VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

COMMONWEALTH OF VIRGINIA,	)	
	)	
v.	)	
	)	**Case No.**
JAMES ALEX FIELDS JR.,	)	
DEFENDANT.	)	

Commonwealth's Motion *in limine* to Admit Two Instagram Posts

The Commonwealth moves for a ruling *in limine* that two Instagram posts made by the defendant, Mr. Fields, are admissible at trial.

Specifically, those Instagram posts, enclosed as Attachment A & B, are:

- A May 12, 2017 Instagram private message reading: "Protest, But I'm Late For Work!!" with language added by the defendant reading "When I see protestors blocking" accompanied by a photograph of a car running into a group of individuals blocking the cars path; and
- A May 16, 2017 Instagram public post reading: "You Have The Right To Protest, But I'm Late For Work" accompanied by the same photograph of a car running into a group of individuals blocking the cars path.

The posts and statements are relevant and probative of intent, motive and state of mind; their probative value is not substantially outweighed by the risk of unfair prejudice; and the posts are not too remote in time. Therefore, the two Instagram posts should be admitted. The following is offered in support:

STATEMENT OF FACTS

1. Fields stands indicted for multiple counts of malicious wounding (§ 18.2-51) and aggravated malicious wounding (§ 18.2-51.2), which involve maliciously wounding any person or by any means causing him bodily injury, with the intent to maim, disfigure,

disable, or kill. Fields also stands indicted for Murder in the First Degree (§ 18.2-32), which involves any willful, deliberate, and premeditated killing.

2. These matters are set for a jury trial in this Court beginning November 26, 2018.
3. The Commonwealth intends to admit evidence to establish that Fields traveled from Ohio to Charlottesville specifically to attend a Unite the Right Rally on August 12th, 2017, and that the charged crimes were committed on that date against individuals that had shown up to protest Rally.
4. A May 12, 2017 Instagram private message reading: "Protest, But I'm Late For Work!!" with language added by the defendant reading "When I see protestors blocking" accompanied by a photograph of a car running into a group of individuals blocking the cars path was located and recovered pursuant to search warrant executed on defendant's Instagram account (Attachment A).
5. A May 16, 2017 Instagram public post reading: "You Have The Right To Protest, But I'm Late For Work" accompanied by a photograph of a car running into a group of individuals blocking the cars path was located and recovered pursuant to the same search warrant referenced in the paragraph above and executed on defendant's Instagram account (Attachment B).
6. At trial, the Commonwealth intends to introduce as an exhibit a picture taken on August 12, 2017 (the date of the charged offenses) by an eyewitness illustrating Mr. Fields driving his car into a group of protestors who were blocking the intersection of 4th and Water Streets. (Attachment C).

Authority and Argument

Evidence is relevant if it has "any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence." Virginia Rule of Evidence 2:401. For the eight felonious assault charges, the Commonwealth must prove beyond a reasonable doubt that the defendant intended to maim, disfigure, disable, or kill his victims and that he acted with malice. Malice exists "either when the accused acted with sedate, deliberate mind, and formed design, or committed a purposeful and cruel act without any, or without great, provocation." *Williams v. Commonwealth*, 64 Va. App. 240, 767 S.E.2d 252 (2015). In addition to malice, the first degree murder charge has willfulness and premeditation as elements that must be proven beyond a reasonable doubt. The defendant's state of mind at the time of the alleged offenses likely will be the central, if not only, issue in this case. Therefore, any evidence related to intent, motive, and state of mind would be relevant and probative.

The Virginia Supreme Court has stated that "[i]n criminal cases, when the motive or intent of the accused is material, a wider range of evidence is permitted in showing such intent than is allowed in other cases." *Hubbard v. Commonwealth* 190 Va. 917, 929 (1950). "Motive is an inferential fact, and may be inferred, not alone from attendant circumstances, but, in conjunction with these, from all previous circumstances which have reference to, and are connected with the commission of the offense. Circumstances which tend to shed light on the motive or intent of the defendant, or tend fairly to explain his actions are admissible." *Hubbard v. Commonwealth* 190 Va. 917, 930 (1950).

Relevant evidence may still be excluded under Virginia Rule of Evidence 2:403 if "the probative value of the evidence is *substantially* outweighed by…the danger of unfair prejudice." (emphasis added). However, an alleged offender's intent or state of mind may be shown by the

person's conduct and statements. *Jennings v. Commonwealth*, 20 Va.App. 9, 18 (1995)(citing *Long v. Commonwealth*, 8 Va.App. 194, 198, 379 S.E.2d 473, 476 (1989)).

The two Instagram posts should not be excluded under Rule 2:403, as the probative value is not substantially outweighed by the risk of unfair prejudice. Importantly, Rule 2:403 guards only against *unfair* prejudice. The Supreme Court of Virginia has noted that "[a]ll evidence tending to prove guilt is prejudicial to an accused, but the mere fact that such evidence is powerful because it accurately depicts the gravity and atrociousness of the crime or the callous nature of the defendant does not thereby render it inadmissible." *Powell v. Commonwealth*, 267 Va. 107, 141, 590 S.E.2d 537, 558 (2004).

The timing of a statement in relation to an alleged crime is also a factor to be considered but "[t]he length of time between a threat and a homicide, standing alone, does *not* make evidence of the threat inadmissible." *Duncan v. Commonwealth*, 2 Va. App. 717, 723 (1986). "In *Maxwell v. Commonwealth*, 167 Va. 490, 187 S.E. 506 (1936), the threats made by defendant toward the victim were made a year or more before the killing. The court held that the remarks were not inadmissible due to their having been made a year prior to the killing, but that the passage of time might weaken their probative value in the jury's mind." *Duncan v. Commonwealth*, 2 Va. App. 717, 724 (1986).

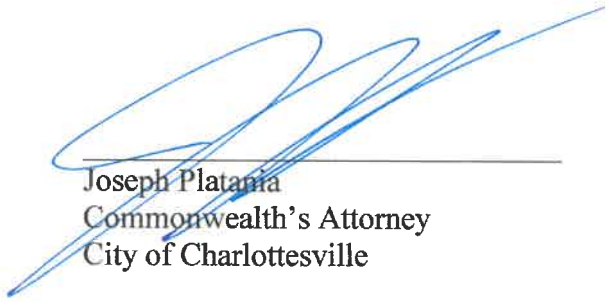
In *Lafon v. Commonwealth*, the Virginia Court of Appeals held that "[w]here prior bad acts resemble a "blueprint" for the crime charged, they show more than a predisposition to commit that type of crime. When the Commonwealth produces sufficient direct or circumstantial evidence to show the fruition of that blueprint into an actual crime, evidence of the prior bad acts is relevant and probative of intent and premeditation [. . . .] The probative value of this evidence was not defeated by its remoteness in time from the crime charged [. . . .] Evidence of prior bad

acts should not be withheld "solely on the basis of remoteness unless the expanse of time has truly obliterated all probative value." *Lafon v. Commonwealth*, 17 Va.App. 411, 419 (1993).

Conclusion

Because the posts and statements are relevant and probative of intent, motive and state of mind; their probative value is not substantially outweighed by the risk of unfair prejudice; and the posts are not too remote in time, the Commonwealth respectfully asks this Court to grant its motion in limine and rule that they are admissible at trial.

Respectfully Submitted,



Joseph Platania
Commonwealth's Attorney
City of Charlottesville

CERTIFICATE OF SERVICE

I hereby certify that I delivered by hand and electronic mail a copy of the above motion Denise Lunsford, 414 East Market St., Suite C, Charlottesville, VA 22902, this 28th day of November, 2018.

Joseph Platania
Commonwealth's Attorney
City of Charlottesville

ATTACHMENT

A

5/12/2017 Private Message to "JAMICUS"

When I see protesters blocking

ATTACHMENT

B

5/16/2017 Public Post to Instagram

ATTACHMENT

C

STAND
NO PARKING
TUNDRA
Water St
Destandt
NO PARKING

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59 S.E.2d 102
190 Va. 917
DOUGLAS D. HUBBARD
v.
COMMONWEALTH OF VIRGINIA.
Record No. 3677.
Supreme Court of Appeals of Virginia.
April 24, 1950.

[190 Va. 920] Conway H. Sheild, Jr. and Owen S. Livsie, for the plaintiff in error.

J. Lindsay Almond, Jr., Attorney General, and H. T. Williams, Jr., Special Assistant, for the Commonwealth.

JUDGE: SPRATLEY

SPRATLEY, J., delivered the opinion of the court.

This case is here upon a writ of error to a judgment of the Circuit Court of York county, entered on June 1, 1949, wherein the defendant, Douglas D. Hubbard, was sentenced to five years in the penitentiary, pursuant to a verdict of the jury finding him guilty of murder in the second degree.

On Saturday afternoon, January 15, 1949, James W. Montague, while hunting in York county, Virginia, was shot by the defendant, Douglas D. Hubbard, and died shortly after his removal to a hospital. Hubbard admitted the homicide; but claimed, upon his trial, that he acted in self-defense.

James W. Montague, a welder by trade, was 44 years old at the time of his death, and resided in Warwick county, a county adjoining York. He kept a number of dogs, was fond of hunting, and engaged in that diversion nearly every day during the hunting season.

On the morning of January 15, 1949, Montague, with three friends, L. J. Gregory, R. C. Marshall, Jr., and G. C. Wood, drove by automobile from Warwick county to York county to hunt rabbits. They carried three hounds [190 Va. 921] belonging to Montague, parked their car near a tavern called the Tiptoe Grill, and hunted for some time in that vicinity. After an hour or more of hunting, two of the dogs became lost. Marshall and Wood went looking for the dogs, while Gregory and Montague stayed at the inn. Not being able to find the dogs, Marshall and Wood returned to the inn, where the party had lunch. Montague drank two bottles of 3.2 beer during the time he remained at the inn. One of the lost dogs returned after lunch, and the group decided to continue the hunt with the hope that the lost dog would hear the other dogs running and return. The group of four was joined by a colored man named Eppes, and all started hunting in the field near the inn. A rabbit was soon located and the dogs ran across the road and into a small body of woods. They soon lost the trail and stopped barking. Montague's party separated and started looking for the dogs. In a few minutes a shot was heard, followed in two or three seconds by two shots fired closely together. Wood, who had been out of the sight of Montague for three minutes, said 'I heard a single shot, then a matter of a few seconds I heard a double shot simultaneously

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and I could hardly distinguish between the two, the last two, so I then, in turn, turned around and ran back through the woods.' After running 35 to 40 yards, he found Montague lying wounded on the ground on the property of Lincoln Orange, 30 or 40 feet from the land of Douglas D. Hubbard. Two dogs were beside Montague, leashed by his belt to his right hand. Montague's 12 gauge double barrelled shotgun, with two empty shells in it, was lying under him. He was conscious when found, but spoke only the words: 'Leave me alone,' or 'Don't bother me,' before his death. Montague was taken to the hospital in Williamsburg by his companions, where he died within ten or fifteen minutes.

