In The

# Supreme Court of Virginia

**RECORD NO. 131574**

## ROBERT KING VIA, JR.,

*Appellant,*

**v.**

## COMMONWEALTH OF VIRGINIA,

*Appellee.*

## BRIEF OF APPELLANT

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## STATEMENT OF THE CASE

On March 26, 27, and 28, 2012, Robert King Via was tried in a jury trial presided over by the Honorable Christopher W. Hutton, Judge of the Hampton Circuit Court, on fourteen felony counts, including one count of robbery in violation of Va. Code § 18.2-58, one count of conspiracy to commit robbery in violation of Va. Code § 18.2-58 and Va. Code § 18.2-22, seven counts of use of a firearm in the commission of a felony in violation of Va. Code § 18.2-53.1, four counts of abduction in violation of Va. Code § 18.2-48, and one count of breaking and entering while armed with a deadly weapon in violation of Va. Code § 18.2-91. Appendix [hereinafter abbreviated "Ap."] 1-15.

At the conclusion of the guilt/innocence phase of the trial, Judge Hutton refused Instruction A proffered by Via, which pertained to the danger of convicting upon the uncorroborated testimony of Carl Gentline. Ap. 66, 68-72. The jury went on to find Via guilty of all but one of the thirteen felony counts, finding Via not guilty of the use of firearm count pertaining to Frank Auche, III. Ap. 92-94.

In the sentencing phase, the jury fixed Via's sentence at the minimum possible on each of the twelve felonies, namely, twenty

years on each of the four abductions, twenty years on the charge of breaking and entering while armed with a deadly weapon, five years on the robbery, three years on the first use of a firearm conviction (Case No. CR11-000798-01), five years on each of the other four counts of use of firearm in the commission of a felony, and one day in jail on the conspiracy count. T.T. 25-27 (3/28/12). In other words, the jury fixed Via's sentence at 128 years and 1 day. Ap. 92-94.

At the sentencing hearing on September 20, 2012, Judge Hutton proceeded to impose the sentence fixed by the jury, without suspending any portion of the sentence. Ap. 113-115. At the conclusion of the sentencing hearing, Judge Hutton appointed Charles E. Haden to act as Via's counsel on appeal, replacing trial counsel Terry N. Grinnalds. Ap. 115.

On September 27, 2012, Via filed a notice of appeal to the Court of Appeals of Virginia. Ap. 116-117. On September 30, 2013, the Court of Appeals affirmed the judgment of the trial court. Ap. 118-128.

On October 8, 2013, Via filed a notice of appeal to the Supreme Court of Virginia. Ap. 129-130.

## STATEMENT OF FACTS

Around 1 a.m. on September 11, 2010, Robert King Via allegedly participated with two others in a home invasion robbery at 822 Arlington Terrace in Hampton, where the robbers detained five individuals inside against their will, and robbed Frank Auche, III, at gunpoint of his PlayStation and his wallet, which contained $280 in cash. T.T. 178-187, 195-202, 208-215, 225-231.

Hampton Police Detective Richard Gainer testified that a blood specimen recovered near the crime was subjected to DNA analysis, which yielded a "cold hit" match to the DNA profile of an individual named Reginald Jones. T.T. 253-254. Detective Gainer testified that he arrested Jones on March 8, 2011, and proceeded to question him about the robbery on September 11, 2010. T.T. 255. According to Detective Gainer, Jones implicated others as participants in the robbery, including Robert King Via, Jr., Samual Sanchez, and someone known to Jones only by the name of Carl. T.T. 255-256. Detective Gainer testified that he then arrested Via and questioned him on March 17, 2011, after first advising Via of his Miranda rights. T.T. 256, 262. According to Detective Gainer, Via "denied being involved in the crime…. I asked him if he knew Samual Sanchez,

Reginald Jones, and a person by the name of Carl…. [H]e told me that, yes, he did know those people and that he was best friends with Reginald Jones." T.T. 257.

