IN THE

Supreme Court of Virginia

RECORD NO. 131166

MICHAEL ARMIN GARDNER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

APPELLANT'S REPLY BRIEF

Peter D. Greenspun (VSB No. 18052)
Jonathan Shapiro (VSB No. 13953)
Mikhail N. Lopez (VSB No. 83255)
GREENSPUN SHAPIRO PC
3955 Chain Bridge Road
Second Floor
Fairfax, VA 22030
(703) 352-0100
(703) 591-7268 (Fax)
pdg@greenspunlaw.com
js@greenspunlaw.com
mnl@greenspunlaw.com

Counsel for Appellant

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

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ARGUMENT

I. The Court of Appeals Erred By Misapplying The Joinder Analysis.

For the first time on appeal, the Commonwealth argues these cases were "connected," Resp. Br. 13-22. It also argues a common scheme or plan existed, and the evidence from one case was admissible in the others.

A. The charges were not "connected"

The Commonwealth's "connectedness" argument was never clearly made below. Pre-trial the Commonwealth argued the offense "is connected and constitutes part of a common scheme or plan, *more specifically a common scheme in this matter*." J.A. 221. (emphasis added). During trial, the Commonwealth simply incorporated by reference its previous arguments or focused on whether justice required separate trials. J.A. 255-56, 1179-84. Connectedness was not clearly argued.

In its oppositions to Gardner's petitions for appeal in the Court of Appeals and in this Court, the Commonwealth never raised connectedness as a basis for joinder, Ex. 1 at EX6-EX7, EX20-EX21, nor did the Court of Appeals. The trial prosecutors wrote those briefs and argued: "In this case, the crimes perpetrated against C.R., C.K. and M.G. constituted a common scheme." Ex. 1 at EX6, EX20. This was in line with their pre-trial argument, J.A. 221, and connectedness was never argued. The

Commonwealth narrowed its argument, as in *Scott v. Commonwealth*, 274 Va. 636 (2007), and it cannot argue "connectedness" now.

The facts in this case exposed disconnected offenses, yet the Commonwealth argues *Yellardy v. Commonwealth*, 38 Va. App. 19 (2002), and *Satcher v. Commonwealth*, 244 Va. 220 (1992), control. Resp. Br. 16-19. While *Yellardy* and *Satcher* indicated the timing and locations of the offenses were the same, the weight of those opinions rested on the details of the offense conduct. Importantly, Justice Hassell's dissent in *Satcher* found the majority blended the common scheme/plan and connectedness tests, thereby creating confusion and lowering the hurdle for joinder. 244 Va. at 269.

Satcher, after noting time and place, focused on how the defendant beat and sexually assaulted his victims, what he took, and where he deposited the stolen property. *Id.* at 229. From start to finish, the assaults exhibited the same conduct. *Id.* *Yellardy*, too, mentioned timing and location, but its analysis also focused on the substance of how the defendant used an uncommon weapon, how he assaulted his victims, and the defense he asserted to explain his conduct and avoid arrest. 38 Va. App. at 24-25.

In light of *Yellardy* and *Satcher*,[1] Gardner's charges should not have been joined. The offense conduct varied considerably between the complainants. *Compare* J.A. 380-82, 612-18, 1061-63, 1104, 1450-51, 1534. Crucially, the initiation of the contact on June 16 stood in stark contrast with the initiation of contact on June18.

On June 16, Gardner was called into his daughter's room to comfort her, and then discovered C.K. was there. J.A. 193, 1670. When Gardner entered his daughter's room, he knew his wife was nearby and awake, and David was nearby, too. J.A. 1670, 1684. Compare the foregoing to June 18, where Gardner allegedly made his way to the basement purposefully and with the intent to assail the complainants while they slept near others in the tightly packed basement. To argue the complainants were isolated in both instances, Resp. Br. 21, ignores the facts as set out here and more fully argued in Appellant's Opening Brief.

B. <u>*Common Scheme/Plan*</u>

No common scheme – the basis for joinder – existed. Ex. 1 at EX6, EX20. There were substantial differences in the offense conduct described by each complainant. *Supra* at 3. These differences belied a finding of

[1] At the time of *Satcher*, the cases were joined for trial as a matter of procedure unless the defendant moved to, and was successful in, severing the charges. The Rules of this Court now demand separate trials unless the Commonwealth can establish a basis for joinder.

idiosyncrasies linking the offenses. *Scott* and *Berton v. Commonwealth*, 2013 Va. App. LEXIS 357 (Va. App. Dec. 3, 2013), catalogued a number of similarities in offense conduct, but still found idiosyncrasies did not exist and joinder was inappropriate. Those cases indicate Gardner's cases should not have been joined.

Gardner also suffered actual prejudice. He could not exercise his rights to testify and to remain silent, which would have been determined by the allegations and evidence in support. He had to pick one right over the other; choosing between rights is disfavored. *See e.g., Simmons v. United States*, 390 U.S. 377, 394 (1968). Had the cases been tried separately, this dilemma would not have existed.

Nor can the sentencing impact be ignored. It cannot be said with any certainty the jury did not consider the facts concerning C.K. in determining guilt or punishment as it related to M.G. and C.R. This alone should be sufficient prejudice because the evidence was not otherwise admissible. *See e.g. Long v. Commonwealth*, 20 Va. App. 223, 227 (1995).

The reality is the joinder order opened the door for the Commonwealth using propensity evidence for purposes of proving all the charges and piling on evidence against Gardner. This was impermissible. *See Satcher*, 244 Va. at 269 (Hassell, J., dissenting)

C. Otherwise Admissible

The Commonwealth finally argues evidence in one case would have been admitted in the other cases to establish identity or "intent," "feelings," and "absence of any mistake." Resp. Br. 26-27. This cannot be. The conduct here was not sufficient to rise to the level of idiosyncratic conduct. Without such conduct, the evidence was merely impermissible propensity evidence insufficient to prove identity. *Id.*

Intent, feelings, and mistake could not be proved by using evidence from one case in the others. On June 16, Gardner was called into the room by his daughter. On June 18, he allegedly risked his family and career by entering the basement to assail the complainants, who were surrounded by their friends. These circumstances do not suggest the same motivations led to the alleged conduct. Mistake was never advanced as defense. The exceptions do not apply, so the evidence was not otherwise admissible. At best, rebuttal was the proper tool for the Commonwealth to admit such evidence, depending on the defense's evidence.

