V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	**CRIMINAL NUMBER FE-2022-485**
VERSUS	)	
LIAM WALLACE BATES	)	**VERDICT – ATTEMPTED SODOMY (COUNT I) and SODOMY (COUNT II)**

MEMORANDUM OPINION AND ORDER
WITH REGARD TO DEFENDANT'S MOTION TO SET ASIDE THE VERDICT
(AMENDED)

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MEMORANDUM OPINION AND ORDER

Before the Court is the *Defendant's Motion to Set Aside the Verdict*. For the reasons set forth in this opinion, the motion is DENIED.

I. Background

On June 21, 2022, the defendant was indicted on a two-count felony indictment: Count One charged the defendant with the Rape of W.M. and Count Two charged the defendant with Sodomy (fellatio) of W.M.[1] On January 25, 2023, Count One was amended, without objection, to Sodomy (anal intercourse). A jury trial began on January 30, 2023, and concluded on February 7, 2023. With respect to Count One, the defendant was found guilty of Attempted Sodomy (anal intercourse). With respect to Count Two, the defendant was found guilty of Sodomy (fellatio).

On June 16, 2023, the defendant filed *Defendant's Motion to Set Aside the Verdict*. On June 23, 2023, the Commonwealth filed *The Commonwealth's Response to Defendant's Motion to Set Aside the Verdict*. On July 7, 2023, the defendant filed *Defendant's Reply to the Commonwealth's Response*. The Court heard oral argument on July 14, 2023, and took the motion under advisement.

II. Grounds for Relief

The motion to set aside the verdict sets out five grounds for relief:

- The first ground is a claim that the jury should not have been instructed on the crime of Attempted Sodomy and should not have been given a verdict form with the option of convicting the defendant of Attempted Sodomy.

- The second ground is a claim that there was insufficient evidence for a jury to find the defendant guilty of Attempted Sodomy.

- The third ground is a claim that the Court erred in ruling that Alex Gerber's Discord app text message, dated January 8, 2022, did not "open the door" to evidence of W.M.'s alleged homosexual orientation.

- The fourth ground is a claim that the Court erred in excluding D.A.'s testimony on relevancy grounds.

- The fifth ground is a claim that the Commonwealth made improper closing arguments and, thereby, engaged in prosecutorial misconduct, warranting a new trial and sanctions.

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[1] Throughout this Opinion, the Court refers to the victim as "W.M.", in order to protect his privacy. Where the victim's full name or surname appear in quotations from the transcript, or exhibits, or pleadings, the Court has substituted "W.M." For the same reason, the Court refers to W.M.'s mother, who testified at trial, as "Ms. M."

III. Grounds for Relief One: Jury Instruction and Verdict Form Regarding Attempted Sodomy

The first ground for relief concerns the defendant's conviction for Attempted Sodomy. The defendant asserts that the Court erred in instructing the jury on Attempted Sodomy and permitting the jury to return a verdict on the crime of Attempted Sodomy.

The defendant's contentions can be summarized as follows:

- Sodomy (anal intercourse) is a *general* intent crime;
- Attempted Sodomy (anal intercourse) is a *specific* intent crime;
- The crime of Attempted Sodomy is not a lesser included offense of Sodomy because it contains an element (*specific* intent) that is not an element of Sodomy.
- A jury cannot be instructed, or return a verdict, on a crime that *is not* charged in the indictment unless it is a lesser included offense of a crime that *is* charged in the indictment.
- Virginia Code §19.2-286 does not provide statutory authority to permit the jury to be instructed on the elements of Attempted Sodomy or to return a verdict on that charge.
- Since Attempted Sodomy is not a lesser included offense of Sodomy, the Court erred in instructing the jury on Attempted Sodomy and providing the jury a verdict form which permitted a conviction on Attempted Sodomy.
- Since the jury convicted the defendant of a crime not charged in the indictment, and which was not a lesser included offense, the verdict on Attempted Sodomy (anal intercourse) must be set aside.
- Even though the jury should not have had the option of convicting the defendant of Attempted Sodomy, the fact that the jury did convict the defendant of Attempted Sodomy *necessarily* means that the jury acquitted the defendant of Sodomy (anal intercourse).

The Court agrees that the defendant was necessarily acquitted of Sodomy (anal intercourse) when the jury found the defendant guilty of Attempted Sodomy.[2] The Court does not agree, however, that it was error for the Court, at the request of the Commonwealth, to instruct the jury on the crime of Attempted Sodomy or to give the jury the option of convicting the defendant of that offense.[3] So long as there was "more than a mere scintilla of evidence" to support the giving of an Attempted Sodomy instruction, it was entirely proper to give that instruction, as well as the related verdict form.[4]

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[2] *See, e.g., Cates v. Commonwealth*, 111 Va. 837, 841 (1910) ("The attempt being included in, or a part of, the offense charged, a conviction of the attempt would be an acquittal of the principal or major offense of rape.").

[3] The Commonwealth has the same right as the defendant to request and obtain an instruction, so long as it is supported by the evidence. *See Craig v. Commonwealth*, 34 Va. App. 155 (2000) (Commonwealth entitled to an instruction on involuntary manslaughter where the defendant was charged with second degree murder).

[4] To warrant the giving of an instruction, it "must be supported by more than a mere scintilla of evidence." *Gibson v. Commonwealth*, 216 Va. 412, 417 (1975).

The reason is straightforward: Virginia Code §19.2-286 explicitly permits a jury that is considering an indictment charging a felony to convict the defendant of an attempt to commit that felony.[5] This has been the law of the Commonwealth since 1848.[6]

The latest iteration of Virginia Code §19.2-286 went into effect in 1975, and reads as follows:

> On an indictment for felony the jury may find the accused not guilty of the felony *but guilty of an attempt to commit such felony*, or of being an accessory thereto; and a general verdict of not guilty, upon such indictment, shall be a bar to a subsequent prosecution for an attempt to commit such felony, or of being an accessory thereto.

(Emphasis added). The language of the statute is unequivocal and without exception. The statute does not say: A jury may convict a defendant of an attempt to commit a felony *except when the attempt crime is a specific intent crime and the crime indicted is a general intent crime*. Nor does the statute say: A jury may convict a defendant of an attempt to commit a felony, *but only when the attempt is a lesser included offense of the felony*. Nor may this Court graft onto the statute such a caveat. Only two weeks ago, the Supreme Court of Virginia reiterated this core principle of statutory construction. In *Prease v. Clarke*, Record No. 220665, 2023 WL 4359509, at *4 (Va. July 6, 2023), the Court quoted from *Tvardek v. Powhatan Vill. Homeowners Ass'n, Inc.*, 291 Va. 269, 277 (2016) (alteration in original) for the following proposition:

> In reviewing statutory language, we have consistently explained that Virginia courts "presume that the legislature chose, with care, the words it used when it enacted the relevant statute." *Zinone v. Lee's Crossing Homeowners Ass'n*, 282 Va. 330, 337 (2011). We believe it to be "our duty to interpret the statute as written and when this is done our responsibility ceases." *City of Lynchburg v. Suttenfield*, 177 Va. 212, 221 (1941). The one canon of construction that precedes all others is that "[w]e presume that the legislature says what it means and means what it says." *In re: Woodley*, 290 Va. 482, 491 (2015).

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[5] Thus, the Court need not reach the question of whether Attempted Sodomy is a lesser included offense of Sodomy. It is Virginia Code §19.2-286 that controls the resolution of this issue. Nevertheless, the Court would note that Attempted Sodomy may well be a lesser included offense of Sodomy. *See, e.g.,* 70C Am. Jur. 2d Sodomy § 46 ("Attempted sodomy is a lesser offense necessarily included in the substantive offense of sodomy....") *See also Cates* , 111 Va. at 841-43 (The crime of attempted rape "was necessarily included in the charge of rape."). At oral argument, defense counsel dismissed the significance of this case because it was a "double jeopardy" case. This was true, but the Court's ruling that attempted rape "was included in and a part of the charge of rape" was not *dicta* but, rather, the whole basis for the Court's ultimate finding that a conviction for attempted rape constituted an acquittal of rape.

[6] *See Dalton v. Commonwealth*, 27 Va. App. 381, 390 (1998), *on reh'g en banc,* 29 Va. App. 316 (1999), *rev'd on other grounds*, *Commonwealth v. Dalton*, 259 Va. 249 (2000).

Just as a court "may not add words to a statute," neither may a court "ignore any of the actual statutory language," *Logan v. City Council of City of Roanoke*, 275 Va. 483, 492 (2008) (citations omitted), or "subtract from it." *In re Woodley*, 290 Va. 482, 491 (2015) (citation omitted).

Moreover, case law for more than a century has interpreted the various iterations of the statute consistent with this Court's understanding.

In *Cates v. Commonwealth*, 111 Va. 837 (1910), the Supreme Court of Appeals of Virginia held that an individual charged with rape could be convicted of attempted rape, relying on a predecessor version of Virginia Code §19.2-286. That remains true today. *See, e.g., Fisher v. Commonwealth*, 228 Va. 296 (1984).

In *Joyner v. Clarke*, No. 2:17CV661, 2018 WL 8804472, at *1 (E.D. Va. June 27, 2018), *report and recommendation adopted*, No. 2:17CV661, 2018 WL 8804467 (E.D. Va. Aug. 1, 2018)), United States Magistrate Judge Robert Krask addressed a habeas corpus petition filed by a Virginia inmate. In his opinion, Judge Krask wrote: "[I]t is well settled in Virginia, as discussed by the circuit court's denial of Joyner's first habeas petition that a defendant can be found guilty of attempted rape on an indictment for rape." In support of this assertion, Judge Krask cited Virginia Code §19.2-286. That reasoning applies with equal force to a charge of sodomy and a conviction for attempted sodomy.

In *Willoughby v. Smyth*, 194 Va. 267 (1952), the defendant was charged with breaking into a store-house with intent to steal; the jury convicted him of attempted store-breaking. The Court cites a predecessor iteration of Virginia Code §19.2-286 for the proposition that a defendant charged with a felony can be convicted of an attempt.

This brings the Court to *Dalton v. Commonwealth*, 27 Va. App. 381, 390 (1998), *on reh'g en banc*, 29 Va. App. 316 (1999), *rev'd on other grounds*, *Commonwealth v. Dalton*, 259 Va. 249 (2000). In *Dalton I*, the Court of Appeals made clear that Virginia Code §19.2-286 gives juries the "statutory power" to find a defendant guilty of an attempt to commit the charged felony: "[T]he General Assembly has added to the offenses for which an accused felon may request a jury instruction by empowering juries to convict accused felons of both 'attempt' and being an 'accessory,' even though neither of these crimes was expressly charged in the felony indictment." *Id.* at 390, n.2. Citing *Willoughby*, the Court of Appeals stated: "Applying this statute [19.2-286], the Virginia Supreme Court has stated that a felony indictment 'embraces' as a 'lesser offense' the crimes listed in Code §19.2-286." *Id.* at 391. The Court of Appeals acknowledged that accessory after the fact was not a lesser included offense of any other crime, but held that a defendant was nevertheless entitled to an instruction on "accessory after the fact" (if warranted by the evidence) "based upon the jury's statutory power under Code §19.2-286." *Id.* at 391 n.3.

The defense correctly notes in its Reply brief that the Court of Appeal's decision in *Dalton* was reversed by the Supreme Court of Virginia. *See Commonwealth v. Dalton*, 259 Va. 249 (2000). But the defense is incorrect in its understanding as to *why* the Supreme Court reversed the Court of Appeals. And that misunderstanding is fatal to the defendant's analysis.

The defense asserts that the Supreme Court reversed the Court of Appeals in *Dalton* because accessory after the fact is not a lesser included offense of murder and Virginia Code §19.2-286 "does not

authorize instructing the jury on offenses that are not lesser-included offenses of those charged in the indictment."[7] It is certainly true that accessory after the fact is not a lesser included offense of murder – both the Court of Appeals and the Supreme Court agreed on that – but this was not the dispositive issue in *Dalton*.

The dispositive issue was whether accessory after the fact was still covered by §19.2-286 after the statute was modified in 1975. The Court of Appeals said it was. The Supreme Court says it was not.[8] It was this determination by the Supreme Court that disposed of the case. Since accessory after the fact was not a lesser included offense of murder, and since that the Supreme Court had now determined that the 1975 amendment to §19.2-286 removed accessory after the fact from the statute, a jury could not convict on accessory after the fact unless it was specifically charged in the indictment.

Unlike the "accessory" language in §19.2-286, the "attempt" language has remained unchanged for over a century. For example, in the 1910 decision in *Cates,* the Supreme Court quoted the earlier version of §19.2-286, as follows: "[O]n an indictment for felony, the jury may find the accused not guilty of the felony, *but guilty of an attempt to commit such felony*; and a general verdict of not guilty upon such indictment shall be a bar to a subsequent prosecution for an attempt to commit such felony." *Cates,* 111 Va. at 838 (Emphasis added). This language "says what it means and means what it says": *A defendant charged with a felony may be convicted of an attempt to commit that felony.*

If there was any doubt about this, consider the second half of the statute. It reads: "[A] general verdict of not guilty, upon such indictment, shall be a bar to a subsequent prosecution for an attempt to commit such felony…." In other words, the prosecution is on notice – as is the defendant – that it does not get to try the defendant twice: once on the felony, and if the defendant is found not guilty, then subsequently on the attempt. But that statutory language only makes sense if the jury has already been given an opportunity to convict the defendant on the attempt. And that is where the first half of the statute comes in. Assuming there is evidence to support the instruction, the jury is statutorily authorized to convict on the attempt. Without that option, there would be no basis for the statute precluding a subsequent prosecution on attempt.

This point is reinforced by Rule 3A:17(c) of the Rules of the Supreme Court of Virginia. Rule 3A:17(c) states in part as follows: "*Conviction of Lesser Offense.* The accused may be found not guilty of an offense charged but guilty of any offense, or of an attempt to commit any offense, that is

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[7] Def. Reply at 2.

