SCV: Submitted on 11-14-2016 13:28:30 EST for filing on 11-14-2016

IN THE

Supreme Court of Virginia

RECORD NO. 160414

MARK THOMAS HOWSARE,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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IN THE

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MARK THOMAS HOWSARE,

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Appellee.

OPENING BRIEF OF APPELLANT

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

A Stafford County grand jury indicted appellant Mark Thomas Howsare on charges of first degree murder, aggravated malicious wounding, and use of a firearm. A jury trial began on October 21, 2014, with the Honorable Michael E. Levy presiding. On October 24, 2014, the jury convicted Howsare of second degree murder, aggravated malicious wounding, and use of a firearm. The jury recommended the minimum sentences. On January 8, 2015, the trial court imposed the jury's

recommendations, declining to suspend any portion. Howsare received active sentences of 5 years for murder, 20 years for aggravated malicious wounding, and 3 years for use of a firearm.

The Court of Appeals denied Howsare's petition for appeal. *Howsare v. Commonwealth*, Record No. 0106-15-4 (September 21, 2015) (per curiam order) (Joint Appendix ("J.A.") Vol. 1; 44-51) and (February 16, 2016) (panel order) (J.A. Vol. 1; 52). This Honorable Court awarded Howsare an appeal upon his petition. *Howsare v. Commonwealth*, Record No. 160414 (October 5, 2016) (order).

ASSIGNMENTS OF ERROR

I. The Court of Appeals erred by finding that the trial court did not abuse its discretion in giving jury instruction number seven, regarding intent.

Preserved at J.A. Vol. 1; 8, 10, 19, 44-46, 52, 81-83, 85, 91; and J.A. Vol. 2; 686-689.

II. The Court of Appeals erred by finding the argument—that jury instruction number seven was inappropriately based on language from cases not involving a jury instruction and meaning to provide rationale for a particular case—was barred by Rule 5A:18.

Preserved at J.A. Vol. 1; 8, 10, 19, 45, 52, 81-83, 85, 91; and J.A. Vol. 2; 686-689.

STATEMENT OF FACTS

The facts are presented in the light most favorable to the Commonwealth, as the prevailing party in the trial court, unless otherwise indicated.

The Incident

Mark Howsare and William Conner, Jr. had a close, uncle-nephew relationship. (J.A. Vol. 1, 122-123, 129, 161, 369). On January, 19, 2014, Conner, along with his girlfriend, Cheyanne Henry, unsuccessfully attempted to return an air mattress for Howsare at Wal-Mart. (J.A. Vol. 1, 125-127). Connor called Howsare and told him that he was needed to return the mattress. (J.A. Vol. 1, 127). Howsare made it clear that he did not want to go to Walmart that night. (J.A. Vol. 1, 127-128, 167). The phone call became disconnected, and Connor called back Howsare. (J.A. Vol. 1, 128, 167). Words were exchanged, and Howsare said that he was "going to hurt" Connor. (J.A. Vol. 1, 128, 176-179, 192-193; J.A. Vol. 2, 618-619, 631-631). Neither Connor nor Henry took Howsare's words seriously or felt afraid. (J.A. Vol. 1, 129, 180).

When Connor and Henry arrived to Howsare's home, they repeatedly knocked on the door and asked questions like, "[A]re you going to come

outside . . . what's going on?" (J.A. Vol. 1, 131, 169-170). Howsare did not open the door. (J.A. Vol. 1, 169). Connor and Howsare yelled at each other. (J.A. Vol. 1, 170). Howsare said that he had his gun and it was loaded. (J.A. Vol. 1, 132, 170; J.A. Vol. 2, 635). Henry left the immediate scene and walked to the front of the house. (J.A. Vol. 1, 136-137, 172). She heard the front[1] door open followed by about three to five gunshots. (J.A. Vol. 1, 138, 142, 144). Henry looked and saw Howsare at this door holding a gun. (J.A. Vol. 1, 138-140). She also saw Connor staggering off the porch and falling down. (J.A. Vol. 1, 145). Connor had been shot in the upper right chest area as well as his abdomen. (J.A. Vol. 1, 293-295, 344, 346, 348). The chest hit was the lethal injury whereas no organs were hit in the abdomen. (J.A. Vol. 1, 344, 346, 348).

