In The

# Supreme Court of Virginia

**RECORD NO. 160993**

## CORDELL LIONEL CARTER,

*Appellant*,

v.

## COMMONWEALTH OF VIRGINIA,

*Appellee.*

## BRIEF OF APPELLANT

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## TABLE OF CONTENTS

**Page**

TABLE OF AUTHORITIES ..... iv

ASSIGNMENTS OF ERROR ..... 1

Rule 5:17(c) statement regarding finality of judgment in the Court of Appeals ..... 3

STATEMENT OF THE CASE ..... 3

STATEMENT OF FACTS ..... 5

AUTHORITIES AND ARGUMENTS I ..... 9

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 ..... 9

STANDARD OF REVIEW ..... 9

ARGUMENT ..... 9

AUTHORITIES AND ARGUMENTS II ..... 15

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 Courts ruling ..... 15

STANDARD OF REVIEW ..... 15

ARGUMENT ..... 15

AUTHORITIES AND ARGUMENTS III ..... 20

III. The Trial Court erred by not granting the defendants motion to set aside the verdict, and grant a mistrial, since Sonny Showalter in his proffer 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 Showalters 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 ..... 20

STANDARD OF REVIEW ..... 20

ARGUMENT ..... 20

AUTHORITIES AND ARGUMENTS IV ..... 24

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 ..... 24

STANDARD OF REVIEW ..... 24

ARGUMENT ..... 24

SUMMARY OF ARGUMENT AND CONCLUSION ..... 27

CERTIFICATE ..... 28

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

Barnes v. Commonwealth,
214 Va. 24, 197 S.E.2d 189 (1973) ..... 18, 19

Burford v. Commonwealth,
179 Va. 752, 20 S.E.2d 509 (1942) ..... 11

Coffey v. Commonwealth
188 Va. 629, 51 S.E.2d 215 (1949) ..... 24

Compton v. Commonwealth,
219 Va. 716, 250 S.E.2d 749 (1979) ..... 12

Crane v. Kentucky,
476 U.S. 683 (1986) ..... 23

Edwards v. Commonwealth,
10 Va. App. 140, 390 S.E.2d 204 (1990) ..... 17

Herndon v. Commonwealth,
280 Va. 138, 694 S.E.2d 618 (2010) ..... 9, 15

Howard v. Commonwealth,
207 Va. 222, 148 S.E.2d 800 (1966) ..... 10

Johnson v. Ravietla,
264 Va. 27, 563 S.E.2d 727 (2002) ..... 14

Karnes v. Commonwealth,
125 Va. 758, 99 S.E. 562 (1919) ..... 11

Kirkpatrick v. Commonwealth,
211 Va. 269, 176 S.E.2d 802 (1970) ..... 11

Kitze v. Commonwealth,
246 Va. 283, 435 S.E.2d 583 (1993) ..... 25

McLane v. Commonwealth,
202 Va. 197, 116 S.E.2d 274 (1960) ..... 25

Powell v. Commonwealth,
133 Va. 741, 112 S.E. 657 (1922) ..... 22

Randolph v. Commonwealth,
190 Va. 256, 56 S.E.2d 226 (1949) ..... 11

Rasnake v. Commonwealth,
135 Va. 677, 115 S.E. 543 (1923) ..... 11

Riner v. Commonwealth,
268 Va. 296, 601 S.E.2d 555 (2004) ..... 11

Rowe v. Commonwealth,
277 Va. 495, 675 S.E.2d 161 (2009) ..... 22

Spencer v. Commonwealth,
240 Va. 78, 393 S.E.2d 609 (1990) ..... 20, 24

Velocity Express Mid-Atlantic, Inc. v. Brian F. Hugen,
266 Va. 188, 585 S.E.2d 557 (2003) ..... 26

