VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

COMMONWEALTH OF VIRGINIA

v. Case No. 11-102

GEORGE HUGUELY,

Defendant.

DEFENDANT'S REPLY MEMORANDUM

Defendant, George W. Huguely, V ("Mr. Huguely"), by counsel, for his reply memorandum to the Commonwealth's Response to Motion to Set Aside the Verdicts, sets forth the following argument from authority:

I. Violation of Sixth Amendment Right to Counsel of Choice

The Commonwealth has asserted that the Court was justified in denying Mr. Huguely's request for a brief postponement on account of the illness of Ms. Quagliana. (See Commonwealth Response [hereinafter "C.R."], pp. 1–7). That argument fails to account for the important Sixth Amendment interests at stake when a defendant is denied his constitutional right to be represented by his counsel of choice.

Contrary to the Commonwealth's argument, there were no circumstances justifying the Court's decision to proceed in the absence of Mr. Huguely's counsel of choice. The claim that the Commonwealth would have been prejudiced by a brief continuance—let alone to the degree necessary to justify proceeding without the defendant's counsel of choice—has no merit, as the Commonwealth merely

speculates about the possible consequences of a short adjournment. In fact, no circumstances warranted the Court's decision to proceed, and the Court abused its discretion by insisting on expeditiousness at the expense of Mr. Huguely's Sixth Amendment rights.

The Commonwealth complains that had the Court granted a short continuance, the trial would have proceeded into a third week. But there is nothing sacrosanct about a two-week trial. All parties and the Court were aware that timing was likely an issue, and nobody could predict at the outset exactly how long the trial would last. Certainly, a pre-conceived notion of how long the trial should last cannot trump the rights of the accused when unexpected events occur. Given that Monday, February 20 was a holiday and Tuesday, February 21 was the Court's docket call, it was entirely foreseeable that a long weekend break might have been required.

The Commonwealth posits that "each day of delay increased the risk that a juror might be unable to continue the case" (C.R., p. 2), but that is true in every case and, without more, could hardly justify pushing forward without counsel of choice. The risk that a juror may need to be disqualified is always present in trials of any significant duration, and every additional day of trial creates an incremental concern, but that cannot justify a zero-tolerance policy for continuances when they are necessary to protect constitutional rights and necessitated by unforeseen events. In any event, the Court took multiple steps to address this exact concern. In addition to swearing and seating two alternate jurors, the Court also

admonished the jurors each day not to obtain any information about the case from the media or any other sources. As of the date of Ms. Quagliana's illness, no juror had been excused for inability to continue, and there was no reason to believe that a short continuance would have materially increased the risk that a juror would need to be disqualified.

The Commonwealth also argues that a delay of a few days "would have separated the jurors considerably from the Commonwealth's evidence and the effect of cross examination of those defense witnesses who testified before the trial proceedings were postponed." (C.R., p. 2). But once again that is an argument that would apply to any continuance or even to breaks in the trial for a weekend or holiday. Especially in a lengthy trial such as this one, it is inevitable that some delay will "separate the jurors" from the prosecution's evidence.

The Commonwealth rightly concedes that the erroneous deprivation of a defendant's right to counsel is structural. (C.R., p. 4). Nonetheless, the Commonwealth argues that Mr. Huguely was not prejudiced, insisting, for example, that Ms. Quagliana's ability to review a transcript of the proceedings was sufficient to safeguard Mr. Huguely's right to counsel.

This is wrong both as a matter of law and fact. It is well-established that once a defendant is erroneously denied his right to counsel of choice, "[n]o additional showing of prejudice is required to make the violation 'complete.'" London v. Commonwealth, 49 Va. App. 230, 239 (quoting United States v. Gonzalez-Lopez, 548 U.S. 140, 146 (2006)). In support of its argument, the

Commonwealth cites a number of Virginia cases that pre-date Gonzalez-Lopez, including Silcox v. Commonwealth, 32 Va. App. 509, 513 (2000). But those decisions are no longer good authority, as "Gonzalez-Lopez calls into question [the Virginia courts'] prior holdings requiring prejudice be shown." London, 49 Va. App. at 239. London makes clear that when a defendant has not requested any prior continuances and his motion for a continuance is timely filed, a trial court abuses its discretion by denying a reasonable request for a continuance to ensure that retained counsel has adequate time to prepare. Id. No prejudice need be shown to make the Sixth Amendment violation complete.