Marshall testified that he heard 'one shot and an interval from 2 to 5 seconds, I'd say, and then there was two shots which seemed almost simultaneously. Just right together.' Hearing his name called, he proceeded to the place where [190 Va. 922] Montague was found. He corroborated Wood as to the details surrounding the finding of Montague and the general surroundings.

At the inquest on the body of Montague it was found that he had received nine buckshot wounds, 'one in front of left knee, one in left side, -- inside, about 6 inches above the knee; one in right side, -- inside, midway between knee and hip; one right side, lower margin of ribs; one directly over the heart and one half-way between the heart wound and the shoulder on the left side; one in the midpoint of the neck, lower part; one in the middle of the neck on the right side; one in the left arm just above the elbow.'

Philip Montague, son of the deceased, testified that his father was an experienced hunter and always fired his gun from his left shoulder. He viewed the body of his father and discovered a bruise on the finger which was not there the night before his death. His father's dogs, on his last hunting trip, were small, one an adult two feet tall, and the 'other just beginning to run,' about eighteen inches high.

V. W. Lovelace, sheriff of the city of Williamsburg and county of James city, received a call about two o'clock of the same day to come to Bell's Hospital because some one had been shot. He promptly responded and went to the emergency room of the hospital, where he found the defendant with a nurse, Mrs. Hubbard, and the Honorable Frank Armistead, Judge of the Fourteenth Circuit, which included the city of Williamsburg and county of York. Upon his arrival, Hubbard asked him, 'What the hell I was doing there?' Judge Armistead then requested the sheriff to swear out a warrant for Hubbard which the sheriff immediately did, charging the defendant with the murder of Montague. Lovelace said someone asked Hubbard about the man who was shot, and Hubbard replied that 'he would like to see them pick the shot out of the other man.'

There was considerable evidence regarding terrain, fences, lines of fire, and pattern of shot. No scaled map was introduced.

[190 Va. 923] H. D. Riley, deputy sheriff of York county, testified that he went to the hospital, viewed the body of Montague, and then went to a room where Hubbard was lying in bed. He asked Hubbard if he felt like talking about the shooting. Hubbard replied, 'If you want to know anything about it, find my attorney Robert Armistead, and if you do find him, tell him I would like to see him myself because I haven't seen him as yet.' Riley, at Hubbard's request, read aloud the warrant charging the latter with the murder of Montague.

Riley thereafter went to the scene of the homicide. He found there a 12 gauge empty shell lying on the Hubbard property beside a poplar tree about 82 feet from a fence. He also found blood on some leaves beside a fence on the Lincoln Orange property approximately 30 steps, or 90 feet, from the tree where the empty shell was found. There was also evidence of the passage of buckshot and fine shot, No. 6 or No. 8, on the trees and bushes. The lines of fire of the buckshot and fine shot were parallel and travelled through the same point. The land where the empty shell was found was about nine feet and two inches higher than that where Montague had been found wounded. In an examination of the pockets of the coat of Montague, Riley found some shells containing No. 6 and No. 8 small shot.

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Dr. B. I. Bell, who treated Hubbard, found 75 or 80 gunshot wounds on the person of the latter. They were made by small shot and

entered his body from his forehead to below his knee, with 'a good many in the right arm and right side of the body and abdomen. There were 16 in the right leg from the hip down to the knee.'

Dr. H. G. Stokes viewed the body of Montague on the afternoon of the shooting. He did not probe or follow the course of the shots in the body. He said he did not know, but that he thought the wound directly over the heart caused death. He expressed the opinion that Montague could not have aimed and fired two shots after he had been struck as described. He said his opinion, in that [190 Va. 924] respect, would not be 'influenced' even though it be assumed that Montague after he was shot turned around and crossed a fence approximately 20 inches high and walked a distance of approximately 30 yards.

Dr. Stokes also gave medical treatment to Hubbard at four-thirty that afternoon. He thought that the shot found in the latter's body possibly formed two patterns or groups of shots. He said that Hubbard, who was then conscious and seemed to know what he was talking about, told him that Montague was on the Lincoln Orange land, and not the Hubbard land, when he was shot.

Edward K. Pettitt, a merchant, testified that between Christmas day, 1948, and New Year's day, 1949, Hubbard came to his store and purchased 'six 12-gauge gun bore No. 4 buckshot shells' of the same make and color as the empty shell found on the Hubbard property and the loaded shell in Hubbard's gun.

Over the objection of the defendant, the Commonwealth's attorney was permitted to ask the above witness whether Hubbard made any comment with reference to the use of the shells. The witness said that Hubbard replied, 'If they didn't do the work, he would cut up some nails and put it in the shells.'

R. M. Goode, a York county police officer, saw the empty 12-gauge shell found on the Hubbard property near a poplar tree. He then went to the Hubbard home and there found the single-barrelled shotgun, with which the killing was done, loaded with a similar 12-gauge No. 4 buckshot shell. He counted the number of shot in a like shell and found that it contained 27 buckshot. He also examined a 12-gauge shell of No. 8 shot, of the same make that was found empty in the Montague gun, and found 450 small shot.

Dr. J. M. Henderson, coroner of the city of Williamsburg, who saw Montague immediately after he was brought to the hospital and who conducted the inquest on the latter's body, was unable to say which particular shot or shots [190 Va. 925] caused his death. There was no evidence of an external hemorrhage.

H. D. Riley said that, upon his examination of the body of Montague, he found a fresh bruise between the first two fingers on the left hand of Montague. There were no marks or scratches of bullets on Montague's gun.

R. C. Marshall, Jr., identified the spot where Montague was lying as being ten or fifteen feet out of the line of fire described by other witnesses.

Hubbard is a farmer, married, about 58 years of age, and has lived practically all of his life on a farm which he owns in York county, about half a mile from the city of Williamsburg. He said that he first met Montague hunting on his property without permission about the first of the hunting season in November, 1948. They then and there had an argument which resulted in Hubbard obtaining a warrant against Montague for trespass. Montague, in turn, obtained a warrant charging Hubbard with threats to kill him and to shoot his dogs. The warrants were disposed of before the trial justice of York county on some date between

December 25, 1948, and January 1, 1949. The record does not show the outcome of the trials.

Between December 25, 1948, and New Year's day following, and before the warrants were disposed of, the defendant bought the six buckshot shells from Pettitt,

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hereinbefore mentioned. Hubbard admitted that one of these shells was used in shooting Montague. There was no evidence that the defendant and the deceased saw each other between the date of the disposal of the warrants and the date of the shooting. It was disclosed that the deer hunting season ended on January 5, 1949, and the general hunting season on January 20, 1949.

The defendant gave the following version of the shooting:

He said that on January 15, 1949, about one o'clock in the afternoon he took his single-barrelled 12-gauge shotgun and a ten months old fox terrier puppy and went into the [190 Va. 926] woods on his farm to train the dog in hunting squirrels; that about 300 yards from his home he stopped to let his dog hunt; that he heard someone calling dogs, and shortly thereafter two dogs jumped a fence and came on his property; that he picked up his puppy and held her on his left arm to keep her from following the other dogs; that a man, whom he did not at first recognize as Montague, followed the two dogs over a low place in the fence four or five steps on to the property of the defendant, about 25 or 30 yards from where the defendant was standing; that thereupon Montague stopped, looked around, called his dogs, bent over as though putting a leash on them, and then quickly straightened up and said, 'I told that Judge at Yorktown the other day I was going to kill you, and damn you, I am going to kill you. * Damn you! Drop that gun!'; that he continued to hold his puppy on his left arm and his gun in his right-hand; that Montague repeated his threat to kill and his order to drop the gun, and then shot him in the stomach and legs; that he twisted around to his left to drop the puppy behind him, and while so twisting Montague said 'God damn you! Drop it!' and shot again, the shots taking effect in his right side, arm and over the right eye; that three shots struck the puppy and some struck his gun; that thereupon he 'straightened around' and returned Montague's fire; that Montague turned and walked four or five steps to the low fence and proceeded across to the Lincoln Orange property; that after firing he immediately reloaded his gun and watched Montague continue to walk slowly away, saying something like 'Oh, Bob;' and that, seeing no other person, he then left the scene, hurried to his home, and told his wife Montague had shot him.

Defendant further testified the buckshot shell which he fired at Montague had been in his gun since the deer hunting season; that he had gone on his squirrel hunting trip without knowing it was still in his gun; that he carried in [190 Va. 927] the pockets of his coat other buckshot shells which had been put therein for a former hunting trip; and that he also had with him some shells with smaller shot used for hunting squirrels. He denied that he had told Dr. Stokes on the afternoon of the shooting that Montague was on the Lincoln Orange land when shot.

The defendant testified that after he told his wife he had been shot, he proceeded to Williamsburg for the purpose of going to a hospital; that on his way he went to the home of Judge Frank Armistead, trying to locate the latter's son, Mr. Robert T. Armistead, his counsel; and that Mrs. Hubbard talked to Judge Armistead possibly two minutes, and when she returned he went directly to the hospital.

On cross-examination, the defendant was asked why he had not related his version of the shooting to Officer Riley, whom he knew was investigating the case. His answer was, 'For several reasons. Mr. Riley came in there and he

didn't warn me that anything I might say might be used against me, but Judge Armistead had told me to keep my mouth shut.'

The trial judge found it necessary to warn the defendant twice about his attitude in answering questions. On the second occasion, in answer to a question from counsel for the Commonwealth, whether

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the shots quickly occurred, the defendant replied: 'There wasn't time then for any damn foolishness.'

Mrs. Hubbard said that her husband went hunting with the puppy on the afternoon of the shooting; that he was gone about 15 or 20 minutes; that when he returned home he told her Montague had shot him; and that while he was away from home, she had heard the sound of three gunshots, evenly spaced.

The jury was fully and fairly instructed, eleven instructions being given for the Commonwealth and eleven for the defendant, covering every aspect of the case.

There are no assignments of error relative to the instructions.