Workman v. Commonwealth,
272 Va. 633, 636 S.E.2d 368 (2006) ..... 12, 16

**STATUTES**

Va. Code § 18.2-32 ..... 3

Va. Code § 18.2-53.1 ..... 3

Va. Code § 18.2-308.2 ..... 4

**RULE**

Va. Sup. Ct. R. 5:17(c) ..... 3

**OTHER AUTHORITY**

3A Wigmere, Evidence 1617(3d ed. 1940) ..... 19

**IN THE SUPREME COURT OF VIRGINIA**

**AT RICHMOND**

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**RECORD NO. 160993**

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**CORDELL LIONEL CARTER,**
**Appellant**

**v.**

**COMMONWEALTH OF VIRGINIA,**
**Appellee**

## OPENING BRIEF OF APPELLANT

TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE SUPREME COURT OF VIRGINIA

## ASSIGNMENTS OF ERROR

**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.**

**(Error preserved at A.p. 246, L. 9 - A.p. 250, L. 15; A.p. 252, L. 18 - A.p. 256, L. 25)**

**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 inconsistences in the Trial Courts ruling.**

**(Error preserved at: A.p. 295, L. 23 - A.p. 296, L. 17; A.p. 322, L. 22 - A.p. 323, L. 20; A.p. 438, L. 1 - 19)**

**III. The Trial Court erred by not granting the defendants motion to set aside the verdict, and grant a mistrial, since Sonny Showalter in his proffer 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 Showalters 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.**

**(Error preserved at A.p. 452, L. 23 - A.p. 453, L. 11; A.p. 457, L. 23-25)**

**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.**

**(Error preserved at A.p. 438, L. 4 - 18; A.p. 439, L. 17 - 22)**

## Rule 5:17(c) statement regarding finality of judgment in the Court of Appeals:

This case is of significant precedential value due to the inflammatory nature of the Commonwealths closing argument which asked the jury to view the case in terms of good and evil, and because it presents a needed clarification regarding threats made by the decedent in a self-defense case.

This case presents a case of first impression regarding the necessity to set aside a jury verdict where a material witness admits to giving false testimony during testimony under oath while the jury is still deliberating.

## STATEMENT OF THE CASE

On June 10, 2014, a grand jury returned true bills indicting the defendant on the following charges: one count of First Degree Murder in violation of Virginia Code Section § 18.2-32, one count of Use of a Firearm in Commission of a Felony in violation of Virginia Code Section § 18.2-53.1

and one count of Possession of a Firearm by a convicted Felon in violation of Virginia Code Section § 18.2-308.2. The defendant was found guilty by a jury of the County of Amherst for First Degree Murder and the use of a firearm in the commission of a felony in this case. The defendant and the Commonwealth adopted the evidence and the objections from the jury trial and the court convicted the defendant of possession of a firearm by a convicted felon. On November 17, 2014 the defendant was sentenced to the Virginia Department of Corrections for a term of fifty- three (53) years on the charge of First Degree Murder with three (3) years suspended in accordance with the jury verdict, and five (5) years on the charge of Use of a Firearm in Commission of a Homicide with two (2) years suspended, and four (4) years on the charge of Possession of a Firearm by a Felon with two (2) years suspended. The defendant was also given post release supervision for three (3) years, substance abuse screening, assessment or testing and treatment as directed. (A.p. 461, line 3 - A.p. 462, line 6)

Carter timely noted his appeal to this Court pursuant to the Rules of the Virginia Supreme Court.

On December 19, 2016, the Clerk of the Supreme Court certified that an appeal was awarded by the Supreme Court of Virginia from the judgment of the Circuit Court of Amherst County. The contents of the

appendix for the appeal were designated in accordance with the Rules of the Supreme Court.

All references herein to the record in this case are made to the September 17 and 18, 2014 trial transcript, the November 17, 2014 sentencing transcript and the Appendix filed as part of the record. References to the September 17 and 18 trial transcript of proceedings are designated as (T. p.__), references to the November 17, 2014 sentencing transcript of proceedings are designated as (S. p. ___), and references to the Appendix are designated as (A. p. __).