Howsare's Statements

Detective Gibbons interviewed Howsare at the Sheriff's Office. (J.A. Vol. 1, 364). A redacted transcript of this interview was admitted as Commonwealth's Exhibit 37. Howsare showed no animosity towards Connor throughout the interview and described their relationship as "the best." (J.A. Vol. 1, 400, 407; J.A. Vol. 2, 877). He does, however, describe

[1] The "front" door was technically the "back" door. (J.A. Vol. 1, 140).

Connor as “an angry man” and “out of control.” (J.A. Vol. 1, 400-401, 407; J.A. Vol. 2, 929).

Howsare explained that his ribs were hurting, following an incident about a week ago. (J.A. Vol. 1, 368, 381, 387-388, 404; J.A. Vol. 2, 840, 842, 844-846, 851, 855-856, 859-860, 862, 924). Howsare said that Connor knew he was in pain that night. (J.A. Vol. 2, 856, 876). Indeed, Henry had similarly told Detective Hammond that Howsare had complained of a sore rib that night. (J.A. Vol. 2, 619).

In reference to the air mattress incident, Howsare said that he pled with Connor over the phone to “call it a day,” “call it good,” and leave him alone. (J.A. Vol. 1, 370-371, 409; J.A. Vol. 2, 857, 860). Howsare told Gibbons that “he wasn’t looking to get beaten to a . . . pulp that night.” (J.A. Vol. 1, 395, J.A. Vol. 2, 895). Howsare said that Connor, angry, came to his house, banging and pounding on the door and elsewhere on the house, and Howsare begged Connor, over and over, to “call it a day” and leave him alone. (J.A. Vol. 1, 371-372, 395-396; J.A. Vol. 2, 843, 855, 857, 860-861, 869, 875-876, 883, 889, 896). Howsare was “scared.” (J.A. Vol. 2, 881). Howsare told Connor to “go away” and that he was “done for the night.” (J.A. Vol. 1, 395, 397; J.A. Vol. 2, 855, 857, 869). Howsare

admitted opening the door "in a rage." (J.A. Vol. 1, 373, 375, 397, 415; J.A. Vol. 2, 882). When he opened the door, Connor "came at a motion towards" him. (J.A. Vol. 2, 876).

Howsare acknowledged that when he opened the door he fired his firearm. (J.A. Vol. 1, 414, J.A. Vol. 2, 865). He said he "shot high." (J.A. Vol. 2, 876, 882). Howsare fired up to five shots. (J.A. Vol. 1, 374-375, 397, 414; J.A. Vol. 2, 863, 882, 888). He may have fired a shot after the initial round when he thought Connor was coming through the sliding glass door. (J.A. Vol. 1, 382, 397, 399-400, 413; J.A. Vol. 2, 865, 889-890, 892). He relayed that he fired the shots because it was his house and he was not going to tolerate what was happening. (J.A. Vol. 1, 375, 411-412; J.A. Vol. 2, 882). Howsare specifically stated: "There was no intent to maim, to hurt, just go away." (J.A. Vol. 2, 863, 893). Howsare thought that he had "scared the shit out of him," for Connor to leave him alone. (J.A. Vol. 2, 858, 863, 892). Howsare told Gibbons that he saw Connor but then did not see him standing on the porch anymore. (J.A. Vol. 1, 375; J.A. Vol. 2, 858, 888). Howsare said that he wondered where Connor went and returned inside the house to reload his gun. (J.A. Vol. 1, 375-376; J.A. Vol. 2, 864). Howsare said that he fired no more shots after he reloaded his gun. (J.A. Vol. 1, 382; J.A. Vol. 2, 864). Howsare told Gibbons "that he knew he shot

what he shot." (J.A. Vol. 1, 376; J.A. Vol. 2, 883). Howsare, however, did not know until the end of the interview that Connor had been shot and died as a result. (J.A. Vol. 2, 908, 915, 926). Upon learning this, Howsare expressed disbelief and shock. (J.A. Vol. 2, 926-928).