Prosecution witness Carl Gentline, a nineteen-year-old student at Radford University, testified that he acted as the getaway driver in the robbery on September 11, 2010, even though he had not been charged with any offense. Ap. 37, 17. Gentline recalled, "[Samual Sanchez and I were] playing Xbox in his room the whole day until Reggie [Jones] and Robert [Via] came in the trailer and they started speaking to us." Ap. 18. "They were in the living room, and me and Sammy went into the living room to hear what they were talking about, and Reggie and Rob were discussing going on an armed robbery." Ap. 19. "I thought they were just joking around. I didn't think anything was serious … because I didn't think anyone would want to do something like that." Ap. 19-20. "Reggie asked me if I would go along with it, and I told him no, just because I thought they were joking around…. After I answered him, him and Rob … left the trailer and went somewhere." Ap. 20. "When they came back [approximately 30 to 45 minutes later,] they had a long white bag with black gloves, camouflage beanies, miscellaneous items … you know,

just for a robbery." Ap. 20. "I'm there with Rob and Reggie when they took the items out of the Wal-Mart bag." Ap. 21. "[Rob] told Sammy to get dressed, and they proceeded to put on their dark clothing." Ap. 21. "At this time … I was just dazed and confused. I said, 'What's going on right now?'" Ap. 20-21. "[A]fter they got dressed, Reggie told me to get in the car. And, I mean, I was scared. I mean, he intimidated me." Ap. 22. "I did [know they were going to commit a robbery, but I got in the car with them] because I was fearful of Reggie. I mean, Reggie had killed someone in the past, and I wouldn't want him to kill me too." Ap. 22. "I am [driving] 'cause they're telling me to take them somewhere." Ap. 23. "They tell me to go to Hampton." Ap. 24. "They just told me to let them out in the front yard of [the residence at 822 Arlington Terrace]." Ap. 24-25. "Reggie and Rob were talking, and they said that they knew one of the drug dealers who was staying at that house." Ap. 33. "I saw all three of them enter the house." Ap. 26. "I was just sitting there waiting. I was freaking out. I didn't know what to do…. [P]robably 30 or 40 minutes after they had entered the house, I see two cops pull behind me in my rearview mirror. Since I was facing … towards the stop sign, they pulled in right behind me [at] the daycare center, [and]

they proceeded towards the house." Ap. 26. "[I didn't just leave because] Sammy was my close friend. The other two, you know, I didn't really know, but I couldn't leave one of my best friends behind." Ap. 27. "After the cops went [up to the house], I guess [Sammy and the others] jumped the fence … and Reggie was calling me [on the phone]…. [T]hey were hiding in the neighborhood behind the house. Once Reggie's phone died, I didn't know what to do. I called my friend and started freaking out. I was like, 'I don't know…. What do I do? Who do I call?'" Ap. 28. "My friends were just telling me …, 'Just stop freaking out…. Just wait for them to call you, and see what happens.'" Ap. 28-29. "I [eventually] received a call from Rob…." Ap. 29. "He told me a specific house number [to meet them at] and that they were in the backyard waiting…. I found that house number [and] I pulled into the driveway…. [T]hey jumped the fence [and] got immediately into the car." Ap. 29-30. "I drove them back to Sammy's apartment…. [W]hile we were in the car, they were just discussing … what they did the whole time." Ap. 30. "They were just laughing and giggling … and Reggie was like, 'Oh, that guy was … talking crap to me, and … I struck my gun in his face, you know, like to shut him up.'" Ap. 30. "[W]e ended up going back … to Sammy's trailer. I

dropped them off and … I left. The next morning … I went to see Sammy at the trailer…. Reggie and Rob went back to the crime scene to try to [retrieve] any evidence that they could or the guns that they had dropped." Ap. 31. On cross-examination, Gentline acknowledged that the police never filed charges against him, despite his admission that he acted as a getaway driver. Ap. 37. Gentline acknowledged that he never contacted the police after the robbery on September 11, 2010, and only spoke to the police in March 2011 after a co-defendant told police that Gentline was involved. Ap. 39-40.

Prosecution witness Samual Sanchez testified, "Reggie and Rob were talking about how they were broke and they needed some money. So they were like, 'There's only one way we can get money right now: … to go rob somebody.'" Ap. 48. "Rob was just like, 'I might know somebody we can go into their house and get some money and some marijuana.' And that's how that came about." Ap. 49. "I borrowed a friend's car that night and Carl had his license, so we drove to Wal-Mart to get some ski masks, and Carl went into Wal-Mart, and … he bought the ski masks." Ap. 49. "I had one [firearm], Reggie had one, and Rob had one." Ap. 51. "Carl parked down the