## STATEMENT OF FACTS

The facts in this matter are in dispute. Cordell Carter and Jennifer Johnson never married however they had a long standing relationship. They had a child, Devon Carter, who was age six. Ms. Johnson also had an older child, Dillon Johnson who was age fourteen. Jennifer lived with her two children along Business 29 in Amherst County in a semi-rural area. Her uncle, Sony Showalter, lived in a small house behind her on the same lot. Cordell Carter lived outside Rustburg, Virginia some half (1/2) hour away and worked at the Pepsi cola plant in Lynchburg, Virginia.

Jennifer Johnson had history of violent acts towards Cordell Carter and other individuals. She also had been in frequent contact with Michael

Browning who was also known as “Squirt”. Mr. Browning had previously been stabbed by Jennifer Johnson, yet he maintained a relationship with her sister, Jamie Harper, while disclaiming any romantic relationship with Jennifer. In the weeks leading up to Jennifer’s death Mr. Browning had made a point to make Jennifer aware of sexually explicit videos involving her. Jennifer, because of Mr. Browning or otherwise, had concluded that Cordell Carter, the defendant, was the man in the video with her and other women even though the tape did not show details to positively identify the male in the photos.

On the night of January 13, 2014, late in the evening, Jennifer Johnson discussed sexual videos with her mother and had an angry and lengthy argument. The conversation also included a threat to Cordell Carter from Jennifer, which the court disallowed. The mother was so concerned about Jennifer’s phone call that she drove in the early morning hours to Cordell Carter’s work to discuss the phone call. Mr. Carter who worked the night shift listened to what the mother had to say and told her in a calm way that things would be O.K. and not to worry.

Carter went home after work and slept a few hours and then went to Jennifer Johnson’s home in the early afternoon. When he entered the home the children were home from school and he spoke to the children as

he entered the house. The oldest child testified at trial. He testified that he did not notice anything unusual about the defendant when he arrived that day and Carter was not carrying anything when entering the house. The child said that Carter went to the bedroom and the door was shut. He then heard arguing, as well as unspecified cursing, but he could not hear what they were saying. He heard a boom or something dropping on the floor. Shortly afterwards Carter left carrying a thin box shaped object. Dillon Johnson said Carter said something about an ambulance but he was not sure what it was.

The defendant was the only person who testified as to what happened in the room. The defendant testified that he had brought Jennifer Johnson some money, and she became angry and wanted more money. Jennifer said “nigger I’ll kill you” and Carter said he would leave. Jennifer then pulled a gun and pointed it at him and he knocked it away. When he struck her hands, her hand went up and he heard a pop. Carter then grabbed his computer, which Jennifer Johnson had taken from his house some time ago, and left. He said he saw her stumble but did not see any blood or believe that she had been shot.

Jennifer Johnson died from a single gunshot wound to the chest. The bullet exited her torso and went through the window and hit a porch

railing. The weapon was never found. Jennifer Johnson's uncle came to the house immediately after the accident and was present before the police arrived.

The defense summonsed the uncle to court and he failed to appear on the morning of the first day of trial. A deputy was sent to locate the uncle and brought him to court after court had started. He denied Jennifer Johnson had a gun during the trial testimony. (A.p. 268, L. 10) He also denied that he tried to stay away from court after his summons, and attempted to state that his absence was voluntary. (A.p. 266, L. 3-17). After the jury had retired to deliberate he was called again as a witness, and testified that he in fact knew Jennifer had a gun prior to her death (A.p. 446, L. 4-13) and that he had tried to avoid coming to Court. No gun was found at Jennifer Johnson's home when the home was processed after the shooting.

During closing arguments the Commonwealth Attorney abandoned a focus on the facts and the law and appealed directly to the emotions of the jury by saying that "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," with reference to the jury verdict.