For the foregoing reasons, joinder was improper.

II. The Court of Appeals Erred By Finding Gardner's Character Evidence Was Improper.

Gardner's reputation for non-assaultive conduct with children was excluded at trial despite being proper character evidence. *See Byrdsong v.*

Commonwealth, 2 Va. App. 400 (1986). The question regarding Gardner's non-assaultive character was: "Do you know . . . what Mr. Gardner's reputation is, among those who know him as 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?" J.A. 1768, 1780. The question unequivocally called for Gardner's reputation in the community for a character trait at issue in the case. The proffer, and testimony preceding it, demonstrated as much.[2]

Nevertheless, the Commonwealth argues "the defense failed to place th[e] proffer into the larger context of community opinion," and it did not concern the correct time period. Resp. Br. 28-29, 31. The Commonwealth stresses "reputation" was not what Gardner proffered, Resp. Br. 30-31; it was "evidence of specific acts." Resp. Br. 31. The Commonwealth's assertions are inaccurate and involve "semantical subtleties," which this Court has previously condemned. *Barlow v. Commonwealth*, 224 Va. 338, 341 (1982).

The Commonwealth suggests the initial objection to the admissibility of the character evidence was based on when the reputation for non-

[2] The arguments concerning Ombrembt's testimony equally apply to Katherine Allan's proposed testimony because the proffer and ruling concerning Ombrembt were incorporated as to Allan. J.A. 1780.

assaultive conduct with children existed. *See* Resp. Br. 28. In reality, its first objection was that reputation for truth and veracity was the only admissible form of character evidence. J.A. 1768-73. Much of the discussion regarding admissibility was centered on that argument. J.A. 1768-73. The trial judge made clear it was this rationale with which he agreed. J.A. 1770-71.

At the end of the admissibility argument, and for the first time, the Commonwealth argued: "if the neighbors had a discussion that he's never known to be a pedophile, that would be one thing . . . , but **I doubt that they did** until after the incident and **I don't think he can prove that** up through this witness or any other." J.A. 1773-74 (emphasis added).[3] Without further argument, the trial judge sustained the Commonwealth's objection. J.A. 1774.

The defense immediately proffered the following facts: 1) "there is no evidence of a negative sort that Mr. Gardner has been involved in any sort of" assaultive behavior with children; and 2) the negative character evidence to be introduced existed during "the time period of mid-June of 2011 and the time frame leading up to that; that she [Ombrembt] has knowledge of that, of people's involvement with Mr. Gardner. . . ." J.A.

[3] The prosecutor's statements were unsupported by the record and evinced only her personal beliefs.

1774. Counsel further incorporated Ms. Ombrembt's foundational testimony preceding the Commonwealth's objection. J.A. 1764-68, 1774.

Ms. Ombrembt's testimony showed that her knowledge of Gardner's reputation was based on what community members discussed with her, J.A. 1766-68, and the proffer further supported such a finding. Ms. Ombrembt lived next door to Gardner during the relevant time periods and well before. J.A. 1766-67. She explained that she knew others who knew Gardner, and knew of Gardner's involvement with her own children as well as others' children. J.A. 1766-67.

Argenbright v. Commonwealth, 57 Va. App. 94 (2010), cited by the Commonwealth, is of no help. In *Argenbright*, the Court of Appeals found five character witnesses' testimony inadmissible because it was not "reputation" or lacked foundation. There, four witnesses admitted to not discussing the defendant's reputation with anyone else. *See Id.* at 102-7. The other witness testified to specific conduct concerning the defendant being a good probationer, paying fines, and not breaking the law. *Id.* at 101-2.

Argenbright is nothing like this case. Ms. Ombrembt knew Gardner for a considerable amount of time, and she also knew his reputation among

her neighbors and peers regarding non-assaultiveness toward children prior to the allegations surfacing.

The Commonwealth ignores *Byrdsong* by arguing the proffer's phrasing – "**she** has knowledge of that" – made Ombrembt's testimony inadmissible. Resp. Br. 33 (emphasis in original). *Byrdsong* stated, "A character witness is allowed to summarize what he has heard or not heard in the community." 2 Va. App. at 406. "[T]he lay witness cannot be expected to respond with the precision of a skilled surgeon." *Id.*

The trial judge misapplied the law when he found truth and veracity were the only admissible traits or, alternatively, that this was not within the relevant time period. The Court of Appeals perpetuated this error by holding the evidence was not "reputation." Both courts' misapplication of the law was, by definition, an abuse of discretion. *Nobrega v. Commonwealth*, 2005 Va. App. LEXIS 189, 15 (Va. Ct. App. May 10, 2005) (finding judge misapplied law, court held: "This error was by definition an abuse of his discretion." (internal quotations and citations omitted)).

III. The Court of Appeals Erred By Finding Perlin's Expert Testimony Was Admissible.

The electronic data packet that Perlin used to conduct his statistical analysis was not in evidence, and vital links were missing in the chain of custody. His testimony, regarding the mixture analysis and the

probabilities, were not based on Loynes's reports or testimony, but on a separate data packet he received and used to form his opinion. This was never turned over to the defense at any point.

A. Facts Not In Evidence

The Commonwealth argues Code § 19.2-270.5 foreclosed objections at trial to admissibility of Perlin's opinion. Code § 19.2-270.5 was inapplicable to the foundational objections made at trial.