[8] Prior to 1960, the statute did not cover accessory liability at all. In 1960, the statute was amended to add "accessory after the fact" to the statute. In 1975, however, the statute was modified. The term "accessory after the fact" was dropped from the statute and replaced with "accessory thereto." The Court of Appeals held that the term "accessory thereto" included both "accessories before the fact and accessories after the fact" and, therefore, "we must interpret the provision as applicable to both forms of accessory liability." *Dalton v. Commonwealth*, 27 Va. App., at 390 n.3. The Supreme Court came to a very different conclusion: It held that when the General Assembly replaced "accessory after the fact" with "accessory thereto," the General Assembly "indicated its intention to eliminate accessories after the fact from the application of Code §19.2-286." *Commonwealth v. Dalton*, 259 Va. 249, 254 (2000).

substantially charged or necessarily included in the charge against the accused." In other words, an accused may be convicted of an attempt to commit a "substantially charged" offense or an attempt to commit a "necessarily included" offense. For example, if a defendant is charged with grand larceny, and if petit larceny is a lesser included offense of grand larceny, a defendant could be convicted of any of the following offenses: (1) grand larceny; (2) attempted grand larceny; (3) petit larceny; and (4) attempted petit larceny. Here, the defendant was charged with Sodomy (Anal Intercourse) and convicted of Attempted Sodomy (Anal Intercourse). This verdict was entirely consistent with the provisions of Rule 3A:17(c).

Finally, the defendant also argues that applying §19.2-286 in the manner urged by the Commonwealth, and adopted by this Court, violates the defendant's Due Process rights by failing to give the defendant notice of the crime for which he was ultimately convicted. But it is the statute itself, in its plain and unambiguous terms, that puts the defendant on notice that the jury may convict a felony defendant of an attempt to commit the felony. The defendant disputes this, relying on this sentence from the Supreme Court's opinion in *Dalton*: "By limiting the statute's application to accessories before the fact, any conflict between the statute and the notification requirements of due process was avoided." *Dalton,* 259 Va. at 254. The defendant reads this sentence to mean that due process prohibits a defendant from being convicted of any offense – attempts or accessories – unless the crime is *also* a lesser included offense. That reading is incorrect. The sentence just quoted is preceded by this: "In deleting the modifier 'after the fact' the General Assembly indicated its intention to eliminate accessories after the fact from the application of Code §19.2-286." *Id.* In other words, once the General Assembly deleted accessory after the fact from §19.2-286, that statute no longer provided a defendant his due process notice that, if charged with a felony, he could be convicted of accessory after the fact to that felony. That has no applicability to the instant case for, unlike accessory after the fact, attempts were never struck from the statute.

In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the United States Supreme Court addressed a similar 14th Amendment Due Process notice claim with respect to the conviction of two defendants who were charged and convicted of criminal trespass after participating in a sit-in demonstration at a drug store in Columbia, South Carolina, and refusing to leave after being asked to do so by the store manager. The criminal trespass statute prohibited the entry "upon the lands of another" after notice from the owner or tenant prohibiting such entry. *Id.* at 349-50. The Supreme Court of South Carolina, however, interpreted the statute "to convert not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave." *Id.* at 350 (footnote omitted). The Supreme Court of the United States reversed the petitioners' conviction because "[s]o far as the words of the statute were concerned, petitioners were given not only no 'fair warning,' but no warning whatever that their conduct in Eckerd's Drug Store would violate the statute." *Id. at* 355 (footnote omitted). The Supreme Court concluded: "The crime for which these petitioners stand convicted was 'not enumerated in the statute' at the time of their conduct. It follows that they have been deprived of liberty and property without due process of law in contravention of the Fourteenth Amendment." *Id.* at 363 (*quoting United States v. Wiltberger*, 18 U.S. 76, 96 (1820)).

In contrast, in the instant case the "words of the statute" are explicit: A defendant charged with a felony can be convicted of an "attempt" to commit that felony. The statute isn't vague, overbroad, or dependent on a judicial construction or interpretation. Unlike the circumstances in *Bouie*, the crime for which the defendant now stands convicted *is* "enumerated in the statute." (*See also* Virginia Code §18.2-

67.5, which states – again explicitly – that "[a]n attempt to commit … forcible sodomy … shall be punishable as a Class 4 felony.").

The last point the Court would make regarding this issue is that there is a distinct and independent basis to warrant denial of the defendant's motion, namely that the arguments now being presented by the defense were not arguments raised by the defendant's counsel at trial. Rather, these arguments are being raised for the first time by the defendant in the *Motion to Set Aside the Verdict.*

It is certainly true that defendant's trial counsel did object to the Attempted Sodomy instruction and verdict form, but their objection was *solely* based on the assertion that the instruction and verdict form were not justified by the evidence.[9] As trial counsel said: "Your Honor, I think there is either a sodomy or there is not a sodomy."[10] "This has been – this whole time it has been Mr. Bates forcibly, anally penetrated W.M. Witness – Mr. Coughlin saw him forcibly penetrate W.M. Nurse Kwon saw abrasions on W.M.'s anus. That has been it."[11] "[Nolan Coughlin] was adamant that what he saw was forcible anal sodomy. I asked him repeatedly, Your Honor. This is a sodomy case."[12]

In order to preserve an objection, it is not only necessary to make the objection, but also to make the *actual* argument before the trial court that is later urged upon the reviewing court. To do otherwise deprives the trial court of the opportunity to meaningfully consider the rationale for the objection and act appropriately at a time when that act can be effective. *See, e.g., Edwards v. Commonwealth*, 41 Va. App. 752, 760 (2003) ("Making one specific argument on an issue does not preserve a separate legal point on the same issue for review."); *Clark v. Commonwealth*, 30 Va. App. 406, 411 (1999) ("An objection raised at trial on one ground does not preserve for appeal a contention on a different ground."); *Thomas v. Commonwealth*, 44 Va. App. 741, 750 (2005) (citation omitted) (italics in original) (To preserve an issue for appellate review, an objection must be both *specific* and *timely* – so that the trial judge would know the particular point being made in time to do something about it."), *Reid v. Baumgardner*, 217 Va. 769, 780 (1977) (citation omitted) ("The purpose of the requirement of specificity is to give the trial court an opportunity to rule intelligently and avoid unnecessary appeals, reversals, and mistrials."); and *Correll v. Commonwealth*, 42 Va. App. 311, 324 (2004) (citations omitted) ("The same argument must have been raised, with specificity, at trial before it can be considered on appeal.")

This Court recognizes, of course, that it is not an appellate court but, like an appellate court, it is being asked to vacate a jury's verdict based on an argument never made to the trial court during the trial itself. Whether the argument is made to a trial court considering a motion to set aside a verdict or made to an appellate court considering a motion to vacate a conviction, the significance of the defendant's failure

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[9] Tr. 2/3/23, at 149-165, 177-187.

[10] *Id.* at 155.

[11] *Id.* at 157.

[12] *Id.* at 164.

to make this argument before now is the same: The trial court was deprived of the opportunity to address the issue *when it could have made a difference.*[13]

This, then, is an independent ground upon which the Court relies for denial of the defendant's motion.

For all the foregoing reasons, the Court denies the defendant's claim that it was error to instruct the jury on Attempted Sodomy and to give the jury a verdict form that permitted a conviction on that crime.

IV. Grounds for Relief Two: Sufficiency of Evidence Regarding Attempted Sodomy

The Court now turns to the defendant's second ground for relief: that there was insufficient evidence to support the conviction of the defendant for the crime of Attempted Sodomy.

a. Elements of Attempted Sodomy

The four elements of Attempted Sodomy are as follows:

1. That at the time of the offense, W.M. was mentally incapacitated or physically helpless; and
2. That at the time of the offense the defendant knew or should have known W.M was mentally incapacitated or physically helpless; and
3. The defendant intended to commit sodomy (anal intercourse) by mental incapacity or physical helplessness; and
4. The defendant did a direct act toward the commission of sodomy (anal intercourse) by mental incapacity or physical helplessness, which amounted to the beginning of the actual commission of that crime.

b. Legal Standard

The role of the Court in a post-trial motion to set aside a jury verdict for insufficient evidence is a limited one. As the Supreme Court of Virginia has said, "When considering the sufficiency of the evidence to sustain a conviction, we examine the evidence in the light most favorable to the Commonwealth, the prevailing party at trial, granting it all reasonable inferences fairly deductible therefrom." *Jordan v. Commonwealth*, 286 Va. 153, 156 (2013). Just last week, the Court of Appeals reiterated this standard. In *Chavez v. Commonwealth*, No. 0793-22-4, 2023 WL 4424795, at *1 (Va. Ct. App. July 11, 2023), the Court stated that the principle requiring a reviewing court to examine the evidence in the "light most favorable" to the Commonwealth "requires us to 'discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences that may be drawn therefrom.' *Kelly v. Commonwealth*, 41 Va. App. 250, 254 (2003) (*en banc*) (quoting *Watkins v. Commonwealth*, 26 Va. App. 335, 348 (1998)."

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[13] Not only did defense counsel *not* make this argument at trial, but it interposed no objection when the Commonwealth asserted that attempted sodomy was a lesser included offense of sodomy. Tr. 2/3/23, at 178. Indeed, defense counsel stated that "I had initially contemplated including lesser includeds [*sic*] myself." Tr. 2/3/23, at 182.

c. **Was there sufficient evidence before the jury for it to find beyond a reasonable doubt that W.M. at the time of the offense was "mentally incapacitated or physically helpless"?**

In considering this issue, the Court has examined the evidence before the jury at eight specific periods of time. With just a few exceptions, each of these time periods is an approximation.

- **7:00 p.m. to 9:30 p.m.**, representing the time period when W.M. was in the defendant's vehicle before arriving at Emma Welther's home.

- **9:30 p.m. to Midnight**, representing the time period prior to W.M. passing out on the porch of Emma Welther's home.

- **Midnight to 1:30 a.m.**, representing the time period when W.M. was passed out.

- **1:30 a.m. to 1:45 a.m.**, representing the time period when W.M. was walked with assistance from Emma Welther's home and placed in the back seat of the defendant's car.

- **1:45 a.m. to 2:15 a.m.**, representing the time period when W.M. was driven by the defendant to the driveway of Robert Hochstetter's home.

- **2:15 a.m. to 2:48 a.m.**, representing the time period when the defendant and W.M. were alone in the defendant's vehicle in Robert Hochstetter's driveway.

- **2:49 a.m. to 3:15 a.m.**, representing the time period when the defendant drove away from Robert Hochstetter's home and arrived at W.M.'s home and W.M. entered his home.

- **3:15 a.m. to late morning**, representing the time period after W.M. entered his home, went to sleep, and woke up in the late morning.

i. **7:00 p.m. to 9:30 p.m., representing the time period when W.M. was in the defendant's vehicle before arriving at Emma Welther's home.**

- At around 7:00 p.m. on December 31, 2021, the defendant picked up W.M. at his home. W.M. called it the "pre-game" time and they were "just hanging out before the party" at Emma Welther's house started.[14]

- The defendant and W.M., and others, drove to a 7-Eleven where W.M. purchased Miller Lite beer, and some hard seltzers. W.M. also bought a Four Loko to drink before the party. (W.M. described a Four Loko as "four beers in a can.")[15]

[14] Tr. 1/30/23, at 223.

[15] *Id.* at 226.

- W.M. drank the Four Loko, as well as Miller Lite beer, and smoked marijuana – all before arriving at Emma's house.[16]

ii. **9:30 p.m. to Midnight, representing the time period at Emma Welther's home prior to W.M. passing out on the porch.**

- After arriving at Emma Welther's home, W.M.'s drinking continued.

- W.M. testified that, among the alcoholic drinks he consumed at Emma Welther's party, he drank "fireball shooters" – which he described as a shot of hard liquor in a plastic container – and also played what he called "drinking games."[17] W.M. also confirmed at trial that he had previously told Det. Charles Lynch that he had consumed eight to ten Miller Lite beers, Grey Goose Liquor, smoked a joint, played drinking games and had fireball shooters. W.M. testified that in making this statement to Det. Lynch, he was seeking to give him a "minimum estimate."[18]

- Robert Hochstetter testified that he saw W.M. "consume a number of beverages throughout the night, including hard liquor."[19] He confirmed that the beverages were alcoholic, and the hard liquor was "vodka or something along those lines."[20] In Robert Hochstetter's interview with Detective Lynch, he said that W.M. had "a lot" of drinks and marijuana between 11p.m. and midnight.[21]

- W.M. also testified that he had taken two prescription medicines that day – Prozac and Zoloft. At the direction of his psychiatrist, he was tapering off one medication and going up on the other.[22] On December 31, 2021, he was on both medications. W.M. testified that his psychiatrist had advised him of the interaction between the medicine and the consumption of alcohol and that the medication bottle had a warning against consuming alcohol because it could cause dizziness and drowsiness.[23]

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[16] *Id.* at 226-27.

[17] *Id.*at 227.

[18] Tr. 1/31/23, at 12.

[19] Tr. 1/30/23, at 178-79.

[20] *Id.* at 179.

[21] Def. Exh. 2.

[22] Tr. 1/31/23, at 16-17.

[23] Tr. 1/30/23, at 229.

- Robert Hochstetter testified that, "as the night went on and W.M. drank more," he became "a lot less energetic."[24] Emma Welther testified that W.M. "was just mumbling words. You could not make out coherent words or sentences."[25] She also testified that W.M. "was so drunk he could barely sit up or stand."[26] Robert Hochstetter would later tell Nolan Coughlin that W.M. was "black-out drunk."[27]

- "Eventually," according to Robert Hochstetter, W.M. just "passed out."[28]

iii. <u>Midnight to 1:30 a.m., representing the time period when W.M. was passed out.</u>

- These are the intoxicants in W.M.'s system at the time he passed out:

  - Four Loko (4 beers)
  - Miller Lite Beer
  - Fireball shooters
  - Grey Goose liquor
  - Alcohol consumed during "drinking games"
  - Marijuana (smoked in the car driving to Emma's home)
  - More Marijuana (smoked at Emma's home)

- In addition, W.M. had two prescription medicines in his system that were not supposed to be mixed with alcohol due to the risk of drowsiness and dizziness.

- So concerned were W.M.'s friends with W.M.'s condition that they tried to check his neck for a pulse. According to what the defendant told W.M. in a controlled telephone call, "No one could actually check your pulse on your neck so that was a little concerning, so I put my apple watch on you and that's how we found out you had a heartbeat."[29]

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[24] *Id.* at 180.

[25] Tr. 2/3/23, at 105.

[26] *Id.*

[27] Def. Exh. 3

[28] *Id.* That, however, was not what the defendant told the jury. He described a far less alarming scene. He testified that around midnight W.M. "asked if it was okay if he went to sleep for a bit before going home" and then he began sleeping – or, as his trial counsel put it, "napping" – for an hour and 15 minutes. Tr. 2/2/23, at 101.