[190 Va. 928] After the instructions had been given to the jury and counsel had concluded their arguments, counsel for the defendant, in referring to a portion of the argument of counsel for the Commonwealth, said to the court: 'I do not think that was proper argument, and I do not ask the court to tell the jury that, because I believe that would, perhaps, emphasize it in their minds; but I do move for a mistrial.' The motion was overruled. The argument objected to was as follows:

'Let us go on to another circumstance. He goes home and what does he tell his wife? Montague shot me. Does he tell his wife he shot Montague? No, sir. From this evidence, and they tell us, she went away to Williamsburg knowing nothing about it except that he was shot. When he left home, gentlemen of the jury -- now, bless your souls, here is a man of good judgment, you saw his ability to preserve and protect himself on the witness stand, you saw him here exhibit his ability -- now he was in the position of a very good citizen who had been terribly mistreated and a man who upheld the law, a man who was shot at an unprovoked attack. He knew he had shot a man and he had walked away seriously injured, and what does he do? Does he call the Sheriff of the county and report it and surrender his gun and say I'm sorry, or would you come out here? ' I don't know whether the man is hurt bad or not, or dead. I had to shoot him.' Why no. He doesn't do that. He runs up to see a friend -- not to the hospital but to see a friend. He tells his friend -- happens to be Honorable Frank Armistead, judge of this Circuit. He doesn't tell us what he told Judge Armistead but what his friend told him to do, and what was it? ' Keep your mouth shut.' Now, gentlemen of the jury, do you suppose Judge Armistead would have told him that if he had told Judge Armistead that he was severely attacked and that he had to shoot a man in self-defense and he was so wrought up about it? We don't know what he told Judge Armistead but he tells you Judge Armistead told him to keep his mouth shut. If he had [190 Va. 929] told the Judge, with his ability as a lawyer wouldn't he have said, 'You don't have to give evidence against yourself -- surely you have a right to keep your mouth shut -- but if you are innocent to come to the authorities to protect you and not to harm you, and to apprise them of the outrageous thing that has happened to you."

It is contended that the trial court erred in permitting E. K. Pettitt to testify as to the defendant's statement about the buckshot shells; in refusing to permit a witness to testify as to a specific act of Montague; in denying the motion for a mistrial because of remarks of counsel for the Commonwealth during his

argument to the jury; and in refusing to set aside the verdict as contrary to the law and the evidence and without evidence to support it. It is claimed that the evidence of the defendant showed, without contradiction, that he acted in self-defense.

The statement of the defendant to Pettitt was obviously a threat to kill. It was made while grievances between the defendant and the accused were unsettled. The words indicated that the buckshot shells were purchased for some purpose other than that of merely shooting animals. Defendant offers no reasonable excuse for their purchase. He was an experienced hunter and knew that buckshot would kill deer.

In criminal cases, when the motive or intent of the accused is material, a

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wider range of evidence is permitted in showing such intent than is allowed in other cases. Parsons v. Commonwealth, 138 Va. 764, 775, 121 S.E. 68.

'As a general rule, general threats to kill, not shown to have any reference to deceased, are not admissible in evidence, but a threat to kill or injure someone not definitely designated is admissible where other facts adduced give individuality to it.' 40 C.J.S., Homicide, section 206(c). Hardy's Case, 110 Va. 910, 919, 67 S.E. 522.

In homicide cases, evidence of the words, actions, conduct, and general demeanor of the defendant before the killing, not too remote in time, may be introduced for the [190 Va. 930] purpose of proving his malice or motive. Motive is an inferential fact, and may be inferred, not alone from attendant circumstances, but, in conjunction with these, from all previous circumstances which have reference to, and are connected with the commission of the offense. Circumstances which tend to shed light on the motive or intent of the defendant, or tend fairly to explain his actions are admissible. Considered in connection with all the circumstances here, the jury had a right to consider whether the statement tended to show an existing disposition or design on the part of Hubbard to commit the offense charged against him.

Elmer Vaughan and W. D. Ball, called to testify on behalf of the defendant, said that the deceased had the general reputation of being quarrelsome when he was drinking. In rebuttal, four other witnesses testified that they had known Montague for many years; that he had the general reputation of being a good, quiet peaceful and law-abiding citizen; and that they had never heard of him being involved in a quarrel.

On cross-examination, Vaughan said that he had had some trouble with Montague about one of the latter's dogs in the summer of 1947, almost two years before the trial. The court refused to permit Vaughan to relate that he then told Montague unless the latter took his dogs off the property of the witness he would kill them, and Montague replied he 'would shoot me before I got home.'

There was no evidence that Montague was intoxicated to any degree on the afternoon of January 15, 1949, as a result of drinking two bottles of 3.2 beer. On the other hand, his companions said he was entirely sober.

Under his plea of self-defense, the defendant had the right to present evidence that the general reputation of the deceased was that of a turbulent person. That right was granted. The only evidence tending to support his claim of self-defense was that of the defendant himself. Under the conditions he related, his right to shoot Montague was [190 Va. 931] not in question. If his version of the killing was true, his defense was complete.

Hubbard did not claim that he knew Montague had been drinking on the day in question and that he had the reputation of

being quarrelsome when he was drinking. He did not assert knowledge of the circumstances of the incident to which Vaughan referred. His defense was that he shot Montague because the latter had shot him twice. The offered evidence of the details of the incident referred to by Vaughan was, in the absence of supporting evidence of self-defense and in point of the time of the alleged incident, too remote to be material under the circumstances here. However, the testimony of Vaughan that there had been trouble between him and Montague over a dog many months previously was before the jury for what it was worth. Randolph v. Commonwealth, ante, pp. 256, 264, 56 S.E. (2d) 226.

We have had frequent occasion to discuss the question of improper remarks of counsel. Trout v. Commonwealth, 167 Va. 511, 522, 188 S.E. 219.

The granting or refusal of a new trial on such grounds is a matter within the sound discretion of the trial court, and such discretion will not be interfered with except when abused.

The situation here differs from that in the ordinary case, in that the defendant specifically refrained from asking the court

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to tell the jury to disregard the objectionable remarks of the prosecuting attorney.

Jurors are supposed to be competent to understand and willing to obey the instructions of the court as to what they shall and shall not consider in determining their verdict. If a party desires to take advantage of his objection on account of improper remarks made by counsel in his address to the jury, the court should be promptly requested to instruct the jury to disregard them. Spencer v. Commonwealth, 143 Va. 531, 129 S.E. 351; Vol. 1, Digest of Va. & W. Va. Reports (Michie), Argument and Conduct [190 Va. 932] of Counsel, section 26 et seq. He is not entitled to gamble on the jury's verdict. The effect, under the circumstances here, was to waive the objection.

Moreover, the remarks of counsel complained of were not exaggerated. The prosecuting attorney had a right to refer to the conduct and actions of the defendant, and to draw reasonable inferences therefrom. The inferences made were plausible, and might well have been drawn by the jury without the aid of counsel. The argument simply discussed what would have been the attitude of a man, entitled to claim self-defense on a charge of murder. The defendant had an opportunity to relate what he said to Judge Armistead and what caused the reply of the judge. It is significant that he did not call the judge as a witness. The advice of the judge, in whose jurisdiction the homicide occurred, was quite natural in any event.

This brings us to the principal assignment of error, that is, the sufficiency of the evidence. We cannot agree that the account given by the accused of the shooting is without conflict, and not inconsistent with any evidence as to the material facts in the case.

The law in Virginia, as the court properly instructed the jury, is that 'every homicide is presumed to be murder in the second degree and the burden of proving the elements necessary to elevate the crime to murder in the first degree is upon the Commonwealth but on the other hand, in order to reduce the offense from murder in the second degree to manslaughter or excusable or justifiable homicide, the burden of the evidence is upon the accused.'

See cases cited in notes to Virginia Code, 1950, section 18-30; Virginia Code, 1942 (Michie), section 4393.

The effect of the verdict in this case was that the Commonwealth had failed to establish that the killing was murder in the first degree,

and that the defendant had failed to introduce evidence sufficient to warrant a finding that the killing was in self-defense.

[190 Va. 933] There were numerous circumstances in the case entirely proper for the consideration of the jury which may have influenced it in attaching small weight to defendant's version of the killing. Bad feeling existed between the defendant and the deceased. While criminal warrants sworn out by each against the other were pending for trial, the defendant evidenced a state of mind bent on mischief. His location of the place where Montague was shot and his version of the time and sequence of the shots fired were contradicted. His conduct, his actions, and statements immediately after the shooting were not those of a man who acted in self-defense. He did not explain how he killed Montague until he went on trial. His statements subsequent to the killing manifested ill feeling towards the deceased. His attitude and demeanor on the witness stand showed a lack of feeling and indifference indicating his mental attitude.

In Randolph v. Commonwealth, supra, at page 263, we said:

'The jury were not required to accept the defendant's statement as to how the killing occurred simply because the defendant said it happened that way and no witnesses testified to the contrary. If from the improbability of his story and his manner of relating it, or from its contradictions within itself, or by the attending facts and circumstances, the jury are convinced that he is not speaking the truth, they may reject his testimony, even though his reputation for truth is not attacked and he is not contradicted by other witnesses.'

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Faced with the burden of reducing the offense from murder in the second degree to a lesser offense or justifiable homicide, the defendant's evidence, conduct, actions, and statements were such as to warrant the jury in finding that he had failed to rebut successfully the legal presumption against him.

Jurors are not given to dealing lightly with the life and liberty of a man. They and the trial judge are in a much [190 Va. 934] better position than we are to estimate the value of the testimony of all the witnesses.

It is not entirely easy to understand the testimony of the defendant as to the circumstances of the killing. His testimony as to why he carried a gun loaded with buckshot to hunt squirrels is not satisfactory. He assigns no good reason why he did not immediately claim he killed the deceased in defense of himself. The learned and able judge who presided at the trial of the case and who, like the jury, observed and heard the witnesses, saw no reason to disturb the verdict. We cannot say that their conclusion was contrary to the evidence and without evidence to support it.

For the reasons stated, the judgment of the trial court must be affirmed.

Affirmed.

* Judge Frank Armistead, by an order of record, disqualified himself to hear and determine the case.

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347 S.E.2d 539
2 Va.App. 717
Claude C. DUNCAN, Jr.
v.
COMMONWEALTH of Virginia.
Record No. 0409-85.
Court of Appeals of Virginia.
Aug. 19, 1986.

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[2 Va.App. 718] Leon R. Sarfan (Sarfan & Nachman, Newport News, on brief), for appellant.

Eugene Murphy, Asst. Atty. Gen. (William G. Broaddus, Atty. Gen., on brief), for appellee.

Present: BAKER, BARROW and HODGES, JJ.

[2 Va.App. 719] HODGES, Judge.

Claude C. Duncan, Jr. was tried by a jury on January 15 and 16, 1985, on charges that he murdered Ronald Mullis and used a firearm in the commission of the murder. The jury found him guilty of both charges. On March 1, 1985, in accordance with the verdict, the court sentenced Duncan to life imprisonment on the murder conviction and two years on the firearm offense. Duncan complains that certain rulings by the trial court denied him a fair trial. He also claims that the court erred by refusing an intoxication instruction even though there was evidence to support giving it. Finding no reversible error, we affirm the judgments.