Even assuming prejudice were necessary, Mr. Huguely was clearly prejudiced by the Court's denial of a short continuance. Ms. Quagliana's ability to review a transcript of the proceedings later was no substitute for her presence in court, before the jury, during the trial. The Commonwealth argues that "the defense was not required to deviate from the division and function they described to the court." (C.R., at 2). But the prosecution does not get to dictate how the defense allocates its responsibilities nor deny the defendant his constitutional right to choose to be represented by more than one attorney. And, in fact, throughout the trial, Ms. Quagliana and Mr. Lawrence consistently and without exception consulted each other about both substantive and strategic issues, regardless of which attorney was responsible for the examination of any particular witness.

In all events, Mr. Huguely had a constitutional right to rely on the experience and advice of both of his chosen attorneys and to have them both in the

courtroom, regardless of how they "divided" their work or the specific functions they performed at any given moment. As the Supreme Court has explained, "[d]ifferent attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument." Gonzalez-Lopez, 548 U.S. at 150. Mr. Huguely retained two experienced attorneys to represent him, and the Court violated his Sixth Amendment rights by forcing him to proceed without one of his chosen attorneys present.

The Commonwealth also complains that a short continuance would have been improper because certain subpoenas for the Commonwealth's witnesses were "scheduled to expire." (C.R., p. 2). But the date on a subpoena cannot trump a defendant's constitutional right to counsel. Moreover, as the Commonwealth acknowledges, witnesses could have been commanded to attend by "special appearances by witnesses to be recognized by the court for an appearance date after the 17th of February." (C.R., p. 2). In light of this alternative, it is simply untrue that the availability of these witnesses would have been "subject to their willingness to cooperate rather than compulsory process." (C.R., p. 2). Indeed, given the complexity of this trial, there was no reasonable basis for the Commonwealth to assume that the case would be completed in exactly two weeks; any issues regarding witness availability might have arisen due to other delays even if Ms. Quagliana had not fallen ill. Finally, it is flatly untrue that Mr.

Huguely's attorneys sought to delay the trial so that the Commonwealth's subpoenas would expire. As a result of the delay, the defense also experienced scheduling problems with one of its critical witnesses.

The Commonwealth claims that Ms. Quagliana was present in her law office and was "working on the case during her absence." (C.R., p. 3). That claim is false. Ms. Quagliana was not in her office or working on the case from any location beginning Thursday morning when she became actively ill and had to be driven home, through Friday evening when she went to the office for the first time and began calling Mr. Chapman and his staff. On Thursday and Friday morning, Ms. Quagliana was subject to repeated unpredictable bouts of vomiting. When she returned to court on Saturday morning, she was not fully recovered and had to excuse herself from the courtroom during a break, an episode witnessed by court personnel. Beginning Thursday morning she was at home and in bed. She remained there until late Friday morning when her husband drove her to her doctor's office and then directly to Martha Jefferson Hospital where she spent the remainder of Friday afternoon, until her husband drove her home. A letter from Ms. Quagliana's physician fully documents her unexpected illness. Witnesses including her husband, office staff, and court personnel would confirm her condition, were that necessary.

It is frankly irresponsible for the Commonwealth to question the severity of Ms. Quagliana's illness and resulting incapacity. It is also legally irrelevant. Indeed, if this Court in any way thought the degree of Ms. Quagliana's illness or

incapacity had any legal relevance, it would necessitate an evidentiary hearing that defendant would welcome. In reality, the Commonwealth's baseless statements only underscore that on the law, the denial of a short continuance to protect a defendant's Sixth Amendment right simply cannot be justified.

The Commonwealth relies heavily on cases (many of which pre-date Gonzales-Lopez) in which trial courts denied a continuance because of intentional delay or gamesmanship by the defendant, both of which are absent here. For example, in Silcox, the defendant had already been granted a continuance to accommodate new counsel, and the court viewed the defendant's subsequent request for another continuance as a mere "attempt to get a postponement" that was akin to "[a]mbush, trickery, stealth, [and] gamesmanship." Silcox v. Commonwealth, 32 Va. App. 509, 514 (2000) (citing Bennett v. Commonwealth, 236 Va. 448, 460–61 (1988)).

