ("there is no evidence ...that [he] has *ever* been involved in" child abuse – and that *never* had it been discussed that Gardner was known as one not to be trusted around children.[5] Moreover, the claimed improper "specific acts" were not prohibited specific acts at all. Rather, that testimony was foundational. It was admissible to show that the opinion to be offered was based on the observations and meaningful assessments of those in the community. It was to be followed by the clear

[5] This is almost identical to what happened in *Byrdsong*, where the Court of Appeals held that "[a] character witness is allowed to summarize what he has heard or not heard" in the community. 2 Va. App. at 406. The Court pointed out the "important negative statement" made by the witness – that his reputation "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 [case] came up." "These words," the Court said, "constitute evidence which the jury could have weighed as proof that prior to the charges . . . no one had ever ventured to question the appellant's reputation for truthfulness." *Id.*

statement that there had never been any question raised in the community that Gardner acted inappropriately with children.[6]

Keeping this evidence from the jury was error and prejudicial – particularly in light of the decision to join the independent cases for trial.

III. The Court of Appeals erred by upholding admission of Dr. Perlin's testimony, despite his reliance on evidence not admitted at trial, and by finding the Commonwealth established a proper chain of custody for those materials.

A. Legal standards

i. Facts Relied Upon by Expert Must Be in Evidence

Virginia law is clear and specific: experts' opinions in criminal cases may not be based on facts not in evidence. *Corado v. Commonwealth*, 47 Va. App. 315, 328 (2005). The legislature clearly intended to limit experts to data admitted into evidence through its enactment of Code § 8.01-401.1. *Simpson v. Commonwealth*, 227 Va. 557, 565-66 (1984).

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[6] Courts have recognized that where allegations of sexual abuse of children are made, evidence of a character for appropriate behavior with children is admissible. *See, e.g., State v. Rhodes*, 200 P.3d 973, 976 (Ariz. 2008) ("We hold that Defendant's sexual normalcy, or appropriateness in interacting with children, is a character trait, and one that pertains to charges of sexual conduct with a child."); *Wheeler v. State*, 67 S.W. 3d 879, 882 (Tex. Crim. App. 2002) (defendant allowed to offer "evidence of his good character (or propensity) for moral and safe relations with small children or young girls" in molestation case.); *United States v. John*, 309 F.3d 298, 303 (5th Cir. 2002) (jury should have been instructed that reputation evidence of sexual morality is properly considered to show defendant not capable of sexual conduct with child).

ii. Chain of Custody

For establishing chain of custody, "the burden is upon the party offering the evidence to show with reasonable certainty that there has been no alteration or substitution of it." *Robinson v. Commonwealth*, 212 Va. 136, 138 (1971). The Commonwealth "must . . . account for every 'vital link in the chain of possession.'" *Hargrove v. Commonwealth*, 53 Va. App. 545, 554 (2009) (internal citation omitted). If a vital link "in the possession and treatment of the evidence is left to conjecture, the chain of custody is incomplete, and the evidence is inadmissible." *Jeter v. Commonwealth*, 44 Va. App. 733, 737 (2005) (internal quotations and citation omitted).

B. <u>Perlin's opinion was based on facts not in evidence</u>

The intermediate court relied heavily on the fact that the Loynes report from September 22, 2011, was in evidence. J.A. 88. However, the defense argued that the data file to which Perlin referred was never admitted. J.A. 960. It was the lack of this disclosure that made his testimony improper. Thus, the Court of Appeals' reasoning that the September 22 report was included in evidence is irrelevant unless that report also contained the electronic data file's information. However, the report contained no such statement. *See* J.A. 114-18.

Ms. Loynes's reports comprised a "subset" of the data used by Dr. Perlin to reach his conclusions. J.A. 956. Notably, Dr. Perlin testified that Loynes's reports were not the basis for his opinions: "The reason we're sent the report in the first place is to make sure we spell names correctly and we have all of the administrative information correct. We make our own determination about what needs to be done . . . we don't rely on it [Loynes's report] in any way." J.A. 1025.

Dr. Perlin further explained that his TrueAllele machine analyzes the 15 STR loci in a given sample of DNA to determine who the contributors are. J.A. 991-1008. To do this, he relied on his computer to synthesize and analyze electronic data he received.

That data comes in a machine readable format and is not something typically printed out – so, it is not something found in Loynes's report. J.A. 1021. Analysis of these data signals by the machine permitted Perlin to create the peaks and valleys he identified during direct testimony. These same peaks and valleys formed the basis for his statistical calculation and allowed him to craft an opinion. J.A. 1021.