On February 1, 1984, at approximately 11:05 p.m., Ronald Mullis was found dead in his car in the parking lot at his employment after his shift at work. The cause of death was a gunshot wound to the head. He and Duncan were employees of the Newport News Shipbuilding and Drydock Company ("the shipyard") in the O-43 Department, Maintenance and Utilities. Approximately one week prior to Mullis' death, Duncan visited Kenneth Wilburn, a co-worker, gave Wilburn his keys to lockers and doors for various power plants at the shipyard, and told him that he was quitting his job. Wilburn said Duncan did not return to work after that date. Duncan had complained to Wilburn in December of 1983 that others were getting raises and he wondered why he did not receive a raise. Wilburn testified that an employee would first have to talk to his supervisor about a raise and that the victim, Ronald Mullis, was Duncan's supervisor.

For approximately three to four months prior to the homicide, Duncan lived at the Patton Motel on Jefferson Avenue in Newport News. On February 1, 1984, the night of the shooting, Duncan came to the motel office around 10:30 p.m. and gave Ricky Dickson, the motel clerk, three letters. He

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told Dickson: "Make sure that you mail those letters for me." Dickson told him he would and he placed all three into the motel mailbox. One letter was addressed to the Daily Press, a Newport News newspaper. Another was addressed to Duncan's estranged wife, but Dickson could not recall to whom the third letter was addressed. Dickson asked Duncan where he was going all dressed up, and Duncan told him he had to go downtown and take care of some business. Dickson asked him to bring back a couple of beers or some whiskey[2 Va.App. 720] and Duncan said that would be no problem because there was some in his room. Duncan then said: "Well, I got to go and I'll probably see you in about an hour or so." He did not, however, return to the motel until approximately 7:30 a.m. the next morning when he was immediately arrested by waiting Newport News police officers.

The murder occurred in the supervisors' parking lot at the shipyard at approximately 11:05 p.m. Shortly thereafter, Detective

Spinner of the homicide squad of the Newport News Police Department received information at the crime scene which led his investigation to the Patton Motel. At the motel he learned of the three letters that Duncan had given to Ricky Dickson to mail. Dickson, however, would not permit the detective to open the letter addressed to the Daily Press. The detective contacted David Gibson, an investigative reporter for the newspaper, and when Gibson arrived at the motel Dickson gave the letter to him. Gibson read it, handed it to Detective Spinner and he read it. Detective Spinner then followed Gibson to the Daily Press building and received a photocopy of the letter, while Gibson retained the original. At trial, the original letter was proffered and admitted into evidence over the defendant's objection.

The letter, purportedly written by the defendant, dated February 1, 1984, the night of the murder, reads, in pertinent part, as follows:

On last Monday, I went to my union office about a grievance of (sic) which I filed against two fellow workers in O43 Dept ... while talking to Thompson my union rep I was informed that my grievances were untimely and that I had better watch out because the yard was out to get me, because of my complaint plus a report of pictures taking in oct. in order to report another violation of fellow workers having unauthorized equipment in the yard. A locker inspection was held and my supervisor was present when this inspection was held, but walked by the locker which contained the t.v. and c.b. gear, and stolen cleaning gear, but he never turned Brownley in, but instead refused my request for a raise from July 1983 ... But one (sic) last Monday, I read a statement by my supervisor who made a statement that my previous service in the Navy made me more (sic) no receptive of the [2 Va.App. 721] policy's (sic) that was implemented, otherwise if something was wrong, I was not to make a complaint regardless of the danger, but this was totally due to my expert training in the Navy. All his statement was a lie ... Also Mullis stated that my problems in my marriage made me feel like I was harassed, but my personel problems had nothing to do with my complaint or grievance ... I have tolerated all I can take, I taken it to the proper people, but they have time limits but my union never mentioned this to me ... so don't think whatever happened on Weds nite was racially motivated. No, it was a lack of interest or support, all supervisor in O43 Dept was told of the incident but informed me to not report it and they would handle it.

The deceased's name and the names of two other shipyard supervisors appeared in the left-hand margin at the end of the letter. The Commonwealth's theory of the case was that these names comprised a "hit list" of those at the shipyard with whom Duncan intended to get even. At trial the two supervisors testified, in part, to the location of their parking spaces at work in relation to the deceased's space. Jim Vannoy, shift foreman in the O-43 Department, testified that he was on the day shift, that

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he had taken part in an investigation based upon a complaint by Duncan about C.B. gear and stolen cleaning materials, and had at that time accompanied another supervisor to check out the complaint. They found nothing to confirm Duncan's complaint. The Commonwealth's Attorney asked Vannoy where he parked on February 2, what hours he had worked, and whether he had parked that morning in the same area as Mr. Mullis. Duncan objected to the question whether Vannoy had parked anywhere near Mr. Mullis that morning. He argued that the question was leading and the objection was sustained. The question was not asked again.

Frank Roundtree, general foreman in the O-43 Department, testified that when Duncan's complaint was made he immediately inspected lockers for radios and televisions but

found nothing. The night of the murder, he was called at home at 11:30 or 12:00, went to the shipyard, returned home around 3:00 a.m. and then went back to the shipyard around 6:00 a.m. He said that he parked two to two and a half blocks from where Mullis parked.

[2 Va.App. 722] During the suppression hearing before trial, Dickson testified that Duncan told him "he was having problems with the shipyard and that one of the men down there--was just a brief conversation about the man and he said that he would get even with the motherf***er" but Duncan did not mention any names. Defense counsel requested a ruling on the admissibility of the "MF" statement and argued that the prejudicial effect outweighed the probative value since the statement was not linked to the deceased and was ambiguous. The court replied that the statement's admissibility would be dependent upon the background information leading up to the statement.

THE COURT: Now, just the statement per se, if he just said that without any background whatever, I'm going to get that so and so, it would not be admissible. If it's sufficiently tied in with other information ...

* * *

* * *

For example, if he had made the statement the day before I don't think it would be admissible, but if it's made within the same time frame, within a reasonable time of which he might carry it out, I think possibly it would be admissible. So that is my thinking on it. I can't rule until I know what the evidence is.

At trial, Dickson testified that he and Duncan had discussed Duncan's employment briefly about three to four days to a week prior to the murder, and Duncan told him he was having trouble at the shipyard and was not working there anymore. Dickson told him: "[I] wouldn't really worry about it, you know and he just said that he was going to get even with some motherf***ers down there." Defendant objected, arguing again that the threat was general, directed at no one in particular and "too remote" in time to the murder. The objection was overruled.

At the conclusion of Dickson's testimony on behalf of the Commonwealth, the defendant moved the court to strike Dickson's testimony regarding Duncan's statement about getting even with some "MFs." Counsel noted that the statement was made, at the latest, three days prior to the shooting of Mullis. The court, however, overruled the motion and held that:

[2 Va.App. 723] [There] are certain circumstances here that are entirely consistent with the Commonwealth's theory of the case and it's a matter which certainly you can argue as to the creditability (sic), but I think it has some probative value and I'll admit it on the (sic) that basis.

Duncan called David Russell to testify on his behalf concerning a grievance that he had filed with his union. Russell was the secretary of the grievance committee, and testified that the grievance was signed by the shipyard personnel supervisor on November 30, 1983, and by the union representative on December 8, 1983. The grievance report indicated that Duncan had last received a pay increase on March 29, 1982. His grievance was that he was being harassed and treated unfairly by his fellow

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workers in the O-43 Department. He said that he had made management in O-43 Department aware, to no avail, of negligence and behavior unbecoming employees of the company. He requested an apology from the parties involved and asked that the company cease and desist. The company alleged that the grievance was untimely filed and that the

company had neither harassed the grievant nor violated the labor agreement.

A letter written by the deceased was made a part of the report, and said in part that:

(Duncan's) grievance is not with this foreman. I feel that since Mr. Duncan has retired from the Navy he may feel superior to us shipyard workers in that maybey (sic) the job is not operated to his specifications.

Mr. Duncan also said he has a very heavy problem with his wife. He may be confusion (sic) his personal problem with his employment.

I.

Duncan complains that the "MF" threat was too "remote" in time to have any probative value. The length of time between a threat and a homicide, standing alone, does not make evidence of the threat inadmissible. In Hardy's Case, 110 Va. 910, 67 S.E. 522 (1910), the court noted that the threat made by the accused [2 Va.App. 724] was a general threat, as well as a conditional threat made some time before the murder, but said,

[I]t tended to show a purpose in the mind of the accused to kill any man who should subject him to prosecution and fine for the illicit sale of liquor.

* * *

* * *

The authorities, so far as we have been able to examine them, unmistakably hold that conditional threats are admissible, wherever it is shown that the party who has been attacked had put himself within the conditions laid down by the party making the threats.

Id. at 919, 67 S.E. at 526.

In Maxwell v. Commonwealth, 167 Va. 490, 187 S.E. 506 (1936), the threats made by defendant toward the victim were made a year or more before the killing. The court held that the remarks were not inadmissible due to their having been made a year prior to the killing, but that the passage of time might weaken their probative value in the jury's mind. Id. at 497, 187 S.E. at 509.

The element of fixedness is lacking, and the probative value disappears, if the threats in question were made at such a time anterior that the design cannot possibly be supposed to have continued throughout the interval. But no mere distance of time in itself should make threats irrelevant. A design once formed may continue. The defendant may use the lapse of time as a circumstance explaining away the significance of the threats by indicating the possible abandonment of the design.

1A Wigmore, Evidence § 108 (Tiller's rev. 1983); see also Newberry v. Commonwealth, 191 Va. 445, 61 S.E.2d 318 (1950).

Defendant also argues that a general threat by an accused directed to no particular person is not admissible unless the prosecution can connect the threat and the victim. He cites Smith v. Commonwealth, 220 Va. 696, 261 S.E.2d 550 (1980) for support. [2 Va.App. 725] In Smith, the defendant was tried for the murder of Patricia McGlothlin, who disappeared August 28, 1977. A witness said she met defendant for the first time on August 28, 1977. When she discovered that defendant wanted to involve her husband in a drug deal, she demanded that her husband return Smith to an ice cream parlor in Norton, Virginia. During the ride to the parlor the defendant was "real nervous and got real upset" and said, "I've got it in for someone." Dye said that the defendant would not respond when asked, "Who?".

The court noted that the statement by the defendant was a mere general threat and referred to no particular person. That

court also noted that the Commonwealth had the burden of showing the connection between the threat and the victim. Id. at 702, 261 S.E.2d at 554. It held that the statement was admissible, however, and followed the holding in McMurray v. Commonwealth, 143 Va. 489, 129 S.E. 252, (1925), where the court had said:

[B]ut the connection "may sufficiently appear from the circumstances, or subsequent declarations of the accused, and if the circumstances are such that the language used might reasonably be construed to include or refer to the deceased or injured person, the evidence should be admitted and the question left to the jury."

