**IN THE**

**SUPREME COURT OF VIRGINIA**

**AT RICHMOND**

**========**

**Record No. 050395**

**========**

**COMMONWEALTH OF VIRGINIA,**

***Appellant,***

***v.***

**REBECCA SCARLETT CARY,**

***Appellee.***

**========**

# *BRIEF OF APPELLEE*

**========**

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## Assignments of Error

I. The Court of Appeals erred in holding that the record showed an overt act by the victim that required the trial court to admit certain evidence of past acts of violence by the victim and further required a self-defense instruction.

II. The Court of Appeals erred in ignoring the fact that Cary's argument on appeal on the issue of self-defense was procedurally defaulted.

III. The Court of Appeals erred in holding that the trial court should have granted Cary's instruction on accidental self-defense where there was no overt act.

IV. The Court of Appeals erred in holding that the jury should have been instructed about the defendant's right to arm where the evidence did not support the granting of the instruction, changes in Virginia law have rendered the instruction unnecessary and the court further erred in fashioning bases for the instruction not offered by the defendant.

V. The Court of Appeals committed error when it held that the failure to instruct on the issue of heat of passion was not harmless.

## Questions Presented

I. Whether in the light most favorable to Ms. Cary there was more than a scintilla of evidence of imminent bodily harm to Ms. Cary such that evidence of past violent behavior of the so-called victim was admissible and instructions on self-defense and accident in the course of self-defense were necessary.

This question relates to the assignments of error I, II & III.

II. Whether in the light most favorable to Ms. Cary there was more than a scintilla of evidence such that an instruction on the right to arm was necessary.

This question relates to the assignment of error IV.

III. Whether the trial court's error in failing to instruct the jury on heat of passion was harmless.

This question relates to the assignments of error V.

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# *BRIEF OF APPELLEE*

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## Statement of the Case

Rebecca Scarlett Cary (Ms. Cary or the defendant) was indicted by the Grand Jury of the Circuit Court of the City of Norfolk for murder and use of a firearm. The case was tried on April 7-11, 2003, before the Honorable Charles D. Griffith, Jr. and a jury. Ms. Cary was found guilty of first-degree murder and use of a firearm. The jury fixed the sentence at the minimum 20 years in prison for first-degree murder and three years for use of a firearm. The cases were continued pending a pre-sentence investigation. On July 25, 2003, Ms. Cary was sentenced in accordance with the jury's verdict.

Ms. Cary timely filed her notice of appeal. The petition for appeal was initially denied by order entered April 7, 2004. After argument before a three-judge

panel, the petition was granted in part and denied in part by order entered July 2, 2004. On December 21, 2004, the Court of Appeals reversed the convictions in an unpublished opinion.[1] On January 4, 2005, the Commonwealth filed a petition for rehearing *en banc*. By order entered February 8, 2005, the Court of Appeals denied a rehearing *en banc*.

On February 18, 2005, the Commonwealth filed a notice of appeal in the office of the Clerk of the Court of Appeals. On February 22, 2005, the Commonwealth filed a petition for appeal in the Clerk's office of this Court.

**Statement of the Facts**

Ricky Beekman and Rebecca Cary had been dating on and off for 15 years and have three children in common. App. 10.[2] On September 6, 2002 Officer L.L. Tessier of the Portsmouth Police Department responded to 1209 Lead Street at 10:47 p.m. App. 58. Upon arriving, she found Ms. Cary beside Mr. Beekman holding a white washcloth to his chest. App. 58-59. At about the same time a paramedic arrived, began resuscitation procedures on the unresponsive Mr. Beekman and transported him to the emergency room. Tr. 97-99. Mr. Beekman subsequently died of a gunshot wound to the chest. App. 88. At the time of his death, he had a blood alcohol level of .23, nearly three times the legal limit to operate an automobile. App. 90. He also had cocaine in his system App. 91.

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[1] The Petition for Appeal states that a copy of the slip opinion is attached thereto. Petition for Appeal at 4. No such copy was attached to the petition served on appellee. A copy is therefore appended hereto.

[2] References to App. are to the joint appendix in the Court of Appeals.

Ms. Cary told Officer Tessier that the decedent hung out in a bad area behind her house and he came banging on her door to let him in. App. 59. She said he had been shot, that he fell to the ground and that she began applying pressure. App. 60.

Officer Scott Mayer of the Norfolk Police assigned to homicide responded to the Lead Street incident at 11:18 p.m. App. 143. He spoke to Ms. Cary. She was upset. App. 146. She told him that the decedent was her children's father and he owed her money. *Id*. She told him she heard a knock on the door and saw the decedent holding his chest and gasping for air. App. 147.

Samuel Korsky of Bob's Gun Shop in Norfolk testified that on May 23, 2002, Rebecca Cary purchased a 9 mm pistol. App. 31 & 36-37 Mr. Korsky testified that the particular firearm does not have a device to indicate that a round is in the chamber. App. 44.