Code § 19.2-270.5 establishes the admissibility of DNA profiles in criminal cases due to the complexity of the underlying science. This import can be gleaned from the very first line of Code § 19.2-270.5: "DNA testing shall be deemed to be a **reliable scientific technique**," and such evidence "**may** be admitted" to prove identity. (emphasis added).

The "may admit" language demonstrates that 19.2-270.5 does not excuse a proper foundational basis for the DNA evidence. Nothing in Code § 19.2-270.5 resolves trial admissibility issues, especially foundation and chain of custody issues that first arise during trial.

Here, it was impossible to make a written objection pre-trial because it was unknown until trial that the Commonwealth would fail to introduce foundational evidence. Nor did Code § 19.2-270.5 change the foundational requirements for expert testimony or the legislative intent evinced by the

passage of Code § 8.01-401.1. *Simpson v. Commonwealth*, 227 Va. 557, 565-66 (1984).

B. *Vital Links Were Missing*

The Commonwealth argues that the chain of custody was established because "Loynes' and Perlin's testimony established all of the vital links." Resp. Br. 40-41. The Commonwealth further suggests that the data packet was not a discrete item. Resp. Br. 40. The record indicates otherwise.

First, the Commonwealth misstates that "Loynes testified her entire file was sent to Perlin." Resp. Br. 37. Nowhere in the record does Loynes mention Perlin or Cybergenetics, nor does she affirmatively state she "sent" anything to anyone. J.A. 806-938

When asked about the statistical analysis, Loynes's stated, "this data . . . was outsourced to a private lab I believe in Pittsburgh, Pennsylvania." J.A. 908. Perlin testified that Cybergenetics received data from DFS, but he never named Loynes as the sender. J.A. 952, 947-1034. How any data ended up with Perlin is unknown, because his testimony never indicated he received the packet directly. There is no indication of who handled the data packet; what happened to it before it arrived at a "private lab in Pittsburgh"; who, if anyone, at Cybergenetics received it; or how it was maintained.

The argument that the data packet is not discrete is undermined by Perlin's testimony. He did not receive the actual DNA or physical evidence. He stated, "Cybergenetics receives the electronic data." J.A. 952. Later, Perlin testified the report Loynes submitted was not necessary to his analysis. *See* J.A. 1025. He needed the data packet. J.A. 1021. This was clearly separate and apart from the Loynes reports.

The trial court could not admit Perlin's opinion on the mixture analysis because the information used was not already in evidence, *Corado v. Commonwealth*, 47 Va. App. 315, 328 (2005), and vital links in the chain of custody were missing.

IV. The Court of Appeals Erred By Finding Partial Verdicts And Hung Jury Declaration Were Proper.

The Commonwealth fails to fully and accurately describe the circumstances prior to taking partial verdicts and declaring a hung jury. It simply concludes the foreperson's ambiguous statement was sufficient for the trial judge's actions. *See* Resp. Br. 44-45. It does not mention, however, that the entire period of deliberations lasted less than five hours, split between two days, for a case that spanned five days, concerned three complainants, and four very serious charges.

The Commonwealth also cannot point to any unequivocal statement by the foreperson that further deliberations would not be useful, and it included only a small portion of the exchange. The full exchange was this:

> COURT: . . . but with respect to the charge that you have not been able to agree on --
> FOREPERSON: Yes.
> COURT: -- has that situation – is there a verdict, is that imminent in that -- in that one charge?
> FOREPERSON: I don't think so. Not at this point.
> COURT: Do you feel further deliberation would be of benefit?
> FOREPERSON: I don't know, Your Honor. Is that fair?
> COURT: Sure.
> FOREPERSON: Yeah, I don't know. 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. Notably, this was the first discussion regarding the status of deliberations. How the foregoing exchange gave the trial court sufficient basis to accept partial verdicts and declare a hung jury is inexplicable.

Additional deliberation could have led to many different outcomes, including those favorable to Gardner. In *Blueford v. Arkansas*, 132 S. Ct. 2044, 2051 (2012), the Court found the jury's verdict was not final until it was announced, and any number of outcomes could result until the verdict was final regardless of purported unanimity.

Here, the trial court was under an obligation to permit a single jury to decide the entire case without calling an end to the proceedings based on an ambiguous statement by the foreperson without knowledge of his co-jurors' feelings. *See Commonwealth v. Washington*, 263 Va. 298, 303 (2002). Likewise, foregoing facts did not show any reason, let alone a "manifest necessity," *United States v. Perez*, 22 U.S. 579, 580 (1824), to support a hung jury finding. The trial court's failure to recognize Gardner's due process rights constituted an abuse of discretion when it accepted partial verdicts and declared a hung jury.

V. The Court of Appeals Erred By Upholding Admission Of Improper Victim Impact Testimony

The Commonwealth argues Gardner's interpretation of "results of the offense" somehow contorts the plain meaning of Code § 19.2-299.1. It claims *Howell v. Commonwealth*, 274 Va. 737 (2007), is inapposite because it would add a "conspicuously absent" causation requirement. Resp. Br. 42.

The Commonwealth fails to explain how the plain language of "results of the offense" does not implicate causation. The plain meaning of "result" is "to proceed or arise as a consequence, effect, or conclusion." *Result Definition*, *Merriam-Webster.com*, http://www.merriam-webster.com/dictionary/result (last visited Apr. 3, 2014). To achieve a

result, then, there must be a cause. In Virginia superseding and intervening causes break the causal chain, relieving individuals of obligations or liability. *See e.g.*, *Howell*, 274 Va. at 741; *Jenkins v. Payne*, 251 Va. 122, 129 (1996) (in negligence case superseding cause, if proven, vitiates defendant's liability). Therefore, the victim impact testimony did not concern acts that were a result of Gardner's offense and should not have been admitted.

CONCLUSION

For all of the foregoing reasons, this case should be reversed and remanded for a new trial, and any additional relief this Court deems appropriate.