Similarly, in United States v. Flanders, 491 F.3d 1197, 1215 (10th Cir. 2007), the trial court refused to grant a continuance because the defendant had already received numerous prior continuances over the last year, and was clearly seeking to delay the proceedings. The Tenth Circuit affirmed, holding that any further continuances were unwarranted in light of the "age of the case and the 'substantial likelihood' that defendant would make an 'eleventh-hour plea' for another continuance." Id. The Ninth Circuit's decision in United States v. Ensign, 491 F.3d 1109, 1112 (9th Cir. 2007), is equally irrelevant. In that case, the court denied the defendant's request to change counsel in the middle of her trial based

on "concerns regarding [the attorney's] ethical fitness" and lack of ability to abide by the Court's orders. The court further noted the risk that this attorney would intentionally "obstruct" the trial and interfere with the other co-defendants' rights to a fair trial. Id. Here, in contrast, there is not the slightest suggestion that Mr. Huguely or his attorneys were acting in bad faith or were seeking to use the continuance to obtain some strategic advantage.

Citing Mills v. Commonwealth, 24 Va. App. 95, 101 (1997), the Commonwealth suggests that a continuance is only required where counsel "had not prepared for trial and had not adequately communicated with his client before trial." But, while those facts are clearly sufficient to require a continuance to avoid a Sixth Amendment violation, nothing in Mills suggests that those are the only circumstances necessitating a continuance. And, once again, the Commonwealth ignores the critical fact that Mills pre-dates Gonzales-Lopez. Mills simply did not address whether it would have been appropriate to grant a short continuance to accommodate an unexpected illness by the defendant's retained counsel of choice.

In sum, the Commonwealth cannot rely on outdated precedents or distortions of the record to avoid the reality that this Court abused its discretion and violated Mr. Huguely's Sixth Amendment rights by refusing to grant a short continuance to accommodate the severe and unexpected illness of Mr. Huguely's counsel of choice.

II. Failure to Strike Jurors for Cause

The Court erred by failing to strike for cause jurors 31, 32, 35, 36, 72, 182, and 211. The Commonwealth's arguments to the contrary lack merit.

The Commonwealth does not dispute that the defendant has a right to a trial by an impartial jury, and that "any reasonable doubt regarding the prospective juror's ability to give the accused a fair and impartial trial must be resolved in favor of the accused." Gosling v. Commonwealth, 7 Va. App. 642, 645 (1989) (citations omitted). Nor does the Commonwealth dispute that the proper inquiry is whether a prospective juror has "an opinion of that fixed character which repels the presumption of innocence," Justus v. Commonwealth, 220 Va. 971, 976 (1980), and whether that juror "can lay aside the preconceived views and render a verdict solely on the law and evidence presented at trial," Cressell v. Commonwealth, 32 Va. App. 744, 761 (2000).

Reasonable doubt exists if the juror's responses to voir dire raise doubts about the juror's impartiality, or if information obtained about the prospective juror discloses views or relationships of a fixed character that would make an impartial decision difficult. See, e.g., Spangler v. Ashwell, 116 Va. 992, 996–97 (1915) ("A trial court must excuse for cause a potential juror who has any interest in the cause, or is related to either party, or has expressed or formed an opinion, or is sensible of any bias or prejudice regarding the action.") (citation and quotation omitted). If a juror has formed an opinion about the case, "whether that opinion has been expressed or not," the juror must be struck, even if the juror later

rehabilitates him- or herself. Justus, 220 Va. at 977. Whatever confidence the juror may have in his own ability to "erase" those impressions from his mind, "the law has no confidence in him; however willing he may be to trust himself, the law does not trust him." Id. at 978 (citation omitted).

Following the voir dire of jurors 31, 32, 35, 36, 72, 182, and 211, reasonable doubt remained about their ability to remain indifferent to the cause.

Juror 31's exposure to violence in her childhood was such that she could not be deemed impartial in a case involving alleged violence within a relationship. In her childhood, she experienced her father's violence against her mother, requiring her and her mother to leave the home when she was 13 years old. Reasonable doubt existed that this juror's experience as an adolescent would not affect her view of a case said to involve domestic violence.