## AUTHORITIES AND ARGUMENTS I

**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.**

**(Error preserved at A.p. 246, L. 9 - A.p. 250, L. 15; A.p. 252, L. 18 - A.p. 256, L. 25)**

## STANDARD OF REVIEW

A circuit court's decision to admit or exclude evidence is reviewed under an abuse of discretion or legal error standard and, on appeal, will not be disturbed absent a finding of abuse of that discretion or legal error Herndon v. Commonwealth, 280 Va. 138, 694 S.E.2d 618 (2010).

## ARGUMENT

The defendant sought to elicit further details of a conversation which Ms. Monaghan had with her daughter Jennifer Johnson on the night of January 13, 2014, which conversation was referenced in the direct examination of this witness by the Commonwealth's Attorney (A.p. 59, L 17-20). The court ruled in a side bar conversation that the defendant could

not on cross examination introduce further details of this conversation (A.p. 67, L. 22 - A.p. 68, L. 2) and later ruled that the proposed testimony was inadmissible and denied the defendant's request to adjourn the trial so that Ms. Monaghan, who had been hospitalized after her testimony as a Commonwealth witness, could testify after her expected release from the hospital. (A.p. 246, L. 9 - A.p. 262, L. 14)

A proffer of the proposed testimony revealed that the testimony would have revealed that the decedent told her mother Jessie Monaghan, late on the evening of January 13 that Ms. Monaghan had "better get your shit from another nigger because this nigger won't be around anymore after tonight" (A.p. 449, L. 17-19) This threat concerned the defendant Cordell Carter. The shooting which resulted in these charges occurred early the following afternoon.

The question of who was the aggressor is central to the defense in this case. This statement is direct evidence of the decedents desire to kill the defendant immediately before the incident in which the defendant took action to protect his life. Intent, like any fact, may be shown by circumstances. It is "a state of mind which may be proved by a person's conduct or by his statements", Howard v. Commonwealth, 207 Va. 222, 228, 148 S.E.2d 800, 804 (1966). A similar death threat has been allowed

to show a defendant's state of mind and its use in evidence was not overturned although the court decided this issue on a waiver of a related hearsay point by the court. Riner v. Commonwealth, 268 Va. 296, 601 S.E.2d 555 (2004). A crime victim's statements regarding their fear of a defendant have been held to be admissible as an exception to the hearsay rule, Karnes v. Commonwealth, 125 Va. 758, 99 S.E. 562 (1919), as have similar statements if they show the conduct and feelings of the accused towards the victim, Kirkpatrick v. Commonwealth, 211 Va. 269, 176 S.E.2d 802 (1970). It therefore follows that this same exception applies with respect to threats of bodily harm made by a deceased towards a defendant when there is a question of who was the aggressor.

It is well settled that the question of who was the aggressor is central to the issue of self-defense and the question of what the victim probably did is relevant, and material. Randolph v. Commonwealth, 190 Va. 256, 56 S.E.2d 226 (1949), Burford v. Commonwealth, 179 Va. 752, 20 S.E.2d 509 (1942), Rasnake v. Commonwealth, 135 Va. 677, 115 S.E. 543 (1923). The defendants' claim that the decedent threatened to kill him and assaulted him with a firearm is corroborated by her disallowed threat made hours before to her mother. Such statements are further admissible as they demonstrate the decedent's future intent to kill the defendant.

Evidence regarding who was the aggressor was held to be relevant evidence with respect to whether evidence which was not produced could constitute a Brady violation. Workman v. Commonwealth, 272 Va. 633, 636 S.E.2d 368 (2006). The threat, made by Jennifer Johnson to the defendant within 24 hours of the shooting, clearly is proof that she was the aggressor and is circumstantial proof that she introduced the gun into the incident, especially when the defendant was observed entering the room where the shooting occurred without a gun. The jury should have been allowed to weigh this testimony with the other testimony in the case.

Statements communicated to the defendant constitute only one instance which governs the admissibility of such statements. Similar threats made by a defendant to a third party regarding a victim have been allowed into evidence. In Compton v. Commonwealth, 219 Va. 716, 250 S.E.2d 749 (1979) a defendant told a third party Ms. Wilson "Well, tell her [Ms. Ratliff] she'd better come on home, don't I'm going to come get her with a knife" Id p. 727. The law therefore clearly allows even conditional threats if they tend to show the state of mind of an aggressor at the time of an incident.