[29] Commonwealth Exh. 3.

iv. **1:30 a.m. to 1:45 a.m., representing the time period when W.M. was walked with assistance from Emma Welther's home and placed in the back seat of the defendant's car.**

- Around 1:30 a.m., the party began to break up. W.M. was still passed out and had to be roused awake.
- Even after that occurred, according to Emma Welther, "[h]e was still not able to make out words or sentences. He was only mumbling."[30] In addition, he could not "sit up or walk on his own."[31]
- Emma Welther was asked to describe how W.M. got from the couch on Emma's porch to the defendant's car. She testified: "So the way he was moved from the couch to Liam's car, which was in the parking lot right beside my house was, I was on one side of him with my arms around him, his arm over my shoulder, and the other side was Liam. And we physically walked him from around my porch to the parking lot to the car."[32]

v. **1:45 a.m. to 2:15 a.m., representing the time period when W.M. was driven by the defendant to the driveway of Robert Hochstetter's home.**

- The drive from Emma Welther's home to Robert Hochstetter's home was not a long one, about 15-30 minutes.

- Robert Hochstetter told Det. Lynch that W.M. was speaking in the car, but it was just "gibberish."[33] He couldn't understand what W.M. was saying. At trial, he described what W.M. was saying as "incoherent ramblings."[34] W.M. was not moving a "great deal" and Robert could not even tell if he was awake or not.[35]

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[30] Tr. 2/3/23, at 105.

[31] *Id.* at 103.

[32] *Id.* at 103. Emma Welther testified that W.M. had one arm around her shoulder and the other arm around the defendant's shoulder, and the two of them helped get W.M. to the defendant's car. However, when the defendant was asked at trial – "Did W.M. need any assistance getting to the car?" – his answer was: "I don't know." *Id.*

[33] Def. Exh. 2.

[34] Tr. 1/30/23, at 218.

[35] Def. Exh. 2. The defendant's testimony about the car ride home was quite different:

> **Q**. How was W.M. in the car on the ride? What was his demeanor?
> **A**. He seemed happy and kind of seemed as he was at the party. He was asking us what was going on while he was asleep. Before he went to sleep some people were there when he woke up they were gone. So we filled him in on all of that. He was making jokes. He and Robert made jokes about the music that was playing in the car.
> **Q**. Was he awake the entire time?
> **A**. Yes, ma'am.
> **Q**. Was he engaged in conversation?
> **A**. Yes.

Tr. 2/2/23, at 104.

- At around 1:51 a.m., Alex Gerber – who was a friend of both W.M. and the defendant – received "some text messages from Liam as well as I think some phone calls."[36] The defendant texted Alex: "It's kind of an emergency." "W.M. needs help." "He's v drunk." "He's very drunk."[37] The defendant asked Alex if they could come over to Alex's home so that W.M. could "sober up."[38] Alex Gerber declined, stating that he was already in bed and "half asleep." [39] When asked how he knew that the text messages had come from the defendant, Alex Gerber testified: "It was sent to me by Liam's phone number as part of a continuing conversation that only ever involved us two."[40]

- When the defendant, W.M. and Robert Hochstetter arrived at Robert's home, the defendant pulled into Robert's driveway and Robert got out.

vi. **2:15 a.m. to 2:48 a.m., representing the time period when the defendant and W.M. were alone in the defendant's car in Robert Hochstetter's driveway.**

- The defendant and W.M. were alone in the defendant's car from around 2:15 a.m. until 2:48 a.m.

- After Robert Hochstetter observed that the defendant's car was still parked in his driveway, he met up with another friend, Nolan Coughlin, and the two of them walked over to the defendant's car to see why it was still in Robert's driveway. The time was 2:48 a.m., according to Nolan Coughlin's written account, which he prepared later that same day.[41]

- According to Nolan Coughlin's written account, he saw W.M. in the back seat of the car and W.M. was "completely unresponsive laying faced down on the back seat of the car." Meanwhile, he observed the defendant "gyrating" on W.M.[42]

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[36] Tr. 2/3/23, at 71.

[37] Commonwealth Exh. 11.

[38] Id.

[39] Id.

[40] Tr. 2/3/23, at 73. Nevertheless, the defendant testified that he was not the one who sent the text messages to Alex. Rather, he said that it was W.M. who sent the text messages, using the defendant's phone. *Id.* at 133. The Court would note, however, that throughout the messages, the defendant is referred to in the first person (as in "I am DDing [designated driving].") and W.M. is referred to in the third person (as in "W.M. needs help.") *See* Commonwealth Exh. 11.

[41] Commonwealth Exh. 5.

[42] Id.

- When Nolan Coughlin was interviewed by Det. Lynch, he described W.M. as "limp," that he "wasn't moving," "not saying anything," not seeming "to have any reaction to anything that was going on."[43]

- At trial, Nolan Coughlin testified that when he looked in the vehicle, he could not detect any movement by W.M.[44]

- Robert Hochstetter told Det. Lynch that "W.M. didn't really seem to be moving a great deal" and he could not tell if W.M. was awake or not.[45] He could, however, tell that the defendant was "over on top of him."[46]

- In contrast, the defendant's description of what went on in the car during this time period depicts W.M. as coherent, profane, and physically and sexually aggressive. According to the defendant, W.M. urged the defendant to get into the back seat with him, told the defendant how good he looked, told the defendant that he loved him, kissed the defendant, grabbed the defendant by the neck and forced him to commit fellatio on him, was on top of the defendant, and repeatedly called the defendant a gay slur.[47] According to the defendant, when W.M. noticed that Nolan Coughlin and Robert Hochstetter were looking into the car window, he said: "F*** them, they're nosy"[48] and then said to the defendant: "Oh, f***. Could you go deal with it?"[49]

- W.M. testified that he had no memory of what happened in the car, and in fact has no memory of how he even got from Emma's house to his own home. He testified to "not having any recollection of the events" at issue in this case.[50] He testified that he told the SANE nurse that he did not remember what the SANE nurse called "the encounter."[51] This is further evidence upon which the jury could have relied that W.M. was so

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[43] Def. Exh. 3.

[44] Tr. 1/31/23, at 99-100.

[45] Def. Exh. 2.

[46] Id.

[47] Tr. 2/2/23, at 107-112.

[48] *Id.* at 117.

[49] *Id.* at 118.

[50] Tr. 1/30/23, at 231.

[51] Id.

inebriated, so "black-out" drunk, so insensible as to what was happening, that he had no memory of it all the following day.

vii. **2:49 a.m. to 3:15 a.m., representing the time period when the defendant drove away from Robert Hochstetter's home and arrived at W.M.'s home and W.M. entered his home.**

- According to the defendant's testimony at trial, he and W.M. conversed on the way to W.M.'s home: "I told W.M. that I was so sorry that that happened. He said, 'Don't worry about it. F*** them. They were being nosy. It's all their fault."[52] When they arrived at W.M.'s home, the defendant says that W.M. asked if he could open the trunk because there were "some drinks" in the trunk that W.M. wanted to take with him. After getting this "stuff" out of the defendant's car, W.M. – according to the defendant – said "Liam, seriously, it's okay. Don't worry about it. Just be true to who you are." W.M. then walked to his front door, climbing the steps without assistance, according to the defendant.[53]

- However, in other evidence admitted at trial, the defendant described a different scene. In the defendant's Discord text message interchange with Alex Gerber, he told Alex that W.M. "was still pretty drunk" when they arrived at W.M.'s house.[54] In fact, according to what the defendant told W.M. in the controlled call, W.M. "fell over twice" in his yard as he made his way to the front door.[55]

viii. **3:15 a.m. to late morning, representing the time period after W.M. entered his home, went to sleep, and woke up in the late morning.**

- When Ms. M. – W.M.'s mother – first saw W.M. after he entered the house, "He was very disheveled, he was dropping things, he was stumbling. He was holding a case of beer that looked like it was wet, and cans were dropping out of it…."[56]
- W.M. kept "bending over to pick up what dropped, and every time he picked up what dropped he would fall over."[57]
- Ms. M. testified that W.M. was unable to communicate.

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[52] Tr. 2/2/23, at 122.

[53] *Id.* at 122-23.

[54] Commonwealth Exh. 6.

[55] Commonwealth Exh. 3

[56] Tr. 1/31/23, at 71.

[57] *Id.* at 71-72.

- She also testified that she couldn't figure out how he had gotten into the house "because he couldn't walk a foot in the house."[58]
- Ms. M. testified that he kept folding himself over the railing on the stairs and she was afraid he was going to fall headfirst down the stairs. This "happened three times" and she had to grab his hoodie to pull him back.[59]
- Ms. M. said he couldn't walk on his own and was "leaning" on her.
- Ms. M. walked W.M. farther down their hallway. They had "a wet/dry vac out because we'd had a flood in the kitchen that day, and he kind of folded over it, so I left him there for a minute while I got the dog in the crate. When I came back he had not moved at all, he was still just laying over the wet vac."[60]
- Ms. M. walked W.M. "down the hallway" because he "couldn't walk on his own." She was able to get W.M. to his room. She "decided he should go to the bathroom" and walked him there and then back to his bedroom.[61]
- W.M. tried to tell his mother something but she "couldn't understand what he was saying." Ms. M. testified that he didn't "make any sense and he was slurring."[62]
- W.M. had no idea, according to his mother, why he wasn't wearing a shirt or where it had gone. His mother testified: "I asked him where his shirt was, and he kind of just stared at me blankly. I asked again where his shirt was, he then said, 'I don't know.'"[63]
- W.M. peed in his bed, according to his mother. She described this as "an extraordinary occurrence."[64]

This, then, is the evidence of W.M.'s physical and mental condition on the night of December 31, 2021, and the very early morning hours of January 1, 2022. From all the foregoing, it is clear that the jury had more than sufficient evidence – indeed, overwhelming evidence – to find beyond a reasonable doubt that W.M. was physically helpless and mentally incapacitated at the time of the alleged sexual assault.

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[58] *Id.* at 72.

[59] Id.

[60] *Id.* at 72-73.

[61] *Id.* at 73.

[62] Id.

[63] *Id.* at 74.

[64] *Id.* at 75.

Jurors are told that they are permitted to use their common sense in evaluating evidence. The jury was free, therefore, to apply their common sense to reject the notion that a young man so drunk at 1:30 a.m. that he couldn't walk on his own, so drunk at 1:45 a.m. that he was "incoherent" and talking "gibberish," so drunk at 1:51 a.m. that the defendant had to plead with a friend to let W.M. "sober up," and still so drunk at 3:15 a.m. that he was literally, not figuratively, *falling down* drunk – and yet somehow was able to briefly emerge from his drunken stupor from 2 a.m. to 3 a.m. in order to have consensual sex with the defendant.

d. **Was there sufficient evidence before the jury for it to find beyond a reasonable doubt that, at the time of the offense, the defendant knew or should have known W.M. was mentally incapacitated or physically helpless?**

The jury also had more than sufficient evidence – indeed, equally overwhelming evidence – that the defendant was acutely aware of the W.M.'s helpless and incapacitated condition at the time he is accused of sexually assaulting W.M.

Unlike Robert Hochstetter, Alex Gerber, Nolan Coughlin, Emma Welther, and Ms. M., the defendant was with W.M. *continuously* from 7 p.m. to 3 a.m., a period of eight hours. He drove W.M. to Emma Welther's home while W.M. was drinking and smoking marijuana. He was with W.M. at Emma Welther's home while W.M. continued to drink, smoked more marijuana, and played "drinking games." He was with W.M. when W.M. was passed out. He was also the one who placed an Apple watch on W.M. to make sure he still had a pulse. And it was he and Emma who helped get W.M. to the defendant's car at the end of the party because W.M. was unable to walk on his own.

The jury was free to conclude that it was the defendant – not W.M. (as the defendant claimed) – who sent the texts to Alex Gerber at 1:50 a.m. that W.M. was "very drunk" and needed to "sober up." [65] The jury was free to conclude that the defendant knew W.M. was still so drunk at 3:15 a.m. that he could not even manage to walk across his lawn without falling down twice.

The jury was also free to attach decisional significance to the fact that at the very time when Nolan Coughlin observed the defendant naked and "thrusting" while positioned over W.M.'s naked backside, W.M. – according to Mr. Coughlin – was "limp", "wasn't moving" and not reacting to "anything that was going on."[66]

And, finally, the jury was free to accept the defendant's own assessment of W.M.'s condition, when he told Alex in the 1:50 a.m. text messages that W.M. was "very drunk", when he told W.M. in the controlled call that W.M. was "messed up" and "not in a sober state of mind," and when he told Alex in the Discord text messages on January 8, 2022 that he knew that W.M. was "drunk", and "under the influence."[67]

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[65] Commonwealth Exh. 6.

[66] Def. Exh. 3.

[67] Commonwealth Exh. 6.

Thus, there was certainly sufficient evidence for the jury to conclude beyond a reasonable doubt that the defendant was well aware of W.M.'s physical helplessness and mental incapacity at the time he is alleged to have sexually assaulted him.

e. **Was there sufficient evidence before the jury for it to find beyond a reasonable doubt that the defendant intended to commit sodomy (anal intercourse) by mental incapacity or physical helplessness and that the defendant did a direct act toward the commission of sodomy (anal intercourse) by mental incapacity or physical helplessness, which amounted to the beginning of the actual commission of that crime?**

This is a case where the jury had a wealth of documentary evidence created and preserved almost immediately after the alleged crimes occurred. As Nolan Coughlin testified, this was the time when his memory was freshest. There is Mr. Coughlin's written chronology made just ten hours after the events at issue. There are the 1:50 a.m. text messages between Alex Gerber and the defendant. There are the January 8th Discord text messages between Mr. Gerber and the defendant. There are the controlled telephone calls between the defendant and W.M. and between the defendant and Mr. Coughlin. The jury could reasonably have concluded that these documents and recordings represent the best evidence of what happened that evening, rather than the testimony of witnesses whose memories may have been clouded by the passage of more than a year.