Respectfully Submitted,
Michael Armin Gardner,
By Counsel

GREENSPUN SHAPIRO PC

By: __*Peter D. Greenspun*_____

Peter D. Greenspun
State Bar I.D. #18052
Jonathan Shapiro
State Bar I.D. #13953
Mikhail N. Lopez
State Bar I.D. #83255
Counsel for the Appellant
GREENSPUN SHAPIRO PC
3955 Chain Bridge Road
2nd Floor
Fairfax, Virginia 22030
Phone: (703) 352-0100
Fax: (703) 591-7268

CERTIFICATE OF SERVICE

1. Appellant:

   Michael Armin Gardner
   c/o Augusta Correctional Center
   1821 Estaline Valley Road
   Craigsville, Virginia 24430

2. Counsel for Appellant:

   Peter D. Greenspun, Esq.
   Virginia State Bar No. 18052
   Jonathan Shapiro, Esq.
   Virginia State Bar No. 13953
   Mikhail N. Lopez, Esq.
   Virginia State Bar No. 83255
   GREENSPUN SHAPIRO PC
   3955 Chain Bridge Road, Second Floor
   Fairfax, Virginia 22030-5116
   (703) 352-0100
   (703) 591-7268 (fax)
   pdg@greenspunlaw.com
   js@greenspunlaw.com
   mnl@greenspunlaw.com

3. Counsel for Appellee:

   Benjamin Katz
   Office of the Attorney General
   900 East Main Street
   Richmond, Virginia 23219
   (804) 371-0148
   bkatz@oag.state.va.us

4. Appellant's counsel is retained.

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

a. An electronic version of the Appellant's Reply Brief was submitted to this Court via email.

b. The original and 15 copies of the Appellant's Brief were filed via hand delivery with Patricia L. Harrington, Clerk of the Supreme Court of Virginia, P.O. Box 1315, 100 North Ninth Street, Richmond, Virginia 23219-1315;

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 **15 pages**, which complies with the 15-page limit, and is properly styled and formatted as required by Rule 5:6(a).

Peter D. Greenspun

EXHIBIT

IN THE COURT OF APPEALS OF VIRGINIA

RECORD NO. 1831-12-4

MICHAEL ARMIN GARDNER

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR APPEAL

James E. Plowman
Commonwealth's Attorney
Loudoun County
20 East Market Street
Leesburg, Virginia 20176
(703) 777-0242

Nicole Wittmann
Chief Deputy Commonwealth's Attorney
Loudoun County
20 East Market Street
Leesburg, Virginia 20176
(703) 777-0242

EX1

IN THE

COURT OF APPEALS OF VIRGINIA

Record No. 1831-12-4

MICHAEL ARMIN GARDNER,

Petitioner,

v.

THE COMMONWEALTH OF VIRGINIA

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR APPEAL

TO: THE HONORABLE JUDGES OF THE COURT OF APPEALS OF VIRGINIA

The Respondent or Appellee will be referred to hereinafter as the "Commonwealth" and the Petitioner or Appellant will be referred to hereinafter as "Defendant."

STATEMENT OF THE CASE

On June 22, 2011, Michael Gardner was arrested and charged with one count of aggravated sexual battery as to both C.R. and C.K., and one count of object sexual penetration as to M.G. from allegations of conduct on June 16 and 18, 2011. The cases proceeded to preliminary hearing on July 12, 2011 in the City of Falls Church Juvenile and Domestic Relations General District Court. Probable cause was found, and the matters were certified to the Grand Jury, which returned true bills of indictment on July 18, 2011. On August 18, 2011, the Commonwealth's Motion for Joinder was granted. *See* Tr. 8/18/11 at 40-41. On October 17, 2011, an additional charge of aggravated sexual battery as to M.G. was brought by direct indictment and consolidated with the prior indictments for trial. On April 11, 2012, counsel filed a motion to reconsider the joinder, which was denied. On May 1, 2012, and on May 2, 2012 the defendant was found guilty of aggravated sexual battery and object penetration of M.G. as well as aggravated sexual battery of C.R. On May 2, 2012, the court declared a mistrial on the count concerning C.K.. The jury recommended sentences of 12 and 6 years for the offenses against M.G. and 4 years for the offense against C.R. On September 7, 2012, the court denied Mr. Gardner's Motion for Judgment of Acquittal or in the Alternative for a New Trial and then imposed the jury sentences consecutively, totaling 22 years, a $15,000 fine, and a three-year period of post-release supervision.

STATEMENT OF FACTS

Mr. Gardner is the parent to 10-year-old twins, Emma and David Gardner. Tr. 4/30/12 at 64. On June 16, 2011, C.K., then nine years old, spent the night at the defendant's home with Emma. Tr. 4/26/12 at 104. C.K. testified that Mr. Gardner twice entered Emma's room to comfort Emma during a thunderstorm. Tr. 4/26/12 at 150, 155. She said that the defendant touched her on her vagina, buttocks and breasts. Tr. 4/26/12 at 119-122. The next night, June 17

in to June 18, 2011, Emma had her 10th birthday party. It was a slumber party where a number of girls spent the night including, C.K., M.G. and C. R. Tr. 4/ 25/12 at 14 and 18.

M.G. testified she was touched by the defendant during the slumber party. Tr. 4/24/12 at 109. M.G. said he touched her "girl parts." Tr. 4/24/12 at 110-11. She said that after this assault, the defendant left her and went over to C.R. Tr. 4/24/12 at 111. When the defendant returned, M.G. stated that he again put his hand on her girl parts, but this time he inserted his finger into her vagina. Tr. 4/24/12 at 112. C.R. testified that the defendant also touched her while she was at the sleepover birthday party. C.R., testified that the defendant came directly to her sleeping area on five separate occasions, four of which resulted in touching. Tr. 4/25/12 at 35-45. Each time, except the first, she was touched on her vagina over her clothes. Tr. 4/25/12 at 38-44. She also said that she knew he was going over to where M.G. was sleeping as well. Tr. 4/25/12 at 52.