Ms. Loynes's testimony did not include testimony about the contents of the electronic data file. This was the missing evidence that had to be admitted before Dr. Perlin could opine on the statistical probabilities. Ms.

Loynes's only testimony regarding the electronic data Perlin received was, "this data for the statistical analysis was outsourced to a private lab I believe in Pittsburg, Pennsylvania." J.A. 908.

By allowing Dr. Perlin to testify about facts not in evidence, the court abused its discretion.

C. <u>There were missing vital links in the chain of custody</u>

Dr. Perlin **believed** his office received the data file from a person in Virginia. That person did not testify at trial, and no other witnesses were able to fill in the gap regarding how the information arrived at Dr. Perlin's office. Thus, there were two vital links missing in the chain of custody: 1) the person receiving it on behalf of Dr. Perlin, and 2) the person who transmitted the data file to Pennsylvania. It is sufficient to reverse when even one vital link is missing, *Jeter*, 44 Va. App. 733.

Additionally, Ms. Loynes never identified that file at trial. Ms. Loynes merely stated that she "believe[d]" the data was "outsourced to a private lab" in Pittsburgh. Ms. Loynes said nothing of the person to which she transmitted her data packet.

The presumption of regularity that typically applies between intraoffice transfers (e.g., within the Department of Forensics) or interoffice transfers between offices named in Code § 19.2-187.01 (e.g., DFS and the

FBI) does not apply to an out-of-state third party that does not qualify as one of the named entities in the controlling statute. *See Dunn v. Commonwealth*, 20 Va. App. 217, 222 (1995). The trial court should have considered chain of custody especially important when faced with Gardner's circumstances because Cybergenetics is not one of the entities listed in Code § 19.2-187.01 and the presumption of regularity would not apply.

The vital link – the person or people responsible for interstate transfer of sensitive information – is absent. Without establishing the chain of custody, the guarantee that the property transferred to Perlin (e.g., the data packet and reports) was the complete, accurate, and proper set of data from which he could work was missing. *See Robertson v. Commonwealth*, 12 Va. App. 854, 857 (1991). As such, admission of Dr. Perlin's opinion testimony was an abuse of the trial court's discretion, and the Court of Appeals erred in affirming that ruling.

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.

A. Legal standards

Defendants possess a "valued right to have [their] trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949); *Commonwealth v. Washington*, 263 Va. 298, 303 (2002).

Neither Virginia statute nor case law addresses the issue of partial verdicts presented here. The corollary federal practice is governed by Rule, which provides the following guidance: "If the jury cannot agree on all counts as to any defendant, the jury *may* return a verdict on those counts on which it has agreed." Federal Rule of Criminal Procedure 31 (emphasis added). Federal case law also makes clear that requesting or requiring the return of a partial verdict is disfavored. *See United States v. Di Lapi*, 651 F.2d 140, 146 (2nd Cir. 1981) (stating "[t]he difficulties of a jury's task in reaching unanimous verdicts as to several defendants tried on multiple charges counsel against judicial attempts to structure the course of jury deliberations."). And, the timing of when a verdict is returned is part of the jury's discretion. *Id.* Forcing a jury to return a partial verdict may "mistakenly permit a tentative vote to become an irrevocable final vote and

forgo the opportunity to gain new insights concerning the evidence" as to a particular defendant or charge. *Id.* at 146-47.

In *Blueford v. Arkansas*, the United States Supreme Court recognized it is inherent in jury deliberations to consider and reconsider the verdict(s) in a case. Blueford was facing four charges of descending severity from capital murder to manslaughter; these charges were mutually exclusive. 132 S. Ct. 2044 (2012). The Court nevertheless found that the jury, even after determining one charge was unsupported by the evidence, could go back and reconsider that charge.

The Court provided an instructive example: The jury reached unanimous not guilty verdicts on two of the most severe charges, but as it considered the third charge, it reconsidered the more severe charges and changed its opinion. *Id.* at 2051. In light of this, the Court stated, "[a] single juror's change of mind is all it takes to require the jury to reconsider a greater offense." *Id.*

Also pertinent are the standards governing declaration of a mistrial. *United States v. Perez*, 22 U.S. 579, 580 (1824), held that the trial court must find "manifest necessity for the act, or the ends of public justice would otherwise be defeated."; *see also Wade*, 336 U.S. at 689. "[T]he power [to declare a mistrial] ought to be used with the greatest caution, under urgent

circumstances, and for very plain and obvious causes." *Id.* "If the record reveals that the trial judge has failed to exercise the 'sound discretion' entrusted to him," the deference afforded to the trial court "disappears." *Arizona v. Washington*, 434 U.S. 497, 510, n. 28 (1978). Thus, if the trial judge, "acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his 'valued right to have his trial completed by a particular tribunal.'" *United States v. Jorn*, 400 U.S. 470, 484 (1971) (quoting *Wade*, 336 U.S. at 689).