Juror 32 not only held an opinion about this case, but equivocated about still holding it. The Commonwealth cites Briley v. Commonwealth, 222 Va. 180, 186 (1981), for the proposition that "the mere existence of any pre-conceived notion as to guilt or innocence of an accused, without more," does not necessarily establish a juror's impartiality, and that it is "sufficient if a juror can lay aside his impression or opinion." Here, when asked whether she could maintain an open mind, Juror 32 equivocated, stating "Well, yes. I do have ... of course, you know my daughter was in J.M.U. and whatever...." (OT, p. 55). That is hardly an unequivocal response and underscores the lack of a clearly stated and credible ability to deliberate impartially.

Juror 35 was similarly equivocal in his answers about his ability to be a fair juror. This juror was a professor at the University and was clearly concerned that this case might cast the University in a negative light. When asked whether defense evidence regarding drinking and other uncomplimentary things about Ms. Love would affect him, Juror 35 responded, "I'd have to think about it." Virtually all of his answers were equivocal or unclear. In particular, he opined that he "thinks" he could "take it on the evidence as it is." (OT, p. 72.) Upon further inquiry, Juror 35 admitted that he viewed male athletes as violent and that he could not "divorce" himself from his "opinions and knowledge." (OT, p. 73.)

The Commonwealth relies on the Court's conclusion regarding Juror 35's "apparent sincerity, consciousness, intelligence, and demeanor." (C.R., p. 13 (citing TT at 81)). But the relevant inquiry is not "sincerity" or "demeanor." It is reasonable doubt, and there were significant doubts over Juror 35's ability to remain impartial in light of his beliefs, opinions, and extensive connections to the University.

As to Juror 36, the Commonwealth admits that, with respect to young people and drinking, she thought "they are doing it a little bit too much at this, you know." (C.R., p. 13). Juror 36 revealed her opinions about alcohol use, and the Commonwealth's attempt to rehabilitate her did not detract from that. Her view of alcohol use rendered her unfit to serve as a juror, despite her assurances to the contrary. Juror 36 also had a strong association with law enforcement through a son who was involved as a juvenile probation officer.

Juror 72 also expressed serious concerns about the abuse of alcohol by "[y]oung people," no doubt in part because her father was an alcoholic who became crippled after breaking his neck while drunk. (OT, pp. 540–41.) Despite this, Juror 72 noted that those thoughts and impressions would be in her mind, but that she thought she could listen impartially. (OT, p. 546.) Juror 72 "could not assure the court that she would render her verdict based solely on the evidence adduced at trial." See DeHart v. Commonwealth, 19 Va. App. 139, 140 (1994).

Juror 182 acknowledged that his sister was a "battered wife" and that this experience would make him "more sensitive than not to issues of domestic violence"; that he had heard about the case "quite often"; that he had a longstanding connection to the University; that the Corner area was "a dangerous place to be after a certain time at night"; that he would "[n]ot necessarily" be more likely to believe a witness who was affiliated with the University; that he "[didn't] believe" his connection to the University would affect his judgment; and when asked whether he had any reservations, he stated, "I don't think so, no." See Memorandum in Support of Motion for a New Trial [hereinafter "Mem."], pp. 26–27. The Court erred in refusing to strike this juror for cause. The Commonwealth argues that Juror 182's answers were "clear and precise" and that his "association with the University is not in and of itself a basis for inclusion or exclusion from the venire." (C.R., p. 16). But Juror 182's answers surely raised at least a reasonable doubt about his ability to render an impartial and unbiased decision.

Juror 211—who actually served on the jury—also should have been struck in light of reasonable doubt about her impartiality. This juror was a professor at the University who taught a close friend of the victim, and who excused that student from her final exam to attend Ms. Love's funeral; Juror 211 had received numerous communications regarding the case and Ms. Love, and she remembered hearing that there was a "break in" and "blunt trauma"; Juror 211 equivocated that she "doesn't think" she heard opinions about the case from other people, but she was "not sure." (Mem., p. 24).

The Commonwealth suggests that Mr. Huguely's objection to Juror 211 "for the record" was "tacit acknowledgement that the legal basis for the motion was dubious." (See C.R., p. 16). But Ms. Quagliana clearly objected to Juror 211, and the Court overruled that objection. (See C.R., pp. 16–17). The sole question is whether the Court's decision was erroneous—which it clearly was in light of Juror 211's close connection to the events giving rise to this case.