street, and we stood outside for like ten minutes, just like hesitating…. I remember Reggie was kind of like forcing Rob and [me] to go in there. We didn't really want to go in there for real, and we just didn't feel right. I was nervous, 'cause I've never done anything like this before, and Rob just didn't feel right about the situation, but Reggie was like, 'Come on, let's go, let's go.' So we're standing in the driveway. Reggie knocks on the door, and they open it and let him in, and as soon as they let him in, Rob follows in and I follow in, and they already had their wallets out, and I think Reggie told Rob [to] go in the back and go search people. I guess Reggie was pretty much … the leader…. [H]e was telling Rob to go in the back and look for people. I followed Rob, 'cause I ain't really know what I was doing. I followed Rob to the back. We found a couple of people, and we brought them to the living room…. Reggie noticed somebody outside, and he went outside and got him inside, and they got into a huge argument. I remember them just arguing…. [Reggie] was like threatening him or something, and the guy was threatening him back…. Then Reggie … told the dude to unplug the PS3…." Ap. 52-53. "He told me to grab it. And then, as soon as I grabbed it, Rob comes out the back, saying, 'The cops are here.' So I drop the

PlayStation 3, and we all run out the back." Ap. 54. "We jumped the fence." Ap. 54. "Reggie told me to just get rid of it all, take off the masks, the gloves, [the guns, etc.] and just throw it. So I listened to him. I just threw [the items on the ground]." Ap. 54. "[We met up with Carl] down like another street. We had to call him [on Rob's phone], because my phone was dead." Ap. 55. "He picked me, Rob, and Reggie up." Ap. 64. "[We went] back to my trailer." Ap. 55. Sanchez acknowledged that he was testifying against Via as part of a plea agreement with the Commonwealth: "I received 68 years, which 13 of it I got to serve." Ap. 56.

Defense witness Amanda Kidwell testified that Robert Via stayed home with her in Poquoson throughout the evening of September 10, 2010 and the early hours of September 11, 2010. T.T. 48-49, 51, 53-55 (3/27/12).

The 21-year-old Defendant, Robert King Via, Jr., took the stand and denied having anything to do with the robbery on September 11, 2010. T.T. 122 (3/27/12).

## ASSIGNMENT OF ERROR

The Court of Appeals erred in affirming the trial court's refusal of Instruction A proffered by Via, which pertained to the danger of convicting upon the uncorroborated testimony of Carl Gentline. Ap. 68-72, 96-98, 101-110. Specifically, the Court of Appeals erred in ruling that Sanchez's testimony corroborated, rather than contradicted, Gentline's testimony, rendering the instruction unnecessary.

## ARGUMENT

### THE TRIAL COURT ERRED IN REFUSING INSTRUCTION A PROFFERED BY VIA, WHICH PERTAINED TO THE DANGER OF CONVICTING UPON THE UNCORROBORATED TESTIMONY OF CARL GENTLINE.

#### Standard of Review

"On appeal, when the issue is a refused jury instruction, [the appellate court views] the evidence in the light most favorable to the proponent of the instruction." Lynn v. Commonwealth, 27 Va. App. 336, 344, 499 S.E.2d 1, 4-5 (1998). Whether the refusal to give a requested instruction is reversible error must be determined within the context of the evidence in each particular case. Id. (erroneous denial of heat-of-passion instruction); Cogdill v. Commonwealth, 219 Va. 272, 279, 247 S.E.2d 392 (1978) (proper denial of entrapment instruction). "When the denial of jury instructions is challenged on appeal, the court must determine … [whether] the instructions cover

all issues which the evidence fairly raises." Lea v. Commonwealth, 16 Va. App. 300, 304, 429 S.E.2d 477, 479 (1993).

Discussion of the Issue

"[W]hen a principle of law is vital to a defendant in a criminal case, a trial court has an affirmative duty to properly instruct a jury about the matter. The trial judge's imperative duty to properly instruct the jury is one which can neither be evaded nor surrendered." Johnson v. Commonwealth, 20 Va. App. 547, 553-54, 458 S.E.2d 599, 602 (1995). Where credible evidence exists that would support giving the jury an instruction on a particular theory of the case, the trial court's failure to give the instruction constitutes reversible error. McClung v. Commonwealth, 215 Va. 654, 657, 212 S.E.2d 290 (1975). "It is immaterial that the jury could have reached contrary conclusions. If a proffered instruction finds any support in credible evidence, its refusal is reversible error." McClung v. Commonwealth, 215 Va. 654, 657, 212 S.E.2d 290 (1975); Taylor v. Commonwealth, 186 Va. 587, 591, 43 S.E.2d 906, 908 (1947); Painter v. Commonwealth, 210 Va. 360, 171 S.E.2d 166 (1969). The determination of whether "the weight of the credible evidence . . . will amount to more than a mere scintilla of evidence is a matter to be

resolved on a case-by-case basis." Brandau v. Commonwealth, 16 Va. App. 408, 412, 430 S.E.2d 563, 565 (1993).