C.R.'s father picked her up the next morning whereupon C.R. immediately told her father that the defendant had touched her. Tr. 4/25/12 at 59. She and her father went to the Falls Church Police Department where she told Det. Sonya Richardson what the defendant had done to her. Tr. 4/25/12 at 60-61. C.R. provided Det. Richardson with the pajamas that she was wearing the night of the crime, directing her to the area on the pajama bottoms where the defendant had touched her. Tr. 4/25/12 at 64.

M.G. also told her mother what the defendant had done to her as she was being driven home. Tr.4/24/12 at 126. She was then taken to the Falls Church Police Department where she told Det. Richardson what the defendant had done. Tr. 4/24/12 at 126. M.G. also provided her clothing, including her underwear to the Falls Church Police. Tr. 4/24/12 292. M.G. was taken to hospital for a S.A.N.E. exam where it was discovered that she had sustained a fresh injury to

her vagina that had not been present before she was assaulted by the defendant. Tr. 4/24/12 at 251.

The items of clothing collected from C.R. and M.G. along with buccal samples from the defendant and the victims, were taken to the Northern Lab of Virginia Department of Forensic Science were they were submitted for DNA testing. Tr. 4/24/12 at 171, 200. The defendant's DNA was found on the exterior pelvic area of the pajama bottoms belonging to C.R., on the interior crotch area of the M.G.'s pajama bottoms and on the interior crotch area of the underwear of M.G. Tr. 4/25/12 at 262, 273,277. Dr. Perlin testified that the match between the defendant and the DNA found in C.R.'s pajama bottoms was 3.000 more probable than a coincidental match to an unrelated Caucasian person. Tr. 4/26/12 at 72. Dr. Perlin also testified that a match between the defendant and the DNA found in M.G.'s underwear was 20 quadrillion times more probable than a coincidental match to an unrelated Caucasian person. Tr. 4/26/12 at 62.

QUESTIONS PRESENTED

I. The trial court erred by joining the complainants' cases contrary to the requirements of Rule 3A:10(c) because there was no common plan or scheme. Preserved at Tr. 8/18/11 at 23-37: Motion to Reconsider Joinder 4/11/12; Tr. 4/23/12 at 29-35: Tr. 4/26/12 at 221; Motion for Judgment of Acquittal or in the Alternative for a New Trial: Tr. 9/7/12 at 21-24.

II. The Trial Court Erred in Overruling The Request by Mr. Gardner to Have a Jury View of The Gardner Residence, The Location of The Allegations. Preserved at Motion for Jury View: Tr. 4/26/12 at 275.

III. The trial court erred when it excluded Mr. Gardner's evidence of character traits regarding his tendency to not be aggressive or assaultive toward children, as this was at issue in the offenses charged. Preserved at Tr. 4/30/12 at 175-81.

IV. The trial court erred by admitting Dr. Perlin's testimony despite his reliance on evidence beyond that admitted at trial and by not requiring the Commonwealth to establish chain of custody for the materials Perlin used to formulate his opinion. Preserved at Tr. 4/26/12 at 13, 24-25, 42, 91.

V. The trial court erred by intruding on the jury's deliberations, requiring a partial verdict to be returned, and declaring a mistrial, thereby depriving Mr. Gardner of his right to have one jury completely consider and decide his case. Preserved at Tr. 5/2/12 at 5, 40.

VI. The trial court erred by permitting Angela Garcia and Daniel Rice to testify about the impact third parties' actions had on the complainants. Preserved at Tr. 5/2/12 at 40-41, 46

STANDARD OF REVIEW

In determining the issues in this case: joinder, declaring a hung jury, the admission of expert testimony, the admission of character evidence and sufficiency of the DNA chain of custody, and the admission of victim impact testimony this Court should apply an abuse of discretion standard. *Scott v. Commonwealth*, 274 Va. 636, 644 (2007); *Prieto v. Commonwealth* 278 Va. 366, 386 (2009); *Commonwealth v. Miller,* 273 Va. 540, 540 (2007).

ARGUMENT

I. The Trial Court Properly Joined All of the Cases

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. The term "common 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. In contrast, the term "common plan" describes crimes that are related to one another for the purpose of accomplishing a particular goal. *Scott v. Commonwealth*, 274 Va. 636, 651 S.E.2d 630 (2007). In this case, the crimes perpetrated against C.R., C.K., and M.G., constituted a common scheme and were admissible to prove the identity of the perpetrator. In each case, the victim was a 9 or 10 year old girl, spending the night with the defendant's daughter, at his home. Each girl was sleeping in either a sleeping bag or on the floor within feet of his daughter. He waited until it was dark and he

thought that the girls were asleep and then touched them on their vagina using his hand. Tr. 8/18/11 at 5-13. Evidence of strikingly similar offenses is admissible to prove identity of a defendant when there exist common characteristics of offenses. *Spencer*, 240 Va. at 81, 87-91 (1990). The trial court properly joined the charge as to C.K. with those of M.G. and C.R. The offense against C.K. happened within 24 hours of the crimes against M.G. and C.R. and in the same house. Tr. 8/18/11 at 16. It occurred using the same M.O. with the defendant entering a room in which a child of approximately the same age was spending the night with his daughter. Tr. 8/18/11 at 5-6. The defendant then engaged in the same type of behavior with C.K., as he did with the other two victims by touching her on her vagina. Tr. 8/18/11 at 6.

Justice does not mandate separate trials as the evidence of the crime against C.K. would have been admissible in the trial of the crimes committed against C.R. and M.G. Evidence of other offenses is admitted if it shows the conduct of the accused toward his victim, if it establishes their prior relations, or it is 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 involved, or where the evidence connected with or leads up to the offense for which the accused is on trial. Kirkpatrick v. Commonwealth, 211 Va. 269,176 S.E.2d 802 (1970). The reason for the admission of that evidence was to help establish the identity of the perpetrator as well as to negate mistake and to provide evidence of the defendant's intent in touching the children and therefore, the court properly joined the cases for trial.

