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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 160993

CORDELL LIONEL CARTER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

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BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

On September 18, 2014, a jury of the Amherst County Circuit Court found the defendant, Cordell Lionel Carter, guilty of first-degree murder and use of a firearm, in violation of Virginia Code §§ 18.2-32 and 18.2-53.1, for the death of Jennifer Johnson. (App. 466). The trial court entered final judgment on November 17, 2014, and imposed a sentence of fifty-eight years' imprisonment, with five years suspended. (App. 466-68). The parties also stipulated to the jury trial's evidence being submitted for a bench trial on the remaining charge, possession of a firearm by a felon, in violation of Code § 18.2-308.2. (App. 463). By final order

entered on November 17, 2014, the court convicted Carter and sentenced him to an active sentence of two years' imprisonment. (App. 465).

Carter appealed his convictions to the Court of Appeals of Virginia asserting all four assignments of error raised in this Court. On June 15, 2016, the Court of Appeals issued a *per curiam* opinion denying Carter's petition for appeal. A three-judge panel of the Court of Appeals subsequently granted Carter an appeal limited to his first three assignments of error. The Court of Appeals affirmed the judgement of the trial court in an unpublished memorandum opinion dated May 31, 2016. *Carter v. Commonwealth*, Record 2261-14-3, 2016 Va. App. LEXIS 177 (Va. Ct. App. May 31, 2016).

ASSIGNMENTS OF ERROR

The defendant has assigned the following errors:

I. The Trial Court erred by refusing to allow the defendant to introduce evidence that the decedent threatened to kill the defendant hours before the shooting in this case when the defendant contended that he acted in self-defense as the decedent pulled a gun on the defendant to initiate the incident that resulted in the shooting that resulted in the decedents death. The Court of Appeals erred by affirming the Trial Court's decision and by holding that the evidence, or a proffer of the evidence, was not timely presented, and that the actions of the Trial Court in this matter were a proper discretionary act.

II. The Trial Court erred in not admitting evidence of prior acts of violence of the decedent Jennifer Johnson prior to 2012, and involving a 2013 incident where the decedent broke her mother Jessie Monaghan's jaw after threatening to kill her, as this evidence is proof of the violent and turbulent nature of the

decedent in a case where the defendant alleged the decedent was the aggressor. The Court of Appeals erred by affirming the rulings of the Trial Court and by holding that the actions of the Trial Court were a proper discretionary act and the Court of Appeals failed to identify any particular clarification of the inconsistencies in the Trial Court's ruling.

III. The Trial Court erred by not granting the defendant's motion to set aside the verdict, and grant a mistrial, since Sonny Showalter in his proffered testimony, which was made during jury deliberation, admitted giving false testimony regarding material evidence during the trial and therefore the jury verdict was based, in part, on false testimony. The Court of Appeals erred by affirming the ruling of the Trial Court and by holding that Showalter's testimony [was] not material, that the defendant invited error, and because the court claimed that there was no proof concerning whether the first or second testimony by Showalter was false, when Showalter testified under oath that his trial testimony was false

IV. The Trial Court erred by not granting a mistrial because the Commonwealth improperly influenced the jury verdict by going outside the evidence and declaring in its closing arguments that this case involved a struggle between good and evil and that the Commonwealth's position was the position of good, thereby directing the jury to go outside the evidence and base its verdict on purely emotional grounds. The Court of Appeals erred by affirming the verdict of the Trial Court and by saying that the motion for mistrial was untimely and harmless or otherwise cured.

(Def. Br. at 1-3).

STATEMENT OF FACTS

THE COMMONWEALTH'S EVIDENCE

The Murder

Jennifer Johnson and Carter were romantically involved and had a child together. (App. 16, 274). The child, Devon Carter, lived with Johnson and her other son, Dillon. (App. 11-12, 274). Over the course of their relationship, Johnson found videos on Carter's phone of him having sex with many women, including Johnson's mother, Jessie Monaghan, and Johnson's sister, Jamie Harper.[1] (App. 93). On January 10, 2014, Johnson showed the videos to Harper's fiancé, Michael Browning, and to Browning's friend. (App. 78-80, 89-91).

On January 13, 2014, Johnson sent her mother one of the videos. (App. 58-59). Late that night or early on January 14, Monaghan spoke to Carter about the videos; he told her that Johnson was blackmailing him. (App. 60). Carter told Monaghan that he had already given Johnson $1000 and would give her more money, even if he had to borrow it. (App. 62). Monaghan was upset, and Carter told her everything would be okay. (App. 62-63, 75).

[1] Police recovered videos of a black man wearing a Pepsi uniform having sex with multiple women, including Harper and Monaghan. (App. 188, 193-94, 215). The videos had last been accessed on January 10, 2014. (App. 196). While the defense disputed during the Commonwealth's case whose phone contained the videos and who was depicted, Carter later admitted the videos were from his phone and depicted him with Monaghan, Harper, and other women. (App. 284, 350, 352-53).

On the afternoon of January 14, Johnson was home with her sons, who had not gone to school because they were sick.[2] (App. 13). At 1:34 p.m., Browning called Johnson about a copy of the videos that Johnson was going to make for him. (App. 80-81). Johnson ended the conversation and said she would call him back. (App. 81). At 1:39 p.m., Carter called Johnson for twenty-eight seconds; the phone records did not show whether Johnson answered the call or whether the call was sent to Johnson's voicemail. (App. 128-29, 141-42).

Carter came to Johnson's house, went into Johnson's bedroom, and shut the door. (App. 15-17). From the living room where he was playing video games with Devon, Dillon heard Johnson and Carter "arguing and bickering back and forth," "a little bit of cursing," and "something hit the floor . . . like, a boom or something dropped." (App. 17-18). A few seconds after the boom, Carter walked out of the bedroom holding a laptop, said something to the boys about an ambulance, and left. (App. 18-20). Carter had been in Johnson's bedroom for two to five minutes. (App. 35, 39).

After Carter left, Dillon went into his mother's bedroom. (App. 20). She was on the floor, speaking in gibberish and shaking. (App. 20-21). Dillon looked around the room for her phone and laptop to contact help, but the defendant had

[2] At the time of trial, Dillon was fourteen years old, and Devon was seven. (App. 11-12).

taken both. (App. 21-22, 41). Dillon ran to his uncle Sonny Showalter's house and called 911 at 1:52 p.m. (App. 5, 8-9, 22-24).

When EMS arrived at 2 p.m., Johnson was dead. (App. 42-43, 46). Police arrived soon after. (App. 47, 53).

Johnson died of a single bullet wound to the chest that punctured her aorta and lungs and severed her spinal cord. (App. 46, 227-29, 237). The aortic injury caused a fifth of her total blood volume to bleed into her chest cavity within "a matter of minutes at the most." (App. 228). The spinal injury paralyzed her "immediately" from the waist down. (App. 229).

No weapons were found in the house, but a .38 shell casing lay on Johnson's bedroom floor. (App. 54, 139, 169). Stippling indicated that Johnson was shot from "within a few feet." (App. 223-24). She had no soot or burns on her hands. (App. 224, 229). From its trajectory, police determined that Johnson had been shot while standing in front of her bedroom window – directly across from the doorway – and at an angle facing towards the right of the room. (App. 162, 165, 178). Her body fell between the bed and the wall, under the front window. (App. 44, 153). The bullet exited a bedroom window and nicked a post on the front porch. (App. 138-39, 153-55, 173-74).

Carter's Post-Murder Actions

At 1:46 p.m. – at most seven minutes after he entered Johnson's home – Carter called Monaghan and asked her to get the boys. (App. 63). Monaghan told Carter that Johnson would not let her have the boys because she and Johnson were arguing. (App. 63-64). Carter replied, "[I]t won't make any difference, by the time you get here she'll be dead, she was shot." (App. 64). This call was later confirmed by phone records. (App. 129).