Jury Instructions

The Commonwealth sought to include the following jury instruction: "Intent is the purpose formed in a person's mind which may, and often must, be inferred from the facts and circumstances in a particular case. The state of mind of the defendant may be shown by his acts and conduct." (J.A. Vol. 1, 19, 80-81; J.A. Vol. 2, 687-688). It is a non-model jury instruction. (J.A. Vol. 1, 81). The trial court overruled the defense objection, deciding to give the instruction to the jury, which was jury instruction number seven. (J.A. Vol. 1, 19, 81-83; J.A. Vol. 2, 688-689).

ARGUMENT

Summary

Howsare makes three arguments why the trial court erred by giving the intent jury instruction : (1) it impermissibly commented on the evidence; (2) it was an inaccurate and incomplete statement of law as well as misleading and confusing; and (3) it was inappropriately based on language from cases not involving a jury instruction and meaning to provide rationale for the case then before the appellate court.

The Court of Appeals considered but rejected the first two arguments stated in the above paragraph. (J.A. Vol. 1, 44-46, 52). The Court of Appeals refused to review the third argument above, finding that Rule 5A:18 barred consideration. (J.A. Vol. 1, 45).

Howsare argues that each argument as to why it was error to give jury instruction number seven, standing alone, is enough to justify reversal. Even if this Honorable Court agreed that the argument as to the instruction being inappropriately based on language from cases not involving a jury instruction and meaning to provide rationale for the case then before the appellate court is not preserved, the rest of the arguments demonstrate the trial court's reversible error. Howsare argues this argument is preserved;

the Court of Appeals erred finding otherwise; and, therefore, this argument provides additional justification for reversal.

I. It is reversible error to have given instruction number seven, regarding intent, to the jury. (Assignment of Error I)

Standard of Review

Appellate courts review jury instructions "to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises." *Lawlor v. Commonwealth*, 285 Va. 228, 187, 738 S.E.2d 847, 870 (2013) (citation omitted). "[W]hether a jury instruction accurately states the relevant law is a question of law" that appellate courts review de novo. *Id.* (citations omitted).

Generally, if the jury instruction accurately states the law, the matter of granting and denying it rests in the trial court's discretion. *Cooper v. Commonwealth*, 277 Va. 377, 381, 673 S.E.2d 185, 187 (2009). However, "it is reversible error for a trial judge to single out for emphasis a part of the evidence tending to establish a particular fact." *Woods v. Commonwealth*, 171 Va. 543, 547-548, 199 S.E. 465, 466-467 (1938). Further, "the giving of instructions which are confusing or which tend to mislead the jury because of ambiguity or for any other reason is reversible error." *State*

Highway & Transp. Comm'r v. Allmond, 220 Va. 235, 241-242, 257 S.E.2d 832, 836 (1979) (citations omitted).

A. Jury instruction number seven impermissibly commented on the evidence.

A trial court may not "single out for emphasis a part of the evidence tending to establish a particular fact," as "[t]he danger of such emphasis is that it gives undue prominence by the trial judge to the highlighted evidence and may mislead the jury." *Keefer v. Commonwealth*, 56 Va. App. 520, 524, 694 S.E.2d 802, 804 (2010) (citing Supreme Court cases). Where the instruction was based from case law "demonstrative of the sufficiency of the evidence sustaining the conviction," "the language in the instruction is properly viewed as a comment upon the evidence by a reviewing court." *Keefer*, 56 Va. App. at 523, 694 S.E.2d at 803.