In sum, the Court's refusal to strike for cause each of the aforementioned jurors violated Mr. Huguely's right to a fair and impartial jury, and requires a new trial. See DeHart, 19 Va. App. at 142 (citations omitted). Although this is structural error that does not require a showing of prejudice, see id. at 140, Mr. Huguely clearly did incur prejudice as a result of these errors. Juror 211 was actually seated on the panel, and the Court's refusal to strike jurors 31, 32, 35, 36, 72, and 182 forced Mr. Huguely to exercise peremptory strikes that he could have used on other veniremen.

III. Impermissible Limitation on Voir Dire

The Commonwealth argues that "a criminal defendant has no right to individual voir dire; the trial courts have broad discretion to decide how to conduct voir dire." (C.R., p. 17) (citing Fisher v. Commonwealth, 236 Va. 403, 410 (1988)). While this proposition may be correct as a general rule, the defendant has a right to a sufficient examination of prospective jurors to identify whether there is reasonable doubt as to the juror's impartiality. The Court impermissibly limited Mr. Huguely's ability to examine those jurors, thus requiring a new trial.

The Commonwealth concedes, as it must, that "the Court approved the defendant's proposed question about victim blaming for use during voir dire." (C.R., p. 17). Indeed, Juror 34 was struck based on her statements during voir dire about how she would respond to evidence that was seen as "blaming the victim." (Mem., p. 31). The Court's refusal to allow defense counsel to ask similar question of other prospective jurors prevented the defense from investigating potential biases, and was a clear abuse of discretion.

The Commonwealth refers to this line of questioning as a "trial tactic." In fact, the questions served simply to identify jurors' potential bias in light of evidence that was expected to be presented, a classic use of voir dire. The questions about "blaming the victim" were analogous to plainly permissible voir dire questions regarding the jurors' experiences with domestic violence or alcohol abuse.

The Commonwealth's argument that the question was "ambiguous" and yielded "meaningless answers" is wrong. (C.R., p. 17). The question clearly yielded sufficient information to disqualify Juror 34. To the extent that the Commonwealth objected to the form of the question, it could have raised this objection during voir dire. In any event, Mr. Huguely's counsel did offer to reframe the question to make it more specific, but the Court rejected this alternative formulation out of hand. (OT, pp. 595–97.)

In sum, a juror that could not neutrally and impartially evaluate evidence that was seen as "blaming the victim" should not have been seated on the panel in this case, and the Court abused its discretion by barring Mr. Huguely from examining this potential source of bias during voir dire.

IV. Denial of Request for Individual Sequestered Voir Dire

While a defendant does not have a constitutional right to individual voir dire or individual sequestered voir dire, there are circumstances in which a refusal to allow it constitutes an abuse of discretion. That was plainly the case here. Mr. Huguely's case had an undeniably high profile in the Charlottesville area, engendered strong feelings, and involved alleged facts that were thought shocking. Even though jurors were identified only by numbers, each juror (especially those affiliated with the University) would have been known to some or many members of the public. Any comprehensive inquiry into their views which might affect their impartiality required protecting those views from public dissemination.

V. Denial of Request to Sequester the Jury

The jurors were subjected daily to running a gauntlet of the media and the public to enter and leave the courthouse, and were subjected to the hype and hysteria of those crowds. It is inconceivable that they would not have been affected by the crowds, which were overwhelmingly in support of a verdict finding Mr. Huguely guilty of all or most of the charges and imposing a severe punishment.

Accordingly, the jury should have been sequestered in order to ensure that Mr. Huguely was afforded a fair trial.

VI. Refusal of Requested Malice Instruction

With regard to the instruction on "malice," the Court erred in refusing the additional sentence proffered by Mr. Huguely. The Commonwealth cites no relevant case law that would justify the exclusion of that sentence.

As expected, the Commonwealth emphasizes that the Court's malice instruction "was taken ver batim from the Model Jury Instructions." (C.R., at 20). But this is hardly the end of the inquiry. The Model Jury Instructions are not mandatory, and it was error for the Court to treat them as such. Virginia Code § 19.2-263.2 states unequivocally that the fact that a tendered instruction is not in conformance with the Model Jury Instructions provides no basis to reject it. Virginia Code § 19.2-263.2 ("A proposed jury instruction submitted by a party, which constitutes an accurate statement of the law applicable to the case, shall not

be withheld from the jury solely for its nonconformance with model jury instructions.").