Monaghan called Harper. (App. 64). Harper then came crying to Browning—who had spoken to Johnson minutes before—and informed him that Carter had just shot Johnson. (App. 82). Browning called Johnson's cellphone four or five times, which Carter finally answered. (App. 83). The men cursed at and threatened each other. (App. 83-84). Browning then called 911. (App. 84).

Monaghan and Harper then went to Carter's home. (App. 65). Monaghan "ran through the woods hollering for my daughter and for [Carter]," but did not find him. (App. 65). She instead found Johnson's laptop, smashed. (App. 66, 76).

After Monaghan and Harper phoned Kary Tomlin, Johnson's other sister, Tomlin also called Johnson's phone. (App. 100-01). Eventually, Carter answered. (App. 106). Tomlin asked where Johnson was, and Carter said she was not with him. (App. 107). Carter then told Tomlin that he had Johnson's phone for "the

same reason why she has my phone."[3] (App. 107). When Tomlin claimed she had an emergency and needed to speak with Johnson, Carter answered, "Well, she's having more of an emergency than you are, maybe you should just go and check on her." (App. 107). Then he hung up. (App. 107). When Tomlin called back, Carter told her to stop calling the phone. (App. 107).

From his own phone, Carter also called Steven Beckner at 1:52 p.m. – the same time Dillon called 911 – and resigned the job he had held at Pepsi for ten years. (App. 111-12). Carter suggested one of his peers to take Carter's position. (App. 112). When Beckner asked why Carter was quitting, Carter "said that he did something bad and [Beckner would] see it on the news." (App. 112-13, 115). This call, too, was confirmed by phone records. (App. 129).

Despite obtaining search warrants for Carter's house and truck, police never recovered Johnson's phone or laptop or the gun. (App. 118-19, 121). They did not find Carter until he turned himself in the next day. (App. 120).

[3] In his testimony, Carter claimed Johnson "stole" his phone. (App. 284).

THE DEFENSE CASE

Carter's Witnesses

The defense called Showalter, Johnson's uncle, but was unsuccessful in having him declared a hostile witness. (App. 264-66). Showalter testified that he went to Johnson's home on January 14 because Dillon came to call an ambulance, and he kept the boys on the porch while waiting for the police. (App. 268, 270). He denied seeing a gun at Johnson's home. (App. 268-69, 272). Showalter testified that he did not know whether Johnson had a gun and denied ever warning Carter to be careful because Johnson had a gun. (App. 268-69).

When Carter took the stand, he confirmed his on-again off-again relationship with Johnson. (App. 274-75). He claimed Johnson had tried to hit him several times in the past, but he avoided her by backing up, hitting her hands or pushing her away. (App. 328-35). Carter claimed on December 31, 2013, Johnson had punched him several times after discovering Devon had found explicit photos on Carter's phone. (App. 330-32). Carter also testified that the year before, Johnson had punched Showalter when Showalter intervened in an argument between Carter and Johnson. (App. 325-26). Carter claimed that Johnson had struck Showalter "a couple times." (App. 326). Carter also claimed that Showalter had told him, in October, 2013, "Boy, be careful because she got a handgun." (App. 289-90).

Carter testified that the night before the killing, he spoke with Monaghan, who was upset but did not tell him why. (App. 279-80). He told Monaghan he

would take Johnson money the next day. (App. 280). When he got to Johnson's house, she came out of her bedroom "furious," "hollering and screaming" that Browning had said Carter was "talking to" Monaghan and Harper. (App. 283, 286). Carter claimed he denied "talking to" them – although he subsequently admitted on cross-examination to having had sex with them – and he and Johnson went into her bedroom. (App. 283, 350, 352).

Carter said that Johnson shut the door and, when he tried to give her $500, said, "No, I want $1000." (App. 283). Carter said Johnson "said she was going to take the videos and do whatever she had to do with them," but that was "fine." (App. 283-84). On cross-examination, Carter admitted Johnson's demand for $1000 was in exchange for the videos, but he denied she was blackmailing him. (App. 351, 354). Carter testified that he next complained to Johnson about her stealing his cellphone to get the videos. (App. 284). Then Carter testified that when he tried to give Johnson $500:

> She said "No. I want $1,000." Then she said, "N***," okay, she said, "N***, I'll kill you." And then I said, "Well, I'll just leave."
>
> And when I turned, she said, "N***, I'll kill you," then she reached like she had the gun. And I hit her hand and her hand went up. And then when I heard a pop, you know, like I said, I never – I looked at her. She fell against the wall.

(App. 287). Carter denied being mad at Johnson,[4] but in response to leading questions, Carter said that he experienced "concern" when he saw the gun and was scared. (App. 287-88). Under further questioning, he said that he tried to knock the gun out of Johnson's hand and "it went off." (App. 291-92).

On cross-examination, Carter testified that after Johnson pulled the gun out of the dresser, she "throwed her hand up. I seen it. I hit her hand up in the air. Her hand come back down, then it went off." (App. 369-70). On redirect, he said the gun "was like shaking from her hand like this to mine and it just like went off," and he did not know what position it was in when it fired. (App. 381). On re-cross-examination, Carter's testified that after he hit Johnson's hand, "[h]er hand went up, and when her hand came down, it like twisted and the gun went off." (App. 384). Next, Carter testified that he did not hit Johnson's hand but, rather, his hand never left her hand – before or after Johnson's hand went up before it fired – because he "was trying to push it away." (App. 389).

Carter claimed Johnson fell against the wall and was "standing there" when he left, leaving the gun behind. (App. 292). Carter claimed he did not believe anything was wrong with Johnson and saw no blood. (App. 287, 293). He admitted

[4] Despite Carter's repeated testimony that Johnson referred to him by a racial expletive, he also claimed the language did not anger him because Johnson "most times" called him that. (App. 287-88).

picking up the laptop, claiming that it belonged to him,[5] and phone, claiming he "thought" it belonged to him, on his way out. (App. 293, 373). He admitted that, despite believing Johnson was fine, he told Dillon to check on her. (App. 294). He claimed that he left the gun in Johnson's bedroom with her dying body and two boys in the house. (App. 292).

On cross-examination, Carter testified Johnson "twisted and fell," but "she was standing up long enough that I didn't see no blood coming out of her." (App. 370, 373). He thought "she was just acting out." (App. 373). Carter denied that she was standing in front of the window when she was shot. (App. 390). He admitted that, after he grabbed the laptop and phone, "She was probably falling when I went out the door." (App. 391). Carter admitted that he called Monaghan to ask her to check on Johnson and the boys, but denied saying anything about a shooting. (App. 337-38). He admitted calling Beckner but denied telling him anything other than that he would not be at work that day. (App. 374).

Carter acknowledged that he and Johnson had recently been to court over Devon's custody. (App. 342). He admitted that he and Harper had a sexual relationship, that he used his own last name to refer to Harper's daughter, and that Harper visited him in jail frequently. (App. 344-46). He initially denied that Harper

[5] Carter admitted "smashing" the computer and throwing it in the woods. (App. 377-78).

talked about marrying him during those visits but, when reminded that jail visits were videotaped, admitted that she discussed marrying him. (App. 348). He claimed that he told her there would be no relationship between them, but he also admitted telling her during jail visits that he loved her. (App. 349).

Carter's First Proffer

After the Commonwealth rested, the trial recessed for the evening because Monaghan, whom Carter intended to call, had left the courthouse in an ambulance due to chest pains. (App. 237-39). When she remained hospitalized the next morning, the defense sought a continuance. (App. 246). Counsel proffered that Monaghan would testify that during a "heated and angry conversation" between her and Johnson late on January 13, Johnson said Monaghan needed to "find herself another n*** because this one wasn't going to be around long." (App. 247). The defense conceded that Johnson's alleged statement was not communicated to Carter but argued that it was relevant to the initial aggressor determination. (App. 249-50).