In *Keefer*, the trial court gave a jury instruction as to intent to defraud, which listed circumstances that an intent to defraud could be inferred from. *Id.* at 522, 694 S.E.2d at 803. The language for the instruction was taken from a sufficiency of the evidence case. *Id.* at 523, 694 S.E.2d at 803. The Court found the instruction "erroneously suggested 'the weight which should be given to specific evidence,'" and "impermissibly commented upon the evidence." *Id.* at 525, 694 S.E.2d at 804-805 (citations omitted).

The Court reversed the conviction and remanded the case. *Id.* at 526, 694 S.E.2d at 805.

Keefer controls the instant case. The intent instruction here was also based solely on sufficiency of the evidence cases: *Ridley v. Commonwealth*, 219 Va. 834, 252 S.E.2d 313 (1979), *Hargrave v. Commonwealth*, 214 Va. 436, 201 S.E.2d 597 (1974), and *Johnson v. Commonwealth*, 209 Va. 291, 163 S.E.2d 570 (1968). (J.A. Vol. 1, 4, 6, 8, 10, 81). *Ridley* is a case of whether the evidence was sufficient to prove appellant had the specific intent to commit larceny, which was needed to support his breaking and entering conviction. 219 at 835, 837, 252 S.E.2d at 313-315. In *Hargrave*, the question was whether the evidence was sufficient to establish the specific intent to commit murder to support appellant's attempted murder conviction. 214 Va. at 436, 201 S.E.2d at 597. Likewise, in *Johnson*, the holding was that the inferences drawn by the jury from the proved facts were reasonable and justified to support an attempted robbery conviction, specifically the element of the intent to rob. 209 Va. at 295, 163 S.E.2d at 573-574. Thus, comparable to *Keefer*, the instruction here was based on cases that concerned sufficiency of the evidence, and therefore should be viewed as an impermissible comment upon the evidence.

As in *Keefer*, the instruction here listed circumstances whereby the jury could infer a specific intent—"acts and conduct." It impermissibly commented on Howsare's acts and conduct by erroneously suggesting the weight to be given to specific evidence—the evidence regarding Howsare's acts and conduct.

Howsare's intent in the shooting was at issue in his trial. The trial court's comment encouraged the jury to emphasize Howsare's actions and conduct when determining Howsare's state of mind. By excluding the instruction that statements can also show state of mind, the jury was left to either (1) not consider Howsare's statements at all when determining his intent or (2) believing that Howsare's acts and conduct were more important than his statements when determining his intent. Thus, the trial court was inappropriately singling out for emphasis that Howsare's acts and conduct tend to establish intent, thereby highlighting this evidence to the jury. This was detrimental to Howsare because his defense primarily rested upon his intent as he did not contest the fact that he shot his nephew causing his death. Many of Howsare's statements were relied upon by the defense to establish his intent during the incident. (*See* J.A. Vol. 2, [closing statement] 730-733, 735-736, 744, 746-747, 750, 765-767, 769-771, 773, 778).

Velasquez v. Commonwealth, 276 Va. 326, 661 S.E.2d 454 (2008) also guides resolution of this appeal. In *Velasquez*, appellant faced trial for rape and statutory burglary. 276 Va. at 328, 661 S.E.2d at 455. A jury instruction was given that an intent to rape could be inferred from an unauthorized presence in a home. *Id.* The Supreme Court found the instruction unnecessary and inapposite as to the rape charge because rape is a general intent, rather than specific intent, crime. *Id.* at 329-330, 661 S.E.2d at 456. While the instruction was "undoubtedly given for the purpose of explaining how an essential element of the burglary case might be inferred from the evidence, [it] necessarily had a collateral effect on the rape case and in that connection amounted to an improper comment on the evidence." *Id.* at 330, 661 S.E.2d at 456.