Turning now to the evidence before the jury:

- Nolan Coughlin was interviewed by Det. Lynch within days of the incident. This is how he described what he saw when he and Robert Hochstetter looked in the car at approximately 2:48 am on January 1, 2022: "We look in the front seat. The lights on in front seat. We don't see anybody at the driver's seat. We're pretty shocked by this. Then we look in the seat behind and we kinda see like what I would describe as like I guess a figure thrusting on another figure and, to the best of my memory, the person thrusting was naked and the person who was below the person thrusting was naked as well."[68]

- In the same interview, Nolan Coughlin identifies the person doing the "thrusting" as the defendant. He tells Det. Lynch: "And I remember Liam thrusting, even when I saw the car when it was dark. W.M. was not moving. Liam was the only person moving." He then saw the person on top "pull up something, possibly his pants . . . and then pull up something on the person on bottom."[69]

- At trial, Nolan Coughlin reiterated what he told Det. Lynch: "Liam Bates was on top and W.M. was on the bottom position."[70] Nolan further testified that the person on top was

[68] Def. Exh. 3.

[69] Id.

[70] Tr. 1/31/23, at 97.

positioned over the bottom person's backside and back. He also testified that the defendant was "undressed" (except that he could not see the defendant's feet).[71]

- Mr. Coughlin told Detective Lynch that he finally got to bed around 6 a.m. on January 1st and that, as soon as he woke up, he began writing out a chronology of what he had observed.[72] He started it at 12:03pm and finished it about twenty minutes later, and sent it to W.M. In that chronology, Mr. Coughlin writes: "Robert and I notice there is no one in the front seat so we look in the back seat and see Liam naked without bottoms on gyrating on what looks to be W.M. who was also not wearing clothes and was completely unresponsive laying faced down on the backseat of the car."[73]

- On January 8th, there was an exchange of text messages on the Discord site between the defendant and Alex Gerber, during which the defendant acknowledged that when he was in the back seat with W.M., "our dicks are partially out."[74]

- W.M.'s testified that when he woke up later that morning "there was some significant pain in and around my – my anus."[75] Later that day, he told the Sexual Assault Nurse Examiner that he had a pain level of 5 out of 10 in his abdomen and rectum and a "deep achy anal pain that feels like it is inside."[76] The SANE report indicates that two abrasions were found in the anal folds, and the SANE Nurse, Yoo Jin Kwon, confirmed that these findings were "abnormal."[77]

- Coupled with the foregoing is the overwhelming evidence presented to the jury of W.M.'s severely inebriated – "black-out drunk" – condition and the defendant's acute awareness of that condition, a condition that left W.M. lying face down on the back seat of the defendant's car, limp, unmoving, and unresponsive.

Taken together, all this evidence provided the jury a more than sufficient basis to find beyond a reasonable doubt that: (1) the defendant intended to commit sodomy (anal intercourse) by mental incapacity or physical helplessness; (2) that the defendant did a direct act toward the commission of sodomy (anal intercourse) by mental incapacity or physical helplessness; and (3) the direct act taken by the defendant amounted to the beginning of the actual commission of that crime. Specifically, the jury

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[71] *Id.* at 98, 113.

[72] Def. Exh. 3.

[73] Commonwealth Exh. 5.

[74] Commonwealth Exh. 6.

[75] Tr. 1/30/23, at 230.

[76] Tr. 2/1/23, at 14.

[77] *Id.* at 17.

had sufficient evidence to find that at or around 2:48 a.m. on January 1, 2022, the defendant took advantage of W.M.'s insensate condition to place his body on top of W.M.'s, to position his front side over W.M.'s buttocks, to strip himself naked (thereby exposing his penis), to lower W.M.'s pants and underwear so that W.M.'s buttocks was naked as well, and to attempt to thrust his penis into W.M.'s anus, causing abnormal abrasions to W.M.'s anus, and causing W.M. to wake up in anal and rectal pain later that day.

As to the defendant's assertion that the jury could either find that the defendant was guilty of sodomy or not guilty of sodomy but that there was no evidence of attempted sodomy, it is sufficient to note the defendant's reaction to Nolan Coughlin's statement during the controlled call:

> **Nolan**: "I didn't see [W.M.] conscious. I saw him not move, not talk. . . ."
> **Liam**: ". . . I don't want you to think I'm a rapist." * * *
> **Nolan**: "I just saw you having sex."
> **Liam**: "I promise there was no penetration."[78]

Further, the jury could have considered the fact that the SANE nurse's abnormal findings were limited to abrasions in the anal folds. The jury could infer that this was evidence of an attempt to penetrate the anus of W.M., but no actual penetration. In addition, the jury could have concluded that it was the unanticipated arrival of Nolan Coughlin and Robert Hochstetter that prevented actual penetration.

In sum, the jury was free to conclude beyond a reasonable doubt that the defendant attempted to commit sodomy and took direct action toward the achievement of that objective, but the act did not result in penetration – a necessary element of Sodomy, but not a necessary element of Attempted Sodomy.

Finally, the jury was free to find "consciousness of guilt" in the defendant's immediate reaction to being seen by Mr. Coughlin and Mr. Hochstetter. According to Mr. Hochstetter, he asks: "Are you okay with this?"[79] He appeared to be "very shocked" and "kinda panicked."[80] The defendant drives away in such haste that W.M.'s shirt is left behind in the Hochstetter's driveway.[81] The defendant texts Mr. Coughlin at 3:01 a.m. and says "I'm sorry."[82] He texts Mr. Hochstetter at 3:07 a.m. and says: "I'm so sorry," and "I was being stupid" and asks Mr. Hochstetter not to say anything about what happened.[83] While the defendant's reaction could be attributed to embarrassment – which is precisely what the

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[78] Commonwealth Exh. 4.

[79] Tr. 1/30/23, at 189.

[80] Def. Exh. 3.

[81] *Id.*

[82] Commonwealth Exh. 5.

[83] Def. Exh. 2.

defendant claimed[84] – the jury was free to infer that it was actually a reaction to having done something he knew to be wrong, which he knew to be criminal, and having been "caught" – which is actually the precise term the defendant used when describing his version of what happened to a college friend.[85]

f. Conclusion with Regard to Sufficiency of Evidence Issue

In sum, there was sufficient evidence for the jury to find beyond a reasonable doubt that the defendant was guilty of Attempted Sodomy, especially when the evidence is evaluated in the light most favorable to the Commonwealth.

V. Grounds for Relief Three: The Discord Text Messages Between Alex Gerber and the Defendant and Whether it "Opened the Door" to Defense Evidence of W.M.'s Alleged Homosexual Orientation; and

VI. Grounds for Relief Four: Exclusion of the Testimony of D.A.

The third claim raised by the defendant is that the Court erred in finding that Alex Gerber's Discord text message did not "open the door" to evidence of W.M.'s alleged homosexual orientation. The fourth claim raised by the defendant is that the Court erred in finding that the testimony of D.A. – which the Court heard outside the presence of the jury during a Rape Shield hearing – was not relevant or probative on any issue in the case and was, therefore, inadmissible.

The Court will address these issues together since they both relate to claims by the defense that the victim had a homosexual orientation, and that such testimony was probative, relevant and admissible.

a. The Commonwealth's Motion *in limine*

On January 30, 2023, which was the morning of trial, the Commonwealth filed a motion *in limine* to exclude three defense witnesses. The motion *in limine* described the three witnesses and their anticipated testimony as follows:

- Dr. Elie G. Aoun would testify, according to his expert designation, "about the fears that are typical within [the LGBT community] and the behaviors associated with those fears when confronted with the possibility of discovery (i.e., being forced out of the closet)."[86]

- Two other witnesses were not identified by name, but the Commonwealth proffered the following:

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[84] *See, e.g.*, Tr. 2/2/23, at 120: "I was just so embarrassed and I wanted to leave that situation as soon as possible for my sake and for W.M."

[85] Tr. 2/2/23, at 184.

[86] Commonwealth's Mot. *in limine*, at 1-2 (Brackets in the original).

> On January 25, 2023, the defense noticed the Commonwealth of their intention to call two witnesses who knew the victim *seven years ago* in middle school (the victim is now a sophomore at the University of Virginia). On information and belief, the defense intends to ask these witnesses about the victim's discussions with them, during the time of his adolescence, of his curiosity regarding various sexual orientations and how they might have applied to him at that time.[87]

The Commonwealth raised three arguments in support of exclusion:

(1) "[T]he defense failed to file the written notice generally describing the evidence"[88] that is required if the defense wishes to offer "evidence [that] relates to the past sexual conduct of the complaining witness with a person other than the accused." Virginia Code §18.2-67.7(B).

(2) If any discussions about sexual orientation did take place, and it was not deemed "conduct" under the Rape Shield Statute, it would be "irrelevant to any issue involved in this case."[89]

(3) The testimony of the proposed witnesses who knew the victim in middle school constituted "general reputation or opinion evidence of the complaining witness's prior sexual conduct," and, therefore, under Virginia Code §18.2-67.7(A) was inadmissible.[90] The Commonwealth stated in its motion: "Insofar as the victim in this case asserts, factually, that he is heterosexual, any belief by another as to the victim's sexual orientation toward homosexuality is entirely 'opinion' evidence disallowed under the Rape Shield statute."[91] Consequently, argued the Commonwealth, the testimony of Dr. Aoun "on this subject is entirely irrelevant to the issues before the jury."[92]

The defense argued, first, that the motion *in limine* was untimely and, second, that the evidence at issue was not subject to the Rape Shield Statute.

In order to address these issues, the Court convened a Rape Shield hearing. The hearing took place on January 30, 2023, after jury selection but prior to opening statements.

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[87] *Id.* at 2 (Alteration in original).

[88] Id.

[89] Id.

[90] Paragraph A of Virginia Code §18.2-67.7 reads, in part, as follows: "In prosecutions under this article … general reputation or opinion evidence of the complaining witness's unchaste character or prior sexual conduct shall not be admitted."

[91] Commonwealth's Mot. *in limine*, at 3.

[92] Id.

b. <u>The Rape Shield Hearing on January 30, 2023.</u>[93]

Initially, the parties argued whether the proffered testimony of the witnesses was even subject to the Rape Shield Statute. The defendant's trial counsel argued "that the rape shield statute does not apply in this case."[94] Trial counsel made several arguments in support of that claim: (1) The statute does not make reference to "sexual orientation," only sexual conduct.[95] (2) "[D]ating is not sexual conduct."[96] (3) Testimony about an individual's sexual orientation does not qualify as general reputation or opinion evidence or prior sexual conduct and, therefore, is not subject to the statute.[97]

The Commonwealth provided the Court some additional information, by way of proffer, regarding the anticipated defense witness testimony. The Assistant Commonwealth's Attorney (hereafter the "ACA") advised the Court that he had met with the victim on January 29, 2023, and he was able to verify that the two lay witnesses the defense planned on calling "would only testify that in middle school there was some conversation had with my – with the victim in this case regarding whether or not they were or he was gay or not gay or homosexual or heterosexual in middle school, sixth, seventh, eighth grade."[98] Further, the ACA stated that it was his understanding that the defense would be claiming that the victim was a "closet [*sic*] homosexual" who had a "motive to fabricate" the charges against the defendant "and he's created this scenario that we are trying this case all the way through in order to protect his ability to

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[93] The transcripts of the Rape Shield hearings on January 30, 2023, and February 1, 2023, were filed under seal. The Court unseals only those portions of the transcript that the Court deems necessary to quote or reference. *See, e.g., Levick v. MacDougall*, 294 Va. 283, 289 n.1 (2017) ("To the extent that this opinion mentions facts found in the sealed record, we unseal only those specific facts, finding them relevant to the decision in this case. The remainder of the previously sealed record remains sealed."); *In re Bennett*, 301 Va. 68, 68–69 (2022) ("Under the Constitution of Virginia, this Court is vested with the 'judicial power of the Commonwealth.' Va. Const. art. VI, § 1. This judicial power includes the inherent authority to control our Court records, and this inherent authority includes the power to unseal a record previously ordered sealed. *See, e.g.*, *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) ('Every court has supervisory power over its own records and files.'); *United States v. Pickard*, 733 F.3d 1297, 1300 (10th Cir. 2013) (A court can unseal documents 'based upon the court's inherent supervisory authority over its own files and records.'). 'Once a court orders documents before it sealed, the court continues to have authority to enforce its order sealing those documents, as well as authority to loosen or eliminate any restrictions on the sealed documents.' *Id.* A court exercises this authority on a discretionary basis 'in light of the relevant facts and circumstances of the particular case.'").

[94] Sealed Tr. 1/30/23, at 4 [hereinafter S. Tr.].

[95] *Id.* at 10.

[96] *Id.* at 11.

[97] *Id.*

[98] *Id.* at 12.

stay in the closet."[99] Based on this understanding, the ACA argued that the proposed defense evidence, including that of the expert witness, "falls right in the realm of what should have been a rape shield hearing...."[100] The ACA argued:

> that their entire defense is going to be eventually be to this jury, their entire closing argument is going to hinge on "W.M. is a homosexual in the closet" despite the fact that he's engaged in nothing but heterosexual conduct his entire life, and it just to me again, is seeking to cloud issues for the jury in an attempt to create a universe where some kind of consent could have been given in this circumstance.[101]

The Commonwealth also reiterated its position that the proposed defense testimony was "off the table" because the defense did not make a written filing, did not provide notice, and did not file for a Rape Shield hearing.[102] Trial counsel responded that the Commonwealth's prediction as to the defense closing argument "was not accurate, Your Honor. As a matter of fact, I don't know if I accused W.M. of lying once. I – as a matter of fact, it has been my client's request that I not, so I don't – that is – I take umbrage with characterization. That is not my intent and I'm certainly not trying to color or cloud the jury's judgment."[103]

The defendant's trial counsel also advised the Court that one of the witnesses that she intended to call "is going to say that he had a relationship with W.M."[104] Trial counsel indicated that the "relationship" did not involve any sexual acts.[105] The other witness, according to trial counsel, would present "[t]he same thing, if I call him."[106]

The Court ruled that the proffered evidence was "subject to the rape shield statute,"[107] but excused the defendant's failure to file the required written notice given that the issue presented was a "novel" one

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[99] *Id.* at 13.

[100] *Id.*

[101] *Id.* at 14.

[102] *Id.* at 15.

[103] *Id.* at 17.

[104] *Id.* at 18.

[105] *Id.* at 19.

[106] *Id.* at 20.