The trial court found that the proposed testimony was not admissible. (App. 257). It reasoned that Johnson made the statement to Monaghan more than twelve hours prior to the killing and, because it was never communicated to Carter, could not create a reasonable fear of imminent deadly harm. (App. 257-58). The defense noted its exception, reiterating that it wanted to introduce the evidence to prove

Johnson was the initial aggressor. (App. 260). Because Monaghan's testimony was precluded, the continuance was denied.

Carter's Second Proffer

During Carter's testimony, the defense proffered alleged violent acts by Johnson. In addition to the testimony that was admitted regarding Johnson's alleged violence toward Carter and Showalter, Carter testified to a ten-year-old incident where he bailed Johnson out of jail, and she told him that she had stabbed Browning because he had hit Harper. (App. 298-300). Carter also claimed, without referencing any date, that Johnson and Harper had fought and that he had witnessed Johnson hit Harper with a pot. (App. 301). The defendant also testified that in August or September of 2013, Johnson broke Monaghan's jaw, although he did not testify that he witnessed the act. (App. 321-22). Carter claimed Johnson first hit him in 2008 or 2009, when Johnson "just went off" and punched him in the face; he hit her back. (App. 301-02).

Despite the Commonwealth's argument that Carter's testimony had moved his defense from self-defense to accident (App. 311-13), the court ruled that the case included "elements of self-defense." (App. 319). It permitted Carter to testify about Johnson assaulting him or Showalter in 2012 and more recently. (App. 319-20). It precluded, however, testimony about the stabbing of Browning; "about

police, arrests, convictions, or charges;" and about Monaghan's jaw. (App. 319-20, 322).

Carter's Third Proffer

Before summations, the defense asked to make an additional proffer while the jury was deliberating. (App. 436-37). The proffer included three parts. First, the defense offered the certified sentencing order regarding Johnson's conviction for unlawful wounding of Browning. (App. 441).

Next, the defense called Showalter, who admitted that he had told a family member that he was not going to come to court. (App. 444). Showalter said he had been sick and was scared to go to court, so he left his home and went to another relative's house. (App. 444-45). Showalter admitted that he had thought the defense would not be able to find him and he would not have to testify. (App. 445). This contradicted his testimony before the jury that his reason for being at a relative's house was not to avoid coming to court. (App. 266). Showalter also admitted that he knew Johnson had her grandfather's gun. (App. 446). This contradicted his testimony before the jury that he did not know Johnson had a gun. (App. 268). Showalter continued to maintain that he did not see a gun at Johnson's house the day she was killed. (App. 446-47).

Interrupting Showalter's testimony, the court wondered "why this is a proffer. . . . I mean, he was on the witness chair when these things were asked."

(App. 445). The defense said, "I was trying to show this as a reason for him to have been an adverse witness." (App. 445-46). After Showalter left the stand, the court stated it would keep the ruling, and the defense replied, "I'm not asking you to change your ruling." (App. 447-48).

The defense then called Harper, who claimed that she heard Monaghan tell defense counsel that Johnson said, "You better get your shit from another n*** because this n*** ain't going to be around after tonight." (App. 449). Harper further testified that her mother was hospitalized under an emergency custody order "for three to five days." (App. 450). The defense was offering Harper "in place of her mother." (App. 450).

THE COMMONWEALTH'S CLOSING ARGUMENT IN REBUTTAL

In her rebuttal argument, the prosecutor highlighted the inconsistencies in Carter's testimony. She noted that his story regarding how the gun discharged changed at least three times over the course of his testimony. (Addendum 3).[6] She also noted his testimony conflicted with the physical evidence, including the

[6] The addendum contains an excerpt of the Commonwealth's closing argument, which was not originally transcribed. By order dated January 25, 2017, the Court permitted Carter to file this excerpt as a supplemental transcript, and it is now included with the record in the Clerk's Office of this Court. Because of its delayed filing, however, the transcript is not included in the appendix. It is appended to this brief for the Court's convenience, along with the three transcript pages immediately following the excerpt that were inadvertently omitted from the appendix.

trajectory of the bullet and the lack of soot on the victim's hands. (Addendum 4). She highlighted Carter's incriminating statements after the murder, and argued that the jury should use its common sense and reject Carter's version of events. (Addendum 6-8). In conclusion, the prosecutor argued,

> There is no gunshot residue, there is not soot, there is no burning on her hands, how did she get shot in the chest? The defendant shot her in the chest because he was mad. He was tired of it. He went there to kill her. There's a saying that says, "Evil triumphs when good men do nothing." Today is your chance to do something. Don't let evil triumph in this case, find him guilty of first-degree murder.

(App. 459). Following closing argument, the trial court provided the jury with additional instruction. The trial court directed the jury to elect a foreperson and reminded them that their verdict was required to be unanimous. (Addendum 11-13). The jury retired to deliberate. (Addendum 13).

Thereafter, the trial court asked the parties whether there were any other matters to be taken up at that point. (App. 441). Defense counsel responded that he had "an objection to the Commonwealth's last complete closing argument." (App. 441). As pertinent to the issue on appeal, counsel briefly argued that the prosecutor's reference to "evil over good" was an "emotional argument" that did not relate to the evidence presented at trial. (App. 441). The trial court rejected this argument holding that the statement was "not sufficient to inflame the jury," and that no inflammatory argument had been made throughout the case. (App. 443).

THE VERDICT AND POST-TRIAL MOTIONS

The jury returned a verdict of guilty of first-degree murder and use of a firearm in the commission of a homicide. (App. 451). Carter moved to set aside the verdict as contrary to the law and evidence. (App. 453). Carter's sole argument as to why the verdict was contrary to the law and evidence was that "Showalter has now testified to the Court that he lied at trial." (App. 453). The Commonwealth disputed the characterization of Showalter's proffer. (App. 453). The court denied the motion. (App. 454).

On the sentencing date, Carter pleaded not guilty to the felon-in-possession charge. (App. 468). The parties adopted all of the trial evidence and submitted it for a bench trial. (App. 468). The court convicted Carter. (App. 468).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN LIMITING DEFENSE TESTIMONY REGARDING JOHNSON'S ALLEGED VIOLENCE AND THREATS.

In his first and second assignments of error, Carter argues that the trial court erred by excluding certain evidence that he asserts supported his self-defense claim. First, Carter claims that the trial court erred by excluding Johnson's threat, made hours before Carter shot her, to kill him. (Def. Br. at 9). Second, Carter claims that the trial court erred by excluding Johnson's prior acts of violence. (Def. Br. at 15). As the Court of Appeals properly concluded, the trial court did not abuse its discretion in excluding the evidence, particularly in light of what the timely proffers actually contained.

Standard of Review

The admissibility of evidence is within the discretion of the trial court and its ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Midkiff v. Commonwealth*, 280 Va. 216, 219, 694 S.E.2d 576, 578 (2010). This Court has identified "three principal ways" by which a trial court abuses its discretion: "when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of

judgment." *Lawlor v. Commonwealth*, 285 Va. 187, 738 S.E.2d 847, 861 (2013). "Only when reasonable jurists could not differ can we say an abuse of discretion has occurred." *Walker v. Commonwealth*, 289 Va. 410, 421, 770 S.E.2d 197, 202 (2015) (quotation omitted).

The Law Regarding Evidence of a Victim's Violent Character.

Generally, "[e]vidence of a person's character or character trait is not admissible for the purposes of providing action in conformity therewith on a particular occasion." Va. R. Evid. 2:404(a). However, the law recognizes an exception for "evidence of a pertinent character trait or acts of violence by the victim of the crime offered by an accused who has adduced evidence of self-defense." Va. R. Evid. 2:404(a)(2). Such evidence is not admissible until a defendant has presented evidence of an overt act by the victim that justifies his self-defense plea. *Cary v. Commonwealth*, 271 Va. 87, 102, 623 S.E.2d 906, 914 (2006).