In this case, the given intent instruction was a specific intent instruction. "Intent to steal," from *Ridley*, "intent to kill," from *Hargrave*, and "intent to rob," from *Johnson* all speak to specific, not general, intents. It was unclear to the jury which charge or charges this intent instruction related to—as it was read towards the beginning, presumably jurors would think it applied to all options as to the range of choices for each finding instruction. While the wounding crimes and first degree murder are specific intent crimes, second degree murder is a general intent crime. *See*

generally Avent v. Commonwealth, 279 Va. 175, 208, 688 S.E.2d 244, 262 (2010) (noting that a specific intent to kill distinguishes first and second degree murder). Thus, even if the instruction is proper for specific intent crimes, it necessarily, as in *Velasquez*, had a collateral effect on the murder case, specifically the jury's option of second degree murder that Howsare was ultimately convicted for, and, therefore, amounted to an improper comment on the evidence.

B. Jury instruction number seven was an inaccurate and incomplete statement of law as well as misleading and confusing.

"No instruction should be given that 'incorrectly states the applicable law or which would be confusing or misleading to the jury.'" *Wells v. Commonwealth*, 60 Va. App. 111, 121, 724 S.E.2d 225, 230 (2012) (citations omitted). Incomplete instructions also cannot be given to juries, as such is misleading. *See Harrah v. Washington*, 252 Va. 285, 295, 477 S.E.2d 281, 287 (1996).

The statement of law in the jury instruction at issue was inaccurate, incomplete, misleading, and confusing, as it did not fairly cover all the issues related to intent. The language in the instruction closely followed the language in *Ridley:* "Intent is the purpose formed in a person's mind which may, and often must, be inferred from the facts and circumstances in

a particular case. The state of mind of an alleged offender may be shown by his acts and conduct." 219 Va. at 836, 252 S.E.2d at 314 (citing, but not quoting, *Hargrave* and *Johnson*). However, it did not closely follow the language in *Hargrave* and *Johnson. Hargrave* stated: "Intent in fact is the purpose formed in a person's mind and may be, and frequently is, shown by circumstances. It is a state of mind which may be shown by a person's conduct or by his statements." 214 Va. at 437, 201 S.E.2d at 598 (citations omitted). *Johnson* stated: "Intent is the purpose formed in a person's mind and may be, and frequently is, shown by circumstances. It is a state of mind which may be proved by a person's conduct or by his statements." 209 Va. at 295, 163 S.E.2d at 574 (citation omitted).

Notably, both *Hargrave* and *Johnson* state that intent can be shown by conduct or statements. *See also Vincent v. Commonwealth*, 276 Va. 648, 652-653, 668 S.E.2d 137, 140 (2008) (while analyzing whether there was sufficient evidence of an intent to steal to support a burglary conviction, stating that intent may be shown "by a person's conduct or by his statements"). *Ridley* and instruction number seven do not state that intent can be shown by statements; there is only reference of conduct and acts. Neglecting to refer to statements in addition to conduct and acts renders the instruction inaccurate, incomplete, misleading, and confusing.

In *Ridley*, there is, perhaps, no mention of intent being proved by statements because the appellant made no statements. 219 Va. at 835-836, 252 S.E.2d at 314. The intent language in Ridley was there as rationale to explain the sufficiency holding, "tailored to the facts and circumstances of the case then before the court on appeal." *Shaikh v. Johnson*, 276 Va. 537, 546, 546, 666 S.E.2d 325, 329 (2008).

By contrast, Howsare made numerous statements, both during the incident and afterwards to police. To have a jury instruction about intent but to only reference acts and conduct and not statements is inaccurate law to the facts of this case. Indeed, statements such as that he had a loaded gun (versus a statement that he was going to shoot it) and that he had no intent to hurt Connor can be inferred that he was intending to scare Connor off his property. Other statements that he made to police, that he kept telling Connor to "call it a day" and leave him alone, also go to intent. Especially as an instruction relying on *Hargrave* and *Johnson*, it is an inaccurate statement of law to exclude explicit mention that state of mind can be shown by a person's statements. (At best for the Commonwealth, it is an incomplete statement of law to mention that state of mind can be shown by acts and conducts but remain silent about statements). This is

especially so when the evidence at issue involved both Howsare's acts and statements, and intent was the primary issue at trial.