II. <u>The Trial Court Properly Denied the Defendant's Request For a Jury View</u>

Code § 19.2-264.1 allows either party to request a jury view of any property relating to the case. The judge may permit a jury view if it is "necessary to a just decision." The question of the propriety of ordering a view...lies largely in the discretion of the trial court which should

only grant it when it is reasonably certain that it will be of substantial aid to the jury in reaching a correct verdict and whose decision will not be reversed unless the record shows that a view was necessary to a just decision. *Prieto v. Commonwealth*, 283 Va. 149, 721 S.E.2d 484 (2012). Defense counsel presented to the jury pictures of the rooms as they had been setup on the nights of the incidents which the Defendant argued were accurate. Therefore, there was no need for a jury view.

III. <u>The DNA Evidence was Properly Admitted</u>

The DNA evaluation was performed by DFS lab technician Kelly Loynes. The lab contracted out the numerical calculations of the Loynes reports to Dr. Perlin at Cyber Genetics. Dr. Perlin testified regarding his statistical analysis of the DNA evidence. Defense counsel objected on two grounds: 1) Dr. Perlin testified based on facts not in evidence, Tr. 4/26/12 at 13; and, 2) the Commonwealth did not establish the chain of custody for the data received by Dr. Perlin. Tr. 4/25/12 at 232-365; Tr. 4/26/12 at 46-90. After argument from both sides, the trial court concluded, "I think it is in evidence, and I think if there's an objection to that under the [sic] 19.2-271 it has to be done within at least 10 days, so it's a two-prong problem." Dr. Perlin's full testimony about his statistical analysis of the DNA was presented to the jury as a result. Tr. 4/26/12 at 46-90. §19.2-271 provides in pertinent part that, "If the opposing party intends to object to the admissibility of such evidence, he shall give written notice of that fact and the basis for his objections at least ten days prior to commencement of the proceedings." The Defendant failed to give notice of his intent to object and therefore waived that objection.

In a criminal case, an expert may give an opinion based on his own knowledge of facts disclosed in his testimony or . . . upon facts in evidence assumed in a hypothetical question. *Burnette v. Commonwealth*, 60 Va. App. 462, 729 S.E.2d 740 (2012). Kelly Loynes testified that she generated a report containing the DNA profiles and her findings dated September 22,

2011, which report was admitted into evidence without objection as Commonwealth exhibit #33. Tr. 4/25/12 at 258. Loynes further testified that, "This data for the statistical analysis was outsourced to a private lab I believe in Pittsburgh, Pennsylvania and that analysis was conducted there at that time." Tr. 4/25/12 at 335. In addition, Dr. Perlin testified that he received a report dated September 7, 2011 from the Northern Laboratory of the Department of Forensic Science. Tr. 4/26/12 at 11. He then went on to say that the information in that report contained the same information as the report dated September 22, 2011. Tr. 4/26/12 at 13. All of the evidence upon which Perlin based his opinion, was in evidence and the court properly admitted his testimony.

IV. The Court Did not Err in Excluding Character Evidence

The court properly excluded the testimony of both Laurie Ombrembt and Katherine Allan as the defendant failed to lay the proper foundation for the information to be admitted. Defense council asked Ms. Ombrembt only the following: "Do you know, 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?" Tr. 4/30/12 at 175. Defense counsel then proffered that he would ask the same questions from Katherine Allan as he had of Ms. Ombrembt. Tr. 4/30/12 at 187. The defendant failed to establish that either witness knew of the defendant's reputation or lack of reputation for being harmful or neglectful to children prior to or at the time of the offenses in so far as defense counsel failed to inquire whether or not those issues had ever been discussed with the community. In finding that the trial court erred in excluding evidence of a defendant's character, the Court in *Byrdsong v. Commonwealth*, 2 Va. App. 400 (1986), held that and one of the foundational requirements for admission of that type of evidence included, the fact that each witness participated in and overheard discussions in which fellow teachers formed a consensus regarding appellant's reputation as a truthful individual. As

defense counsel failed to lay the proper foundation, the Court did not err in disallowing the defendant from introducing that specific character evidence through those witnesses.

V. The Court Properly Allowed Victim Impact Testimony

In 1995, in recognition of the concern for the victims and witnesses of crime, the General Assembly enacted the Crime Victim and Witness Rights Act, Code §§ 19.2-11.01-11.4. The purpose of the statute is to ensure that the full impact of crime is brought to the attention of the courts of the Commonwealth: that crime victims and witnesses are treated with dignity, respect and sensitivity: and that their privacy is protected to the extent permissible under law. Code § 19.2-11.01(A). The trial court's ruling regarding the admissibility of evidence will not be disturbed on appeal absent a clear abuse of discretion. *Commonwealth v. Shifflett*, 257 Va. 34 (1999). Angela Garcia and Daniel Rice testified about the impact of the media misinformation. Tr. 5/2/12 at 40-41. This is clearly proper testimony as their testimony focused on the issues that the statute allows, namely, the impact that the crime had on them as victims. Therefore, the Court did not err in admitting this evidence.

VI. The Trial Court Properly Declared a Mistrial

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 v. Commonwealth*, 278 Va. 366, 682 S.E.2d 910 (2009). The jury in the case at hand had deliberated for approximately five hours, split over two days, before the verdicts on three of the four charges were received and the mistrial declared. The note from the foreperson of the jury read as follows: "We have reached a unanimous verdict on three of the four counts. We cannot reach a unanimous verdict on the forth count. What do we do? " Tr. 5/2/12 at 4. This clear and unequivocal statement by the jury, that they "*cannot reach a verdict on the fourth*

count" makes it clear that further deliberation would not end in an unanimous verdict. Additionally the Court's discussion with the foreperson:

"Q: I have a simple question. I do not want to know numbers, where any of your fellow jurors are standing, but with respect to the charge that you have not been able to agree on...