Id. at 497, 129 S.E. at 255.

In addition, a threat made against a class of persons is admissible even though the victim is not specifically identified so long as the victim is shown to have been a member of the class against whom the threat is made. C. Torcia, Wharton's Criminal Evidence Relevance and Materiality § 203 (1972).

The class may be so broad as to constitute no specified class at all. Thus, it may be shown that the defendant threatened to kill somebody before night; that he said he was going to kill a man before sundown; that he would "split the skull of any fellow that was saucy;" that he would kill anyone who got in his way; or that he would 'get even' with somebody.

[2 Va.App. 726] Id.

Prior to Dickson's testimony, the jury heard evidence that Duncan was upset about not getting a raise when others were; that the first person an employee would talk to about a raise would be his supervisor; that Duncan's supervisor was Mullis; that on the night of the shooting Duncan's co-worker, Kenneth Wilburn, saw him in the shipyard parking lot headed towards the supervisors' parking lot just prior to the shooting; that Wilburn knew Duncan did not work there anymore; and that Wilburn decided not to talk to defendant when the defendant looked at him. Wilburn described his reaction at seeing Duncan in the parking lot: "I ain't (sic) never seen a look that way at me before so my instinct told me to get in my car and get out of the lot."

We believe that the Commonwealth successfully established a link between the threat made by Duncan and the subsequent murder of Mullis and there was no error in admitting the statement.

II.

Duncan claims that the introduction of the letter to the Daily Press was reversible error because: (1) there was no proof that he had written the letter; (2) there was a one-year break in the chain of custody of the letter; and (3) the letter's contents were ambiguous and the Commonwealth failed to sufficiently show a connection between defendant and victim.

On the night of the killing, Duncan gave Ricky Dickson, the motel manager, three letters and asked him to mail them for him. Dickson said that he never read the letter to the newspaper himself, but testified that a photocopy of an envelope shown to him appeared to be identical to the original envelope. He was asked what he based that opinion on and he responded: "Well, it does look the exact same writing as that night and I can remember that far back. That is the letter that Mr. Duncan did present to me, put (sic) in the box, and I did present that to the Daily Press."

One of the four non-statutory ways to authenticate a document is through the use of circumstantial evidence. "The court must determine if the circumstantial evidence is sufficient to justify the document's admission; the jury will then, as in all cases, [2 Va.App. 727] make an independent decision as to whether the document is genuine." C. Friend, The Law of Evidence in Virginia § 180 (2d ed. 1983). While merely showing that a writing

purports to be from a sender is not sufficient, Harlow v. Commonwealth, 204 Va. 385, 389, 131 S.E.2d 293, 296 (1963), the evidence in this case clearly indicated that Duncan wrote the letter. Not only did he deliver the

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letter to Ricky Dickson, who identified the handwriting on the envelope as Duncan's, but the contents of the letter were fairly unique to Duncan.

When the authenticating evidence is circumstantial, however, the question whether reasonable men could find its authorship as claimed by the proponent, may be a delicate and balanced one, as to which the judge must be accorded some latitude of judgment. Accordingly, it is often said to be a matter of discretion ... if a prima facie showing is made, the writing or statement comes in, and the ultimate question of authenticity is left to the jury.

E. Cleary, McCormick on Evidence § 227 (3rd ed. 1984).

The letter in contention here contained information which strongly indicated that Duncan was its author. A large part of the letter's content dealt with Duncan's grievance to his union and delineated specific incidents which, while perhaps known by others at the shipyard, were reasonable indications that he was the author. Part of the letter related directly to Duncan's possible motive for killing Ronald Mullis, who had been his supervisor at the shipyard.

[O]ne (sic) last Monday I read a statement by my supervisor who made a statement that my previous service in the Navy made me more (sic) no receptive of the policy's (sic) that was implemented, otherwise if something was wrong, I was not to make a complaint regardless of the danger, but this was totally due to my expert training in the Navy. All his statement was a lie to clear himself for not acting on Mr. Griffin and Brownley's constant harassment of me.

* * *

* * *

Also Mullis stated that my problems in my marriage made me feel like I was harassed, but my personel problems had [2 Va.App. 728] nothing to do with my complaint or grievance.

* * *

* * *

So don't think whatever happened on Wednesday night was racially motivated. No, it was a lack of interest or support, all supervisor in O43 Dept was told of the incident but informed me to not report it and they would handle it.

We hold that the Commonwealth made a prima facie showing that Duncan was the author of the letter, and its introduction into evidence was not error.

III.

Duncan's next claim is that the letter was inadmissible due to an eleven month "break" in the chain of custody. This argument is without merit. He contends that the Commonwealth offered no proof of the whereabouts of the letter from the day of the crime until the day of trial. Duncan argues that Detective Spinner's identification of the letter was insufficient to establish a reasonable certainty that there had been no alteration or substitution of the letter. The Commonwealth counters that the chain of custody is only important if there is a likelihood that the evidence might have been tampered with, and that in the present case there was no such evidence.

The appellant cites Robinson v. Commonwealth, 212 Va. 136, 183 S.E.2d 179

(1971), for the rule that the proponent of demonstrative evidence has the burden of showing a reasonable certainty that the evidence was not altered or substituted. Duncan contends that the court in this case could not assume that the letter was properly handled from the time the letter was taken to the Daily Press to the time Detective Spinner picked the letter up from the Daily Press office. [1]

To accept Duncan's contention would be to ignore completely the testimony of Detective Spinner, who testified that

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he followed [2 Va.App. 729] the investigative reporter to the Daily Press building, obtained a copy of the letter which he kept, returned shortly before trial to the Daily Press and retrieved the original, and compared his copy with the original. He further testified that his copy and the original obtained from the Daily Press were the same. This evidence was clearly sufficient to show with reasonable certainty that the letter was neither altered nor substituted. See Smith v. Commonwealth, 219 Va. 554, 559, 248 S.E.2d 805, 808 (1978). We reject Duncan's contention that the letter was improperly introduced. We believe the Commonwealth carried its burden of showing with reasonable certainty that the letter was authentic and had not been altered or substituted.

IV.

Duncan further contends that the court erred in allowing testimony from two shipyard supervisors about their parking space locations at work in relation to where the victim parked.

Both supervisors who testified about their parking locations were mentioned in the letter that Duncan wrote to the Daily Press. Their names appeared in the margin with Ronald Mullis' name. The text to the right of the margin where their names appeared reads:

[S]o don't think whatever happened on Wednesday night was racially motivated. No, it was a lack of interest or support, all supervisors in O43 Dept. was told of the incident but informed me to not report it and they would handle it.

Duncan contends that the parking location testimony and the fact that the supervisors' names appeared in the letter together with the victims' name, was improperly and repeatedly used by the Commonwealth in closing argument to indicate that Duncan had compiled a "hit list." When he objected at trial to any reference to a hit list, the court held that the Commonwealth could draw any reasonable inference from the facts that had been introduced. Duncan claims that the parking spaces testimony was neither relevant nor material and misled and prejudiced the jury against him.

[2 Va.App. 730] We hold that the jury could have drawn a reasonable inference that Duncan had included the names of Vannoy and Roundtree in the letter to the newspaper the night of the killing because he intended to take revenge against all those he believed had wronged him. Both Roundtree and Vannoy were supervisors who had taken part in the locker inspections spurred by Duncan's complaint. There was evidence that at the time of the shooting in the parking lot, three shots were fired, but when the police seized the murder weapon from the glove compartment of Duncan's car, the weapon was fully loaded. The police also seized an almost full box of shells. In addition, Duncan's whereabouts were unknown for approximately eight hours between the time of the shooting and his arrest at approximately 7:30 a.m. the next morning. Vannoy and Roundtree did not have to report to work until 7:00 a.m., although they usually arrived earlier.

A Commonwealth's Attorney has the right to argue the evidence and all reasonable inferences from the evidence, Bailey v. Commonwealth, 193 Va. 814, 830, 71 S.E.2d 368, 376 (1952), and we cannot say that the court erred by holding that the argument was properly based on inferences reasonably drawn from the evidence.

V.

Duncan's final contention is that the trial court erred in refusing to grant an instruction regarding his intoxication prior to the shooting. He argues that it is reversible error for a court to refuse an instruction when there is any credible evidence to support it. McClung v. Commonwealth, 215 Va. 654, 657, 212 S.E.2d 290, 293 (1975).

The McClung case involved a homicide charge against the defendant. The jury was instructed on first and second degree murder, as well as self-defense. The trial court refused to grant an instruction on voluntary manslaughter requested by the defendant based upon her contention that the shooting took place after provocation

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by the victim. The Supreme Court reviewed the conflicting testimony and noted that the general rule is that whether credible evidence of provocation is sufficient to rebut the presumption of malice arising from a homicide is a question of fact, and the refusal to grant the instruction was reversible error since the jury [2 Va.App. 731] was the factfinder. 215 Va. at 656, 212 S.E.2d at 292.

The law with regard to an intoxication instruction has no relation to the holding in McClung. In Johnson v. Commonwealth, 135 Va. 524, 115 S.E. 673 (1923), the Supreme Court explained the limited circumstances under which intoxication would be available as a defense:

> When a man has become so greatly intoxicated as not to be able to deliberate and premeditate, he cannot commit murder of the first degree, or that class of murder under our statute denominated a wilful, deliberate and premeditated killing. But so long as he retains the faculty of willing, deliberating and premeditating, though drunk, he is capable of committing murder in the first degree; and if a drunk man is guilty of a wilful, deliberate and premeditated killing, he is guilty of murder in the first degree.
>
> Id. at 531, 115 S.E. at 675-76.

Therefore, the only issue on which an intoxication instruction would have been relevant was whether Duncan was capable of premeditation and deliberation, essential elements of a first degree murder charge. In Virginia, mere intoxication from drugs or alcohol is not sufficient to negate premeditation. Fitzgerald v. Commonwealth, 223 Va. 615, 631, 292 S.E.2d 798, 807 (1982); Giarrantano v. Commonwealth, 220 Va. 1064, 1073, 266 S.E.2d 94, 99 (1980). To justify an instruction on voluntary drunkenness, the evidence must show more than the mere drinking of alcohol. Hatcher v. Commonwealth, 218 Va. 811, 814, 241 S.E.2d 756, 758 (1978). The question is whether the facts indicate that the defendant was intoxicated to such extent that he did not know what he was doing or did not know right from wrong. Hite's Case, 96 Va. 489, 497, 31 S.E. 895, 897 (1898).