Federal Court of Appeals' circuits demonstrate that a complete, accurate, and clear instruction regarding inferring intent or state of mind explicitly references statements in addition to acts. *See, e.g.*, *Niziolek v. Ashe*, 694 F.2d 282, 292-93 (1st Cir. 1982) (finding a state jury instruction regarding intent constitutional, which included that intent is determined "from any statement or act done or act omitted"); *United States v. Scott*, 730 F.2d 143, 147-48 (4th Cir. 1984) (intent jury instruction upheld, which stated, in part, that a defendant's intent may be inferred by "any statement made or act done"); *United States v. Bowers*, 660 F.2d 527, 530 (5th Cir. 1981) (court properly instructed jury on intent by explaining that defendant's intent could be decided "'by looking at all the circumstances surrounding what was done . . .' in addition to statements, acts or omissions"); *United States v. Walker*, 972 F.2d 679 (6th Cir. 1992) (unpublished appendix to published opinion) (court properly instructed the jury that it "may consider any statement made or act done or omitted by a party whose intent is in issue"); *Mattes v. Gagnon*, 700 F.2d 1096, 1107 (7th Cir. 1983) (court clearly and accurately instructed jurors on intent, in part, through an instruction "that the jury must find intent, if at all, from the acts, words, and

statements of the defendants"); *United States v. Ashford*, 530 F.2d 792, 799 n.5 (8th Cir. 1976) (noting that the district court told the jury, regarding intent, in part, that it might consider "any statements made and acts done or omitted by the accused"); *House v. United States*, 279 F.2d 648, 650-51 (9th Cir. 1960) (jury instruction regarding determining intent proper where it stated, in part, that "any statements made and acts done or omitted by the accused" may be considered); and *United States v. Dysart*, 705 F.2d 1247, 1257 (10th Cir. 1983) (intent instruction, whereby the jury was informed that it was "entitled to consider the defendant's statements and acts," was a part of instructions as a whole that were fair).

Jury instructions regarding intent in state courts also refer to statements and not just acts and conduct. *See, e.g.*, *State v. Johnson,* 764 N.W.2d 696, 699, 701 (2009) (Supreme Court of North Dakota noted that proof of intent instruction stated that the jury "may consider any statement made or act done or omitted by the Defendant"); *State v. McDonald*, 872 P.2d 627, 654-55 (1994) (Court of Appeals of Alaska found no error in trial court's use of instruction regarding intent that the jury may consider "any statements made, and acts done or omitted by an accused"); *State v. Eagle*, 611 P.2d 1211, 1213-14 (1980) (Supreme Court of Utah held that the court's instruction on the element of criminal intent, which stated that

"[a] person's statement of mind . . . may ordinarily be inferred from acts, conduct, statements or circumstances" is an accurate statement of law); *State v. Perkins*, 614 N.W.2d 25, 33 (2000) (Court of Appeals of Wisconsin implicitly finding proper jury instruction that intent can be considered by "any statements or conduct of the defendant which indicate state of mind"); *State v. Iromuanya*, 719 N.W.2d 263, 287 (2006) (Supreme Court of Nebraska noting that the pattern instruction for intent states, in part: "In deciding whether the defendant acted with intent, you should consider his words and acts and all of the surrounding circumstances"); and *Miller v. Metro. Prop. & Cas. Ins.,* 2010 R.I. Super. LEXIS 137, *51 (2010) (Superior Court of Rhode Island noting that in criminal cases where an individual's intent is at issue, justices routinely give an instruction stating, in part, that the jury "may consider any statement made or acts done or omitted by the defendant"). Thus, there is much persuasive authority in both state and federal courts that jury instructions about intent explain that intent can be inferred from behavior (acts and conduct) and statements.