Paul Murphy, a firearms expert, testified the fatal shot was fired from a distance in excess of 24 inches from the decedent. App. 117. He also testified that this type of gun can have one round in the chamber without any visual indication that the weapon is loaded. App. 128.

Yolanda Beekman-Bray, the sister of the decedent, testified that she spoke to Ms. Cary at the Fin-N-Feather restaurant three weeks before the decedent was shot. App. 8. According to Ms. Beekman-Bray, Ms. Cary said "I bought a gun and I'll use it." App. 9. She said she was "legally crazy" so if she killed the decedent she wasn't "going to get a day of time." App. 10.

Tracy Tabron testified that Ms. Cary told him the day before the decedent died that if he "don't have her no money by Friday, she was going to kill him." App. 50. Investigator G.H. Northern, assigned to the Norfolk Public Defender's Office, interviewed Mr. Tabron on February 24, 2003. During that interview, Mr. Tabron told Northern that he never heard Ms. Cary make any threats to hurt or kill the decedent. App. 297. Mr. Tabron denied telling Investigator Northern that he never heard Ms. Cary threaten the decedent. App. 55.

Ms. Cary denied making the statements attributed to her by Ms. Beekman-Bray and Mr. Tabron. App. 398 & 400.

On September 8, 2002, Detective Guy Servais and Investigator Newman interviewed Ms. Cary. App. 205. At first, she said she couldn't remember anything that happened. She stated that she needed to be placed in a mental institution. App. 206-07. Later, she stated that she couldn't remember where the gun was or what had happened. App. 214. They told her that "selective amnesia" was not likely to occur in a situation like this one. She continued to give a blank stare in response to questions. App. 215.

They asked her if she was trying to protect her son. App. 216. She advised them that it was "too stressful with all the trauma and medication she was on." *Id*. The detectives left and returned with a consent to search form, which she signed. *Id*. They conducted a search of her apartment the same day, but found nothing. App. 219.

The detectives returned to the interview room again and asked Ms. Cary if she could have done this. She responded "I don't' think so." App. 221. They re-

interviewed her again after 5:45 p.m. and asked her about the gun. She stated that she gave it to her son, Darron, who gave it to her brother, Lesure, to dispose of. App. 222. She bought the gun in April from Bob's Tackle Shop and kept it in a drawer in her bedroom. App. 223. She was going to use the gun to scare the decedent, but it discharged. App. 224. The detectives then took a taped statement from Ms. Cary in which she repeated that the gun went off accidentally while she was trying to scare the decedent. App. 230.

Rebecca Cary testified that on September 6, 2002 Ricky Beekman knocked on her door and she let him in. App. 364. They got into a struggle and he grabbed her by her hair. She felt fear, panic and was scared. App. 365. He was calling her a bitch and a whore. He was in a rage. App. 366. She told him to leave, but he wouldn't go. App. 367. He left the room and Darron came in with the gun. App. 370. She grabbed the gun from Darron and took the clip out. App. 371. She didn't believe that the gun would fire without the clip. *Id*. She looked at the gun and thought the safety was on. App. 379. The decedent returned and she again told him to leave. App. 372. He didn't, so she pointed the gun at him. App. 373. When he started to come back into the room, he was verbally assaulting her. App. 378. She then just heard the gun go off App. 379. She told the story to the police about him knocking on the door because she was scared at the time. App. 406.

Ms. Cary testified that she purchased the gun for protection. App. 374.

Darron Cary, Rebecca's son age 16, testified that he was living at 1209

Lead Street on the evening his father was shot. App. 309.[3] He saw his mother and father fussing on September 6, 2002. App. 519. He went to his mother's bedroom and got her gun. He took it into the front room and his mother "snatched" it from his hands. App. 520. His mother took the clip out. App. 521. His father returned into the room, standing in the doorway. App. 522. His mother told him to leave about seven times. App. 523. His mother pointed the gun at the decedent. App. 524. Darron didn't think he was shot, App. 525, and in fact, was planning on shooting his father himself. *Id*.

The trial court ruled that evidence of the violent character of the decedent would not be allowed. App. 416-31. The trial also excluded any evidence that the decedent was skilled at martial arts. App. 442.

Due to the court's ruling that prior conduct of the decedent would not be allowed, Ms. Cary proffered the following testimony outside the presence of the jury:

Ricky Beekman had been physically and sexually abusing Ms. Cary since 1984. App. 569-70. He raped her. App. 570. He cut her on numerous occasions, one requiring 75 stitches. App. 577. She still bears the scars on her chin and neck, which she displayed. App. 577-78. He broke her jaw, requiring it to be wired in place for some two and one-half months. App. 580. Sometimes the beatings were as frequent as "every other day." App. 576. Ms. Cary and the decedent have three children in common. The first two births were premature as a result of the beatings and the newborn children spent their first days in intensive

[3] Darron Cary resumed his testimony after his mother finished testifying.

care. App. 584. Drink made the decedent violent. App. 585. "[O]nce he started drinking, he became a different person." *Id*.