[107] *Id.* at 21.

and the Court could "understand" why the defendant's trial counsel "may have concluded that it was not covered by the statute...."[108]

The Court then moved directly into consideration of the proffered evidence. The Commonwealth represented that, given that the indictment was predicated on the victim's physical helplessness or mental incapacity, "an individual's sexual orientation, in this case, the complaining witness being heterosexual, has no relevance because whether he is homosexual or heterosexual, the issue is whether or not he was inebriated at the time that this act occurred."[109] However, the Commonwealth added this caveat:

> With that said, as I understand it, I will not, the Commonwealth will not have to elicit from the complaining witness that he is a heterosexual unless if the Defense opens the door by putting forward a question of consent, then I do believe the complaining witness' sexual orientation, which is to him a fact and not an opinion, I do believe it becomes relevant because in his position, with his knowledge of his sexual orientation, he has one more layer of knowing he did not give consent to the act that was performed on him.[110]

The Commonwealth confirmed, however, that it was not going to say in opening statement and was not going to elicit in direct exam from any witness that W.M. was heterosexual, unless the door was opened by the defense.[111]

The Court made the following rulings:

- "[S]aying someone is homosexual based on past behavior, while it's not referring to specific acts, does fit into the category of [prohibited] general reputation or opinion evidence of the complaining witness's unchaste character or sexual prior conduct."[112] And the proffered testimony of the defense "fits into that category."[113]

- The Court said to the defendant's trial counsel: "[Y]ou have a right, obviously to cross-examine on the issue of consent, and if in response to your questions the alleged victim brings out heterosexuality, that he's heterosexual and that's further evidence that he didn't grant consent, in my view that would be opening the door."[114] Trial counsel asked if that extended

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[108] *Id.* at 21, 28.

[109] *Id.* at 23-24.

[110] *Id.* at 24.

[111] *Id.* at 26.

[112] *Id.* at 28.

[113] *Id.* at 29.

[114] Id.

to all of the Commonwealth's witnesses and the Court said: "All the witnesses."[115] However, the Court cautioned trial counsel: "[Y]ou can't fish for evidence of heterosexuality, but you can challenge consent."[116]

- The Court told the Commonwealth: "[Y]ou're welcome to offer that testimony [that W.M. is heterosexual], I'm not in any way restricting you from doing so, but if you do offer that testimony, certainly the Defense can offer testimony that it's not true."[117]

- The Court further stated: "I don't see the relevance at all that the alleged victim is homosexual or bisexual unless that door is opened. If the door is opened, then it becomes relevant assuming that the evidence you wish to offer is probative, and it may not be."[118] The Court asked the defendant's trial counsel whether she thought the defense "could offer testimony that he is – has a homosexual orientation absent any reference by Mr. Clingan or Mr. Clingan's witnesses that he's heterosexual."[119] Trial counsel said "No," but added that she expected the Commonwealth to offer just such testimony.[120]

- The Court stated: "The Commonwealth is welcome to open the door if they wish, but if they do open [the] door, in other words, if one of the assertions the Commonwealth makes through its witnesses or argument or opening statement is that the alleged victim was heterosexual and that's additional evidence that he didn't grant consent, which they're welcome to do, but I see that as opening the door, and in that event, the – well, the door is open."[121]

- The Court made it clear, however, that it was not ruling at this time on the admissibility of defense evidence if the door, in fact, was opened: "Now, what's admissible or not is a decision I'm not making now … because the evidence has to be probative and relevant, but we can cross that bridge."[122] Whether such evidence would be admissible "is a separate question."[123] The Court added: "I'm not ruling that the testimony of these young people [regarding the

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[115] *Id.*

[116] Id.

[117] *Id.* at 24.

[118] *Id.* at 30.

[119] *Id.* at 31.

[120] Id.

[121] *Id.* at 32.

[122] Id.

[123] *Id.* at 34.

alleged middle school "relationships"] comes in, I'm not ruling it doesn't come in. I would have to – I believe I'm going to have to hear [it] first."[124]

- As for opening statement, the Court instructed the defendant's trial counsel that "unless Mr. Clingan says anything about the alleged victim being heterosexual," there "cannot be reference to these supposed relationships that he had in middle school or to the expert, [Dr.] Aoun, who you are offering, because it wouldn't be relevant, as you acknowledge…."[125]

c. <u>The Admission of Commonwealth Exhibit 6 (Discord Text Messages).</u>

On January 31, 2023, the Commonwealth called Alex Gerber. Mr. Gerber testified that he had been friends with both the defendant and W.M. since "grade school."[126] He testified that he had "almost daily" contact with both of them, using Facetime, texts, and a website and app called "Discord."[127] He described Discord as a program used to have group chats with friends and to send text messages. He indicated that he and the defendant had been communicating on Discord since 2016. He identified his own "username" as "Alex C. Gerber" and the defendant's "username" as "The Final Mask."[128]

The Commonwealth then showed Commonwealth Exhibit 6 to Mr. Gerber. He authenticated it as an accurate copy of his Discord text communication with the defendant on January 9, 2022.[129] The Commonwealth moved Commonwealth's Exhibit 6 into evidence. There was no objection from the defense and the exhibit was admitted.[130]

Immediately upon the admission of the document, the defendant's trial counsel asked to approach the bench. Ms. Fuller said: "So, I do want to draw the Court's attention to the fact that the Commonwealth has introduced this entire document into evidence. I do believe that he has now met the requisite for introducing evidence of W.M.'s heterosexuality into the record."[131]

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[124] *Id.*

[125] *Id.* at 32-33.

[126] Tr. 1/31/23, at 190-91.

[127] *Id.* at 191.

[128] *Id.* at 190-192.

[129] The Discord text messages identified as Commonwealth Exhibit 6 is actually dated January 8, 2022, not January 9, 2022. The defendant confirmed the January 8th date during his own testimony. Tr. 2/2/23, at 172. *See also* Tr. 2/3/23, at 77.

[130] Tr. 1/31/23, at 194-195.

[131] *Id.* at 196.

The Court indicated that it would take the matter up at a later point. The jury was neither shown nor read the Discord text messages and neither the Commonwealth nor the defense questioned Mr. Gerber about its contents. Mr. Gerber was excused, with the understanding that he would likely be called again to testify.

d. <u>The Rape Shield Hearing on February 1, 2023.</u>

On February 1, 2023, the Court convened the second Rape Shield hearing to consider the question of whether the Commonwealth – by moving into evidence Commonwealth Exhibit 6 – had "opened the door" to evidence from the defense that W.M. had a homosexual orientation. Commonwealth Exhibit. 6, in its entirety, read as follows:[132]

January 8, 2022

TheFinalMask
hey alex, hope you've been doing ok. first i wanna say i didn't reach out to you directly because i thought it was better to go towards someone more outside the situation when i noticed i was kicked from AHC. regardless i was hoping you would be willing to talk to me sometime so i can explain my side of the story. you have every right not to and i will ultimately respect any decision you make.

alex
You're welcome to tell me your version of events.

TheFinalMask
can we call and talk about it? i would prefer that to text but its up to you

alex
Im not super amicable to a call right now and im not alone so I'd prefer text.

TheFinalMask
Ok

TheFinalMask
I have to send in multiple parts bc character limit
First off I want to state that I did not sexually assault or rape W.M. that night. the situation begins with W.M. (who was drunk) coming onto me (who was high) in the backseat of my car while we were waiting for him to sober up and go home. While I knew he was under the influence he kept saying things like "i love you" "i want to touch you" and other sexual things. There were several times when I said this is not

[132] The Court notes the following with regard to the transcription of Commonwealth Exhibit 6: (1) The Court has not corrected spelling, capitalization, or punctuation errors. (2) Several parts of the text messages repeat themselves; the repetitions have not been reproduced in the transcription; (3) Next to each name that appears, there are the word "Yesterday" and a time. These have not been reproduced in the transcription; and (4) The Court has used italics and bold face in the Discord messages, in order to set it off from other text in this opinion.

a good idea, you are under the influence, you're my best friend i dont want to ruin our friendship, etc. but eventually i made the mistake of giving into his advances. The most explicit thing that happened between us was kissing and him making me suck him off until I asked him to stop. Eventually it gets to a point where both of our shirts are off and our dicks are partially out. He has me pinned down in the backseat of my car and was on top of me with his hand around my neck. It was at this point Nolan and Robert knock on the car door. In my panic I shove W.M. off of me and get dressed and run outside to apologize to Nolan and Robert because I was embarrassed about what they saw (especially since W.M. has only presented himself as straight). Afterwards I drop W.M. off at home and help him inside because he was still pretty drunk.

2 days later when im back at school he calls me and says he has no recollection of the events so i tell him everything i told you. i dont hear from anyone else until 3 days later when nolan calls me to ask about what happened. after telling nolan the same thing he basically calls me a liar and that he quote "knows what he saw" which was, according to him, me on top of W.M. anally penetrating him. Firstly, there was no penetration or anal sex at all that night. Again the most explicit thing was me sucking him off for 30ish seconds. Second, W.M. was very much on top of me as i vividly remember (and had a small bruise) of his hand around my neck. Today tryn told me that nolan was also under the influence that night and therefore, in both of our opinions, can not give the most accurate account of what he saw. Nolan and I talked for about 30 min basically going back and forth because this is now a he said she said situation. Ive tried reaching out to robert a few times but got no response from him.

Nolan was unable to give any descriptive details about what he saw (im guessing due to low visibility/alcohol) and when I asked questions like "how are you so sure it was me on top of him" or "how much did you see" he kept giving extremely vauge answers. Eventually he says "liam i know you rehearsed this just please tell me the truth" to which i realize that no matter how much i speak my truth about what happened i can't change anyone's opinion.

the main reason i stayed quiet about this was because of the sensitive info regarding W.M.'s sexuality. i did not want to make this a public convo and wanted to keep it between me W.M. robert and nolan. when i noticed i was kicked from AHC today i realized that everyone else must know something so i decided to talk to tryn

tldr, i will defend the fact that i did not have sex with W.M. nor did i assault him until the day i die. i am so incredibly confident about this that i would defend myself in court, on my family, etc. i do not know how else to express it. obviously you all have every right to dissociate with me and i would understand why you did so. Since i wont see any of you until the summer im hoping that maybe a few of us can reconnect then but i have no expectations.

Thank you for hearing me out, whatever you decide i will respect that and im glad to have known you for as long as i have

alex

I read the entire thing, not just the TLDR. Heres what I will say. I have a lot of reasons to trust W.M. and believe him. I consider Nolan possibly the most trustworthy

person I know and I know for a fact he was mainly sobered up by that point and was with his family the entire night, so he wasnt getting super hammered. Plus both Robert AND Nolan have the exact same version of events.
A few reasons why I find it hard to believe you
-Even if your version of events is COMPLETLEY true, W.M. was still extremely drunk, that is a universal fact. You definitley know better than to think that consent is possible by someone that drunk. Are you alleging that W.M. physically forced you to suck his dick?? Becuase its still SA.[133] Also you were the DD that night, so if youre going to plead also not being sober thats a separate fucked up issue.
Beyond that, I find it nearly impossible that W.M. advanced on to you because of the fact that he agressivley rejected your advances in the recent past.
Like at the mountains w/ Tess you came on to W.M. while he was under the influence and yet he rejected you and was upset for weeks about the incident.
Meanwhile you have a history of both being gay and being interested in W.M.
W.M. has neither of those things AND both Robert and Nolan's account of the evening
and truly, framing Nolan's account of the evening as inaccurate due to alc is really disingenous because he had like a few drinks with his fam at 9 or 10 pm and it was 2 or 3 am at the time of the event.

TheFinalMask
In regards to that I was going purely off of what tryn told me 20 min ago

TheFinal Mask
Responding to are you alleging W.M. made you suck your dick:
Yes. He was being quite aggressive the entire time, referring to the physical evidence on my neck the next day
However all of your points are valid
I made some major errors that I regret every day since this happened, but I also know that I did not assault or rape him.
alex
I just cant see any reason why W.M. Nolan and Robert would all like conspire to lie about you like this.

The position of the defense was that the Commonwealth had "opened the door" by moving into evidence Commonwealth Exhibit 6, which contained these two sentences written by Alex Gerber to the defendant:

> "Meanwhile you have a history of both being gay and being interested in W.M."
> "W.M. has neither of those things"

At the outset of the hearing, the Court said the following:

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[133] Mr. Gerber testified that "SA" stands for "sexual assault." Tr. 2/3/23, at 80.

> I mean, one issue is, Mr. Clingan didn't read this email or text to the jury. The jury hasn't seen it. Certainly, it would be possible to redact those lines. Those two lines. And that certainly could be done in a way that addresses that claim that he has – you're claiming that he has opened the door. Now, you may be able to view that having offered the exhibit, it's too late. But this is a little different than him questioning a witness and the witness saying, or questioning W.M. for that matter, and him saying that you know he's not gay.[134]

The Court then asked the defendant's trial counsel: "[W]hy don't we just redact those two lines if the Commonwealth agrees and you agree?"[135] Trial counsel did not agree: "Your Honor, I obviously think – . . . I obviously want this testimony to come in. I make no bones about that."[136] A few moments later, trial counsel made her position explicit: "I don't agree that it should be redacted."[137]

The Commonwealth made a number of arguments that the door had not been opened: (1) The matter was not properly before the Court because no written notice had been filed pursuant to the Rape Shield Statute; (2) "Consent is not even an issue in this case based on the evidence."[138]; (3) Alex's statement is ambiguous and the "foundation" of his knowledge regarding W.M.'s sexual orientation unknown.[139] ACA Clingan said there had been no fleshing out of "[t]he extent of what Alex is talking about, the extent of this knowledge regarding what he is talking about, the basis for his knowledge, his view of what he means by the history. Does he mean that W.M. is recently gay, or does he mean that W.M. has never been gay?"[140]; (4) Alex's statement is an opinion, not a fact, and opinion evidence is precluded by the Rape Shield Statute. ACA Clingan said: "But the statute specifically deals with reputation or opinion evidence. Another person's opinion of another person's sexual orientation is not the same as that person, his own factual knowledge."[141]; and (5) The door has not been opened to what would be speculative testimony from the defense expert that W.M. had "created this universe that we find ourselves in today based

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[134] S. Tr. 2/1/23, at 7. The Court reiterated this point a few moments later: "It's not W.M. saying he is not gay. It's Alex expressing that view." *Id.* at 9.

[135] *Id.* at 8.

[136] *Id.*

[137] *Id.* at 10.

[138] *Id.* at 13.

[139] *Id.* at 14.

[140] Id.