The Court of Appeals avoided addressing this issue entirely by focusing on the timing of the proffer. The proper chronology is that the defense first sought to introduce the statement through cross-examination

of the Commonwealth's witness, Jessie Monaghan. Even though the events surrounding the conversation were revealed in great detail in the direct testimony, and the defense felt the Commonwealth had opened the door for its introduction, the Court ruled that the defense would have to recall the witness in its case in chief to present the evidence, as the defense would have to offer testimony putting self-defense in issue in its case in chief before such testimony would be considered.

Unfortunately Ms. Monaghan was taken from Court by ambulance after her testimony and was unavailable to testify later in the trial. The unavailability of the witness was made known to the Court. The defendant moved for a continuance to allow the appearance of the witness when she was released from the hospital. As a basis for the denial of the continuance the Court, after considering the representation of the defense that the defendant would testify and place self-defense at issue, preempted the defendant's proffer of the witness, and said that the testimony the court previously considered would not be allowed when offered as the threat was not directly communicated to the defendant. There is no evidence to support the Court of Appeals' contention that this is a post-trial motion which is disfavored. Carter v. Commonwealth, 2016 Va. App. (see page 4 of the May 31, 2016 opinion).

In this regard the language from Johnson v. Ravietla, 264 Va. 27, 33, 563 S.E.2d 727, 731 (2002) controls, since the attempt to continue the trial and introduce the evidence occurred “at a point in the proceeding when the trial court (was) in a position, not only to consider the asserted error, but also to rectify the effect of the asserted error”. The court in its ruling indicated that it had fully considered the admissibility of the statement and made its ruling when the court chose to rule. The denial of the continuance merely served as an appropriate time for the Court to address an issue which it had fully considered.

## AUTHORITIES AND AGRUMENT II

**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 Courts ruling.**

**(Error preserved at: A.p. 295, L. 23 - A.p. 296, L. 17; A.p. 322, L. 22 - A.p. 323, L. 20; A.p. 438, L. 1 - 19)**

## STANDARD OF REVIEW

A circuit court's decision to admit or exclude evidence is reviewed under an abuse of discretion or legal error standard and, on appeal, will not be disturbed absent a finding of abuse of that discretion or legal error Herndon v. Commonwealth, 280 Va. 138, 694 S.E.2d 618 (2010).

## ARGUMENT

The Court allowed evidence of the decedent's prior acts of violence known to the defendant but was arbitrary and inconsistent in allowing some violent acts from a period that the Court deemed relevant, while disallowing other similar acts from the same period. The sheer number of prior violent acts makes this evidence more compelling.

The crucial question which was never answered was why the Trial Court stated it would allow evidence of the prior violent acts from a certain point in time, and then failed to follow its own ruling.

The defendant attempted to put on evidence of his knowledge that the decedent Jennifer Johnson had stabbed Michael Browning, who was a witness in this case, to establish the decedent's violent propensity in a case where the identity of the aggressor was a material issue. Workman v. Commonwealth, 272 Va. 633, 636 S.E.2d 368 (2006). This testimony was evidence of a violent stabbing (A.p. 441, L. 1-9), which is precisely the type of evidence that the rule allowing past violent acts as evidence of the identity of the aggressor, and the defendant's perceptions of the danger thereby presented, was intended to address. The courts' acknowledgement that this type of evidence is admissible makes the ruling which limits the scope of the inquiry to two years unreasonable and without legal justification (A.p. 319, L. 15 - A.p. 320, L. 7; A.p. 322, L. 22 - A.p. 323, L. 3).