Although most of the specific incidents described were remote in time, she testified that they were continuous. App. 579. He came to the apartment the weekend before the shooting. He "punched" and "slapped [her] around." She did "g[o]t hurt pretty bad." App. 587-88.

Darron Cary witnessed more than 12 acts of physical violence that the decedent directed against his mother. App. 602-03. They included bruises to the face, black eyes and bloody noses. App. 605. He could not recall specific dates, but six or seven trips to the doctor were required. App. 606. The decedent was physically violent to Darron and his sister and when their mother would try to protect them, the decedent would beat her. App. 606-08.

## Argument

### I. Whether in the light most favorable to Ms. Cary there was more than a scintilla of evidence of imminent bodily harm to Ms. Cary such that evidence of past violent behavior of the victim was admissible and instructions on self-defense and accident in the course of self-defense were necessary.

The Court of Appeals correctly concluded that the trial court improperly excluded evidence of self-defense that was relevant both to prove self-defense as such as well as to prove that Ms. Cary was lawfully engaged in defending herself when the gun accidentally discharged. The Court of Appeals further correctly concluded that it was error to refuse to instruct on self-defense. The Court of Appeals based its decision on the cases of *Commonwealth v. Sands*, 262 Va. 724,

553 S.E.2d 733 (2001) and *Mealy v. Commonwealth*, 135 Va. 585, 115 S.E. 528 (1923).

In *Sands*, the question was whether a self-defense instruction should have been granted where there was insufficient evidence of an "imminent threat" of great bodily harm. 262 Va. at 727-28, 553 S.E.2d at ___. There the decedent was reclining on a bed. The defendant sought him out. This is the distinguishing factor. The decedent had retired from the affray. He was not doing anything when he was shot. In *Mealy*, the case involved the admissibility of evidence of the decedent's character for violence. However, again the defendant had retired from the affray and was sitting at a table. The defendant sought him out and shot him in the back. 135 Va. at 596, 115 S.E. at ___.

The Court of Appeals correctly rejected that Commonwealth's assertion that the differences between this case on the one hand and *Mealy* and *Sands* on the other are superficial. If differences such as advancing versus resting in a chair or bed, being shot in the back versus being shot in the chest or being shot five times versus being shot once are superficial, then it gives new meaning to the word. Seeking out a victim lying in bed and shooting him five times justifies the radical step of taking the issue of self-defense away from the jury. So does seeking out a victim sitting in a chair and shooting him in the back. No rational trier of fact could find that those decedents were an imminent threat.

The crucial factor that led to the decision in both *Sands* and *Mealy* was not present in this case. Here, the decedent had not retired from the affray. He had been drinking and went to the bathroom to relieve himself. He was not sitting

down at a table. He was not reclining in bed. He was returning to the living room where Ms. Cary was. She did not seek him out. He was swearing at her. He was threatening to beat her and to "sew up" her vagina. He was shot in the chest not in the back. In the light of these facts, absent in both *Sands* and *Mealy*, the prior beatings, the fact that alcohol use had uniformly caused the prior beatings, the prior death threats and the decedent's skill as a martial artist were all relevant to the issue of whether or not Ms. Cary was defending herself. This alone would render the evidence of self-defense admissible and an instruction thereon necessary.

There was, however, an additional reason why the evidence was admissible, a reason not present in either *Sands* or *Mealy*. Ms. Cary testified that the gun had accidentally discharged while she was defending herself. In so doing, Ms. Cary relied on the case of *Braxton v. Commonwealth,* 195 Va. 275, 77 S.E.2d 840 (1953). The Court of Appeals correctly rejected the trial court's mistaken belief that the defense "cannot be both intentional and an accident." App. 325. *Braxton* explains the relationship: "[W]here the defense of excusable homicide by misadventure is relied on, the principles of self-defense may be involved, not for the purpose of establishing defense of self, but for the purpose of determining whether accused was or was not at the time engaged in a lawful act; and it has been held that in such case the right, but not the law, of self-defense is invoked. Accused is entitled to an acquittal where he was lawfully acting in self-defense and the death of his assailant resulted from accident or misadventure." 195 Va. at 278, 77 S.E.2d at ___ (citations and quotation marks omitted). Thus, those

facts that would be relevant on a plea of self-defense would also be relevant to show that Ms. Cary "was lawfully acting in self-defense" when the gun accidentally discharged.

The Commonwealth argued to the jury with devastating effect that Ms. Cary's own testimony showed that she pulled back the slide on the gun. App. 679. The argument continued that Ms. Cary's testimony that she had removed the magazine should be disregarded because there was a warning on the side of the weapon itself that it would fire even without a magazine in it. App. 681. The prosecutor summed up that she had "cocked" the weapon. App. 682.