Duncan argues that Ricky Dickson's testimony that Duncan was intoxicated prior to the time he left the motel before the shooting was sufficient to justify the requested instruction. We disagree. Dickson testified that he was out of town for a while in January, but that when he returned the last week of that month, Duncan seemed like a totally different person. He said that their conversations before he went out of town had made sense while, upon his return to the motel, Duncan "would just keep rambling [2 Va.App. 732] on." In

addition, Duncan's room was now messy whereas it was clean before, and Dickson saw whiskey bottles around which he had not seen before. He said that when Duncan handed him the three letters to mail he could tell Duncan had been drinking that evening "by looking at his eyes and the slur of the words in his mouth." Dickson continued: "And I asked him, you know, where he was going to. And he told me that he was going downtown to take care of some business. And I asked him on his way back would he stop and get me something to drink and he said he would see me in about an hour." Dickson added that he knew Duncan was getting into his car and driving but he did not know where he was going.

The facts of drunkenness attested to by Ricky Dickson are similar to those adduced in Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202 cert. denied, 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979). In Waye, the defendant and witness, Len Gooden, had both consumed several beers on the evening of the killing for which Waye was on trial. The defendant claimed that Gooden's testimony that defendant was drunk raised a factual issue of his drunkenness and an instruction on intoxication should have been granted. The Supreme Court rejected his contention, pointing out that even Gooden admitted he had no qualms about riding with the defendant and that the defendant had driven "all right". Other testimony, the court said, showed that defendant was drinking but

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was not intoxicated. Id. at 698, 251 S.E.2d at 211.

In Hatcher v. Commonwealth, 218 Va. 811, 241 S.E.2d 756 (1978), the defendant was drinking whiskey on the day of the murder. The court stated: "[The evidence was] insufficient to show that [defendant] was so intoxicated as to render him incapable of committing a willful, deliberate and premeditated act.... Those events at the time the offense was committed and immediately thereafter show that, even though defendant had been drinking, he was aware of his actions and was not too intoxicated to form the intent requisite for murder in the first degree." Id. at 814, 241 S.E.2d at 758.

Dickson did not testify that he observed Duncan drink any alcohol that night. Beyond his opinion that Duncan had been drinking, there was no evidence that Duncan was incapable of premeditating or deliberating. When Dickson saw him that night, Duncan delivered three letters to him, requested that he mail them, and [2 Va.App. 733] told Dickson he was going downtown to take care of some business. Dickson made no attempt to dissuade Duncan from getting into his car and driving off, and in fact, asked Duncan to bring him back something to drink. We believe that the evidence of drinking was insufficient to require an intoxication instruction; the trial court did not err when it refused to grant such an instruction.

Therefore, in accordance with this decision, we find that the trial court did not err and we therefore affirm.

AFFIRMED.

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1 The contention that the letter was in fact tampered with is without merit. The fact that there was a "red check mark" in the margin in no way altered the text of the letter and, in addition, Duncan made no objection in this regard at trial and it cannot be raised for the first time on appeal. Rule 5A:18.

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438 S.E.2d 279
17 Va.App. 411
John David LAFON
v.
COMMONWEALTH of Virginia.
Record No. 2244-91-3.
Court of Appeals of Virginia.
Nov. 30, 1993.

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[17 Va.App. 413] Douglas E. Brinkman (Raphael B. Hartley, III; Frank & Hartley, on brief), for appellant.

Richard B. Smith, Asst. Atty. Gen. (Stephan D. Rosenthal, Atty. Gen., on brief), for appellee.

Present: KOONTZ, ELDER and FITZPATRICK, JJ.

KOONTZ, Judge.

John David Lafon (Lafon) was convicted by jury on counts of first-degree murder, illegal use of a firearm during the commission of a murder and simple abduction in connection with the death of Meredith Anne Mergler (Mergler). On appeal, Lafon contends (1) the trial court erred in admitting testimony regarding Lafon's prior bad acts; (2) the trial court erred in admitting testimony from two lay witnesses that expressed an opinion as to the ultimate fact of Lafon's guilt; (3) the trial court erred in not suppressing uncounseled statements made by Lafon to a police informant; and, (4) the Commonwealth failed to present evidence sufficient to sustain Lafon's [17 Va.App. 414] conviction for simple abduction. For the reasons that follow, we affirm Lafon's convictions.

Meredith Anne Mergler, a student at Virginia Polytechnic Institute & State University, disappeared sometime during the early morning hours of Sunday, August 30, 1987 after leaving a restaurant in Blacksburg. She had planned to return to her home in Northern Virginia that morning with Ann Ryan, a fellow student. Ryan informed Mergler's family that Mergler failed to meet Ryan that morning and that mutual friends Ryan had contacted could not locate Mergler.

Efforts by Blacksburg Police and a private investigator hired by Mergler's family failed to elicit any information concerning Mergler's disappearance. During the early days of the investigation, Lafon made inquiries to the Giles County Sheriff's office concerning the investigation. Lt. Bill Stables, who knew Lafon as an occasional informant, told Lafon that Blacksburg police had not indicated any connection between the investigation and Giles County.

On October 17, 1988, David Kanode, his father, and Roger Whittaker, a family friend, visited property the Kanode family owned in Giles County. The family had not used the property in several years, but a woman named Lucy Seymour occasionally checked on the property for the Kanodes. She had visited the property last in early August 1987. At that time, only loose boards covered the well on the property. Unknown to either the Kanodes or Seymour, Lafon and William Link had cultivated the property in 1987 and had used the well for irrigation.

While clearing brush from the land, Kanode asked Whittaker to examine the well. Whittaker discovered a concrete slab covering the boards; nonetheless, he could see into the shaft and saw a body floating at the bottom of the well. The three men immediately left the property and contacted the Giles County Sheriff's office.

Deputies recovered from the well a body later identified as Mergler's. An autopsy showed that Mergler's body had been exposed to a high concentrate of lime and water; death had resulted from two shotgun wounds, either of which would have been

fatal. Deputies also recovered a number of Mergler's personal effects from the well along with three shotgun shell casings and three shell wads.

[17 Va.App. 415] Forensic tests identified the shell casings as Remington .12 gauge loads. The same weapon fired two and possibly all three of the shells. Lafon owned and hunted with a .12 gauge shotgun at the time of Mergler's disappearance.

When Lafon learned of the discovery of the body, he told William Link and others that he knew "where we all were that night [be]cause I figured the law would be hounding me about this." Lafon insisted that he and his friends could alibi one another because they had all attended a party and had not left until 2:00 a.m. the morning of Mergler's disappearance. Link reminded Lafon that in fact they (Link and Lafon) had left the party at 11:30 p.m. Link recalled that Lafon had specifically requested that Link note the time, 12:10 a.m., that Lafon had dropped Link at the latter's home.

Lt. Stables testified that he conducted the investigation following the discovery of Mergler's body. He interviewed Lafon as a potential informant, but did not consider Lafon a suspect. In March 1990, Stables interviewed Melinda Link on an unrelated matter and, in accord with his practice at the time, concluded by inquiring about the Mergler homicide. Melinda Link stated that Lafon had killed Mergler and directed Stables to interview Doug Jones, a friend of Lafon's.

Jones at first refused to discuss the matter with Stables, but after a friend assured Jones that he could trust Stables, Jones obtained a tape recorder and met with Lafon, recording their conversation. Jones gave a letter to Stables detailing Lafon's statements along with the tape of their conversation. Jones then agreed to tape future conversations he had with Lafon. Jones thereafter taped several conversations he had with Lafon and one conversation Jones had with Lafon's counsel in which they discussed the murder and the well on the Kanode property. The trial judge overruled Lafon's motion in limine to exclude the tapes and other evidence derived from these conversations. The tapes of Jones's conversations with Lafon were played during the trial.

At trial, Jerry Martin, over Lafon's objection that the evidence lacked relevance and unfairly prejudiced his character, recalled an incident in which he, Lafon, Doug Jones and William Link drove to Blacksburg in June 1986 after Lafon said he knew where they could find a woman in Blacksburg. Arriving in Blacksburg, the group drove to a residential area of apartments where many Virginia Tech co-eds lived. Lafon asked Jones and one of the other men if they would "grab the girl," but they refused to do so. Lafon then said that he would "get [17 Va.App. 416] her," and directed one of the other men to cruise the area. Lafon spotted a young woman and engaged her in a brief conversation, but made no attempt to accost her. After he and the other men drove away, Lafon commented that they would have to kill any woman they picked up.

Doug Jones testified that sometime during the spring of 1988, prior to Jones's first contact with Stables, Lafon visited Jones at the store where Jones worked. Asking to speak to him privately, Lafon told Jones, "I did it, Douglas, I did it ... I've put something in a well I can't let anybody find." Jones asked Lafon what he meant, and Lafon said, "What we had always talked about before, going to Blacksburg to pick up a girl and take her to the mountains, rape her and bury her there." Lafon then asked Jones to describe how to construct a concrete form to cover the top of the well. Jones described the method for making a concrete form and then asked Lafon what he would do if someone discovered the body. Lafon replied, "[T]hey couldn't find out because he (Lafon) had put lime down in the

well to dissolve the body and keep the smell down." In 1987, Lafon worked for the Virginia Lime Company and had access to the quick lime which the company produced.

Upon learning of the discovery of Mergler's body, Jones confided in Sherry Roberts, a co-worker, that he believed Lafon had committed the murder. Jones stated several times during his testimony, without objection from Lafon, that he believed Lafon had committed the murder. Only during redirect

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examination, when Jones recounted a statement made to police regarding Lafon's capability to commit such crimes, did Lafon object to Jones's stating an opinion as to Lafon's guilt.

During cross-examination, Lafon attempted to show that Jones had only recently fabricated the story of Lafon's admissions. Over Lafon's objection, the trial judge permitted Roberts to testify concerning her conversation with Jones as prior consistent statements.

Lafon did not testify but presented witnesses to impeach the credibility of the Commonwealth's witnesses. Lafon's wife presented alibi testimony, stating that Lafon had returned home intoxicated at 12:15 a.m. on the morning of Mergler's disappearance.

[17 Va.App. 417]

I.

THE PRIOR BAD ACTS ISSUE

Lafon argues that the testimony of Jerry Martin and certain statements made by Lafon during taped conversations with Doug Jones contained improper statements of prior bad acts committed by Lafon. As a general rule, evidence that shows or tends to show crimes or other bad acts committed by the accused is incompetent and inadmissible for the purpose of proving that the accused committed or likely committed the particular crime charged. Kirkpatrick v. Commonwealth, 211 Va. 269, 272, 176 S.E.2d 802, 805 (1970). Evidence of other specific, similar bad acts does not logically support the inference that an accused has a propensity to commit bad acts of this nature and, therefore, the accused probably committed the bad act with which he or she stands charged. Spence v. Commonwealth, 12 Va.App. 1040, 1045, 407 S.E.2d 916, 918 (1991); Sutphin v. Commonwealth, 1 Va.App. 241, 245, 337 S.E.2d 897, 899 (1985).