II. An additional argument—jury instruction number seven is inappropriately based on language from cases not involving a jury instruction—is not barred by Rule 5A:18, and it provides further reason that the giving of the instruction was error. (Assignments of Error I and II).

Standard of Review

Whether a particular argument is barred by Rule 5A:18 presents a question of law, which requires a de novo review. *Brown v. Commonwealth*, 279 Va. 210, 217, 688 S.E.2d 185, 189 (2010) (citation omitted). If this Honorable Court finds that Rule 5A:18 does not apply, the standard of review cited in Argument I applies to the merits of the argument.

A. Howsare sufficiently put the trial court on notice that the cases relied upon by the Commonwealth for the instruction were inappropriate to support that instruction, and the trial court, after reviewing the case law, intelligently ruled on Howsare's objection.

"Rule 5A:18 requires a litigant to make timely and specific objections, so that the trial court has 'an opportunity to rule intelligently on the issues presented, thus avoiding unnecessary appeals and reversals." *Brown*, 279 Va. at 217, 688 S.E.2d at 189 (citation omitted). "If a trial court is aware of a litigant's legal position and the litigant did not expressly waive such

arguments, the arguments remain preserved for appeal." *Id.* at 217, 688 S.E.2d at 189 (citation omitted).

Although Rule 5A:18 requires specificity, it is not an exacting standard and the objection needs only to be reasonably specific. *See Cox v. Commonwealth*, 65 Va. App. 506, 515, 779 S.E.2d 199, 203 (2015) (Rule 5A:18 only requires the objection be stated with "*reasonable certainty*."). A broad objection that gives the trial court notice of the "substance of the objection" is sufficient, even if an objection "could have been more definite and complete." *Overton v. Slaughter*, 190 Va. 172, 179, 56 S.E.2d 358, 361-62 (1949).

Linnon v. Commonwealth, 287 Va. 92, 752 S.E.2d 822 (2014) applies the above principles to a case where the defendant challenged a Commonwealth's jury instruction. This Honorable Court found that the Court of Appeals erred in determining under Rule 5A:18 that appellant had failed to state a basis for his objection to the Commonwealth's proposed jury instruction. *Id.* at 103-04, 752 S.E.2d at 829. Although appellant made a timely objection at the time the trial court was reviewing the instructions, at that time, there was no specific argument against the instruction. *Id.* at 103, 752 S.E.2d at 828-29. This Court, however, reasoned that because the basis of the objection was encompassed by his earlier arguments on

the motions to strike, the trial court was "fully apprised of the argument relevant to this proposed jury instruction and intelligently ruled on it." *Id.* at 103, 752 S.E.2d at 828. The *Linnon* Court went on, however, to find that because appellant made different arguments in the motion to strike and on appeal for the issue, the argument advanced on appeal was not preserved. *Id.* at 104, 752 S.E.2d at 829.

Unlike in *Linnon*, here, in both the trial court and on appeal, Howsare has advanced the same argument that jury instruction number seven is inappropriately based on *Ridley*, *Hargrave*, and *Johnson*. Similar to *Linnon*, the trial court understood Howsare's argument relevant to the proposed instruction and intelligently ruled on it. Thus, Howsare's argument—that jury instruction number seven is inappropriately based on language from cases not involving a jury instruction—is preserved for appellate review.

The trial court understood that the objection to jury instruction number seven was based, in part, on case law underlying the instruction—the trial court examined the cases of *Ridley*, *Hargrave*, and *Johnson* in reaching its decision. (J.A. Vol. 1, 85, J.A. Vol. 2, 689). Therefore, the trial court had an opportunity to intelligently rule (and did indeed rule on)

whether the instruction was properly based on language from the cases relied upon by the Commonwealth.