The Commonwealth contended that malice was shown because, "When you point a firearm at a person, I think you can infer if the gun goes off, that person is going to be harmed." App. 686. And because of the wound, "you can infer that that person very likely will have died." *Id*.

The Commonwealth argued that not engaging the multiple safety devices on the pistol evidenced the intent to kill. App. 686. The killing was deliberate and premeditated, the prosecutor continued, because, "What is more deliberate that pointing a firearm at another human being? That is a willful act. You have to choose to do it. She chose to do that." App. 687.

In the face of this onslaught, Ms. Cary was powerless to argue that she was pointing the weapon at the decedent because she was in fear for her life as the trial court had excluded crucial portions of her evidence and then taken that issue away from the jury altogether by denying the instruction.

The exclusion of the evidence of self-defense and the denial of the self-defense instruction not only deprived Ms. Cary of that defense, but also gutted the accident defense because the jury did not have the proper instruction to determine whether Ms. Cary was engaged in a lawful act at the time the gun discharged.

Because the trial court refused to grant the instructions proffered by the accused, the facts must be viewed in the light most favorable to the defendant. *Commonwealth v. Alexander*, 260 Va. 238, 240, 531 S.E.2d 567, 568 (2000). Moreover, whether there was an imminent threat of great bodily harm is a fact that must be viewed through Ms. Cary's eyes at the time of the shooting. *Craig v. Commonwealth,* 14 Va. App. 842, 844, 419 S.E.2d 429 (1992).

The Commonwealth's argument does not view the facts from Ms. Cary's point of view and in the light most favorable to her. Indeed, the Commonwealth's extensive argument of the *facts* shows that the Court of Appeals was correct when it ruled that the issues of self-defense proper and accident in the course of lawful self defense were jury questions.

Ms. Cary testified that on the night of the shooting at about 11:00 p.m., there was "a physical altercation" between Ms. Cary and the decedent. App. 365. She testified that the decedent "grabbed the back of my hair and proceeded fighting on me." *Id*. "[H]e was hitting me in the face and the sides." App. 366. He was in a "rage." *Id*. "He was calling me bitch and whore and he can't stand me." *Id*. At the time, she felt "fear," "panic" and was "scared." App. 365. Ms. Cary told the decedent "several or more times" to leave her home. App. 367. Ms. Cary

smelled alcohol on the decedent. App. 368. Drinking caused the decedent to be "vicious," like a terror. *Id*.

The decedent went to the bathroom and returned in "[a] little bit more than five minutes." App. 372. Ms. Cary again ordered the decedent to leave the apartment and again he refused. App. 373. Instead, he was "swearing," stating that he was "going to smack" her and "break [her] up." App. 376. The decedent threatened to "sew up" Ms. Cary's vagina. App. 377. When the gun went off, the decedent was "still verbally assaulting" Ms. Cary and "getting ready to come into the living room." App. 378. If he had come into the living room, Ms. Cary testified, "I don't know whether I would be alive today." App. 379.

The Commonwealth ignores the standard of review and would have the Court interpret the evidence strictly against Ms. Cary. For example, the Attorney General argues that there was no imminent threat of serious bodily harm because of Ms. Cary's testimony that on the night of the shooting, she was afraid that "***one day***" he would kill her because he had nearly done so before. Brief of Appellant at 18 (Appellant's emphasis). This is a jury question. Whether or not the inference the Commonwealth wants the Court to draw is a reasonable one is not the question. It is clearly not the only inference. In fact the most reasonable inference in the context of the other testimony is that 'one day' referred to the day of the shooting. But that is not for the Court to decide. Questions such as this are for juries. The standard of review here, that the evidence not be weighed, but viewed favorably to Ms. Cary, protects the right to have the factual question submitted to the jury. The standard of review performs the same function here as

it does in questions of sufficiency of the evidence where it protects the right of the Commonwealth to have the jury find the facts.

The same may be said of the Commonwealth's other arguments that parse Ms. Cary's words. Because she "thought" the decedent was "getting ready" to come into the living room, the Commonwealth asks the Court to conclude that he was not actually walking into the room. Brief of Appellant at 16-17. Again, this may be a reasonable interpretation for the meaning of the words, but again that is not the question. Clearly an equally reasonable interpretation of these facts is that she was in fear of imminent serious bodily harm because he had just beaten her, he was then and there threatening to do so again and he was starting towards her. It was for the jury to decide amongst the competing inferences.

She was prevented from testifying as to how the decedent would become violent when he drank. App. 369. She was prevented from telling the jury that she was afraid of the decedent because of numerous beatings including a "glass bust in my face." App. 373. She was prevented from answering the question why was she afraid of the decedent on the night of the shooting. App. 415.