B. <u>The trial court prematurely accepted the jury's verdict</u>

The Court of Appeals held that the trial court did not abuse its discretion in receiving the partial verdicts and declaring a mistrial. It held that, based on the circumstances observed by the trial judge, there was no abuse of discretion. J.A. 95-96. However, the facts did not support the trial court's conclusion.

The trial court did not have any indication from the foreperson, the jurors' note, or any other source that the jury wished to present its verdicts on the first three counts without deciding, or at least further considering, the fourth count. *See* J.A. 2018, 2027. When the foreperson was called out, Judge Kendrick only asked about the status of deliberations on the fourth charge. *see* J.A. 1026-27. After speaking with only the foreperson outside

the presence of other jurors about the status of deliberations, the court, over objection, announced that it would take the verdict on the three other charges. J.A. 2027.

In a strikingly similar situation, the Eighth Circuit overturned a trial judge's similar action. In *United States v. Benedict* the jury had deliberated for a day and informed the court that it had decided three of four verdicts, but was still deliberating on the fourth. 95 F.3d 17, 18 (8th Cir. 1996). The Eighth Circuit found that "[i]t is improper for a trial court to intrude on the jury's deliberative process in such a way as to cut short its opportunity to fully consider the evidence." *Id.* at 19. Thus, it was error for the trial court to take a partial verdict where deliberations were still ongoing on the fourth charge, the jury was not deadlocked at the time the partial verdict was taken, the jury's verdict was not final (i.e., not announced in open court), and neither party had requested a partial verdict. *Id.* at 19-20.

The same circumstances existed here. Neither party had requested that the court receive a partial verdict. Immediately prior to taking the partial verdict, no official entry of the verdict had been made. The court proposed taking a partial verdict *sua sponte*, though the parties had never requested this action. And, when the trial court decided to take a partial verdict, it had envisioned continued deliberations and possibly providing

additional instruction to the jury on the undecided count, but at the last minute decided to declare a mistrial. J.A. 2027-28.

As *Blueford* illustrates, ongoing jury deliberations of a different charge can easily lead to reconsideration of "decided" charges. There was nothing preventing the jury from reconsidering its decision as to the first three counts while considering the fourth. It would only take one juror to change his mind about an initial verdict to reignite discussions. And though the Court of Appeals found that there was no "imminent" verdict on the fourth count, that did not mean further deliberations would not lead to a decision. Any finding concerning the "imminent" decision was purely conjectural by the trial court.

C. The declaration of mistrial was unsupported by the record

The trial judge committed additional error when he declared a mistrial. Gardner's trial lasted seven days, but the jury deliberated less than five hours, split over two days, before declaring a mistrial. Additionally, the note requesting guidance from the court did not unequivocally say, or even tacitly suggest, that the jury was deadlocked and would not be able to reach a verdict.

Prieto makes clear that the jury should not have been found deadlocked. In *Prieto*, defense counsel moved for a mistrial because the jury was hung. *Prieto*, 278 Va. at 387. The trial court denied the request.

In upholding the trial court's refusal to grant a mistrial in *Prieto*, the Supreme Court of Virginia found consideration of the following four factors important: 1) length of the trial; 2) successfully reaching a verdict after additional deliberation; 3) length of deliberation on an issue; and 4) the contents of the notes delivered to the judge during deliberations. *Id.* In *Prieto*, the jury eventually did arrive at a verdict, the trial lasted for approximately four weeks, the jury deliberated on the issue of mental retardation for a day and a half, and the foreperson's note did not state the jury was unable to reach a unanimous decision. *Id.*

Here, however, the trial court found the jury was hung after less than five hours of deliberation in a case with serious allegations, volumes of testimony and physical evidence, and an accused who was a well-respected member of the community. Additionally, there was no evidence on how long the jury deliberated the count regarding C.K. And finally, just as in *Prieto*, the jury's note and the foreperson's comments did not unequivocally state that further deliberations would be useless. Thus, the trial court erred by declaring a mistrial.