[141] *Id.* at 15.

on his fear of being outed as a homosexual."[142] The ACA concluded: "I just – I don't think this evidence opened that door at all."[143]

The Court stated it would hear the testimony of a witness the defense wished to call with respect to the middle school issue.[144] The Court stated that after hearing the testimony, it would resolve both outstanding issues: (1) Whether the door had been opened to testimony about W.M.'s alleged homosexual orientation or same-sex attraction; and (2) whether the testimony the defense sought to offer was probative or relevant.[145]

D.A. was called by the defense and testified as follows:

- When he was in the Seventh Grade, he was friends with W.M. and they "dated briefly."[146]
- W.M. was also in the Seventh Grade. [147]
- Both boys were 12 years old.[148]
- During this time period, W.M. "identified" himself as "pansexual," a term which D.A. said meant that "gender isn't something that's really taken into consideration when you're choosing a partner."[149]
- The extent of his physical contact with W.M. was "cuddling, he would put his head on my shoulder in class, stuff like that."[150]
- D.A. confirmed that it was common knowledge in the school that they were "dating,"[151] and he confirmed that they showed affection in public.[152]

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[142] *Id.*

[143] *Id.*

[144] The defense advised the Court that it was now only seeking to call one witness with respect to the middle school matter. *Id.* at 18.

[145] *Id.*

[146] *Id.* at 20.

[147] *Id.* at 21.

[148] *Id.* at 28, 31.

[149] *Id.* at 22.

[150] *Id.* at 22-23, 29.

[151] *Id.* at 23.

[152] *Id.*

- D.A. and W.M. "broke up" after two weeks.[153]
- D.A. said: "I received a text from W.M. saying that his parents found out and he had to end it."[154]
- The last time he actually saw W.M. was when they were both in high school.[155]
- D.A. also testified that W.M. had "dated" a trans man before "dating" D.A. He knew this because W.M. and the other individual "told us when they started dating," and they would be seen in school hallways "holding hands."[156]

Following the conclusion of D.A.'s testimony, the Court heard additional argument and then made two rulings: First, the Court ruled that the admission of Commonwealth Exhibit 6 did not "open the door" to testimony that W.M. had a homosexual orientation or was attracted to individuals of the same sex.[157]

Second, the Court ruled that even if the door had been opened by Commonwealth Exhibit 6,

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[153] *Id.* at 24, 26, 27.

[154] *Id.* at 23.

[155] *Id.* at 24.

[156] *Id.* at 31, 33.

[157] *Id.* at 41-42.

the testimony of D.A. had no relevance or probative value[158] and, therefore, was inadmissible.[159]

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[158] At oral argument, defense counsel argued that the Court's references to "probative value" suggested that the Court had applied the wrong legal standard for the admissibility of evidence. The Court disagrees.

First, the Court made it clear and explicit that it was making a *relevancy* determination, as required. *See* these excerpts:

THE COURT: "[I]f W.M. was 42 and we were talking about something that occurred when he was 35, that might be meaningful. But you want me to attribute that W.M. is homosexual because he cuddled and put his head on the shoulder and, quote unquote, 'dated,' for two weeks at the end of the school year when the two of them were 12-years-old . . . How could I possibly do that? *How could I possibly say that it is relevant evidence that when W.M. was 12 he held a hand of someone* ...." S. Tr. 2/1/23, at 34-35. (Emphasis Added).

THE COURT: "[O]bviously, you know what we're talking about. We're talking about fellatio an anal sex. And your basis for including that is, W.M. is homosexual because at age 12 he cuddled and put his shoulder on another 12-year-old. He wasn't 35. He was 12. How could I – *I literally do not understand how I could possibly find that relevant.*" S. Tr. 2/1/23, at 36. (Emphasis Added).

MS. FULLER: "I believe what the Court has to consider is whether it is more prejudicial than probative. And I don't know that given his testimony that it is. What is the harm in his testimony? How is what he said going to cloud a jury's mind? I fully expect –

THE COURT: *It has to be relevant.*" S Tr. 2/1/23, at 39. (Emphasis Added).

Second, the Court's references to "probative value" were not that the evidence had *little* probative value or *minimal* probative value but, rather, that the evidence had *no* probative value, or lacked *any* probative value. *See* S. Tr. 2/1/23, at 42: "[E]ven if the Court were to conclude that the Commonwealth had opened the door, I don't find *any* probative value. I don't see it as a probative versus prejudice issue. I simply don't find probative value that when W.M. was 12-years-old he put his shoulder on this boy and cuddled with him and they – for a two week period when both boys were 12-years-old. I don't see how that contradicts the statement that Alex, not W.M., but Alex is making. *So I don't find it relevant or probative* ...." S. Tr. 2/1/23, at 42. (Emphasis Added). When a court says that evidence has *no* probative value or lacked *any* probative value, it is essentially saying it has no relevance. *See, e.g., Calhoun v. Commonwealth,* 35 Va. App. 506, 509-10 (2001) (citation omitted) ("It follows that the refusal to take the [mandatory breath] test also has no probative value as to guilt or innocence. 'Therefore, the evidence is not relevant...'"); *Commonwealth v. Proffitt*, 292 Va. 626, 634 (2016), *quoting* Charles E. Friend & Kent Sinclair, The Law of Evidence in Virginia § 6–1, at 342 (7th ed. 2012) ("If [evidence] has *any* probative value, however slight—i.e., if it has any tendency whatsoever to prove or disprove the point upon which it is introduced—it is relevant.").

Finally, the Court's Order from the February 1, 2023 Rape Shield hearing makes clear that the Court made a determination regarding relevancy. That Order reads, in part, as follows: "The Court found that the Commonwealth had not 'opened the door' permitting the Defense to present the evidence at issue and further found that, even if the Court concluded that the Commonwealth had 'opened the door,' *the evidence had no probative value and was not relevant.*" (Emphasis Added.)

After the Court made and announced its decisions regarding the two matters, the Court again raised with the defendant's trial counsel the issue of redaction. The Court said: "I am assuming that the Commonwealth would have no objection to redacting those two lines; not because I believe it opens the door, but because it addresses that subject."[160] The Commonwealth confirmed that it had no objection to the proposed redactions. The Court made it clear, however, that it was "reserving that issue" for the defendant's trial counsel to decide: "They can have it redacted or not have it redacted."[161] Ms. Fuller asked whether the defense needed to make that decision "right now"?[162] The Court responded that the decision just needed to be made before the defense rested its case.[163] This, then, represented the *second* time that the Court offered to have the two sentences redacted.

e. <u>Alex Gerber Testifies Again.</u>

The defense rested its case on February 3, 2023.[164]

The defense, however, had not yet advised the Court whether it wished to have Commonwealth Exhibit 6 redacted. Nevertheless, the Court gave the defendant one final opportunity to have the two sentences removed. Ms. Fuller announced: "We're going to keep it in."[165]

Ms. Fuller then advised the Court that, having made the decision to keep the two sentences in Commonwealth Exhibit 6,

> I now have a question. Does that mean, because we are electing to keep it in and not redact it, that I can cross Alex with respect to what he has said, because this is already into evidence, with respect to W.M.'s history of not liking boys? Of not being gay.[166]

The Court asked Ms. Fuller to explain what it is she wanted to do. Ms. Fuller responded:

> So right here where it says, W.M. has neither of those things .... Speaking specifically to, 'You have a history of being both gay and being interested in W.M.'

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[159] S. Tr. 2/1/23, at 42.

[160] *Id.* at 42-43.

[161] *Id.* at 43.

[162] *Id.*

[163] *Id.* at 43-44.

[164] Tr. 2/3/23, at 54.

[165] *Id.* at 77.

[166] *Id.*

Am I now able to ask questions about that if this is in evidence and now we are referencing this document on Commonwealth's evidence?[167]

Ms. Fuller confirmed that what she was seeking to do was ask about the basis for Alex's knowledge that W.M. had no "history" of being gay. The Court told Ms. Fuller: "You can do it."[168]

The Court asked whether the defense was seeking to call additional witnesses on this issue or just question Mr. Gerber about his statement that W.M. had no "history" of being gay.[169] Ms. Fuller confirmed that it was just seeking to question Mr. Gerber about his statement – "like why he would say something like that."[170]

The Court thus authorized the defendant's trial counsel to cross-examine Mr. Gerber as to why he made the statement that W.M. had no history of being gay, and the basis of his knowledge. Nevertheless, trial counsel ultimately chose not to question Mr. Gerber regarding the statement.

f. <u>The Court's rulings were not in error.</u>

During trial, the Court held that Commonwealth Exhibit 6 did not "open the door" to defense testimony regarding W.M.'s alleged homosexuality. The Court also held that D.A.'s testimony was not relevant or probative to the issues in the case and, therefore, was inadmissible. The defendant claims that both decisions were in error. The Court disagrees.

i. <u>Commonwealth Exhibit 6 did not "open the door."</u>

The unredacted admission of Commonwealth Exhibit 6 did not "open the door" to defense testimony regarding W.M.'s alleged homosexuality. This is for several reasons:

First, the Court offered the defense the right to have the two sentences at issue redacted. The Court made the redaction offer *three* times. The first time it was rejected. The second time – which was *after* the Court ruled that the door had not been opened – it was taken under advisement by defendant's trial counsel. And the third, and final time, the offer was rejected again.

When the Court first suggested redacting the two sentences, the defendant's trial counsel made it clear that it had no interest in having these sentences redacted. Ms. Fuller told the Court: "I obviously want this testimony [regarding W.M.'s alleged homosexuality] to come in. I make no bones about that."[171]

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[167] *Id.* at 78.

[168] *Id.* at 79.

[169] *Id.*

[170] *Id.* at 79-80.

[171] S. Tr. 2/1/23, at 8.

During the first Rape Shield hearing, the Court had cautioned the defendant's trial counsel that it could not "fish for evidence of heterosexuality" in order to open the door to evidence of homosexuality.[172] But that is the practical effect of what happened. Yes, the Commonwealth offered the exhibit in unredacted form, but it was neither shown to the jury or read to the jury, nor was Alex Gerber initially questioned about its contents. The Court then placed *exclusively* in the defendant's hands the question of redaction[173] – the question of whether the two sentences would *ever* be seen or heard by the jury. The defense ultimately chose not to have the two sentences redacted. That was their right – but they should not now be heard to complain that the door was opened, and they were prejudiced thereby.[174]

Second, the Commonwealth never asked a single witness to confirm or opine that W.M. was heterosexual. Not Nolan Coughlin. Not Robert Hochstetter. Not Emma Welther. Not even Alex Gerber, the author of the two sentences at issue. And not W.M. himself.

Third, how could Alex Gerber's statement – that W.M. had no "history" of being gay – have "opened the door" to evidence that W.M. did have a "history" of being gay, when the defendant's trial counsel made it pellucidly clear that it was *not* asserting that W.M. was gay. See this excerpt from the January 30, 2023 Rape Shield hearing:

> **THE COURT: Are you alleging that the alleged victim in this case is homosexual?**
> **MS. FULLER: I am not, Your Honor.**[175]

And see this excerpt from the February 1, 2023 Rape Shield hearing:

> **MS. FULLER: First of all, Your Honor, I am not saying that W.M. is a homosexual. I think that I've been clear on that multiple times. I am not saying that, nor would I say that. That is not at all what I am saying....**[176]

And see this further excerpt from the same hearing:

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[172] S. Tr. 1/30/23, at 29.

[173] S. Tr. 2/1/23, at 43: "THE COURT: "I'm reserving that issue for Ms. Richardson and Ms. Fuller to decide. They can have it redacted or not have it redacted."

[174] Defense counsel also argued that a redaction might leave the jury "wondering why this one part is left out and the rest of it is just entirely condemning him." *Id.* at 11. That concern, however, could have been alleviated in a variety of ways had defense counsel wanted to have the two sentences redacted.

[175] S. Tr. 1/30/23, at 6.

[176] S. Tr. 2/1/23, at 36.

MS. FULLER: I am not saying that [W.M.'s] gay....[177]

So, if the defendant's trial counsel was not arguing that W.M. was gay, what exactly was it arguing that it could admit through that supposedly opened door? Trial counsel's answer was that it was seeking to admit evidence that W.M. had "some same sex attraction."[178] The Court responded that Alex Gerber's text message did *not* say "there's no history of a same sex attraction. It says he has no history of being gay."[179] In other words, on the one hand trial counsel was arguing that Alex Gerber's two sentence statement opened the door to contradictory evidence. On the other hand, the defense did not actually wish to offer that contradictory evidence. Rather, it wished to offer evidence of a different sort.

Fourth, even after the defense chose not to have the two sentences redacted, the Commonwealth did not ask Alex Gerber a single question about those sentences.

Fifth, the defense obtained explicit authorization from the Court to cross-examine Alex Gerber regarding the basis of his claim that W.M. had no history of being gay. Nevertheless, after obtaining this authorization, the defendant's trial counsel declined to ask Mr. Gerber any questions about the two sentences. The defense responds to this by saying, essentially, that it would have been unwise for the defense to cross-examine Mr. Gerber on this matter.[180] Be that as it may, it is nevertheless worth noting that the Court explicitly advised trial counsel that it had the right to cross-examine Alex Gerber on the very statement to which the defense now attaches such significance.

Finally, there is a material difference between the Commonwealth flat out asking W.M. whether he is heterosexual and the admission of a lengthy text message containing two sentences in which Alex Gerber expresses his opinion that W.M. had no history of being gay. The Commonwealth did not elicit that statement in its direct examination of Mr. Gerber, nor follow the admission of the text messages with follow-up questions regarding the two sentences. Rather, what the Commonwealth did was to simply move the admission of an obviously relevant (and unobjected to) document created shortly after the events in question and containing explicit incriminating admissions by the defendant, including admitting to the fellatio which was the subject of Count Two of the Indictment.

On February 1, 2023, the Court ruled that the Commonwealth – by seeking the admission of Commonwealth Exhibit 6 – did not "open the door" to defense evidence that W.M. had a "history" of being gay. The Court reaffirms that decision today.

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[177] *Id.* at 38.

[178] *Id.*

[179] *Id.* at 39.

[180] *See* Def.'s Reply to the Commonwealth's Resp., at 19: "No competent defense attorney would openly question a witness, whose position appears adverse, in open court before a jury in order to discover in real-time what his answers might be. That is inadvisable and was not a legitimate opportunity to attack the Commonwealth's case."

ii. The testimony of D.A. was not relevant and, hence, was inadmissible.