The Trial Court found elements of self-defense to exist in this case and stated it would allow the defendant to testify concerning acts after a certain date. It then refused the admission of certain acts within that time range. There was substantial evidence concerning prior acts of violence by

the deceased, Jennifer Johnson. They are so numerous that they can be best explained by the following chart:

| | Act | Date | Victim | Admitted into Evidence |
|---|---|---|---|---|
| 1. | Striking with Fist | 2008-2013 | Sonny Showalter | yes |
| 2. | Striking with Fist | 2008-2013 | Sonny Showalter | no |
| 3. | Felonious Wounding by knife | 2005 | Michael Browning "Squirt" | no |
| 4. | Assault with a pot | 2008-2012 | Jamie Harper | no |
| 5. | Striking with Fist | 2008 or 2009 | Cordell Carter | no |
| 6. | Striking with Fist | 2012 or 2013 | Cordell Carter | no |
| 7. | Striking with Fist | 2012 or 2013 | Cordell Carter | no |
| 8. | Jumping forward to make contact | 2012 or 2013 | Cordell Carter | yes |
| 9. | Breaking mothers jaw with fist | 2013 | Jessie Monaghan | no |
| 10. | Jumping forward to make contact | 2012 or 2013 | Cordell Carter | yes |
| 11. | Striking with Fist | 2012 or 2013 | Cordell Carter | yes |

The rules of evidence are very straight forward. Such evidence is allowed "Where the defendant claims self-defense, evidence of prior acts of violence by the victim is relevant as bearing on the reasonable apprehension which the defendant may have expressed and on the likelihood of the victim's aggressive behavior as claimed by the defendant". Edwards v. Commonwealth, 10 Va. App. 140, 142 390 S.E.2d 204, 206 (1990).

Since the Court has ruled that there are elements of self-defense in this case (A.p. 319, L. 17-19), the defendant objects to the exclusion of any

of the eleven incidents as they were all serious, all well known by the defendant, and presented a continuous pattern of violence perpetrated by Jennifer Johnson over many years. The limitations on evidence to the 24 months prior to Jennifer's death (A.p. 319, L. 15-22) was arbitrary and not supported by any factor derived from the evidence. The exclusion of a late summer 2013 incident where the decedent broke her mother's jaw was clearly arbitrary as it was within a date range previously allowed by a specific ruling of the Court.

In viewing the incidents the court excluded the two most serious incidents: a horrible stabbing of Michal Browning, and a 2013 incident where Jennifer broke her mother's jaw because she was angry over a failed attempt to move in with the defendant. The effect of the court's ruling was to allow some disturbing, yet minor evidence in, while excluding more shocking and probative evidence of the type that has been well accepted as bearing on the issue of who was the aggressor.

The exclusion of the 2013 incident where the mother's jaw was broken should alone serve as a valid basis for granting a new trial, yet the best statement regarding the temporal connection between these types of turbulent and violent acts and an alleged offense can be found in Barnes v. Commonwealth, 214 Va. 24, 197 S.E.2d 189 (1973).

Although the jury might have concluded that evidence of the decedent's turbulent nature five years before was too remote, it might have determined that his aggressive tendencies surfaced whenever he drank to excess, ... once a nexus for relevancy of prior conduct or character has been established, as here, the issue of remoteness concerns that weight of the evidence and the credibility of the witness, both of which are within the province of the jury. See 3A Wigmere, Evidence 1617(3d ed. 1940). To bar such evidence altogether was error. Barnes at p. 26

## AUTHORITIES AND ARGUMENTS III

**III. The Trial Court erred by not granting the defendants motion to set aside the verdict, and grant a mistrial, since Sonny Showalter in his proffer 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 Showalters 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.**

**(Error preserved at A.p. 455, L. 23 - A.p. 456, L. 11; A.p. 462, L. 23-25)**

## STANDARD OF REVIEW

When a motion for a mistrial is made, based upon an allegedly prejudicial event, the trial court must make an initial factual determination whether the defendant's rights are so "indelibly prejudiced" as to necessitate a new trial. Unless an appellate court can say that determination was wrong as a matter of law, it will not be disturbed on appeal. Spencer v. Commonwealth, 240 Va. 78, 393 S.E.2d 609 (1990).