When a defendant pleads self-defense, evidence of the victim's propensity for violence is relevant to determine: (1) who was the initial aggressor and (2) whether the defendant reasonably feared for his safety. *Workman v. Commonwealth*, 272 Va. 633, 649, 636 S.E.2d 368, 377 (2006) (citing *McMinn v. Rounds*, 267 Va. 277, 281, 591 S.E.2d 694, 697 (2004). The admissibility of

evidence regarding the initial aggressor determination does not hinge on what the defendant knew. *Workman*, 272 Va. at 649, 636 S.E.2d at 377. Instead, admissibility turns on whether the victim's prior acts are sufficiently connected to the crime in time, place, and circumstance that they help determine the victim's conduct toward the defendant. *Id.*; *Barnes v. Commonwealth*, 214 Va. 24, 26, 197 S.E.2d 189, 190 (1973); *Randolph v. Commonwealth*, 190 Va. 256, 265, 56 S.E.2d 226, 230 (1949).

If a trial court wrongfully precludes a defendant from offering evidence of a victim's violent or turbulent character, the error is subject to nonconstitutional harmless error analysis. *See Rose v. Commonwealth*, 270 Va. 3, 11, 613 S.E.2d 454, 458 (2005). "If, when all is said and done, the [court] is sure that the error did not influence the jury, or had but slight effect, the verdict and the judgment should stand." *Id.* (quoting *Clay v. Commonwealth*, 262 Va. 253, 260, 546 S.E.2d 728, 731-32 (2001)).

The Trial Court Did Not Err in Precluding Testimony about Johnson's Alleged Statement.

At the outset, Carter's argument on brief does not address the actual evidence proffered to the trial court. Carter claims that Johnson "threatened to kill" him "hours before the shooting." (Def. Br. at 9). In fact, as noted by the Court of Appeals, counsel proffered that Monaghan would testify that during "the late

evening on the day before the decedent died . . . the decedent told the mother that she needed to move her things because – and find herself another n*** because this one wasn't going to be around long." *Carter*, 2016 Va. App. LEXIS 177, at *6-7. (App. 247). A threat is a statement meant to "communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359-60 (2003) (citation omitted) (defining threats in First Amendment context).

Preliminarily, assuming the alleged statement was a threat, it is not clear whether a bare threat made twelve hours before the shooting, without any attempt to carry it out before the confrontation in Johnson's bedroom, is admissible to the initial aggressor determination.[7] This Court last addressed this issue in 1947 where a decedent came to the defendant's residence two hours before a shooting, asked where the defendant was, and said "that he was going to find the accused and 'kill the son-of-a-bitch.'" *See Riddick v. Commonwealth*, 186 Va. 100, 102-03, 41 S.E.2d 445, 447 (1947). In holding that the trial court erred by excluding the evidence, the *Riddick* court found that the "deceased's design to do violence upon the defendants is of some value to show that on the occasion in question he did carry out, or attempt to carry out, his design." *Id.* at 103, 41 S.E.2d at 447. Here,

[7] The alleged threat would not be admissible to prove the reasonableness of Carter's fear because it was not communicated to him. (App. 249).

however, Johnson's statement included no design; at best, it was a vague threat that did not indicate a plan or demonstrate any attempted action. She made no attempt to harm Carter; instead, he came to her house and shut them into the bedroom together, standing between her and the door. (App. 162). Accordingly, Johnson's statement is not admissible under *Riddick*.

Moreover, Johnson's alleged statement is not a threat because it did not express Johnson's intent to do anything. If the statement was made, it was just as likely a statement that Monaghan – who was one of many women Carter was sleeping with behind Johnson's back – should not expect him to stick around.[8] This is particularly true as it was made in the context of Monaghan and Johnson arguing over a video of Carter, Johnson's boyfriend, having sex with a woman other than Johnson. (App. 58-59). As a statement of the defendant's unreliability as a romantic partner, Johnson's statement was mere hearsay. Unlike the threat in

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[8] In asserting that Johnson's statement was a threat, the defendant relies upon the double hearsay proffered by Harper, who testified during deliberations that her mother repeated Johnson's statement as, "You better get your shit from another n*** because this n*** won't be around anymore after tonight." (App. 449). (Def. Br. at 10). While arguably more ominous, this statement still does not communicate any intent. Moreover, as the Court of Appeals properly noted, the latter proffer is wholly irrelevant to this Court's evaluation of the trial court's ruling because it was offered not when the trial court was ruling on admissibility but, rather, after the case had been submitted to the jury. *See Carter,* 2016 Va. App. LEXIS 177, *9. *Accord Commonwealth v. Shifflett*, 257 Va. 34, 44, 510 S.E.2d 232, 237 (1999) (when proffer made after case is submitted to factfinder differs from prior proffer, latter proffer is not used by appellate courts in evaluating trial court's ruling).

Riddick, it did not communicate an intent to kill Carter, and it certainly did not rise to the level of design.[9] *Cf. Riddick*, 186 Va. at 103, 41 S.E.2d at 447.

Even if Johnson's statement were found to be a threat, and even if such a threat would have been admissible at some point during the trial, it was not admissible when it was proffered. The defense proffered Monaghan's testimony before offering any evidence of an overt act by Johnson from which he needed to defend himself. (App. 251). In doing so, it conceded that "evidence probably needs to be heard by the Court" before the court ruled on the admissibility of the alleged threat. (App. 253). Evidence of a victim's violent tendencies is properly excluded when, at the time it is offered, the defendant has not yet offered any evidence that the victim committed an overt act that establishes a right to self-defense. *Cary*, 271 Va. at 102, 623 S.E.2d at 914. Accordingly, at the time Carter proffered Monaghan's testimony, he had not met the prerequisites for presenting it to the jury, and the trial court did not err in excluding it. Carter never again asked to put Monaghan's testimony before the jury. Accordingly, the trial court did not err at the time that it ruled, and Carter did not timely raise the issue again after he offered overt act evidence. *See Johnson v. Raviotta*, 264 Va. 27, 33, 563 S.E.2d 727, 731

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[9] While the issue does not appear frequently, at least two other states permit consideration of a victim's explicit threats to kill a defendant in support of a self-defense claim and the initial aggressor determination. *See People v. Petty*, 7 N.Y.3d 277, 285-86 (N.Y. 2006); *Wilson v. Commonwealth*, 551 S.W.2d 569, 570 (Ky. 1977).

(2002) (to satisfy Rule 5A:18, "an objection must be made . . . at a point in the proceeding when the trial court is in a position, not only to consider the asserted error, but also to rectify the effect of the asserted error"); *Riner v. Commonwealth*, 268 Va. 296, 324-25, 601 S.E.2d 555, 571 (2004).

The Trial Court Did Not Err in Limiting Testimony about Johnson's Alleged Violent Acts.

At the outset, Carter's argument on brief neither accurately states the evidence proffered nor the trial court's ruling. Accordingly, the Commonwealth will respond to the proffer made by Carter, during a break in his testimony, about Johnson's alleged violent acts and the subsequent ruling.[10] (App. 296-311, 321-22). Carter was permitted to testify about any violence Johnson committed against him from 2012 until the present time and any violence he witnessed her commit against

[10] The record contradicts the chart presented on page 17 of Carter's brief, which is presented without citation. Carter was not prevented from testifying regarding any violent acts Johnson committed against him in "2012 or 2013." (*Compare* Def. Br. at 17, #6-8 with App. 319). Carter did not, contrary to his claims, proffer any evidence regarding alleged violence against Showalter that Carter did not also present to the jury. (*Compare* Def. Br. at 17, #2-3, App. 296-98, and App. 325-26). Furthermore, the trial court did not rule on Carter's claim that he saw Johnson hit Harper with a pot during a mutual fight. (Def. Br. at 17, #4; App. 301). Accordingly, that matter is not preserved. *Taylor v. Commonwealth*, 208 Va. 316, 324, 157 S.E.2d 185, 191 (1967) (to preserve an issue for appeal, defendant must seek and obtain a ruling). Moreover, given that the court had permitted testimony about Showalter because Carter witnessed it and precluded testimony about Browning and Monaghan because he did not, it is likely that – had Carter sought and obtained a court ruling on the testimony about Harper – it would have been favorable.