Once the Court decided that the door had not been opened, it made irrelevant even the most persuasive and compelling evidence of W.M.'s alleged homosexuality. The evidence the defense offered was anything but persuasive and compelling. Rather, it had no relevance or probative value and, therefore, this stands as a distinct and independent basis for the Court's decision to exclude the testimony of D.A.[181]

First, the events described by D.A. occurred when W.M. and D.A. were in Seventh Grade and just twelve years old.[182] Their supposed romance lasted just fourteen days and consisted of occasional "cuddling" and W.M. resting his head on D.A.'s shoulder. *How could that possibly constitute proof relevant to whether W.M. consented to the defendant attempting to anally penetrate W.M., and performing fellatio on W.M., so many years later?*

Second, the Court attaches little significance to the fact that D.A. used adult terms like "dating" and "relationships" to describe those fourteen days, or to the fact that the defendant's trial counsel now characterizes those fourteen days as a "prior homosexual romantic relationship," [183] or proof that W.M. had a "'history' of being homosexual,"[184] or as "evidence of W.M.'s homosexuality,"[185] or as "a history of homosexual activity."[186] Those terms connote at least a degree of maturity – and mature acts – consonant with the grave purpose for which the evidence is now being offered. But these were just children, barely out of elementary school, and the activities described – some cuddling and head-resting

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[181] The Commonwealth's Motion *in limine* sought the exclusion of three witnesses: (1) D.A.; (2) a second lay witness; and (3) Dr. Elie G. Aoun. The defense chose not to present the testimony of the second lay witness at the Rape Shield hearing; only D.A. was called to testify. As to Dr. Aoun, while the Court did not expressly exclude his testimony, it was the Court's understanding that the predicate for Dr. Aoun's expert testimony was the *assumption* that W.M. was a "closeted" homosexual determined to remain "closeted." The supposed "proof" for that assumption was to come from D.A. In Defendant's Motion to Set Aside the Verdict, the defendant states: "In light of this ruling [excluding the testimony of D.A.], Dr. Aoun, who was present for trial, was not called as a witness." *Id.* at 10.

[182] The events described by D.A. occurred in June 2016. Both W.M. and D.A. were then twelve. *See* S. Tr. 2/1/23, at 27-31. On January 1, 2022 – the date of the sexual assaults – W.M. was 18.

[183] *See this heading in* Def.'s Motion to Set Aside the Verdict, at 30 ("Evidence of W.M.'s Prior Homosexual Romantic Relationship was Relevant.").

[184] *See* Def.'s Reply to Commonwealth's Resp., at 9 ("Here, the Commonwealth knew it was false to tell the jury that W.M. had no 'history' of being homosexual.").

[185] *See id.* at 10 ("In fact, that is exactly what the Commonwealth did during the preliminary hearing, before evidence of W.M.'s homosexuality began to emerge.").

[186] *See id.* ("The Commonwealth made these choices because it was aware that evidence existed demonstrating that W.M. had a history of homosexual activity.").

and Instagramming for two weeks in Seventh Grade – cannot bear the weight that defense counsel now attaches to it. Simply put, D.A.'s testimony is not proof that W.M. had a "'history' of being homosexual."

Third, D.A. acknowledged having minimal contact with W.M. after that fourteen-day period in the Seventh Grade.[187] While the specific factual issue that the defendant's trial counsel was seeking to rebut was ostensibly Alex Gerber's text message that W.M. had no "history" of being gay, the underlying issue was whether W.M. was engaged in a "romantic tryst" on January 1, 2022 – as trial counsel put it in opening statement[188] – or was being sodomized against his will through the use of his physical helplessness or mental incapacity. D.A. had not even seen W.M. since high school and, even in high school, they "weren't, like, really friends."[189] The passage of years, the brevity of their "relationship," the fact that they were children who had not even entered their teenage years, and the complete absence of any physical contact typically associated with a sexual relationship, all bear on the question of relevance and admissibility.[190]

Fourth, the defendant himself contradicted the substance and purpose of D.A.'s proffered testimony. Much of the *Defendant's Motion to Set Aside the Verdict* is devoted to the two sentences in the Discord text messages in which Alex Gerber states that W.M. had no "history" of being gay. But no attention is devoted to what the defendant said *before* Mr. Gerber made his statement. This is what the defendant wrote: "W.M. has only presented himself as straight."[191] The defendant and W.M. were not casual acquaintances. The defendant met W.M. in early grammar school and considered W.M. to be his "best friend." Yet this statement is wholly at odds with the substance and purpose of D.A.'s testimony. If, as D.A. testified, it was "common knowledge" that he was "dating" W.M., how could it possibly be that the defendant was unaware of it?

Fifth, the Rape Shield hearings and the rulings that came out of these hearings were predicated on the assumption that the defense asserted by Mr. Bates, at least as to Count Two (Sodomy-Fellatio), was one of consent. The defendant, in his Reply brief, describes this defense as "standard" and "predictable"

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[187] *See* S. Tr. 2/1/23, at 24: "We went to the same high school, but we didn't really talk after we broke up."

[188] *See* Tr. 1/30/21, at 171: "Our evidence will show that not only did Mr. Bates not come close, however, to anally sodomizing W.M., it will show that W.M. was up, he was awake, he was active, and he was a participant in a romantic tryst with Mr. Bates in that SUV parked on Mr. Hochstetter's driveway."

[189] S. Tr. 2/1/23, at 24.

[190] The defendant's response to the absence of any evidence of sexual activity between D.A. and W.M. is that it was "customary" that middle school students would not be engaging in "sexual conduct." S. Tr. 1/30/23, at 18. True as that is, it simply illustrates the problem with relying on a two-week middle school affectionate relationship between two boys to prove that one of those boys, as an adult man, was homosexual.

[191] Commonwealth Exh. 6.

and the "most common defense" in adult sexual assault cases.[192] That may well be true in most cases where the defense of consent is alleged. It is not, however, true in this case. In opening statement, the defendant's trial counsel described what happened in the back seat of the defendant's car as a "romantic tryst" in which W.M. was a full and active and voluntary participant. But what emerged from the defendant's own testimony was a far more sinister claim. The defendant now claimed to have been physically coerced into performing fellatio on W.M. As trial counsel argued in closing: "It was forcible sodomy and Liam didn't do the forcing."[193] Consent was still an issue in the case but now it was interwoven with an accusation by the defendant that he – not W.M. – was the victim of forcible sodomy. In other words, what had begun as a "standard" consent defense had now been transformed into a consent/coercion defense. Although the full breadth of the defendant's accusation against W.M. did not come out until the defendant actually testified – which occurred one day *after* the second Rape Shield hearing – it does reinforce the Court's decision at the Rape Shield hearing that D.A.'s testimony was irrelevant.

Sixth, D.A.'s testimony in no way supported the defense's alternative theory – that W.M. was motivated to fabricate his testimony in order to keep secret that he had willingly engaged in homosexual acts with the defendant. First, D.A.'s testimony (for the reasons cited above) was not probative of whether W.M. is homosexual. Second, it is a peculiar fabrication indeed whose central feature is the absence of a fabricated memory. W.M. did not testify that the defendant sodomized him; rather, he testified to having no memory of what happened in the defendant's car. The defense argues, therefore, that the fabrication must be just that – the claim of no memory.[194] This begs the question, of course, as to why – if W.M. was willing to lie to protect his allegedly closeted life as a homosexual – he did not *affirmatively* accuse the defendant of sexual assault. Moreover, where is the evidence, or even a proffer of evidence, to support the defense assertion that W.M. is "in the closet"? It appears to be this: W.M. is "in the closet" because, as the defendant told Alex Gerber in the Discord text message, W.M. "has only presented himself as straight."[195] *In other words, because W.M. has always presented himself as straight, he must be in the closet*. But the absence of evidence is not evidence; it is just a tautology.

The thin reed upon which the defense relies is the statement by D.A. that the reason he and W.M. "broke up" was because W.M.'s parents found out about the relationship and W.M. had to "end it."[196] Even if that is true, D.A. offered no testimony as to *why* W.M.'s parents made W.M. end his relationship with D.A. The defense simply *assumes* that W.M.'s parents' objection to the relationship was their

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[192] Def.'s Reply to the Commonwealth's Resp., at 8.

[193] Tr. 2/6/23, at 66-67.

[194] *See* Def.'s Mot. to Set Aside the Verdict, at 37 (citation omitted): "[T]he fabrication in this case is not that W.M. affirmatively alleged that Mr. Bates sexually assaulted him. Rather, the fabrication is W.M.'s claim that he was black-out drunk at the time of the sexual encounter and that he does not remember engaging in consensual sexual activity with Mr. Bates."

[195] Commonwealth Exh. 6.

[196] S. Tr. 2/1/23, at 23.

opposition to same-sex relationships.[197] There is no evidence to even suggest this. There are myriad reasons why parents might not want their 12-year-old child to be in any type of relationship. Maybe W.M. was not getting his homework done. Maybe the time W.M. was supposedly spending with D.A. was interfering with after-school activities. Maybe W.M.'s parents did not want W.M. spending so much time on Instagram where, according to D.A., he and W.M. would exchange messages. All these "maybes" are pure speculation, but so is the assumption that W.M.'s parents did not approve of same-sex relationships.[198]

The defense then uses this very thin reed to make yet another assumption: that W.M. was so concerned about his parent's opposition to same-sex relationships that he – an adult college student – hid his (alleged) homosexual identity "in the closet." The defense proffered no evidence to support this claim. The defense then uses this assumption to make a final leap: that W.M. was so determined to keep secret his (alleged) homosexual identity, so fearful of it coming out, that he was willing to fabricate that he was a victim of a sexual assault by the defendant, who considered W.M. to be his "best friend."[199]

In support of this assertion, the defense sought to also call Dr. Elie G. Aoun, a forensic psychiatrist. According to *Defendant's Designation of Expert Witnesses*, filed on January 20, 2023, Dr. Aoun "will testify about the fears that are typical within [the LGBT community], and the behaviors associated with those fears when confronted with the possibility of discovery (i.e. being forced out of the closet)."

As stated above, the Court did not expressly exclude the testimony of Dr. Aoun. Nevertheless, given the connection between the *expert* testimony of Dr. Aoun and the *lay* testimony of D.A., the Court will address several additional and independent grounds that would warrant the exclusion of Dr. Aoun's testimony:

First, there was no evidence proffered that W.M. was a member of the "LGBT community." Even if the Court had permitted D.A. to testify, his testimony would not have supported a finding that W.M. – on January 1, 2022 – was a member of that community.

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[197] *See* Def.'s Mot. to Set Aside the Verdict, at 4: "D.A.'s testimony supported the argument that W.M.'s parents did not approve of his same-sex relationship, which provided an additional motive for W.M. to fabricate these allegations against Mr. Bates."

[198] Had the defense wanted to take this assumption out of the realm of pure speculation, it certainly could have done so. It could have called W.M.'s mother, Ms. M., during the Rape Shield hearing. *Who better to shed light on the reason (if true) that W.M.'s parents caused him to "end" his two week "relationship" with D.A.?* At oral argument, defense counsel said that given the Court's rulings in the Rape Shield hearing, the defendant's trial counsel would not have been permitted to put this question to Ms. M. *in front of the jury*. Even assuming that to be the case, it would not have prevented trial counsel from calling Ms. M. in the Rape Shield hearing itself (which, of course, would have taken place *outside the presence of the jury*.) After all, her testimony would certainly have been relevant to the defendant's claim that it was W.M.'s parents' objections to same-sex relationships that motivated him to lie at trial. Nevertheless, the defense chose to leave the assumption squarely within the realm of pure speculation.

[199] Tr. 2/2/23, at 132, 177, 178.

Second, even if there had been the predicate laid for assuming that W.M. was a member of the LGBT community, what possible relevance would there be in the fact that some, or even many, or even most, members of that community had "fears" and "behaviors associated with those fears" when "confronted with the possibility of discovery (i.e. being forced out of the closet.)"? Even if such fears were "typical within these communities," there was no suggestion in the defense proffer that Dr. Aoun's testimony would be *specific* to W.M.

Third, there was nothing in Dr. Aoun's expert designation to suggest that it is "typical" behavior of a member of the LGBT community, when faced with the possibility of being "outed," to lie to the police, to lie to a SANE nurse, to lie to a jury *under penalty of perjury*, and to be willing to see one of his best friends convicted of felony sex crimes because of those lies – for that is precisely what the defense now accuses the victim of doing.[200]

Finally, there is the remarkable fact that D.A.'s testimony, had it not been excluded, would actually have undermined Dr. Aoun's testimony. D.A. testified in the Rape Shield hearing that it was "common knowledge" that he and W.M. were "dating," that W.M. would lay his head on D.A.'s shoulder *in the classroom* (which made D.A. – but, apparently, not W.M. – uncomfortable), and that when W.M. was supposedly "dating" a trans man in middle school, they held hands while walking down school hallways

[200] *See* Def.'s Mot. to Set Aside the Verdict, at 37-38 (citation omitted): "Additional potential fabrications are the statements made by W.M. and the behaviors displayed by W.M. meant to corroborate the allegation that he was the victim of a sexual assault. For example, W.M.'s claim of experiencing anal pain is subjective and not verifiable by anyone. Another potential fabrication is the display of emotion by W.M. when initially disclosing the alleged sexual assault to his mother." *See also id.* at 38: "The Defense was entitled to argue that W.M.'s demeanor with his mother, as compared to his demeanor with [his friend, Sam] Wells and the detective, was not genuine but performative and based on W.M.'s desire to convince his mother that he had not consensually engaged in homosexual sexual conduct but that he had been a victim of a sexual assault."

and told others they were "dating."[201] The key factual predicate for Dr. Aoun's testimony was the assumption that W.M. was a closeted homosexual who would take desperate measures to avoid being "outed." D.A.'s description of W.M.'s behavior at age 12 did not support that assumption.[202]

iii. Conclusion with Respect to the 3rd and 4th Issues

The Court finds that the unredacted admission of Commonwealth Exhibit 6 did not "open the door" to evidence of W.M.'s alleged homosexuality. The Court further finds that D.A.'s testimony was irrelevant and, therefore, properly ruled to be inadmissible. To the extent that the defense contends that the Court *implicitly* excluded Dr. Aoun's testimony as well, the Court finds that his testimony warranted exclusion as well, first, because it was predicated on the excluded testimony of D.A. and, second, for the independent reasons cited above.

The definition of "relevant evidence" is "evidence having any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence." Va. Sup. Ct. R. 2:401. The "facts in issue" in this case were whether the defendant sodomized W.M., against his will, and through the use of his physical helplessness or mental incapacity. A related "fact in issue" was whether W.M. was physically or mentally capable of consenting to engaging in sexual acts with the defendant. The Court held, and reaffirms today, that D.A.'s testimony had no "tendency" to make any of these "facts in issue" more probable or less probable. "Evidence that is not relevant is not admissible." Va. Sup. Ct. R. 2:402(a). The trial judge is the "evidentiary gatekeeper," [203] and a core responsibility of the evidentiary gatekeeper is to rule on the admissibility of evidence. This evidence was not admissible.