While counsel never uttered the exact words that the instruction was inappropriately based on language from cases not involving a jury instruction and meaning to provide rationale for a particular case, counsel said enough to put the trial court on notice of this argument. It was clear to all the parties and the trial court that the instruction was based on *Ridley*, *Hargrave*, and *Johnson*. (J.A. Vol. 1, 10, 66-67). At a pre-trial hearing discussing this jury instruction, counsel linked the cases to the fact that the proposed instruction was not a model jury instruction. (J.A. Vol. 1, 81-83). Counsel noted: "It should have been turned into a model jury instruction if it was agreed upon by other courts as well, Judge." (J.A. Vol. 1, 82-83). This is another way of saying that if the case law had demonstrated that the Commonwealth's proposed language had been approved by appellate courts to be a jury instruction, it would have been a model instruction. The implication is that the cases cited by the Commonwealth to rely on the language were not about jury instructions but rather about the case before the court. The trial court understood this when it responded, "I'm going to take a look at those cases." (J.A. Vol. 1, 85). When the trial court ruled, it

explicitly said that it had "checked the case law, and that instruction will be given." (J.A. Vol. 2, 689).

As the Court of Appeals erred in finding this specific argument barred by Rule 5A:18, this Honorable Court can now consider the argument when resolving the merits of whether the Court of Appeals erred by finding that the trial court did not abuse its discretion in giving the intent instruction.

B. Jury instruction number seven is inappropriately based on language from cases not involving a jury instruction and meaning to provide rationale for the case then before the appellate court.

Appellate courts "have frequently cautioned against 'the danger of the indiscriminate use of language from appellate opinions in a jury instruction." *Shaikh v. Johnson*, 276 Va. 537, 546, 666 S.E.2d 325, 329 (2008) (citations omitted). The Supreme Court of Virginia has stated:

> Appellate language used to explain a ruling or illustrate a point must necessarily be tailored to the facts and circumstances of the case then before the court on appeal. Unless clearly intended for use as a jury instruction, such language is *inappropriate* for that purpose.

Id. (emphasis added). Indeed, "courts have often cautioned against lifting the 'language of a specific opinion' for a jury instruction given that an appellate opinion 'is meant to provide a rationale for a decision – and may

not translate immutably into jury instructions.'" *Mason v. Commonwealth*, 49 Va. App. 39, 49, 636 S.E.2d 480, 485 (2006) (citations omitted).

As noted above, the intent instruction was based on *Ridley*, *Hargrave*, and *Johnson*, all sufficiency of the evidence cases. In these cases relied upon by the Commonwealth to support its instruction, the intent language was present in the case as to sufficiency issues of specific intent. The intent language was not there in context of a jury instruction. Clearly, the intent language in *Ridley*, *Hargrave*, and *Johnson*, was not intended for use as a jury instruction, and, therefore, such language was inappropriate in the jury instruction in Howsare's case. *See Shaikh*, 276 Va. at 546, 666 S.E.2d at 329.

CONCLUSION

For the reasons stated above, Howsare respectfully prays that the Court of Appeals' judgment and his convictions be reversed. Howsare requests this case to be ultimately remanded to the trial court for a new trial if the Commonwealth is so inclined.

Respectfully submitted,
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CERTIFICATE

Counsel for the Appellant certifies as true the following information:

a. The Appellant is Mark Thomas Howsare. Counsel for the Appellant is Catherine French, Senior Appellate Coordinator, Virginia Indigent Defense Commission. The Appellee is the Commonwealth of Virginia.

b. Counsel for the Appellant was appointed by Order of the Circuit Court of the County of Stafford; and

c. Counsel submits Appellant's case on his Opening Brief with a request for oral presentation.

d. In compliance with Rule 5:26, I hereby certify that on November 14, 2016, the correct number of true and accurate copies of this Opening Brief were hand-filed with the Supreme Court of Virginia and an electronic copy filed via VACES in PDF format, and an electronic copy via email in PDF format to:

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