A: Yes

Q: Has that situation...is there a verdict, is that imminent in that ... in that one charge?

A: I don't think so. Not at this point.

Q: Do you feel further deliberation would be of benefit?

A: I don't know. Your Honor. Is that fair?

Q: Sure

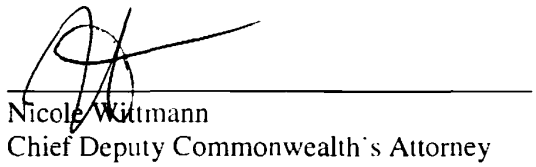
A: Yeah, I don't know, I don't know. I mean, I think...I think we've deliberated. I think we've raised a lot of issues, and I think, you know we're not...there's still a differentiation in view"

makes it abundantly clear that the jury was hung and would not be able to reach a verdict. 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. *Smith v. Commonwealth*, 239 Va. 243 (1990). The jury in this case deliberated for approximately five hours over the course of two days, sent a note to the court stating in no uncertain terms that they were unable to reach a verdict on one of the counts and then added, through the foreperson, that further deliberation would not be beneficial by stating that they had deliberated, raised a lot of issues and that there was still a differentiation in view. That the jury was unable to reach a verdict — has long been considered the "classic basis" establishing necessity for doing so. *Arizona v. Washington*, 434 U.S. 497 (1978). The Supreme Court of the United States has 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 v. Arkansas*, 132 S. Ct. 2044 (2012). The Court acted well within its discretion allowed by law to declare the mistrial.

CONCLUSION

For the above stated reasons, the Appellant's Petition for Appeal should be denied.



Nicole Wittmann
Chief Deputy Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that the rules of the court have been complied with, that this Brief in Opposition complies with the word count limitation as defined in Rule 5A:13(b)(1) in that this brief contains 3,494 words, and four true copies of the foregoing Brief in Opposition to Petition for Appeal was mailed this 18 day of January, 2013 to the Clerk, Court of Appeals of Virginia, Richmond, Virginia and a copy of this Brief in Opposition to Petition for appeal was mailed to Peter J. Greenspun, Counsel for the Defendant, at 3955 Chain Bridge Road, 2nd Floor, Fairfax, Virginia 22030

Nicole Wittmann

SUPREME COURT OF VIRGINIA

RECORD NO.

MICHAEL ARMIN GARDNER

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR APPEAL

James E. Plowman
Commonwealth's Attorney
Loudoun County
20 East Market Street
Leesburg, Virginia 20176
(703) 777-0242

Alejandra R. Amato
Senior Assistant Commonwealth's Attorney
Alex.amato@loudoun.gov

SUPREME COURT OF VIRGINI9A

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BRIEF IN OPPOSITION TO PETITION FOR APPEAL

TO THE HONORABLE JUDGES OF THE VIRGINIA SUPREME COURT:

The Respondent or Appellee will be referred to hereinafter as the "Commonwealth" and the Petitioner or Appellant will be referred to hereinafter as "Defendant."

STATEMENT OF THE CASE

On June 22, 2011, Michael Gardner was arrested and charged with one count of aggravated sexual battery as to both C.R. and C.K., and one count of object sexual penetration as to M.G. from allegations of conduct on June 16 and 18, 2011. The cases proceeded to preliminary hearing on July 12, 2011 in the City of Falls Church Juvenile and Domestic Relations

General District Court. Probable cause was found, and the matters were certified to the Grand Jury, which returned true bills of indictment on July 18, 2011. On August 18, 2011, the Commonwealth's Motion for Joinder was granted. *See* Tr. 8/18/11 at 40-41. On October 17, 2011, an additional charge of aggravated sexual battery as to M.G. was brought by direct indictment and consolidated with the prior indictments for trial. On April 11, 2012, counsel filed a motion to reconsider the joinder, which was denied. On May 1, 2012, and on May 2, 2012 the defendant was found guilty of aggravated sexual battery and object penetration of M.G, as well as aggravated sexual battery of C.R. On May 2, 2012, the court declared a mistrial on the count concerning C.K. The jury recommended sentences of 12 and 6 years for the offenses against M.G. and 4 years for the offense against C.R. On September 7, 2012, the court denied Mr. Gardner's Motion for Judgment of Acquittal or in the Alternative for a New Trial and then imposed the jury sentences consecutively, totaling 22 years, a $15,000 fine, and a three-year period of post-release supervision.

STATEMENT OF FACTS

Mr. Gardner is the parent to10-year-old twins, Emma and David Gardner. Tr. 4/30/12 at 64. On June 16, 2011, C.K., ten nine years old, spent the night at the defendant's home with, Emma. Tr. 4/26/12 at 104.

C.K. testified that Mr. Gardner twice entered Emma's room to comfort Emma during a thunderstorm. Tr. 4/26/12 at 150, 155. She said that the defendant touched her on her vagina, buttocks and breasts. Tr. 4/26/12 at 119-122. The next night, June 17 in to June 18, 2011, Emma had her 10th birthday party. It was a slumber party where a number of girls spent the night including, C.K., M.G. and C. R. Tr. 4/ 25/12 at 14 and 18.

M.G. testified she was touched by the defendant during the slumber party. Tr. 4/24/12 at 109. M.G. said he touched her "girl parts." Tr. 4/24/12 at 110-11. She said that after this assault, the defendant left her and went over to C.R. Tr. 4/24/12 at 111. When the defendant returned, M.G. stated that he again put his hand on her girl parts, but this time he inserted his finger into her vagina. Tr. 4/24/12 at 112. C.R. testified that the defendant also touched her while she was at the sleepover birthday party. C.R., testified that the defendant came directly to her sleeping area on five separate occasions, four of which resulted in touching. Tr. 4/25/12 at 35-45. Each time, except the first, she was touched on her vagina over her clothes. Tr. 4/25/12 at 38-44. She also said that she knew he was going over to where M.G. was sleeping as well. Tr. 4/25/12 at 52.