These two errors deprived Gardner of one important right: his right to have one jury fully deliberate and decide the entire case.

V. The Court of Appeals erred by finding that Angela Garcia's and Daniel Rice's testimony regarding third-party actions was not improper victim testimony.

A. Legal standards

Victim impact testimony must be limited to harm suffered as a "result of the offense." Code § 19.2-299.1. "Result of the offense" is undefined, but it should not be read broadly. *See Bell v. Commonwealth*, 47 Va. App. 126, 135 (2005) (holding that Code § 19.2-187, which "deals with criminal matters" and governs admissibility of evidence, "'should be strictly construed against the Commonwealth and in favor of the accused.'") (internal citation omitted). Indirect, superseding, intervening or attenuated results of an offense are outside the scope of Code § 19.2-299.1. *See Howell v. Commonwealth*, 274 Va. 737 (2007).

In *Howell*, this Court interpreted language in Code § 19.2-305.1 that is similar to the language at issue here. In *Howell*, the Court narrowly defined causation, holding "costs that result only indirectly from the offense, that are a step removed from the defendant's conduct, are too remote and are inappropriate for a restitution payment." *Howell*, 274 Va. at 740-41; *see also Beck v. Commonwealth*, 253 Va. 373, 381 (1997) ("the admissibility of

victim impact evidence . . . is limited only by the relevance of such evidence to show the impact of *the defendant's actions.*"); *Maye v. Commonwealth*, 2011 Va. App. LEXIS 40 (Va. Ct. App. Feb. 8, 2011) (clarifying that, based on *Howell*, "restitution does not include financial loss that results indirectly from the defendant's criminal conduct because that loss is not 'caused by the offense.'").

Where a defendant's sentence may be increased due to testimony that arouses the emotions of the jury, clouds rational decisionmaking, and strongly prejudices the defendant, then, *a fortiori*, a direct result of the offense – not just any result caused by superseding or intervening forces – must be the only type of evidence admissible as victim impact testimony.

B. The Garcia and Rice testimony was beyond the scope of victim impact testimony

The Garcia and Rice testimony described the media's misreporting, the effect of the litigation process, and defense counsel's perceived conduct – extremely emotional testimony – but wholly improper. The subject matter was simply not proper because whether the media reported this case fairly or not had nothing to do with Gardner's actions towards the complainants.

The Court of Appeals reasoned that Mrs. Garcia's testimony regarding the media was proper because it provided "'other information' related to the impact of the offense." J.A. 93. This was not the defense's argument. *See* Ct. of Appeals Pet. for App. at 46-48. The argument then, as it is now, was that "result of the offense" in Code § 19.2-299.1 did not include third-party intervening or superseding acts. The intermediate court's observation that this was "other evidence" does not address Gardner's argument that it was beyond what is permitted in Code § 19.2-299.1.

The unfairly prejudicial victim impact testimony influenced the jury and affected the recommended punishment. The practical effect is that Gardner, now a 50-year-old man, has spent two years in prison and will continue to be incarcerated until he is nearly 70-years-old.

CONCLUSION & RELIEF REQUESTED

For all of the reasons stated above, Gardner's convictions on all three counts should be reversed, and this Court should provide whatever other relief is deemed appropriate.

Respectfully Submitted,
MICHAEL ARMIN GARDNER,
By Counsel

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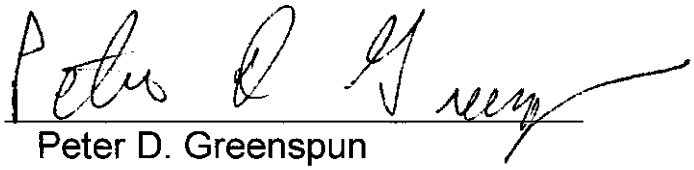
By: 

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4. Appellant's counsel is retained.

5. Counsel for the Appellant hereby certifies that on March 4, 2014, the following items were filed or served in the following manner:

   a. An electronic version of the Appellant's Brief was submitted to this Court via a compact disc filed with the clerk along with the paper copies of the brief.

   b. Three copies of the Appellant's Brief were mailed first class to Counsel for the Appellee at the above-listed address. One electronic copy was emailed to Counsel for the Appellee at the above-listed email address.

6. Counsel for the Appellant hereby certifies that pursuant to Rule 5:26(b), the Appellant's Brief contains **8,717 words**, which complies with the 8,750 maximum word limit.

Peter D. Greenspun