The jury was prevented from hearing her testimony that Ricky Beekman had been physically and sexually abusing her since 1984. App. 569-70. He had raped her. App. 570. He cut her on numerous occasions, one requiring 75 stitches. App. 577. She still bears the scars on her chin and neck, which she displayed. App. 577-78. He broke her jaw, requiring it to be wired in place for some two and one-half months. App. 580. Sometimes the beatings were as frequent as "every other day." App. 576. Ms. Cary and the decedent have three children

in common. The first two births were premature as a result of the beatings and the newborn children spent their first days in intensive care. App. 584. Drink made the decedent violent. App. 585. "[O]nce he started drinking, he became a different person." *Id*. Although most of the specific incidents described were remote in time, she testified that they were continuous. App. 579. He came to the apartment the weekend before the shooting. He "punched" and "slapped [her] around." She did "g[o]t hurt pretty bad." App. 587-88. Indeed, the decedent was engaged in the same continuous course of conduct on the night of the shooting.

Darron Cary testified that on the night of the shooting his father came in. App. 315. "His eyes was red. He had some beer with him." App. 315-16. According to Darron, his father sat down and "started fussing." App. 315. "[H]e started getting on me and my cousins telling he was going to get his –" *Id*. At that point the Commonwealth objected "to anything that was said by the victim." *Id*.

Out of the presence of the jury, the trial court asked, "Is that what Darron Cary is going to say, that Mr. Beekman threatened to kill [Ms. Cary]?" App. 319. Defense counsel responded that Darron would specifically testify that his father threatened to kill his mother on the night of the shooting. *Id*. The Commonwealth did not dispute that Darron would so testify yet the court excluded the statement.

The jury was also prevented from hearing Darron's testimony that he had witnessed more than 12 acts of physical violence that the decedent directed against his mother. App. 602-03. They included bruises to the face, black eyes and bloody noses. App. 605. He could not recall specific dates, but six or seven trips to the doctor were required. App. 606. The decedent was physically violent

to Darron and his sister and when their mother would try to protect them, the decedent would beat her. App. 606-08.

The jury was also prevented from learning that the decedent was a skilled martial artist. App. 442.[4]

The jury could not possibly have evaluated whether it reasonably appeared to Ms. Cary that she was in imminent fear of bodily harm without knowing those facts that the trial court kept from them.

The jury did not know the history of the beatings and woundings. The jury did not know that alcohol precipitated these violent acts. The jury did not know that these violent acts against Ms. Cary often began when she protected the children from the decedent. The jury did not know that the beatings had continued up until the weekend before the shooting. The jury did not know that the decedent was a skilled martial artist. The jury did not know that the decedent had issued a specific threat to kill Ms. Cary on the night of the shooting.

Without knowing these facts, the jury could not make an informed decision as to whether Ms. Cary was defending herself. They could not make an informed decision as to whether she was lawfully trying to defend herself when the gun accidentally discharged.

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[4] Ms. Cary testified that the decedent had martial arts skills, in particular Kung Fu. App. 441-42. The Commonwealth objected. Ms. Cary argued that the evidence was relevant because Ms. Cary "was being attacked." App. 443. The trial court held, "It's not relevant to just simply say that, well, he could do martial arts. It would be relevant if your evidence was that … he attempted to martial arts on her as an overt act, but I asked you about that, and you said no." App. 444. The trial court asked if there was any further proffer in that regard and there was not. *Id*.

Viewed in the light most favorable to Ms. Cary, the evidence reveals that Ricky Beekman presented an imminent danger to Ms. Cary at the time of the shooting. She reasonably believed that she was in danger of serious bodily harm or death. Specifically, the decedent was intoxicated and went to see Ms. Cary at her apartment. She testified that when he was drinking he often abused her physically. On this occasion, he grabbed her, pulled her hair and assaulted her. He called her names and threatened her. Based on his prior abusive conduct, she thought he was going to kill her that night. She told him to leave and he didn't. The decedent advanced on Ms. Cary and she was scared. App. 378-79. Her apprehension was reasonable and well-grounded, justifying her perception that she was in imminent danger.

Also, there is evidence from Darron Cary that the decedent was verbally assaulting his mother to the extent that he, Darron, was ready to shoot his father himself. His lifelong experience had told him what to expect. The Commonwealth concedes that Ms. Cary testified that she thought the decedent was starting towards her. Brief of Appellant at 17. This together with the attack moments earlier, the attack of the preceding weekend and the long history of violence perpetrated on Ms. Cary that the Commonwealth admits continued intermittently until Mr. Beekman's demise, Brief of Appellant at 14, were enough to make out a case of self-defense.

Because there was more than a scintilla of evidence of self-defense, the Court of Appeal correctly concluded the instruction should have been given by the trial court. The Commonwealth complains that the Court of Appeals ignored

its argument that this issue is procedurally defaulted. That argument was no more than a mere mention. [CAV] Brief of Appellee at 20. Plainly the Court of Appeals did not think the issue of procedural default was a colorable issue given that the controlling cases, *Mealy*, *Sands* and *Braxton*, were argued at length in the trial court.