Showalter from 2012 until the present time. Three proffered instances of alleged violence were precluded: Johnson's ten-year-old stabbing of Browning; Carter's claim that Johnson hit him in 2008 or 2009, after which he hit her back; and Carter's claim that he "knew about" Johnson breaking her mother's jaw in August or September of 2013. (App. 298-302, 319, 321-22).

Carter offers no case law to demonstrate that the precluded evidence "was sufficiently connected in time and circumstances with the homicide as to be likely to characterize the victim's conduct toward the defendant." *Barnes*, 214 Va. at 26, 197 S.E.2d at 190. Instead, his argument presumes that any act of violence by Johnson was admissible. Under the law, however, the violent act must be relevant to whether the victim acted as the defendant claimed. For example, when a defendant has claimed that he shot a man in self-defense during an armed robbery, testimony that the decedent had previously drawn a pistol on an acquaintance was considered irrelevant to whether he attempted to rob the defendant. *Randolph,* 190 Va. at 265, 56 S.E.2d at 231. Similarly, claims that a decedent had been investigated, a decade before, for spousal and child abuse was inadmissible to support a defendant's claim that the decedent attacked him; the allegations were too remote and involved a different type of relationship. *See Avent v. Commonwealth*, 279 Va. 175, 192, 688 S.E.2d 244, 254 (2010). On the other hand, proof that a decedent was a violent drunk was admissible to support the

defendant's self-defense claim once it was established that the decedent had a blood alcohol content of .21. *Barnes*, 214 Va. at 25-26, 197 S.E.2d at 190. The defendant's citation to *Barnes* ignores that the nexus found in that case – drunkenness – was wholly lacking here. (Def. Br. at 18-19).

Here, neither of Johnson's alleged acts of violence against other people was connected in time or circumstance to her death. The victim's stabbing of Browning was remote in time. Based on Carter's own proffer, it was also unrelated in circumstances because it was motivated by a misbegotten attempt to protect Harper. (App. 300). Nor was the reason for Johnson's alleged anger at Monaghan clear: the defendant did not know what Johnson and Monaghan had spoken about. (App. 322). Even if she did break her mother's jaw, the defendant proffered no evidence of how that happened.[11] Neither act involved a gun. Neither act involved a victim who was a romantic partner. Neither act involved a threat to kill. In short, neither act made it more likely that Johnson would have, while her boys played videogames in the next room, drawn a gun on Carter and announced an intent to kill him. Accordingly, those acts are not sufficiently connected in time and

[11] Carter's testimony about Johnson breaking Monaghan's jaw was also precluded by the hearsay rule. This claim had no probative value unless it was true. The defendant had no first-hand knowledge about it. (App. 322). The prohibitions against hearsay do not disappear merely because a defendant pleads self-defense. *See Avent*, 279 Va. at 189, 688 S.E.2d at 251.

circumstance. *See Avent*, 279 Va. at 192, 688 S.E.2d at 254; *Barnes*, 214 Va. at 25-26, 197 S.E.2d at 190; *Randolph*, 190 Va. at 265, 56 S.E.2d at 231.

Finally, even though evidence of the incidents with Browning and Monaghan, and a time Johnson punched Carter in "'08 or '09," were excluded, the defense was allowed to introduce other evidence of Johnson's violent behavior. The law does not require that a defendant be permitted to offer evidence of every assertion of a decedent's violent act. Rather, the trial court still retains discretion to determine how many acts are allowed. *Burford v. Commonwealth*, 179 Va. 752, 767-68, 20 S.E.2d 509, 515 (1942); *Rasnake v. Commonwealth*, 135 Va. 677, 699-700, 115 S.E. 543, 551 (1923).

Any Error in Precluding Defense Evidence Was Harmless.

Even if this Court believes the trial court erred by not admitting either Monaghan's testimony or further testimony from Carter, such error would be harmless. The evidence of Carter's guilt was overwhelming. Carter told Monaghan, during a discussion of their problems with Johnson and the videos, that "everything would be okay." (App. 63). The next day, he went to Johnson's home and shot her within five minutes of arriving. (App. 17, 35). He left with Johnson's computer and phone, leaving her children – including his own six-year-old – to deal with her body. (App. 18-22). At the same time Dillon was discovering his mother's body,

Carter was calling Monaghan to tell her how he had made it "okay": he had fatally shot Johnson. (App. 63-65). Next, while Dillon was frantically calling 911, Carter calmly resigned and made incriminating statements to his boss and Johnson's family members. (App. 8-9, 64, 107, 111-12). Then, he destroyed the items stolen from Johnson's house and hid from the police for a day. (App. 120, 377-78).

In the face of this overwhelming evidence, the defendant told an unlikely and ever-changing story. He claimed that by merely knocking Johnson's hand while she pointed a gun at him, it managed to twist 180 degrees until it struck her squarely in the chest with a shot that went through not only her aorta and both lungs but also her spinal column. (App. 227). This description of how the gun fired defies credulity. Furthermore, the physical evidence – the stippling and lack of gun powder on the victim's hands – established that the victim was shot from within a few feet but without contact. (App. 223-24). This testimony was uncontroverted yet inconsistent with Carter's version of events. Also unbelievable was Carter's story about where Johnson stood – contradicted by where her body fell but apparently concocted to suggest she closed him into the room – and her apparent ability to stand without apparent injury despite sustaining a wound that instantly paralyzed her and caused her to bleed to death within minutes. (App. 44, 153, 229, 292, 390). Moreover, Carter's story about how the gun accidentally discharged changed multiple times during his testimony. (App. 287, 291-92, 367-70, 381, 384,

389). In short, Carter's claim of self-defense stood in such defiance of common sense that the excluded evidence would not have changed the jury's verdict. *See Rasnake*, 135 Va. at 700, 115 S.E. at 550 (considering defendant's unlikely version of events in determining that the trial court did not commit reversible error in excluding a particular incident of violence).

The quality of the excluded evidence also demonstrates that any error in excluding the evidence was harmless. In the case of Johnson's alleged "threat" to Monaghan, the statement offered neither an intent nor plan to harm Carter and could easily be a mere complaint about Carter's feckless attitude towards romantic commitments. Regarding the alleged acts of violence, given the more recent acts regarding Carter and Showalter about which Carter testified, the exclusion of other acts regarding her mother or sister was unlikely to sway the jury. *See Rasnake*, 135 Va. at 699-700, 115 S.E. at 551 (where trial court permitted several specific violent acts by victim, exclusion of another act was harmless).

Accordingly, under these circumstances, it cannot be said the trial court abused its discretion.

II. THE TRIAL COURT DID NOT ERR IN REFUSING TO SET ASIDE THE VERDICT.

The defendant argues that the trial court erred when it refused to set aside the jury's verdict.[12] Specifically, the defendant called Showalter, hoping to have him declared hostile, but failed to meet his burden to do so. Then, the defendant chose to wait until after the jury was deliberating to recall Showalter who, under different questions, testified that he had been untruthful before the jury. At that time, the defense explicitly told the court that it was not asking the court to change any rulings. After the jury returned its guilty verdicts, the defendant moved to set aside those verdicts, arguing that the verdict was contrary to the law and evidence because his own witness had lied. Now he seeks to have this Court overturn the trial court's refusal to do so.