In Virginia, the jury, if satisfied of guilt, may convict an accused upon the uncorroborated testimony of an accomplice. Blount v. Commonwealth, 213 Va. 807, 810, 195 S.E.2d 693, 695 (1973). Where accomplice testimony is uncorroborated, however, it is the duty of the court to warn the jury against the danger of convicting upon such uncorroborated testimony. Jones v. Commonwealth, 111 Va. 862, 868, 69 S.E. 953, 955 (1911); Johnson v. Commonwealth, 224 Va. 525, 528-29, 298 S.E.2d 99, 101 (1982); Dillard v. Commonwealth, 216 Va. 820, 821, 224 S.E.2d 137, 139 (1976). This warning is required because the source of accomplice testimony is tainted with the temptation to exculpate oneself by laying the crime upon another. Largin v. Commonwealth, 215 Va. 318, 319, 208 S.E.2d 775, 776 (1974); Dillard v. Commonwealth, 216 Va. 820, 821, 224 S.E.2d 137, 139 (1976). "[T]he danger of collusion between accomplices and the temptation to exculpate themselves by fixing responsibility upon others is so strong, that it is the duty of the court to warn the jury against the danger of convicting upon their uncorroborated testimony. From these considerations, the generally

accepted rule is, that "If two or more accomplices are produced as witnesses, they are not deemed to corroborate each other, but the same rule is applied, and the same confirmation is required, as if there were but one." Jones v. Commonwealth, 111 Va. 862, 868, 69 S.E. 953, 955 (1911). The general test to determine whether or not a witness is an accomplice is to determine whether he could be indicted for the same offense. Guthrie v. Commonwealth, 171 Va. 461, 469, 198 S.E. 481, 484 (1938). "When the witness has made himself an agent for the prosecution before associating with the wrongdoers or before the actual perpetration of the offense, he is not an accomplice; but he may be, if he extends no aid to the prosecution until after the offense is committed." Guthrie v. Commonwealth, 171 Va. 461, 469, 198 S.E. 481, 484 (1938).

In the case at bar, Via's counsel submitted a proposed Jury Instruction A, which pertained to the danger of convicting upon uncorroborated testimony of Carl Gentline. However, the instruction was rejected by the trial judge. Ap. 68-72, 96-98, 101-110. The instruction stated as follows: "Carl Gentline has testified he was an accomplice in the commission of crimes charged in the indictments. While you may find your verdict upon his uncorroborated testimony,

you should consider his testimony with great care and/or caution as to the danger of convicting the Defendant upon the uncorroborated testimony of an accomplice. Nevertheless, if you are satisfied from the evidence of the guilt of the Defendant beyond a reasonable doubt, the Defendant may be convicted upon the uncorroborated testimony of an accomplice." Ap. 106-107. Although the trial judge refused to give an accomplice instruction regarding the testimony of Carl Gentline, the trial judge did give an accomplice instruction regarding the testimony of Samual Sanchez. Ap. 89. Of course, warning the jury to beware of the testimony of accomplice Samual Sanchez was not the same thing as warning the jury to beware of the testimony of Carl Gentline. The trial judge had refused even to identify Carl Gentline as an accomplice. Gentline plainly ought to have been identified as an accomplice, because the Commonwealth could have indicted Gentline for the same offenses that it indicted Via. As noted, "The general test to determine whether or not a witness is an accomplice is to determine whether he could be indicted for the same offense." Guthrie v. Commonwealth, 171 Va. 461, 469, 198 S.E. 481, 484 (1938); Clinton v. Commonwealth, 204 Va. 275, 282, 130 S.E.2d 437, 442 (1963).

Although the per curiam opinion of the Court of Appeals dated May 22, 2013 noted that Gentline had not been indicted for any offense (Ap. 120), the fact that the Commonwealth did not actually indict Gentline meant nothing. The Commonwealth's decision did nothing to change the fact that Gentline could have been indicted for the same offenses that Via had been indicted, and that Gentline thus met the definition of an accomplice set forth in Guthrie. The Commonwealth's decision whether or not to indict Gentline had no bearing on Gentline's status as a potential accomplice. If anything, the Commonwealth's decision not to indict Gentline in return for his testimony made it all the more important that the jury be warned about the danger of collusion between accomplices and the temptation to exculpate themselves by fixing responsibility upon others.