Well established exceptions to the general rule of exclusion of other bad acts evidence apply where the evidence is relevant to show some element of the crime charged. To be admissible as an exception, evidence of other bad acts must be relevant to an issue or element in the present case. Sutphin, 1 Va.App. at 245, 337 S.E.2d at 899. In Sutphin, we enumerated the most common issues and elements for which evidence of prior crimes and bad acts are potentially relevant:

(1) to prove motive to commit the crime charged; (2) to establish guilty knowledge or to negate good faith; (3) to negate the possibility of mistake or accident; (4) to show the conduct and feeling of the accused toward his victim, or to establish their prior relations; (5) to prove opportunity; (6) to prove identity of the accused as the one who committed the crime where the prior criminal acts are so distinctive as to indicate a modus operandi; or (7) to demonstrate a common scheme or plan where the other crime or crimes constitute a part of a general scheme of which the crime charged is a part.

Id. at 245-46, 337 S.E.2d at 899. This list is neither exhaustive nor definitive; intent, general (as opposed to guilty) knowledge, agency, premeditation and other elements of criminal acts are all subsumed within the exceptions to the general rule and may be

shown by prior bad act evidence when relevant to prove a material element or issue of the crime charged. See Freeman v. Commonwealth, 223 Va. 301, 313-14, 288 S.E.2d 461, 467-68 (1982); Evans v. Commonwealth, 222 Va. [17 Va.App. 418] 766, 773-74, 284 S.E.2d 816, 820 (1981), cert. denied, 455 U.S. 1038, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982); Barber v. Commonwealth, 182 Va. 858, 867, 30 S.E.2d 565, 569 (1944); Callahan v. Commonwealth; 8 Va.App. 135, 140, 379 S.E.2d 476, 479-80 (1989).

In order for evidence that the accused has committed other crimes or bad acts to be admissible under an exception, its relevance to prove a material fact or issue must outweigh the prejudice inherent in proving that the accused has committed other bad acts. Spencer v. Commonwealth, 240 Va. 78, 90, 393 S.E.2d 609, 617, cert. denied, 498 U.S. 908, 111 S.Ct. 281, 112 L.Ed.2d 235 (1990). The decision to admit such evidence involves a balancing of probative value against incidental prejudice that is committed to the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion. Id. 240 Va. at at 90, 393

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S.E.2d at 617; see also Satterfield v. Commonwealth, 14 Va.App. 630, 635, 420 S.E.2d 228, 231 (1992) (en banc).

In this case, the evidence of Lafon's prior conduct established his intent, motive and premeditation to abduct and murder Mergler. Lafon argues that Sutphin requires both a significant similarity in the modus operandi of the acts and a close proximity in time between the prior act and the crime charged before prior bad act evidence will be admitted to show guilty knowledge or intent. Lafon's argument oversimplifies the analysis the trial judge must undertake in determining the relevance and probative value of prior bad act evidence.

In Spencer, the Supreme Court adopted the standard of the Seventh Circuit in United States v. Hudson, 884 F.2d 1016 (7th Cir.1989), cert. denied, 496 U.S. 939, 110 S.Ct. 3221, 110 L.Ed.2d 668 (1990), stating that the similarity between the crime charged and the prior conduct need not be one of identity so much as one of striking similarity. 240 Va. at 90, 393 S.E.2d at 616; see also Witt v. Commonwealth, 15 Va.App. 215, 221, 422 S.E.2d 465, 469 (1992). The modus operandi is not only the commission of similar crimes but the planning of similar crimes. Ferrell v. Commonwealth, 11 Va.App. 380, 387 n. 5, 399 S.E.2d 614, 618 n. 5 (1990). In this instance, the trial judge was permitted to determine that the sequence of events during 1986 which constituted the plan for a crime was sufficiently similar to the events alleged to have occurred in Mergler's disappearance and death to be probative of intent, motive and premeditation and admissible under those exceptions.

The Commonwealth had the burden of proving intent and premeditation to commit abduction and murder. If the events in 1986 showed [17 Va.App. 419] no more than a predisposition to commit violent acts, they would be inadmissible to prove the specific intent to commit a particular crime. We believe, however, that where prior bad acts resemble a "blueprint" for the crime charged, they show more than a predisposition to commit that type of crime. When the Commonwealth produces sufficient direct or circumstantial evidence to show the fruition of that blueprint into an actual crime, evidence of the prior bad acts is relevant and probative of intent and premeditation.

The probative value of this evidence was not defeated by its remoteness in time from the crime charged. We can distinguish cases relied on by Lafon where evidence of prior bad acts was ruled inadmissible, although much more proximate to the crime charged. In Sutphin, for example, there was no "signature" element to the prior crime; Sutphin's involvement in

one break-in could not implicate him in any other break-in regardless of how close in time the two crimes occurred. The evidence was excluded because it was not factually relevant, without any consideration of its remoteness. Once factual relevance has been established, the trial court may consider remoteness as one of the factors in determining evidentiary relevance of prior bad act evidence, but it should not withhold such evidence solely on the basis of remoteness unless the expanse of time has truly obliterated all probative value. This determination is committed to the sound discretion of the trial court. Brown v. Commonwealth, 3 Va.App. 182, 186, 348 S.E.2d 849, 852 (1986), aff'd, 238 Va. 213, 381 S.E.2d 225 (1989).

Thus the ultimate issue becomes whether such evidence of prior conduct was sufficiently connected in time and circumstances with the homicide as to be likely to characterize the victim's conduct toward the defendant. [Randolph v. Commonwealth, 190 Va. 256, 265, 56 S.E.2d 226, 230 (1949)]. Or stated alternatively, the test is whether the evidence of prior character is 'so distant in time as to be void of real probative value in showing present character.' 3A Wigmore, Evidence § 928, at 755 (Chadbourn Rev.1970).

... Once a nexus for relevancy of prior conduct or character has been established ... the issue of remoteness concerns the weight of the evidence and the credibility of the witnesses, both of which are within the province of the jury.

[17 Va.App. 420] Barnes v. Commonwealth, 214 Va. 24, 26, 197 S.E.2d 189, 190-91 (1973) (emphasis added). In this case, fourteen months was not sufficient to erase all probative value and the trial

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court properly allowed the evidence to go to the jury, who were permitted to accord the appropriate weight to that evidence considering all factors, including its remoteness in time.

II.

THE LAY WITNESS OPINION ISSUE

Lafon also argues that the trial judge erroneously permitted Doug Jones to state his opinion on the ultimate question of Lafon's guilt, and that Sherry Roberts was permitted to testify to a prior consistent statement of Jones on that same issue. [1] As a general rule, opinion testimony of lay witnesses is incompetent because the jury is in as good a position as a witness to form opinions from the facts. Although the "opinion rule" is well settled law throughout the United States, it originated from a misinterpretation of English common law. See, e.g., Edward W. Cleary, McCormick on Evidence, § 11 (3d ed. 1984). Accordingly, there are numerous exceptions to the rule that allow lay witnesses to express "opinions" in their testimony. See Charles E. Friend, The Law of Evidence in Virginia § 201 (3d ed. 1988). [2]

The principal exception to the "opinion rule" is the common sense understanding that the terms "fact" and "opinion" are relative. Id.; see also 31A Am.Jur.2d Expert and Opinion Evidence § 9 (1988). Some statements are not mere opinions but are impressions drawn from collected, observed facts, and are admitted under the "collective facts rule." Thomas v. Commonwealth, 186 Va. 814, 819-20, 44 S.E.2d 365, 368 (1947), rev'd on other grounds, 187 Va. 265, 46 S.E.2d 388 (1948); see also State v. Revere, 572 So.2d 117, 139 (La.Ct.App.1990) (a natural inference or conclusion based on stated facts is not opinion evidence), cert. denied, 581 So.2d 703 (La.1991); Dawson v. Casey, 178 W.Va. 717, 720, 364 S.E.2d 43, 46 (1987) (citing with approval the use of the rule in Virginia). See generally 31A Am.Jur.2d[17 Va.App. 421] Expert and Opinion Evidence § 10 (1988); 32 C.J.S. Evidence § 546(3) (1964). Thus, an "opinion" formed by a witness at a given time,

may be a "fact" that explains why the witness acted in a particular way. Making this distinction is a question best left to the discretion of the trial judge. See 31A Am.Jur.2d Expert and Opinion Evidence § 9 (1988).

Jones's statements, "I knew right then that [Lafon] had told me the truth," "I told [Roberts] that I knew who did it and that it was [Lafon]," and that he "put two and two together" upon hearing of the discovery of Mergler's body, are not overt expressions of opinion; rather they are each the final link in a chain of questions and answers which explain, respectively, why Jones first delayed going to authorities, why he confided in Roberts, and why he ultimately came forward to tell authorities what he knew. The facts that supported these conclusions were given to the jury, and the jury was free to make its own interpretation of those facts and accord the appropriate weight to Jones's actions resulting from his conclusions.

We find that each of the instances in which Jones commented on his personal belief in Lafon's guilt, he merely expressed a permissible impression drawn from observed facts that explained his actions. The trial judge was within his discretion in allowing these statements into the record.

Jones's statement on redirect examination ("They also asked me if [Lafon] was capable of doing something like this and I said yes") and Roberts's testimony corroborating Jones's testimony that he had confided in her about Lafon's statements to him were admitted after Lafon attempted to show that Jones had fabricated his testimony. The admission of prior consistent statements after an attempt is made to impeach a witness through a charge of recent fabrication is proper. See Smith v. Commonwealth, 239 Va. 243, 261, 389 S.E.2d 871, 880 (1990); Skipper v. Commonwealth, 195 Va. 870, 876-77, 80 S.E.2d 401, 405 (1954).

III.

UNCOUNSELED STATEMENTS TO A POLICE INFORMANT ISSUE

Lafon argues that once Jones agreed to become a police informant, Lafon was entitled to assistance of counsel when Jones engaged [17 Va.App. 422] him in conversation about Mergler's murder. [3] While acknowledging that the existing rules governing assistance of counsel do not support Lafon's claim of a violation of his rights, he invites this Court to recognize a limited exception to the holding in United States v. Gouveia, 467 U.S. 180, 188, 104 S.Ct. 2292, 2297, 81 L.Ed.2d 146 (1984), that the Sixth Amendment right to counsel does not attach prior to initiation of adversarial proceedings. Specifically, Lafon asserts that where the Commonwealth identifies a principal suspect in its investigation, the suspect retains counsel, and the counsel notifies the Commonwealth of his desire to attend all interrogations of his client, secretly taped conversations between a police agent and the suspect should not be used against the suspect in a subsequent prosecution.