The Court of Appeals found correctly that the issue of self-defense was mistakenly taken away from the jury and that the evidence of the decedent's threat to kill Ms. Cary and of the continuing acts course of violence he perpetrated against her should have been made known to the jury.

**II. Whether in the light most favorable to Ms. Cary there was more than a scintilla of evidence such that an instruction on the right to arm was necessary.**

The Court of Appeals correctly concluded that the jury should have been instructed that if they believed from the evidence that Ms. Cary reasonably believed that the decedent was going to attack her, they could not infer malice from arming herself to defend against such an attack under *Lynn v. Commonwealth,* 27 Va. App. 336, 347, 499 S.E.2d 1 (1998), *aff'd*, 257 Va. 239, 514 S.E.2d 147 (1999).

The foundation of the Commonwealth's argument again is a failure to view the evidence in the light most favorable to Ms. Cary. Here, Ms. Cary testified that she purchased the weapon "for protection." App. 374. The record is replete with evidence, and additional evidence should have been admitted, that Ms. Cary was afraid of Mr. Beekman. These facts to-

gether allow the reasonable inference that the gun was for protection from Mr. Beekman.

Moreover, in denying this instruction, the trial court said, there is "no testimony that this specific victim specifically threatened to kill or harm Ms. Cary." App. 645. The trial court ignored Ms. Cary's testimony that Mr. Beekman was "swearing," stating that he was "going to smack" her and "break [her] up." App. 376. The decedent threatened to "sew up" Ms. Cary's vagina. App. 377. Not only is this finding not supported by the record, but it also ignores the fact that the trial court had excluded evidence of Mr. Beekman's specific threat to kill Ms. Cary on the night of the shooting.

The Commonwealth tries to fashion a waiver argument from the way Ms. Cary argued for the instruction at trial. Ordinarily, a right to arm instruction is an adjunct to self-defense. However, the trial court had already taken the issue of self-defense away from the jury. It is plain from the record that Ms. Cary's argument was made in light of that ruling. "[T]his would tie into self-defense, but I believe that it is still appropriate." App. 639. Furthermore, it is quite clear that the trial court did not wish to hear the issue of self-defense renewed in any way. App. 642-43. Thus, it is apparent that Ms. Cary was asking for the instruction even absent an instruction on self-defense. This in no way detracts from her additional argument that the instruction also would have been necessary to the defense of self and accident in the course of lawful self-defense.

The Commonwealth also cites a civil case for the proposition that a court will only consider an instruction on the basis of the argument advanced at trial.

The case, however, does not stand for that proposition. The case holds that because of the failure to make a transcript part of the record, the Court cannot entertain issues based on argument on instructions contained in that transcript. *Morgen Industries, Inc v. Vaughan,* 252 Va. 60, 68, 471 S.E.2d 489 (1996). The criminal case cited in *Morgen Industries* deals with instructions where an objection was stated with no grounds whatsoever. *Smith v. Commonwealth,* 165 Va. 776, 781, 182 S.E. 124 (1935).

There is a transcript of the argument on instructions in this case and grounds for the objection were stated. Furthermore, the Commonwealth's argument ignores the fact that when a criminal defendant makes an issue of a principle of law that is materially vital, it is the obligation of the trial court to see that the jury is properly instructed. *Whaley v. Commonwealth,* 214 Va. 353, 355-56, 200 S.E.2d 556, 558 (1973); *Bryant v. Commonwealth,* 216 Va. 390, 392-93, 219 S.E.2d 669, 671-72 (1975).

**III. Whether the trial court's error in failing to instruct the jury on heat of passion was harmless.**

The Court of Appeals correctly held that the trial court erred in not instructing on heat of passion and voluntary manslaughter. Ms. Cary requested an instruction on voluntary manslaughter, App. 654, and an instruction on heat of passion. App. 659. A plea of self-defense and a claim of provoked heat of passion do not conflict with one another. *McClung v. Commonwealth*, 215 Va. 654, 657, 212 S.E.2d 290, 293 (1975). Both were argued to the trial court in this case, App. 647 (no express or implied malice; defendant engaged in lawful act negligently) and App. 646 (defendant acting under a reasonable belief that her safety

was in danger; not acting with malice). Both are supported by the facts of the case.

First-degree murder is defined as a malicious killing accomplished by a willful, deliberate and premeditated act. Second-degree murder does not require a premeditated act; it is defined as a malicious killing. Voluntary manslaughter is defined as an intentional killing while in the sudden heat of passion, upon reasonable provocation. *Turner v. Commonwealth*, 23 Va. App. 270, 274, 476 S.E.2d 504 (1996). The determination of whether a killing is committed "in pursuit of a continuing animus or upon reasonable provocation or whether it was accomplished maliciously or in the heat of passion is a jury question." *Read v. Commonwealth*, 63 Va. (22 Gratt.) 924, 939 (1872); *Moxley v. Commonwealth,* 195 Va. 151, 160, 77 S.E.2d 389, 394 (1953). The trial court must instruct the jury on voluntary manslaughter if there is a scintilla of evidence to support the instruction. *Buchanan v. Commonwealth*, 238 Va. 389, 409, 384 S.E.2d 757, 769 (1989), *cert. denied*, 493 U.S. 1063 (1990).