## ARGUMENT

At trial Sonny Showalter, the uncle of the deceased Jennifer Johnson, was called by the defense. The defense attempted to have him

declared an adverse witness but the Court would not allow further questions on the subject of the witnesses' attempt to evade the process of the Court after the witness indicated he had voluntarily appeared. Within hours the witness would state in proffered testimony that this statement was untrue. Sonny Showalter further testified at trial that Jennifer Johnson did not have a gun. In the same proffered testimony the witness would shortly say that this testimony at trial was false.

Shortly after closing arguments ended, and while the jury was still deliberating, Sonny Showalter was called to the stand to make a proffer. Showalter testified that after he was served with a subpoena by the defendant to testify as a witness he went to a family member and said he wasn't coming to court (A.p. 444, L. 11-13), that he thought he wouldn't be able to be found, that no one would know where he was, that the defense would not be able to use him as a witness and that the trial would go on without him (A.p. 444, L. 8-13), that he was afraid of what he might be asked and what he might have to answer (A.p. 444, L. 24-25), that he went to a family member's house rather than come to court (A.p. 445, L. 3-7), and that the sheriff had to come get him at 10:30 on the day of the trial and bring him to court from where he was hiding out (A.p. 447, L. 6-12). Most importantly he said that he knew Jennifer possessed a gun (A.p. 446, L. 4-

8) and that his testimony earlier in the trial about Jennifer not having a gun was untrue (A.p. 446, L. 9-13).

The Court of Appeals sought to rely upon invited error as a basis to deny the defendant's appeal, saying the defendant called the witness. This ignores the perjured responses of the witness previously cited which prevented the witness from being declared an adverse witness. As such, no such invited error existed. Merely calling a witness who chooses to commit perjury, when his trial testimony was contrary to the defendants expectations regarding the testimony and consistent with the testimony from his proffer, does not constitute invited error. Rowe v. Commonwealth, 277 Va. 495, 675 S.E.2d 161 (2009).

The testimony regarding Jennifer Johnson having a gun was relevant and material and Sonny Showalter's testimony regarding his perjurious trial testimony was uncontradicted. When he was called by the defense to make the proffer the jury was still deliberating and the witness remained separated. The result in this case should follow the precedent established by Powell v. Commonwealth, 133 Va. 741, 112 S.E. 657 (1922), where a conviction was set aside and a new trial granted, when it was uncontradicted that a material witness testified falsely in a trial. The court

stated that it could not fairly conclude that the jury would have reached the same verdict "had the perjured testimony been eliminated". Id at page 757.

Because Sonny Showalter deceived the jury on at least two vital material points concerning who was the aggressor, no fair verdict could be achieved in this case and a new trial should be granted.

One can only entertain with great difficultly the statement from Carter v. Commonwealth, 2016 Va. App. (see page 11 of the May 31, 2016 opinion) "Further, Appellant assumes that Showalter's testimony while the jury was deliberating was truthful, however no other evidence indicates whether Showalter was testifying truthfully the first or second time he testified." The two statements under oath by Showalter, given only hours apart, are contrary to one another. Both statements can't be true. One is clearly perjury. It is for the jury to weigh the statements. The jury must receive all the evidence for the defendant to be able to present a complete defense consistent with his 6th and 14th Amendment Rights. Crane v. Kentucky, 476 U.S. 683, 691 (1986). "No other evidence" can be more meaningful on the issue of Showalter's truthfulness than his own testimony that his prior testimony was false.

## AUTHORITIES AND ARGUMENTS IV

**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.**

**(Error preserved at A.p. 438, L. 4 - 18; A.p. 439, L. 17 - 22)**

## STANDARD OF REVIEW

When a motion for a mistrial is made, based upon an allegedly prejudicial event, the Trial Court must make an initial factual determination whether the defendant's rights are so "indelibly prejudiced" as to necessitate a new trial. Unless an appellate Court can say that determination was wrong as a matter of law, it will not be disturbed on appeal. Spencer v. Commonwealth, 240 Va. 78, 393 S.E.2d 609 (1990).