Via's counsel commented on the proposed instruction regarding Carl Gentline: "Your Honor, Mr. Via was entitled to that instruction, and it was error not to do it…. Mr. Gentline was an accomplice under the rules set forth in Guthrie[1]…. And the evidence of Mr. Gentline

[1] Guthrie v. Commonwealth, 171 Va. 461, 469, 198 S.E. 481, 484 (1938).

and Mr. Sanchez, under the rule set forth in Jones,[2] cannot be deemed to corroborate each other so that another instruction is not needed. The jury had … to be given an instruction so they could understand that not just Mr. Sanchez's testimony needed to be viewed with caution, but also Mr. Gentline's…. I think this was the only evidence they had [against Via] was these two people." Ap. 107-108.

Via's proposed instruction went straight to the heart of his defense, namely, that Carl Gentline had a bias or motive to falsely implicate Via in the robbery so that Gentline himself would obtain lenient treatment from the Commonwealth, specifically, no prosecution of Gentline at all, despite the fact that he admitted to acting as the getaway driver for the robbers, driving the others both to and from the scene of the crime, despite the fact that Sanchez testified that Gentline purchased masks and robbery paraphernalia from Wal-Mart prior to the robbery, and despite the fact that Gentline failed to say anything to the police around his involvement in the robbery for approximately six months after the robbery. T.T. 276,

[2] Jones v. Commonwealth, 111 Va. 862, 868, 69 S.E. 953, 955 (1911).

296, 298-299, 308. Gentline was also presumably the person on the cell phone the robbers were speaking to inside the house whom Frank Auche heard advise the robbers to “shoot him, shoot him.” T.T. 231.

The per curiam opinion of the Court of Appeals dated May 22, 2013 incorrectly asserted that Gentline’s testimony was corroborated by Sanchez. Ap. 120. However, Gentline’s testimony was not corroborated but contradicted by Sanchez, who testified that Gentline purchased the robbers’ masks from Wal-Mart prior to the robbery, whereas Gentline claimed others, not he, went to Wal-Mart. Ap. 20-21, 49. Gentline testified, “Reggie asked me if I would go along with it, and I told him no, just because I thought they were joking around…. After I answered him, him and Rob … left the trailer and went somewhere.” Ap. 20. “When they came back [approximately 30 to 45 minutes later,] they had a long white bag with black gloves, camouflage beanies, miscellaneous items … you know, just for a robbery.” Ap. 20. “I’m there with Rob and Reggie when they took the items out of the Wal-Mart bag.” Ap. 21. By contrast, Sanchez testified, “I borrowed a friend’s car that night and Carl had his license, so we drove to Wal-Mart to get some ski masks, and Carl went into

Wal-Mart, and … he bought the ski masks." Ap. 49. Sanchez plainly contradicted Gentline's assertions that Gentline had nothing to do with the acquisition of the tools and clothing to be used in the robbery.

Via's proposed instruction was an accurate statement of the law, and was supported by more than a scintilla of evidence. As such, Via was entitled to have the jury instructed on the danger of convicting upon the uncorroborated testimony of the accomplice, Carl Gentline, which was supported by more than a scintilla of evidence and was not duplicated by other jury instructions. Accordingly, Appellant submits that the trial court erred in refusing the proposed instruction, and that Via's twelve felony should be reversed, and a new trial ordered in which the trial court adheres to its duty to warn the jury against the danger of convicting upon uncorroborated accomplice testimony.

## CONCLUSION

For the reasons herein, it is requested that this Court grant this petition for appeal and reverse the judgment of the Court of Appeals.

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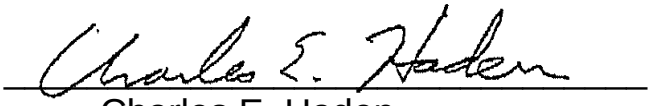
CERTIFICATE

I, Charles E. Haden, In compliance to rule 5:26(h) of the Rules of the Supreme Court, certify this 25th day of March, 2014 that: 1) three copies of the Opening Brief of Appellant and one copy of the Appendix, with one electronic copy on CD, was served, via UPS Ground Transportation, to Benjamin H. Katz, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, 900 East Main Street, Richmond, VA 23219 (telephone: 804-786-2071; fax: 804-371-0151; email: oagcriminallitigation@oag.state.va.us); 2) fifteen copies of the Opening Brief and ten copies of the Appendix, with ten electronic copies on CDs, were hand filed with Patricia L. Harrington, Clerk, Supreme Court of Virginia, 100 N. Ninth St., Richmond, VA 23219-2334; 3) I am an appointed attorney; 4) I request oral argument; 5) the word count is 3,861 words; and 6) I have complied with Rules 5:26 and 5:28.



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