Standard of Review

A trial judge may only set aside a jury verdict if the verdict is plainly wrong or without credible evidence to support it; a trial judge may not substitute his conclusion merely because he would have voted differently had he been on the jury. *Commonwealth v. McNeely*, 204 Va. 218, 222, 129 S.E.2d 687, 689-90 (1963). Likewise, this Court may only reverse the trial court's refusal to set aside

[12] Carter also assigns error to the trial court's failure to grant a mistrial. As noted by the Court of Appeals, Carter never moved for a mistrial; he only asked for the court to set aside the jury's verdict. *Carter*, 2016 Va. App. LEXIS 177, at *14 n.3.

the verdict if the trial court's judgment was plainly wrong or without evidence to support it. Va. Code § 8.01-680.

The Verdict Was Not Plainly Wrong or Without Evidence to Support It.

As discussed above, the evidence of the defendant's guilt was overwhelming. Carter came to Johnson's house, killed her, and left with her property. Within moments of leaving, he told Monaghan that Johnson was shot and then told his boss that he "did something bad" that would be on the news. When he testified, the defendant's story confirmed that he had, in fact, come to Johnson's house and killed her. His story of self-defense was internally inconsistent and belied by the physical evidence. In short, the jury's verdict was neither plainly wrong nor without evidence to support it. *McNeely*, 204 Va. at 222, 129 S.E.2d at 689-90.

The defendant's choice to recall Showalter during jury deliberations and ask him additional questions, resulting in different answers, does not change the weight of the jury's evidence. During the belated proffer, Showalter testified that he had been untruthful about avoiding court and about whether Johnson had a gun. The defendant, however, unreasonably presumes that Showalter's later testimony was truthful. To the contrary, no evidence demonstrated the truthfulness of either the earlier or later testimony. Accordingly, the later testimony was merely an attack on

Showalter's credibility by Showalter himself. *See Haas v. Commonwealth*, 283 Va. 284, 292, 721 S.E.2d 479, 482 (2012). Moreover, Showalter's testimony did not change about whether Johnson threatened Carter or whether he saw a gun in her bedroom after she was shot, and the defendant never asked Showalter about Johnson's alleged abuse. With or without either version of Showalter's testimony, the weight of the evidence fully supported the conviction.

The defendant's citation to *Powell v. Commonwealth*, 133 Va. 741, 112 S.E.2d 657 (1922), highlights the problems with his request to set aside the verdict. First, unlike in *Powell,* this case did not involve a Commonwealth's witness. Carter may not offer a witness and then complain that the witness "indelibly prejudiced" him because he did not like the witness's testimony.[13] "No litigant, even a defendant in a criminal case, will be permitted to approbate and reprobate – to invite error . . . and then to take advantage of the situation created by his own wrong." *Fisher v. Commonwealth*, 236 Va. 403, 417, 374 S.E.2d 46, 54 (1988).

Second, *Powell* stands for the proposition that newly-discovered evidence of a Commonwealth's witness's perjury does not require a jury verdict to be set aside if, eliminating the perjured evidence, there is still other evidence sufficient to support the verdict. *Powell*, 133 Va. at 757, 112 S.E.2d at 662. Here, there was no

[13] Counsel never met Showalter before trial, nor did he offer any evidence to impeach Showalter. (App. 265).

newly-discovered evidence. The defendant knew before the jury began deliberations that he wished to proffer additional evidence, yet he chose to wait until after the case was submitted to the jury until he presented it. (App. 436-37). Carter's choice to make an untimely proffer does not elevate his proffer to "newly-discovered evidence." Moreover, unlike in *Powell*, Showalter's testimony was not material: he had no personal knowledge of the moments Johnson and Carter were closed in her bedroom.

To comply with the contemporaneous objection rule, Carter needed to present his proffer at trial when the judge ruled on his motion to have Showalter declared an adverse witness. *See Shifflett*, 257 Va. at 44, 510 S.E.2d at 237; *Raviotta*, 264 Va. at 33, 563 S.E.2d at 731. While the defendant claimed to be proffering Showalter to establish why he should have been declared an adverse witness (App. 445-46), the issue was already waived. Although Carter moved to have Showalter declared adverse before he began testifying, he never renewed that motion once Showalter was evasive on how he came to court or demonstrated that Showalter surprised him by changing stories once before the jury. Va. Code § 8.01-403; *Dupree v. Commonwealth*, 272 Va. 496, 496, 635 S.E.2d 676, 676 (2006). It is unclear why Carter, who had waived the matter during the trial, would seek to make an untimely proffer accompanied by a statement that he was ***not asking*** the court to reverse its prior ruling.

Regardless of Showalter's testimony, the trial court did not err in refusing to set aside the verdict because it was neither plainly wrong nor without evidentiary support. *See McNeely*, 204 Va. at 222, 129 S.E.2d at 689-90.

III. THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A MISTRIAL BECAUSE OF THE COMMONWEALTH'S REBUTTAL ARGUMENT.

In his final assignment of error, Carter argues that the trial court erred when it failed to grant a mistrial. But Carter never moved for a mistrial. Further, his objection – raised after the jury had retired – came too late. In any event, as the Court of Appeals correctly concluded, Carter failed to prove that he was prejudiced by the remark. Accordingly, the trial court did not abuse its discretion in its ruling.

Standard of Review

A trial court's decision whether to grant or deny a motion for mistrial is a matter within the court's discretion, and an appellate court will disturb that decision only upon a determination that it was wrong as a matter of law. *See Blanton v. Commonwealth*, 280 Va. 447, 455, 699 S.E.2d 279, 284 (2010). "'[W]hen a decision is discretionary . . . . the court has a range of choice, and . . . its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law.'" *Lawlor*, 285 Va. at 212-13, 738 S.E.2d at 861 (quoting *Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011) (ellipses in original, other citation omitted)).

The Defendant Failed to Make a Timely Objection.

"[I]t is well-established that the Court will not consider a defendant's 'assignments of error alleging that improper remarks were made by the prosecutor' unless he 'has made a timely motion for a cautionary instruction or for a mistrial.'" *Maxwell v. Commonwealth*, 287 Va. 258, 267, 754 S.E.2d 516, 520 (2014) (quoting *Schmitt v. Commonwealth*, 262 Va. 127, 148, 547 S.E.2d 186, 200 (2001)). To be timely, a mistrial motion must be made "when the objectionable words were spoken." *Yeatts v. Commonwealth*, 242 Va. 121, 137, 410 S.E.2d 254, 264 (1991). Here counsel did not object until after the prosecutor had finished her argument and the jury had retired to deliberate. (App. 438) (Addendum at 13). This objection, raised for the first time after the case was submitted to the jury, came too late. *See Russo v. Commonwealth*, 207 Va. 251, 257, 148 S.E.2d 820, 825 (1966) ("Counsel cannot remain silent when improper argument is made and after the whole argument is concluded and in the absence of the jury successfully move for a mistrial."); *Maxwell*, 287 Va. at 268, 754 S.E.2d at 520 ("The defendant must make the motion for mistrial before the jury retires or it 'is untimely and properly refused.'") (citation omitted).

Significantly, moreover, trial counsel's objection was not accompanied by a motion for a mistrial or a request for a cautionary instruction. (App. 438-440).

Therefore, even if Carter's objection had been timely, his failure to ask for a mistrial precludes relief on appeal. *See* Rule 5:25. *Cf. Blount v. Commonwealth*, 213 Va. 807, 811, 195 S.E.2d 693, 696 (1973) (rejecting defendant's assertion of prejudice when he objected to closing argument but failed to move for a mistrial or cautionary instruction); *Cheng v. Commonwealth*, 240 Va. 26, 38-39, 393 S.E.2d 599, 605-06 (1990) (allegations of prosecutorial misconduct relating to rebuttal argument not properly preserved where defendant objected but "neither requested a cautionary instruction nor moved for a mistrial.").[14]

Because Carter failed to make a timely objection or move for a mistrial, the Court of Appeals properly concluded that Carter's argument was waived for purposes of appeal.