C.R.'s father picked her up the next morning whereupon C.R. immediately told her father that the defendant had touched her. Tr. 4/25/12

at 59. She and her father went to the Falls Church Police Department where she told Det. Sonya Richardson what the defendant had done to her. Tr. 4/25/12 at 60-61. C.R. provided Det. Richardson with the pajamas that she was wearing the night of the crime, directing her to the area on the pajama bottoms where the defendant had touched her. Tr. 4/25/12 at 64.

M.G. also told her mother what the defendant had done to her as she was being driven home. Tr.4/24/12 at 126. She was then taken to the Falls Church Police Department where she told Det. Richardson what the defendant had done. Tr. 4/24/12 at 126. M.G. also provided her clothing, including her underwear to the Falls Church Police. Tr. 4/24/12 292. M.G. was taken to hospital for a S.A.N.E. exam where it was discovered that she had sustained a fresh injury to her vagina that had not been present before she was assaulted by the defendant. Tr. 4/24/12 at 251.

The items of clothing collected from C.R. and M.G. along with buccal samples from the defendant and the victims, were taken to the Northern Lab of Virginia Department of Forensic Science were they were submitted for DNA testing. Tr. 4/24/12 at 171, 200. The defendant's DNA was found on the exterior pelvic area of the pajama bottoms belonging to C.R., on the interior crotch area of the M.G.'s pajama bottoms and on the interior crotch area of the underwear of M.G. Tr. 4/25/12 at 262, 273,277. Dr.

Perlin testified that the match between the defendant and the DNA found in C.R.'s pajama bottoms was 3,000 more probable than a coincidental match to an unrelated Caucasian person. Tr. 4/26/12 at 72. Dr. Perlin also testified that a match between the defendant and the DNA found in M.G.'s underwear was 20 quadrillion times more probable than a coincidental match to an unrelated Caucasian person. Tr. 4/26/12 at 62.

ASSIGNMENTS OF ERROR

I. The Court of Appeals erred by finding joinder was appropriate. Preserved at Tr. 8/18/11 at 23-37; Motion to Reconsider Joinder 4/11/12; Tr. 4/23/12 at 29-35; Tr. 4/26/12 at 221; Motion for Judgment of Acquittal or in the Alternative for a New Trial; Tr. 9/7/12 at 21-24. Request for three judge panel, April 2, 2013.

II. The Court of Appeals erred by upholding the admission of Dr. Perlin's testimony. Tr. 4/26/12 at 13, 24-15, 42, 91. Request for three judge panel, April 2, 2013.

III. The Court of Appeals erred when it excluded Mr. Gardner's evidence of character traits, preserved at Tr. 4/30/12 at 175-81. Request for three judge panel, April 2, 2013.

IV. The Court of Appeals erred by upholding the admission of Angela Garcia and Daniel Rice's victim impact testimony. Preserved at Tr. 5/2/12 at 40-41, 46. Request for three judge panel, April 2, 2013.

V. The trial court erred by intruding on the jury's deliberations, requiring a partial verdict to be returned, and declaring a mistrial, thereby depriving Mr. Gardner of his right to have one jury completely consider and decide his case. Preserved at Tr. 5/2/12 at 5, 40. Request for three judge panel, April 2, 2013.

STANDARD OF REVIEW

In determining the issues in this case: joinder, declaring a hung jury, the admission of expert testimony, the admission of character evidence and sufficiency of the DNA chain of custody, and the admission of victim impact testimony this Court should apply an abuse of discretion standard. *Scott v. Commonwealth*, 274 Va. 636, 644 (2007); *Prieto v. Commonwealth* 278 Va. 366, 386 (2009); *Commonwealth v. Miller,* 273 Va. 540, 540 (2007).

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Q: Has that situation...is there a verdict, is that imminent in that ... in that one charge?

A: I don't think so. Not at this point.

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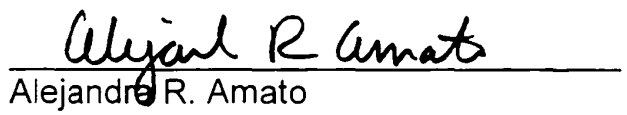
A: Yeah, I don't know, I don't know. I mean, I think...I think we've deliberated. I think we've raised a lot of issues, and I think, you know we're not...there's still a differentiation in view"

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. *Smith v. Commonwealth*, 239 Va. 243 (1990) . The jury in this case deliberated for approximately five hours over the course of two days, sent a note to the court stating in no uncertain terms that they were unable to reach a verdict on one of the counts and then added, through the foreperson, that further deliberation would not be beneficial by stating that they had deliberated, raised a lot of issues and that there was still a differentiation in view. That the jury was unable to reach a verdict — has long been considered the "classic basis" establishing necessity for doing so. *Arizona v. Washington*, 434 U.S. 497 (1978). The Supreme Court of the United States has 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 v. Arkansas*, 132 S. Ct. 2044 (2012). The Court acted well within its discretion allowed by law to declare the mistrial.

CONCLUSION

For the above stated reasons, the Appellant's Petition for Appeal should be denied.



Alejandro R. Amato
Senior Assistant Commonwealth's Atty.

CERTIFICATE OF SERVICE

I hereby certify that the rules of the court have been complied with, that this Brief in Opposition complies with the word count limitation as defined in Rule 5:17(f) in that this brief contains 3,241 words, and an original and seven true copies of the foregoing Brief in Opposition to Petition for Appeal were mailed this 30th day of July, 2013 to Patricia L. Harrington, Clerk of the Supreme Court of Virginia, PO Box 1315, 100 North Ninth Street, Richmond, Virginia, 23219-1315 and a copy of this Brief in Opposition to Petition for appeal was mailed to Peter J. Greenspun, Counsel for the Defendant, at 3955 Chain Bridge Road, 2nd Floor, Fairfax, Virginia 22030.

Alejandra R Amato

Alejandra R. Amato