In Gouveia, the Supreme Court reaffirmed its position that the Sixth Amendment right to counsel does not attach prior to initiation of adversarial proceedings. Id. at 188, 104 S.Ct. at 2297. The Court has also recognized a suspect's need to have counsel present during in-custody conversations with government informants. See United States v. Henry, 447 U.S. 264, 274, 100 S.Ct. 2183, 2188, 65 L.Ed.2d 115 (1980) (defendant's Sixth Amendment right to counsel was violated by a police informant, who shared a cell with the defendant, eliciting statements without the suspect's attorney being present). [4] However, in Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986), the Court held

that a Sixth Amendment violation does not occur when the government places an informant in the accused's cell and the informant remains passive. Id. at 459, 106 S.Ct. at 2630. In Wilson, the Court distinguished between active and passive behavior on the part of the informant. By inquiring beyond the government's actions and into the nature of the informant's actions, the Court in Wilson favored the societal goal of effective law enforcement. See April Leigh Ammeter, Comment, Kuhlmann v. Wilson: "Passive" and "Active" Government Informants--A Problematic Test, 72 Iowa L.Rev. 1423 (1987).

[17 Va.App. 423] In Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985), the Court addressed the issue of whether an accused's Sixth Amendment right to counsel was violated by the admission into evidence of incriminating statements made by the accused to a co-defendant, a secret government informant, at a pre-arranged meeting where the two convened to plan a trial strategy after their indictment. Id. at 161, 106 S.Ct. at 478. The Court held that a suspect's right to counsel was violated when the government deliberately elicited incriminating statements from the suspect by "knowingly circumventing [his] right to have counsel present" during confrontations between the accused and an undercover agent of the State. Id. at 176, 106 S.Ct. at 487.

We distinguish the present case from Henry and Moulton on several grounds. First, in both cases, the right to counsel had already attached through the initiation of adversarial

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proceedings. Second, unlike the present case, the informants in Henry and Moulton pursued their own self-interests; Jones was not a jail-house informant, but a private citizen assisting police. [5] Finally, in Henry, and to a certain extent in Moulton, the informant initiated the contact with the suspect after becoming police operatives; here, Lafon approached Jones and unburdened himself long before Jones became a police operative.

There is some support for Lafon's assertion that the Sixth Amendment right is not exclusive to post-arrest adversarial proceedings:

Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him--"whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Brewer v. Williams, 430 U.S. 387, 398, 97 S.Ct. 1232, 1239, 51 L.Ed.2d 424 (1977) (quoting Kirby v. Illinois, 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972) (plurality opinion)). That statement ... does not foreclose the possibility that the right to counsel might under some circumstances attach prior to the formal initiation of judicial proceedings....

[17 Va.App. 424] Gouveia, 467 U.S. at 193, 104 S.Ct. at 2300 (Stevens, J., concurring) (emphasis added). However, we do not believe that this case presents the appropriate facts and circumstances to advance the right to counsel beyond the scope provided for by the majority in Gouveia.

Lafon's assertion that "principal" suspects should have a right to counsel presents the troubling question of defining a "principal suspect." In this instance, Lt. Stables was following up a current lead and recruited Jones to assist in that investigation; this is such a common means of police investigation that to accept Lafon's position we would have to extend the right to counsel to any suspect in whom police had a credible suspicion.

Moreover, the fact that Lafon had retained counsel and that counsel had requested that he be present during interrogations is not relevant. While affirmative steps to exercise

the right to counsel may bar the use of statements from uncounselled, custodial interrogations under the Fifth Amendment, such steps have no application to a situation where the right to counsel under the Sixth Amendment has not attached. Lafon cannot create a Sixth Amendment right by asserting that he is exercising his Fifth Amendment right.

We find the issue presented here indistinguishable from that in Hummel v. Commonwealth, 219 Va. 252, 247 S.E.2d 385 (1978), cert. denied, 440 U.S. 935, 99 S.Ct. 1278, 59 L.Ed.2d 492 (1979), where our Supreme Court held that the Sixth Amendment right to counsel does not attach during the investigation of a crime, even when the suspect has retained counsel. 219 Va. at 256-57, 247 S.E.2d at 388. Accordingly, Lafon had no right to counsel during his conversations with Jones.

IV.

SUFFICIENCY OF EVIDENCE TO PROVE ABDUCTION ISSUE

Finally, Lafon contends that the evidence adduced at trial is insufficient to sustain his conviction for simple abduction. [6] Lafon was convicted of abduction as a lesser included offense of abduction with intent to defile. Code § 18.2-47 defines abduction as follows:

Any person, who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains [17 Va.App. 425] or

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secretes the person of another, with the intent to deprive such other person of his personal liberty or to withhold or conceal him from any person, authority or institution lawfully entitled to his charge, shall be deemed guilty of "abduction"....

Lafon argues that the sole evidence that he abducted Mergler was that she disappeared from Blacksburg and was at some later time murdered in Giles County and that these facts do not in themselves exclude the possibility that Mergler left Blacksburg voluntarily. We disagree. Circumstantial evidence sufficient to support the jury's finding was presented at trial.

When considering the sufficiency of the evidence on appeal of a criminal conviction, we must view all the evidence in the light most favorable to the Commonwealth and accord to the evidence all reasonable inferences fairly deducible therefrom. The jury's verdict will not be disturbed on appeal unless it is plainly wrong or without evidence to support it.

Traverso v. Commonwealth, 6 Va.App. 172, 176, 366 S.E.2d 719, 721 (1988) (citations omitted). In a case based upon circumstantial evidence, the Commonwealth must exclude every reasonable hypothesis of innocence. Cantrell v. Commonwealth, 7 Va.App. 269, 289, 373 S.E.2d 328, 338 (1988). However, "[w]hether the Commonwealth relies upon either direct or circumstantial evidence, it is not required to disprove every remote possibility of innocence, but is, instead, required only to establish guilt of the accused to the exclusion of a reasonable doubt." Id. (quoting Bridgeman v. Commonwealth, 3 Va.App. 523, 526-27, 351 S.E.2d 598, 600 (1986)).

The evidence viewed in the light most favorable to the Commonwealth adduced the following circumstances: Mergler lived in the Stonegate Apartments, within site of the Terrace View Apartments where Lafon talked about abducting and killing a college girl the previous year. Mergler was last seen at the hotel lounge where she and several friends had gone for an after-dinner drink. Mergler did not have a car and was depending on her friends to drive her back to her apartment, some two miles from the hotel.

Mergler disappeared less than eight hours before she was scheduled to leave Blacksburg for Northern Virginia. She had arranged her affairs in Blacksburg and reconfirmed her plans for the trip shortly before her disappearance. When she telephoned Ann Ryan only a few [17 Va.App. 426] hours before her disappearance, Mergler stressed her desire to get an early start on the following morning.

Family and friends testified that Mergler would not normally remain out of communication with her family or fail to inform them of a change of plans. "[A] jury may properly take into account the unlikelihood that an absent person, in view of [her] health, habits, disposition, and personal relationships would voluntarily ... remain out of touch with family and friends. The unlikelihood of such a voluntary disappearance is circumstantial evidence entitled to weight equal to that of bloodstains and concealment of evidence." Epperly v. Commonwealth, 224 Va. 214, 228-29, 294 S.E.2d 882, 890 (1982).

In this case, the circumstantial evidence is sufficient to exclude all reasonable hypotheses of innocence. The Commonwealth need only exclude reasonable hypotheses of innocence that flow from the evidence, not those that spring from the imagination of the defendant. Cook v. Commonwealth, 226 Va. 427, 433, 309 S.E.2d 325, 329 (1983); Fordham v. Commonwealth, 13 Va.App. 235, 239, 409 S.E.2d 829, 831 (1991). Although no one actually saw Lafon accost or abduct Mergler, the circumstantial evidence, viewed in the light most favorable to the Commonwealth, was sufficient to justify the jury's conclusion that Mergler would not voluntarily have travelled to Giles County or otherwise accompanied Lafon willingly. While it is possible to envision a myriad of scenarios in which Mergler voluntarily went to Giles County, or was abducted by someone other than Lafon, there is simply no evidence in the record to support such speculation. "Hypotheses not flowing from the evidence must be rejected." Fordham, 13 Va.App. at 239, 409 S.E.2d at

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831. Accordingly, we cannot say that the jury's conclusion is plainly wrong. [7]

For the foregoing reasons, we reject each of Lafon's arguments for reversing his convictions, and, accordingly, the judgment appealed from is affirmed.

Affirmed.

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1 The Commonwealth questions whether Lafon adequately preserved this issue for trial. Rule 5A:18. The record reflects that, on the several occasions during Jones's testimony, Lafon did not object to Jones making statements about Lafon's guilt. Nonetheless, we find that when Lafon did object to Jones's and Roberts's testimony, the objections were sufficient to preserve this issue for appeal.

2 The 1993 revision of Title 8.01 legislatively abrogated the "opinion rule" in civil proceedings. See Code § 8.01-401.3.

3 The Commonwealth correctly states that Lafon argues a different perspective on the right to counsel issue on appeal than was raised below. The suppression motion was based on Lafon's "Fifth Amendment" assertion through his retained counsel that he wished to have counsel present during interrogations. However, during the hearing on the motion, the Commonwealth acknowledges that Lafon "want[ed] to argue some sort of Sixth Amendment right to counsel." We believe that the nature of his motion in limine and the evidence and argument adduced at the hearing on that motion create a colorable issue to address on the merits.

4 In Henry and its progeny there was no assertion that the conversations between informants and suspects amounted to

interrogations triggering the Fifth Amendment right to counsel. Although Lafon initially asserted a Fifth Amendment right, it is now conceded that the conversations between Lafon and Jones did not occur in an in-custody setting; therefore, Lafon is not entitled to Fifth Amendment protection.

5 We do not suggest that the police may avoid constitutional restrictions by employing citizen informants in all circumstances. We simply recognize that one of the concerns in using jail-house informants is reliability, a factor of less concern when the motives of the informant are more salutary.

6 The Commonwealth notes that in renewing his motions at the close of trial, Lafon neglected to renew specifically his motion to strike, foreclosing his right to challenge the sufficiency of the evidence on appeal. Because the exchange between the trial judge and Lafon's counsel concerning renewal of motions is ambiguous, we elect to address this issue on its merits.

7 The fact that the jury chose to convict on only the lesser included offense of simple abduction further persuades us that their action was neither precipitous nor ruled by inflamed emotion. The jury clearly considered the trial court's instruction on the elements of the offenses and looked to the evidence in reaching their verdict.