The Trial Court Properly Overruled Carter's Objection to the Closing Argument.

"A trial court has broad discretion in the supervision of opening statements and closing argument." *O'Dell v. Commonwealth*, 234 Va. 672, 703, 364 S.E.2d 491, 509 (1988). A decision regarding the propriety of an argument lies within the

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[14] Carter's failure to move for a mistrial also distinguishes this case from *Angel v. Commonwealth*, 281 Va. 248, 704 S.E.2d 386 (2011). Further, unlike the jury in *Angel*, who left the courtroom prior to Angel's motion for a mistrial to make a decision as to *when* it would begin deliberations, the jury in the instant case actually began deliberations before Carter made his objection. *Id.* at 270-71, 704 S.E.2d at 399.

discretion of the trial court, because "often it is difficult to draw the line between proper and improper argument, and usually it is preferable, therefore, to leave to the trial court the task of deciding upon which side of the line a particular argument may fall." *Hutchins v. Commonwealth*, 220 Va. 17, 21, 255 S.E.2d 459, 461 (1979). For this reason, the trial court's ruling "will be allowed to stand unless it is made to appear probable that the party complaining has been substantially prejudiced by the objectionable remarks or argument." *Avent*, 279 Va. at 204, 688 S.E.2d at 260 (quotation omitted).

Carter did not assert any particular prejudice at trial, nor does he do so on appeal. His appellate argument that prejudice should be presumed because the prosecutor's statement was an attempt to "have the jury view itself as the protector of the community" was not argued to the trial court. (*Compare* Def. Br. at 25 *with* App. 438-39). As this Court has noted, an "appellate court, in fairness to the trial judge, should not . . . put a different twist on a question that is at odds with the question presented to the trial court." *Shifflett*, 257 Va. at 44, 510 S.E.2d at 237. *See also Scialdone v. Commonwealth*, 279 Va. 422, 437, 689 S.E.2d 716, 724 (2010) ("A party must state the grounds for an objection 'so that the trial judge may understand the precise question or questions he is called upon to decide.'") (citation omitted). Having failed to present this argument to the trial court, Carter cannot now urge it as a basis for reversal.

Carter's sole contention before the trial court was that the prosecutor's argument was an "emotional appeal." (App. 438-39). As this Court has recognized, however, "arguments of counsel are made extemporaneously at the conclusion of trials that are often protracted and hotly contested. Trial judges customarily and understandably accord counsel reasonable latitude in making their arguments." *Artis v. Commonwealth*, 213 Va. 220, 227, 191 S.E.2d 190, 195 (1972). Here, trial court found that the prosecutor's isolated remark was "not sufficient to inflame the jury." (App. 440). On the record before the Court,[15] it cannot be said that this determination was an abuse of discretion.

CONCLUSION

This Court should affirm the judgment of the Court of Appeals of Virginia and the Circuit Court for Amherst County.

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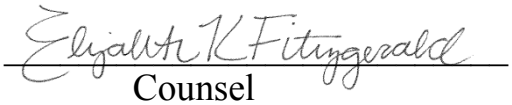
[15] Although an excerpt of the Commonwealth's closing argument has been transcribed and added to the record, to the extent the entirety of the parties' closing arguments are required for a finding of prejudice, the defendant has waived this assignment of error by failing to file the necessary transcript. Rule 5:11(a). *Cf. LeVasseur v. Commonwealth*, 225 Va. 564, 589, 304 S.E.2d 644, 658 (1983) (finding that a single improper question on direct examination, when viewed in the context of the entire examination, did not cause such impressive prejudice that the court's cautionary instruction could not cure the impropriety).

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

By: 
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CERTIFICATE OF TRANSMISSION AND SERVICE

On February 24, 2017 the required number of copies of this brief and appendix were hand-delivered and e-mailed to the Clerk of this Court and mailed and emailed to counsel for the appellee, Joseph A. Sanzone, VSB No. 20577, SANZONE & BAKER, LLC, 1106 Commerce Street, Suite 3A, Post Office Box 1078, Lynchburg, Virginia 24505; valaw@sanzoneandbaker.com; (434) 846-4691 (phone); (434) 528-5264 (fax);. In accordance with Rule 5:6, I certify that this document contains 9,506 words, in compliance with Rules 5:26(b) and 5:28.

The Commonwealth desires to present oral argument in this case.

Elizabeth Kiernan Fitzgerald
Assistant Attorney General

ADDENDUM

1 VIRGINIA:

2 IN THE CIRCUIT COURT FOR THE COUNTY OF AMHERST

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4 COMMONWEALTH OF VIRGINIA,

5 Plaintiff,

6 vs.

7 CORDELL LIONEL CARTER,

8 Defendant.

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13 PARTIAL TRANSCRIPT OF PROCEEDINGS
THE HONORABLE J. MICHAEL GAMBLE, PRESIDING

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16 September 18, 2014
Amherst, Virginia

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1 September 18, 2014 PROCEEDINGS Amherst, Virginia
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4 MS. MADDOX: To find him not guilty of
5 these charges, you would have to believe what
6 he said occurred. He wants you to believe that
7 she brought the gun out, threatened him by
8 saying "I'm going to shoot you, nigger." She's
9 got a child with him. They've been together on
10 and off for six years, at least, seven, six.
11 She pulls the gun out on him, threatens him.
12 He at first said the gun -- he hit her
13 hands and the gun went up and then at some
14 point it went off. Then later on direct or
15 cross he said he hit her hands, the gun went up
16 and came back down and that's when the shot
17 went off. And then when I was asking him, he
18 said, "No, I never took my hands off the gun.
19 I put my hands on her hands on the gun, and
20 we're struggling and the gun goes off." And I
21 had my hands pointed at him like that
22 (Indicating).
23 I said, "She pulled gun on you to shoot
24 you, that's what you're saying?" And he said
25 yes. Now he wants you to believe that she shot

1 herself while she's holding the gun pointed at
2 him. This woman who loves her children and has
3 all these pictures on the walls and the
4 homework and the kids toys and everything in
5 the home and her kids are in the home, he wants
6 you to believe that she pulled a gun on him,
7 pointed it at the wall where her kids are on
8 the other side of the wall and threatened him
9 with the gun and that that's how all this
10 happened and that's when they struggled over
11 the gun, and she shoots herself.
12 The medical examiner testified she was
13 shot from several feet away. Perfect shot
14 right through the chest. Paralyzed instantly.
15 Dead within a short amount of time, maybe
16 minutes as her lungs collapsed and her chest
17 cavity fills with blood. He walks out and
18 leaves her there.
19 When does he call 911? Never. Never. So
20 he wants you to believe that she shot herself
21 from three feet away. There is no soot or
22 anything on her hands. The only soot and
23 stippling is around the gunshot wound. But
24 she's got her hands on the gun and she somehow
25 twists the gun around and pulls the trigger and

1 shoots herself from several feet away. That's
2 what he wants you to believe. That was his
3 whole story.
4 And then as she's laying up against the
5 wall, he looks for and finds his laptop,
6 because he wants his laptop. And he
7 accidentally takes her cell phone. Just like
8 the gun accidentally went off. He takes her
9 cell phone and takes the computer and leaves.
10 But he says he doesn't stick around to see --
11 he didn't know she was hurt. He just left.
12 But he stops and gets the cell phone and
13 he gets his laptop. He gets in his truck and
14 starts making phone calls on his phone. He
15 calls Steven Beckner at the exact same time
16 that Dillon has finally gotten to a phone and
17 is calling 911 for desperate help.
18 The defendant is on the phone going down
19 the road talking to Steve Beckner and says, "I
20 quit." And Steven Beckner said, "I'm not
21 accepting that resignation." He said he
22 resigned, that he wanted to give his job to
23 this other guy, this part-time worker. He
24 said, "I did something bad. You will see it on
25 the news." He wouldn't elaborate. Steve