## ARGUMENT

The making of improper statements in argument is reversible error, where such statements are so impressive as to remain in the minds of the jurors and influence their verdict. Coffey v. Commonwealth, 188 Va. 629, 51 S.E.2d 215 (1949).

In this case the Commonwealth ended the case by telling the jury: "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." (A.p. 438, L. 13-16).

The Supreme Court of Virginia has further said regarding closing arguments that "nothing should be done or permitted to prejudice the case of an accused, or obscure the minds of the jurors on the question of whether or not he is guilty of the offense charged." McLane v. Commonwealth, 202 Va. 197, 116 S.E.2d 274 (1960).

The statement in this case which misdirected the jury's role from applying the law to the facts to becoming a warrior in the fight for good against evil, must also be seen as an attempt by the Commonwealth to have the jury view itself as the protector of the community, a role which has previously been specifically ruled to create a "manifest probability" of improperly influencing the jury verdict, and requiring a new trial. Kitze v. Commonwealth, 246 Va. 283, 435 S.E.2d 583 (1993). Juries should decide cases upon a reasoned approach to the law and the evidence, and it is a subversion of the legal process to allow or encourage purely emotional appeals to particular verdicts. Such an approach places value on an

abandonment of reason, thoughtfully applied by a jury of one's peers, and instead champions a return to the chanting judgment of a mob.

Even in a civil case, with its lower standard of proof, "Golden Rule" arguments are prohibited, Velocity Express Mid-Atlantic, Inc. v. Brian F. Hugen, 266 Va. 188, 585 S.E.2d 557 (2003), and arguments of this type are proper grounds for reversal.

Comparing a plaintiff to a juror in the prohibited "Golden Rule Argument" is far short of the inflammatory effect of characterizing the defendant's position as "evil" in a racially charged prosecution. The argument alone is grounds for a reversal.

The statement regarding "good and evil" made by the Commonwealth was the concluding portion of the Commonwealth's rebuttal argument and the defendants motion occurred immediately following that statement. No portion of the trial took place beyond that point. The motion was therefore timely made. In addition, there can be no more emotional battle cry than to frame litigants' positions as "good and evil". Perhaps it would have been evil to allow a verdict based on Sonny Showalter's admittedly false statement, however such an interjection of inflammatory personal perceptions is not proper argument. A conclusion that such an argument would not influence the jury cannot be said with any requisite certainty.

## SUMMARY OF ARGUMENT AND CONCLUSION

For the reasons stated, the defendant Cordell Lionel Carter respectfully submits that the trial court erred as stated herein and that a new trial should be granted in this matter, or in the alternative that this case be dismissed.

Counsel for Appellant respectfully requests that he be allowed to appear and state orally his reasons that the court award the defendant a new trial for the reasons stated herein, and for such other and further relief as this court deems proper.

Respectfully submitted,

CORDELL LIONEL CARTER

By_____
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## CERTIFICATE

I, Joseph A. Sanzone, Counsel for Appellant, Cordell Lionel Carter, wish to state orally the reasons his conviction should be reversed and certify that a true copy of the foregoing Brief of the Appellant is in compliance with Rule 5A:19(f); that electronic copies of the Brief of Appellant and Appendix have been filed, via VACES, and paper copies of the same have been hand-filed herewith the Supreme Court of Virginia and that electronic copies on CD of the Brief of Appellant and Appendix have been served, via UPS Grand Transportation this 30th day of January, 2017 to Elizabeth Kiernan Fitzgerald, Assistant Attorney General, Office of the Attorney General, 202 North Ninth Street, Richmond, Virginia 23219, oagcriminallitigation@oag.state.va.us. This foregoing brief has a count of 5,843 words.

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Counsel for Appellant