Mr. Huguely's proffered sentence regarding the standard for malice was taken from Professor Bacigal's Virginia Practice Instructions, which provide a helpful indication of the current state of the law. Indeed, in considering an instruction on the relationship between intoxication and first-degree murder, the Court asked whether Professor Bacigal had provided an instruction on point. (See UT, February 16, 2012, at 47:11.)

The cases cited by the Commonwealth only reinforce that Mr. Huguely's proffered instruction was proper under Virginia law. The Commonwealth tracks a long and consistent usage of that language, dating back to 1850. (C.R., p. 22). The sentence was also included in the Court's definition of "malice" in Thomas v. Commonwealth, 186 Va. 131, 139 (1947), which the Court of Appeals has repeatedly cited with approval. See Hegedus v. Commonwealth, 1759-96-2, 1997 WL 359283 (Va. Ct. App. July 1, 1997) (citing this definition of "malice"); Shimhue v. Commonwealth, 1736-97-2, 1998 WL 345519 (Va. Ct. App. June 30, 1998) (same); see also Shifflett v. Commonwealth, 221 Va. 191, 193 (1980) (noting that this instruction was given to the definition of "malicious").

Accordingly, the proffered language "constitutes an accurate statement of the law applicable to the case." See Va. Code § 19.1-263.2. Its purpose was to clearly define the legal standard regarding a critical element of the offense—namely, the level of conduct sufficient to give rise to malice. In the absence of a

further definition of intent in the malice instruction, the conduct constituting malice was ill-defined and permitted the Commonwealth to argue—and the jury to infer—that any wrongful action could constitute malice.

The Commonwealth argued at trial, and argues again in its Response, that "malice may be implied from any deliberate willful and cruel act against another, however sudden." The Commonwealth further argues that the "final sentence of the Model Instruction encapsulates this entire aspect of malice while avoiding a source of confusion and varying interpretations." (C.R., p. 21). Mr. Huguely's proffered instruction stated that the jury was permitted to infer malice from "any deliberate, willful, and cruel act against another," but also went on to provide a more comprehensive definition of malice based on language cited in prior Virginia decisions.

The Commonwealth's argument that the requested instruction pertains only to a "depraved heart" theory of murder is wrong. (C.R. p. 21-22). Virginia courts have given the requested instruction in a number of cases, and not one of those courts suggested that this interpretation of the malice element was limited to "depraved heart" situations. For example, Scott v. Commonwealth, 143 Va. 510, 519 (1925), involved a heat-of-passion killing, in which the defendant allegedly stabbed the victim to death after a heated argument and fistfight. Similarly, in Martin v. Commonwealth, 184 Va. 1009 (1946), the defendant shot her husband following an argument in which "unpleasant words were passed" between them. The court gave the jury the malice instruction that Mr. Huguely sought to give

here, even though Martin was a simple domestic dispute that was wholly unrelated to a "depraved heart" theory of murder. The very cases cited by the Commonwealth thus make clear that the proffered instruction provides a general definition of malice that is not limited to situations involving alleged "depraved heart" murder.

Furthermore, the Commonwealth's argument about the Court's duty in relation to instructions actually supports Mr. Huguely's argument. The Commonwealth concedes that an appellate court is "bound by the principle that the accused is entitled, on request, to have the jury instructed (on a legal theory) that is supported by more than a 'scintilla of evidence in the record.'" (C.R., p. 25 (citation omitted)). The Commonwealth also agrees that where "credible evidence exists that would support giving the jury an instruction on a particular theory of the case, the trial court's failure to give the instruction constitutes reversible error." (Id.) The Commonwealth nonetheless asserts that Mr. Huguely's additional instruction was unwarranted because "[t]his case is not one in which the defendant was denied an instruction concerning a legal theory such as a lesser included offense that was fairly raised by the evidence." (Id.).

To the contrary, the evidence submitted in the case demonstrates that Mr. Huguely's actions did not flow "from a wicked or corrupt motive," were not "done with an evil mind and purpose and wrong intention," and were not indicative of "a heart regardless of social duty and fatally bent on mischief." The very essence of Mr. Huguely's defense was that Ms. Love's death was accidental and in

connection with an altercation which rose to no higher level than a simple assault. The important additional language in the refused instruction was critical for the jury's understanding of what constituted sufficient malice to support a conviction of second degree murder.