In this case, the evidence to support an instruction on voluntary manslaughter comes again from both Darron and Ms. Cary. As previously stated, both attempted to testify that the decedent was drunk and fussing at Ms. Cary on September 2, 2002. The Appellant testified that she was scared as he was making gestures toward her. Ms. Cary had been injured previously at the hands of the decedent, and was now in fear for her life. App. 601. By all accounts, Ms. Cary was only trying to deter the decedent before he had the opportunity to injure her. That is at least the scintilla of evidence necessary to establish a confronta-

tion between the decedent and Ms. Cary. There is evidence to support the view that Ms. Cary acted after provocation and did not simply kill maliciously. For that reason, the jury should have been instructed on voluntary manslaughter.

The Court of Appeals correctly held that the rejection of second-degree murder by the jury did not render the failure to instruct on voluntary manslaughter harmless under *Turner v. Commonwealth*, 23 Va. App. 270, 276, 476 S.E.2d 504 (1996) because of the failure to admit evidence of self-defense and to instruct on that theory.

**IV. Whether the issue of the trial court's improper instruction to the defendant as to how to testify was procedurally defaulted.**

The Court of Appeals erroneously held that Ms. Cary failed to preserve her argument that the judge's improper instructions to the witness on how to testify effectively invaded the province of the jury.

Midway through Ms. Cary's trial testimony, the judge excused the jury to allow Ms. Cary to compose herself. In doing so, the judge stated:

> You're going to have to compose yourself. All right? You can't just continue to break down like this the whole time you testify. Put yourself in that frame of mind that you put yourself in when the police got to your apartment the night after this happened, okay? Try to make yourself be calm like you were then so you can testify so that this jury can understand your testimony without you breaking down like this every time you get ready to talk about this. All right? You did it then. You can do it now. Do you understand? Do you understand?

App. 384.

Ms. Cary immediately objected:

> Your Honor, I hate to do this but I find that I must lodge an objection to the Court's comments and the implication drawn therein, the

> Court's comments that Ms. Cary made herself as calm as she was then. I think it's evidence of the Court's opinion on the case and although I have refrained from doing so up to this point, there have been other comments that the Court has made in the presence of the jury that I feel may or will transfer the Court's attitude and opinions on this case to the jury.

App. 385 (emphasis supplied).

The objection makes reference to "other comments that the Court has made in the presence of the jury that I feel may or will transfer the Court's attitude and opinions on this case to the jury," and that counsel had "refrained from [objecting] up to this point." No issue as to the "other comments" was made as no objection was lodged as to them, but this objection is clear in its assertion that the judge was displaying bias. By arguing to the trial court that this was a continuation of a course of conduct the result of which would be to "transfer the Court's attitude and opinions on this case to the jury," there was no doubt about the clear implication of Ms. Cary's objection.

The trial court was under no misunderstanding as to what it was doing or what issue was before the court. The trial judge admitted, "The fact is that I do believe from listening to her that this is a bit of a feigned upset. That's why I said it to her…" App. 389. He continued by expressing his belief that since it was done outside the presence of the jury, there would be no harm. Although he stated that he was instructing the defendant so the jury could understand, the trial court admitted that it believed Ms. Cary was feigning her upset. *Id*.

Ms. Cary has a right to testify in her own behalf at trial. U. S. Const. amend V, Va. Const. art. I, § 8, Va. Code § 19.2-268, *Rock v. Arkansas,* 483 U.S. 44, 53 (1987), *Hazel v. Commonwealth,* 31 Va. App. 403, 410-411, 524

S.E.2d 134 (2000). One has "the right … to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy v. Hogan,* 378 U.S. 1, 8 (1964). Thus, a defendant may only be forcibly medicated to insure his competency to stand trial where that medication does not significantly affect his "behavior and demeanor." *See Riggins v. Nevada,* 504 U.S. 127, 145 (1992) (Kennedy, J., concurring). *See also Johnson v. Commonwealth,* 19 Va. App. 163, 164, 449 S.E.2d 819 (1994) (error to direct defendant to wear civilian clothes rather than his military uniform at trial).

Ms. Cary's right is to tell her side of the story in her own words and not the words of the judge. It does not much matter if the control over her demeanor is asserted through the administration of psychotropic medications or through directions on how to testify or otherwise. The result is the same. Ms. Cary was deprived of the right to convey her defense to the jury. The jury was deprived of the ability to observe and evaluate Ms. Cary's demeanor without it first being filtered through the judge's idea of what was true or not true.