1 Beckner said he wouldn't say anything else.
2 The defendant said he didn't say any of
3 that. He wasn't quitting his job. He just
4 wasn't coming in that night and he just said to
5 Steve Beckner, "I don't know what's going on."
6 None of which sounds like, "I'm quitting. I'm
7 resigning. Give my job so somebody else. I
8 did something bad. It will be on the news."
9 Never says he accidentally did anything to
10 anybody or anything.
11 Before he calls Pepsi to quit his job, he
12 calls Jennifer's mother and tells her what
13 happened. She then calls Jamie to tell Jamie
14 what happened. Because Jamie runs in the house
15 to Squirt, Michael Browning and says, "Mama
16 just called. Beanie's killed Jennifer. Beanie
17 shot Jennifer." They know about it before 911
18 knows it, before anybody can get there.
19 Michael Browning calls Jennifer's number,
20 the one that he had just been talking to her
21 on, and who answers the phone? The defendant
22 who says, "Mother fucker, you're next." He's
23 still mad about the videos. He's mad about the
24 videos getting out. Michael Browning wants a
25 copy of the videos. He's coming to get him,

1 too.
2 He told Jennifer's mother what he did, he
3 killed her. He meant to kill her. He drives
4 in his truck to Campbell County, and then he
5 says he got out of his truck, gave his cell
6 phone to his daughter and just started walking
7 down the road. And that's how the story ends,
8 he just starts walking down the road. The
9 police are out looking for him, can't find him.
10 They go to his house and wait out on Old
11 Rustburg Road in Campbell County. He never
12 shows up. They look for him in the City of
13 Lynchburg. They never can find him. They tell
14 the family we've got warrants out for his
15 arrest.
16 He finally turns himself in the next day.
17 He never calls 911. He never tells anybody,
18 hey, it's an accident. I accidently shot her.
19 He said, "I shot her." He said to Jessie on
20 the phone, "I shot Jennifer," and that's how
21 that played out, and Squirt talked to him.
22 When Kary Tomlin the half sister calls,
23 she's at work in Lynchburg, she calls
24 Jennifer's phone trying to get in touch with
25 her sister because she's heard from her mom and

1 her sister Jamie. She's upset. She calls
2 Jennifer's phone several times. The defendant
3 answers. She says, "I need to speak to
4 Jennifer." He says, "She's not here." She
5 said, "I'm having an emergency. I need to
6 speak to Jennifer." He said, "She's having
7 more an emergency than you are." That's what
8 he tells Kary. She rushes out to her sister's
9 house.
10 The jury instructions call for you to use
11 your common sense. You get to use your common
12 sense when you hear all the evidence and the
13 explanations that were given for what occurred.
14 Does the defendant's story make sense to you?
15 Use your common sense.
16 Mr. Sanzone discussed for a long time the
17 reasonable doubt instruction and what
18 reasonable doubt means. Reasonable doubt means
19 what is reasonable to you as jurors when you
20 listen to this evidence. It's what is
21 reasonable to you. That's it. That's all
22 that's required. Reasonable doubt is a burden
23 that's met in courtrooms just like this one in
24 towns just like this one in criminal cases
25 every day. It's not an impossible burden.

1 It's a serious one, but it's not impossible.
2 It's what's reasonable to you.
3 Is it reasonable to you that he drove out
4 there mad about these videos and what's going
5 on, he walked into the house, he pulled out a
6 gun and he shot her because he was tired of it?
7 Tired of her, tired of the videos, tired of her
8 mother calling, all this stuff that was going
9 on. Maybe he wanted to spend more time with
10 his son. I don't know. We don't have to prove
11 motive. We have lots of reasons we could come
12 up with why but we don't have to prove that.
13 We just have to prove what happened.
14 He walked in there. He pulled a gun out.
15 He shot her. Now, he says that when he left,
16 he picked up the cell phone and the computer.
17 Where's the gun? The gun is not there. Dillon
18 does not pick up the gun. Dillon doesn't see a
19 gun. Sonny doesn't see a gun. Dillon is on
20 the phone hysterical with 911, "Help me. Help
21 me," trying to get his mom help, crying. And
22 Sonny takes them outside to sit on the porch,
23 and that's where they all are when the rescue
24 squad gets there.
25 Where is the gun? It just magically

disappeared. These bullets are magic too because it went through her chest when she's up against the wall, curves around and goes out the window, because she wasn't standing in front of the window. She was standing in front of the wall, he said. And the gun is magical too because she had the gun in her hands and she twists it around and magically shoots herself through the chest and kills herself instantly.

Use your common sense. How did Jennifer get that gunshot wound through her chest from several feet away when there were only two of them in the room. There is no gunshot residue, there is no soot, there is no burning on her hands, how did she get shot in the chest? The defendant shot her in the chest because he was mad. He was tired of it. He went there to kill her. There is a saying that says, "Evil triumphs when good men do nothing." Today is your chance to do something. Don't let evil triumph in this case, find him guilty of first-degree murder.

1 which that statement may be considered by you
2 is its bearing on the witness's credibility.
3 It is not evidence that what the witness
4 previously said is true.
5 If you believe from the evidence that the
6 defendant previously made a statement
7 inconsistent with his testimony at this trial,
8 that previous statement may be considered by
9 you as proof that what the defendant previously
10 said is true.
11 You may not consider any matter that was
12 rejected or stricken by the Court. It is not
13 evidence and should be disregarded.
14 The fact that the defendant has been
15 indicted by a grand jury is not evidence
16 against him and you should not consider it.
17 All right. Would the Commonwealth like to
18 argue the case?
19 MS. MADDOX: Yes, sir, Judge.
20 (Thereupon, closing arguments were had,
21 after which the following resumed:)
22 THE COURT: Members of the jury, the first
23 thing you should do when you go to the jury
24 room is elect your foreperson. Your verdict
25 must be unanimous. All of you must agree upon

1 the verdict. I'll send both the instructions
2 and the exhibits back to the jury room so that
3 you may refer to them if you wish to do so.
4 When you reach your verdict, knock on the
5 door. There will be a deputy sheriff stationed
6 outside the door and the deputy will let me
7 know.
8 Now, I'll send with the instructions the
9 verdict forms. For the first-degree murder
10 case, there are four possible verdicts, one to
11 four on this sheet of paper.
12 If you unanimously find that the defendant
13 is guilty of first-degree murder, then your
14 foreperson would sign on the top line. If you
15 unanimously find that the defendant is guilty
16 of second-degree murder, then your foreperson
17 would sign on the second line.
18 If you unanimously find that the defendant
19 is guilty of voluntary manslaughter, your
20 foreperson would sign on the third line.
21 Now, when I say if you unanimously find,
22 you must unanimously find in any of these cases
23 beyond a reasonable doubt that the defendant is
24 guilty of any of these three offenses.
25 If you find that the defendant is not

1 guilty, then your foreperson will sign on the
2 bottom line. When you look at this, it is
3 self-explanatory.
4 Now, with respect to the firearms offense,
5 there is two possible verdicts. If you find
6 beyond a reasonable doubt, if you unanimously
7 find beyond a reasonable doubt that he's guilty
8 of using a firearm in the commission of a
9 homicide, then your foreperson will sign on the
10 top line.
11 If you find that he is not guilty, then
12 your foreperson would sign on the second line.
13 Again, that's self-explanatory when you look at
14 it.
15 Now, one last thing, Mr. Massie Cash, who
16 is Mr. Cash? You are our alternate. I don't
17 know whether that's good news or bad news, but
18 as soon as I tell the jury to go in the jury
19 room, you may leave. And thank you very much
20 for serving.
21 All right. Members of the jury, you may
22 retire to the jury room and consider your
23 verdicts.
24 (Thereupon, the jury retired to the jury
25 room at 4:25 p.m.)