The Commonwealth argues that at, "a minimum, when the defense requested language inserted into the Model Instruction, it has a tendency to confuse and mislead a jury regarding the law of malice. That result is to be avoided in a case in which that legal theory is not raised by the evidence or argued by the parties." (C.R., p. 33). From start to finish, Mr. Huguely's legal theory was that there was no malice as defined under Virginia law. The Court's refusal to grant the requested, and previously approved, instruction regarding this critical element of the offense was clear error requiring a new trial.

VII. Limitation of Medical Testimony Evidence

The Court erred in limiting the testimony of Dr. Uscinski based on his receipt of emails from Mr. Huguely's counsel concerning the Commonwealth's expert testimony. Mr. Huguely's right to present evidence on his behalf is of constitutional magnitude.

The Commonwealth suggests that Mr. Huguely's counsel's actions were "blatant and intentional" and that their purpose was to "gain an advantage when the witness testified." (C.R., p. 27). None of these observations is accurate. Nothing prohibits counsel from communicating with potential witnesses

concerning areas counsel will cover in the witness examination, nor is it improper to focus witness attention on certain areas where questions will likely be asked.

All of the information contained in the emails could have been conveyed to the witnesses, so long as counsel neither referenced a witness by name nor referenced the particular in-court testimony of any specific witness. On their face, the emails were neither "blatant" nor "intentional." There is nothing surreptitious or secretive about the emails and, without delay, counsel immediately contacted Mr. Chapman at home and notified the Court upon discovering the error.

No evidence suggests that either Dr. Leestma or Dr. Uscinski was affected by the emails or in any way modified their testimony in response. Both experienced medical professionals, neither physician required additional information or prodding from the testimony of other experts. The parties had exchanged information about the basic content of their expert witness' expected testimony. Before trial, both Dr. Leestma and Dr. Uscinski had reviewed reports issued by the Commonwealth's expert witnesses and were familiar with opinions rendered by Commonwealth's experts. Before receiving any emails, defense experts were prepared to address and counter opinions rendered by Commonwealth expert witnesses.

As the Commonwealth recognizes, a determination as to exclusion includes whether there was "intentional impropriety," whether "any substantial aspect of the case" was covered, and "whether [the statements] had any effect on the witness' testimony." (C.R., p. 29 (citing Bennett v. Commonwealth, 236 Va. 448

(1988)). Here there was no intentional impropriety, as the information in question was not substantive and had no effect on the witness testimony.

The cases cited by the Commonwealth (C.R.. pp. 29–33) are inapposite. Those cases generally involved situations in which fact witnesses—not experts—had been improperly exposed to earlier testimony. In those circumstances, there is a far greater risk that the witness' testimony will be unduly influenced by the earlier testimony. As one court explained, the purpose of witness sequestration is to "avoid any artificial harmony of testimony [and] ... avoid any outright manufacturing of testimony." Pierce v. State, 34 Md. App. 654, 663–64 (1977) (excluding testimony of fact witness who violated sequestration order and whose testimony would have "substantiated" the defendant's version of the facts).

But those concerns are substantially diminished in the context of expert witnesses such as Dr. Uscinski. Indeed, courts have emphasized that the concerns underlying the sequestration rule "generally do not arise with regard to expert witnesses in any proceeding," and that "an expert witness often may need to hear the substance of the testimony of other witnesses in order to formulate an opinion or respond to the opinions of other expert witnesses." State v. Bane, 57 S.W.3d 411, 423 (Tenn. 2001). Thus, "allowing an expert witness to remain in the courtroom ... generally does not create the risk that the expert will alter or change factual testimony based on what is heard in the courtroom." Id.; see also Commonwealth v. Albrecht, 511 A.2d 764, 772 (Pa. 1986) (noting that

sequestration may be inappropriate for experts because "an expert witness may state his opinion based upon evidence he has heard presented in the courtroom").

With respect to this defense expert, no serious risk was demonstrated that Dr. Uscinski's limited exposure to testimony by Commonwealth witnesses unduly affected his testimony, whose purpose was to contradict the Commonwealth's medical witnesses and rebut medical opinions known well in advance. In sum, the sanction imposed with respect to Dr. Uscinski's testimony was grossly disproportionate to the violation of the rule on exclusion, and deprived Mr. Huguely of his Sixth Amendment right to present evidence on his own behalf.