Although the trial court was purporting to make the testimony understandable, the instructions he gave Ms. Cary as to how to testify went beyond any reasonable need. It is plainly apparent on the face of the record that the judge's instructions to Ms. Cary reflected his perception that she was lying. That was, however, a question to be decided by the jury and not by the judge. The jury was prevented from performing that function.

This was a case about emotion. The alleged crimes are crimes of violence. The distinction between first- and second-degree murder depends on in-

tent which in large measure depends upon inferences to be drawn from behavior. The defense allowed by the court was accident. That likewise depends on intent and whether Ms. Cary was lawfully defending herself. That in turn depends on whether she was reasonably in fear. Defenses that were denied, defense of self and heat of passion, likewise depend upon state-of-mind evaluations. In short, this is a case about emotion. To command Ms. Cary to "compose herself" and to testify "without breaking down" was to deprive her of communicating her emotional state to the jury.

It is well settled in Virginia jurisprudence that the credibility of witnesses is a question exclusively for the jury. The jury has the right to determine from the appearance of the witnesses on the stand, their manner of testifying, and their apparent candor and fairness, their apparent intelligence or lack of intelligence, and from all the other surrounding circumstances appearing on the trial, which witnesses are more worthy of credit, and to give credit accordingly. *Zirkle v. Commonwealth,* 189 Va. 862, 863-864, 55 S.E.2d 24 (1949).

> In Virginia, it is the duty of the trial judge to interpret and to apply the law; but it is the peculiar duty of the jury to evaluate the evidence. A judge must not express or indicate, by word or deed, an opinion as to the credibility of a witness or as to the weight or quality of the evidence. Any question or act of the judge which may have a tendency to indicate his thought or belief with respect to the character of the evidence is improper, and should be avoided. The impartiality of the judge must be preserved in form and in fact.

*Brown v. Commonwealth,* 3 Va. App. 101, 106, 348 S.E.2d 408 (1986), *quoting*, *Jones v. Town of LaCrosse,* 180 Va. 406, 410, 23 S.E.2d 142, 144 (1942).

In this case, the trial judge decided that Ms. Cary had "feigned upset." App. 389. He asked the jury to leave the courtroom and then instructed Ms. Cary

to pull herself together and into a different frame of mind. By doing so, he inappropriately usurped the power of the jury to make a credibility determination based upon her testimony.

When the court instructed the witness on how to testify, he projected his evaluation of credibility onto the witness and incorrectly influenced the testimony. The jury was not given the opportunity to evaluate Ms. Cary's genuineness and trustworthiness because the court instructed her to remain calm. It is beyond doubt that the emotion displayed or not displayed by a witness describing the emotional and violent death of her long-time lover and father of her three children is crucial to a determination of the credibility of that witness. The trial judge erred in directing the witness to "compose herself" and to stop "breaking down."

The ultimate authority figure in the courtroom, the judge, directly addressed the litigant and told her, in effect, that he thought she was lying ("You did it then. You can do it now. App. 384). A trial judge may not address a witness outside of the presence of the jury, tell the witness he is lying and thereby affect the evidence that is presented to the jury. That invades the province of the jury in an even more egregious way than a direct comment on the evidence in that it is unseen.

The trial judge certainly has a duty to maintain order and decorum. The judge may certainly take a recess to allow a witness to become calm. If that is not effective, the trial judge may ask a party's lawyer, and if none, the attorney proffering the witness to caution the witness. If these don't work, there may even be a case where the trial judge may address the witness directly. But the trial

judge cannot tell the witness how to testify. The trial judge may not tell, or intimate to the witness, that she is lying, which because of the authority the judge carries can only be understood as a direction to change the testimony or manner of giving it. He may not become the witness's lawyer and give the witness advice.

The action of the trial judge in the case was beyond the pale. It deprived Ms. Cary of her right to testify in her own behalf and to a jury trial. Had the Court of Appeals not granted a new trial on other grounds, it should have do so on this issue.

## Conclusion

For the foregoing reasons, it is respectfully submitted that this Honorable Court deny the petition for appeal, but that in the event that the petition is granted, that it grant the assignment of cross-error contained herein.

**Respectfully submitted,**

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## Certificate

I, Joseph R. Winston, a member of the Bar of this Court, hereby certify:

(a) The appellant is the Commonwealth of Virginia. Rebecca Scarlett Cary, defendant-appellant below is Appellee.

(b) The names, addresses, and telephone numbers of counsel are:

| ***Counsel*** | ***Party Represented*** |
|---|---|
| Mr. Stephen R. McCullough<br>Assistant Attorney General<br>900 East Main Street<br>Richmond, Virginia 23219<br>804-786-2071 | Commonwealth of Virginia |
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(c) that on August 19, 2005, I served a copy of the foregoing document on the foregoing counsel, which include all of the parties required to be served, by depositing it in a United States mailbox with first class postage prepaid and addressed as listed above.

_____
Joseph R. Winston