VIII. Sufficiency of the Evidence

The Commonwealth correctly sets forth the standard for determining whether or not a motion to set aside the verdict on insufficient evidence should be granted. Nevertheless, it reaches the incorrect conclusions.

A. Grand Larceny

The evidence was insufficient as a matter of law to support a conviction for grand larceny. The Commonwealth is flatly wrong to suggest that Mr. Huguely raised "[n]o contention ... that proof of value on the grand larceny charge was insufficient as a matter of law." (C.R., p. 35). Mr. Huguely has consistently argued that the Commonwealth's proof was insufficient as a matter of law. He raised the argument in a motion to strike the evidence at the conclusion of the Commonwealth's evidence and again at the conclusion of the defense evidence.

The Commonwealth misinterprets Mr. Huguely's argument with respect to the inadequacy of the proof of grand larceny. Mr. Huguely does not dispute that the jury could consider Mr. Sacco a sufficient expert to testify as to the fair market value of Ms. Love's computer on the date in question. Mr. Sacco's testimony, however, did not provide an adequate basis for a finding that the computer's value exceeded two hundred dollars.

Mr. Sacco's two isolated sales, some distance from the critical valuation date, do not in and of themselves establish fair market value. Moreover, Mr. Sacco's testimony was based on a very limited number of customers. His testimony did not provide the proper standard to determine the fair market value of the computer on a given day. It is not about "his customers"; it is about fair market value, an issue that was wholly unaddressed by Mr. Sacco.

"Fair market value" for purposes of establishing grand larceny is the price property will bring if offered for sale by a seller who desires but is not obligated to sell and bought by a buyer under no necessity of purchasing. Robinson v. Commonwealth, 258 Va. 3, 5–6 (1999) (citations omitted). In this analysis, the price of sale on a given occasion "is not conclusive evidence but is to be given substantial weight in determining fair market value." Bd. of Sup'rs of Fairfax County v. Donatelli & Klein, Inc., 228 Va. 620, 628 (1985). The factors to consider include "the reasons for the purchase." Id. at 628.

Other courts have been wisely skeptical of the sale price of items on limited or restricted markets, if there is a more general market available. See, e.g.,

McGuire v. C. I. R., 44 T.C. 801, 808–09 (1965) ("[I]t is nevertheless recognized that ... sales on restricted markets, are not always the best criterion of value, and are certainly not conclusive, particularly where there is evidence that the property would sell for more under different circumstances.") (citations omitted); see also Gresser v. Stearns, 1987 WL 25997 (Minn. Tax Court 1987) (noting the "valuation problem" caused by "a relatively new, large, well constructed, attractive lake residence," because "there may be a limited market for this type of property"). Testimony addressing the "pawnshop market" or pawnshop customers, in the absence of a connection and testimony saying that such customers represent customers generally, provides no fair market value as that term is defined by law.

In this case, defense expert Mr. Thomas testified to the value of the product on a general market. In contrast, the Commonwealth's expert Mr. Sacco testified that his customers had particular characteristics that may, or may not, be true of customers as a whole; for example, he testified that his customers "aren't too concerned about" processor speeds. (UT, Feb. 15, 2012, p. 18.) There was no testimony from Mr. Sacco of the extent to which the general public is concerned about processor speeds, which is surely an important driver of the price of a computer.

Moreover, the Commonwealth failed to offer any testimony as to the fair market value of Ms. Love's computer on the date in question, as required to secure a conviction. See Baylor v. Commonwealth, 55 Va. App. 82 (2009).

Accordingly, as a matter of law, there was no proper evidence from which the jury could conclude a grand larceny was committed.

B. Second Degree Murder

As a matter of law, the evidence failed to support the jury's finding of second degree murder. No evidence submitted by the Commonwealth shows definitively that Ms. Love died as a result of the defendant's intentional and volitional actions towards her rising to the level of malice—as defined by the law, not the trial court's erroneous instruction. The evidence was far more consistent with the conclusion that Ms. Love's death was accidental.

Accordingly, there was insufficient evidence to support a finding of second degree murder.

Conclusion

For the reasons set forth above, the defendant, George W. Huguely, V, respectfully requests that he be granted a new trial.

GEORGE HUGUELY

By Counsel