It should also be emphasized that while the Court analyzed the admissibility of D.A.'s testimony through the Rape Shield Statute, the Court would have reached the same relevancy decision even outside that context.

Finally, even if it were the case that the Court erred in its decision that the door had not been opened to evidence of W.M.'s alleged homosexuality, or in excluding the testimony of D.A. and Dr. Aoun, it

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[201] S. Tr. 2/1/23, at 23, 33.

[202] There were two other reasons that Dr. Aoun's testimony might well have been excluded as well. First, his proffered testimony would appear to invade the province of the jury with respect to the credibility of W.M. Second, his proffered testimony regarding the fears and behaviors of individuals who wish to protect their sexual identity from public disclosure, would not appear to be "beyond the ken" of the jury itself. *See, e.g.*, *Coppola v. Commonwealth*, 220 Va. 243, 252 (1979) ("It is well settled in Virginia that the credibility of witnesses and the weight to be given their testimony are questions exclusively for the jury. *Zirkle v. Commonwealth*, 189 Va. 862, 870 (1949); *Johnson v. Commonwealth*, 142 Va. 639, 640 (1925). In any proper case, an expert witness may express his opinion upon matters not within the common knowledge or experience of the jury. *Cartera v. Commonwealth*, 219 Va. 516, 519 (1978). However, expert testimony concerning matters of common knowledge or matters as to which the jury are as competent to form an opinion as the witness is inadmissible.")

[203] *Blankenship v. Commonwealth*, 69 Va. App. 692, 702 (2019).

would not warrant setting the verdicts aside. This is because the evidence of W.M.'s physical helplessness and mental incapacity, and his inability to consent to engaging in sexual acts with the defendant, was overwhelming.[204]

Whether W.M. was homosexual or not, heterosexual or not, pansexual, bi-sexual, or any other form of sexuality, what was inescapably established by the Commonwealth is that on January 1, 2022, between 2 a.m. and 3 a.m., W.M. was essentially comatose, or at least nearly so, as he lay face down in the back seat of the defendant's car. In other words, when Nolan Coughlin and Robert Hochstetter peered into the window of that car and saw the defendant naked and on top of their "black[ed]-out,"[205] "passed out,"[206]

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[204] *See, e.g.*, *Clagett v. Commonwealth*, 252 Va. 79, 90–91 (1996) ("[T]he evidence adduced against Clagett was overwhelming, precluding the possibility that any prejudice which might have resulted from the introduction of prior criminal history evidence could have improperly influenced the jury's decision-making process."); *Scott v. Commonwealth*, 25 Va. App. 36, 42–43 (1997) ("[O]ur harmless error analysis is akin to harmless error review in cases of improperly admitted evidence, where the error is held harmless if the record contains 'overwhelming' evidence of guilt."); and *Angel v. Commonwealth*, 281 Va. 248, 268–69 (2011) ("Based on this record, we agree with the Court of Appeals' conclusion that the admissible evidence constitutes 'overwhelming evidence that [Angel] was the perpetrator of the June 18 misdemeanor sexual battery against S.P., and thus, any error in joining for trial that offense with the offenses against V.L. was harmless on the issue of guilt or innocence.'").

[205] Defense Exh. 3.

[206] *Id.*

incoherent,[207] "super-drunk,"[208] friend, W.M. was incapable of consenting to engaging in sexual acts with the defendant.[209]

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[207] Tr. 1/30/23, at 218.

[208] Defense Exh. 3.

[209] At oral argument, defense counsel suggested that such observations of W.M.'s inebriated state were not germane because they referred to W.M.'s condition at an earlier point in the evening. The Court disagrees.

First, the jury had before it substantial credible evidence of the defendant's physical helplessness and mental incapacity that *bracket* the time period when he was in the back seat of the defendant's car. Emma Welther testified that even after W.M. was roused at her house (which would have been about 1:30 a.m.), he still couldn't sit or walk on his own or even form coherent sentences. She also testified that she and the defendant had to physically support W.M. in order to get him to the defendant's car. This was no more than *thirty minutes* before the defendant and W.M. were parked in the driveway of Robert Hochstetter's home. Then, minutes after the defendant was observed "gyrating" over W.M.'s limp and unresponsive body, W.M. arrives home. Ms. M. testified to what she observed: her son was disheveled, stumbling, unable to communicate, repeatedly nearly falling over the railing on the stairs, unable to walk on his own, and not making any sense. The defendant himself confirmed W.M.'s condition: He wrote Alex Gerber that W.M. "was still pretty drunk" when they arrived at W.M.'s house and he told W.M. in the controlled call that W.M. "fell over twice" in his yard as he made his way to the front door.

Second, at oral argument defense counsel asserted that the defendant had not had a drink in three hours at the time of his sexual contact with the defendant. Even assuming that to be true, it does not address the cumulative effect of the multiple intoxicants (4 Loko, 8-10 Miller Lite beers, Grey Goose liquor, fireball shooters, and marijuana smoked both before and after arriving at Emma's party) that W.M. had consumed between 7 p.m. and midnight, nor the potentially sedating effect of the two prescription medications in his system.

Finally, there is eyewitness testimony regarding W.M.'s condition at the *exact* moment when W.M. was being sexually assaulted by the defendant. In the chronology that Nolan Coughlin prepared later that same day, he wrote that at 2:48 a.m., when the defendant was "gyrating" on W.M., W.M. was "completely unresponsive laying faced down on the back seat of the car." Commonwealth Exh. 5. Mr. Coughlin told Det. Lynch that W.M. was "limp," that he "wasn't moving," "not saying anything," and did not seem "to have any reaction to anything that was going on." Def. Exh. 3.

VII. Grounds for Relief Five: Allegation of Prosecutorial Misconduct During Closing Argument

a. Introduction

In the Defendant's Motion to Set Aside the Verdict, the defendant describes the Commonwealth's conduct in closing argument in the following terms: "improper,"[210] "irreparably prejudiced Mr. Bates' defense,"[211] "necessitated a mistrial,"[212] "so egregious as to warrant a mistrial,"[213] "improperly argued,"[214] "unfairly opened the door,"[215] "violating Mr. Bates' due process rights,"[216] "improper statements necessitated a mistrial,"[217] "irreparably prejudiced the defense,"[218] "improper arguments,"[219] "indelibly prejudiced Mr. Bates,"[220] "opened the door and shut it,"[221] "ambushed the Defense,"[222] "circumventing the Court's ruling,"[223] "precisely the type of conduct found repugnant by courts,"[224] and [sanctionable] gamesmanship."[225]

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[210] Def.'s Mot. to Set Aside the Verdict, at 2, 3.

[211] *Id.* at 3.

[212] *Id.*

[213] *Id.* at 18.

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.* at 22.

[218] *Id.*

[219] *Id.* at 22 n.66.

[220] *Id.* at 25.

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.* at 26.

In the Defendant's Reply to Commonwealth's Response, the denunciations of the Commonwealth's conduct continued, and actually escalated: "wholly inappropriate,"[226] "impermissible,"[227] "egregious,"[228] "disingenuous,"[229] "inappropriately argued,"[230] knowingly made "false" statements to the jury,"[231] argued an interpretation of the evidence "that it knew to be false in order to win,"[232] made argument that "was false and the Commonwealth knew it,"[233] presented argument "to the jury as fact what it knew to be fiction,"[234] "violated Mr. Bates' Due Process rights,"[235] made arguments that had a "significant tendency to mislead the jury because the statements were not true, were one-sided and deprived the Defense of the opportunity to rebut them with competent evidence,"[236] engaged in "intentional circumvention of the Court's order to Mr. Bates' detriment,"[237] Commonwealth's conduct was "nothing less than intentional,"[238] Commonwealth demonstrated "flagrant disregard" for the Court's rulings on the matter,[239] Commonwealth argued "to the jury facts that it knew to be untrue and that were barred by the Court's previous rulings,"[240] and made "clearly objectionable"[241] and "improper" arguments.[242]

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[226] Def.'s Reply to Commonwealth's Resp., at 4.

[227] *Id.*

[228] *Id.* at 5.

[229] *Id.*

[230] *Id.* at 6.

[231] *Id.* at 9.

[232] *Id.*

[233] *Id.*

[234] *Id.* at 10.

[235] *Id.*

[236] *Id.* at 11.

[237] *Id.* at 17.

[238] *Id.*

[239] *Id.* at 18.

[240] *Id.*

[241] *Id.*

[242] *Id.*

At oral argument, defense counsel reiterated these claims and added one more, referring specifically to ACA Clingan: "He cheated."

The Court disagrees. Given the accusations and allegations described above, it is important for the Court to speak plainly and explicitly: This Court finds that the Commonwealth did not cheat. This Court finds that the Commonwealth did not lie. This Court finds that the Commonwealth did not "ambush" the defense. This Court finds that the Commonwealth's arguments were not "improper," "flagrant," "repugnant," or "egregious." And this Court finds that the Commonwealth did not commit prosecutorial misconduct.

b. <u>The Two Passages from the Commonwealth's Closing Argument that are at Issue.</u>

This ground for relief concerns two passages from the Commonwealth's Closing Argument. The first passage is from the Commonwealth's initial Closing Argument. It is in reference to the controlled call between W.M. and the defendant:

> **MR. CLINGAN: Do you know what else he doesn't do? He doesn't say, "W.M., I've been there. It's hard to come out. It's hard to come out. I get it. It's going to be hard but you got to think about it, dude. You got to think about it. After the things you did to me in that car you really have to think about it. This is our friendship on the line." He doesn't say any of that because W.M. is not coming out. W.M.'s got no place to come out from. He knows it.[243]**

The second passage is from the Commonwealth's rebuttal Closing Argument and begins with a reference to Ms. Fuller's Closing Argument on behalf of the defendant:

> **MR. CLINGAN: Mr. Gerber's text message, Commonwealth's Exhibit 6. We talked about this and counsel brought this up. She said that the text message says from Alex, "Beyond that I find it nearly impossible that W.M. advanced onto you because of the fact that he aggressively rejected your advances in the recent past. Like at the mountains with Tess you came onto W.M. while he was under the influence and yet he rejected you and was upset for weeks about the incident. Meanwhile, you have a history of both being gay and being interested in W.M." That's where it stops. But the next one. "W.M. has neither of those things." How do we know W.M. isn't (inaudible).[244] Don't believe me. Don't believe Alex. Let's go to the SANE exam. Look at the SANE report. We are all focused on this question of whether or not he wiped or washed himself in the affected area [where] it says no. Sure enough, maybe he didn't. Fine. The DNA expert explains. We know why there's no DNA there. But what's that on number 10 talking about W.M.'s history. W.M. doesn't have a**

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[243] Tr. 2/6/23, at 32.

[244] In Defendant's Motion to Set Aside the Verdict, the defendant suggests that the word described as inaudible is "gay" or "homosexual" or "something of synonymous meaning." That appears to the Court to be a reasonable assumption given the context.

history. Liam Bates's sexual orientation is not on trial here. Don't let anybody convince you otherwise. Liam Bates's actions are on trial here.[245]

c. Summary of the Defendant's Claims

The defendant's arguments can be broken into three categories:

- The Commonwealth made intentionally false statements to the jury.
- The Commonwealth violated the Court's Rape Shield orders.
- The Commonwealth impermissibly suggested to the jury that it had personal knowledge of W.M.'s heterosexuality.

d. Discussion

For the following reasons, the Court finds each of the defendant's arguments to be without merit.

i. The Commonwealth Did Not Lie to the Jury

First, the defendant accuses the Commonwealth of making intentionally false statements to the jury. The two allegedly false statements are as follows: (1) During the Commonwealth's initial closing, the ACA said: "W.M.'s got no place to come out from." In other words, W.M. does not need to "come out" as gay because he isn't gay. (2) During the Commonwealth's rebuttal closing, the ACA said: "W.M. doesn't have a history [of being gay]."[246]

The defense claims that these statements were not only false, but the Commonwealth *knew* they were false.[247] The basis for these serious allegations are: (1) D.A.'s testimony at the Rape Shield hearing; and (2) Statements made by W.M. to the Commonwealth that W.M., in middle school, "questioned his sexuality."[248]

In the hierarchy of prosecutorial misconduct, lying to a jury is certainly among the worst types of misconduct. However, neither D.A.'s testimony, nor W.M.'s uncertainty in middle

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[245] Tr. 2/6/23, at 83-84.

[246] In support of that assertion, the Commonwealth referred, first, to Alex Gerber's statement to the defendant in the Discord text messages that W.M. did not have a history of being gay and, second, to a question on a SANE questionnaire that asked the nature of W.M.'s last consensual sexual activity, to which W.M. indicated that it was "vaginal."

[247] *See, e.g.,* this statement from the Defendant's Reply to Commonwealth's Response: "Here, the Commonwealth knew that it was false to tell the jury that W.M. had no 'history' of being homosexual." *Id.* at 9.

[248] *Id.*

school about his sexual orientation, *remotely* supports the defendant's claim that the Commonwealth intentionally lied to the jury.

D.A.'s testimony at the Rape Shield hearing is described in detail earlier in this Opinion. His testimony concerned his fourteen-day "relationship" with W.M. when both children were 12 year old Seventh Graders, and which consisted of some "cuddling" and W.M. occasionally resting his head on D.A.'s shoulder in the classroom. In addition, D.A. testified that in the same middle school time period W.M. described himself as "pansexual" and, at one point, was observed walking in school hallways holding hands with a trans man. After hearing this testimony, the Court ruled that D.A.'s testimony was had no relevance on the issue of whether W.M. was homosexual or had a "history" of homosexuality. ACA Clingan naturally was present when the Court made this ruling. *If the Court – after taking sworn testimony from D.A. – did not find D.A.'s testimony to relevant, how can that same testimony possibly be a predicate for the defendant's claim that ACA Clingan knowingly lied to the jury?*

The other evidence that the defense relies upon to establish that the Commonwealth lied to the jury is that W.M. was curious, or questioning, about his sexual identity in middle school. Again, in no way does this establish that W.M. is homosexual or has a "history" of being gay.

Yet, on these gossamer threads, the defense accuses the ACA of intentionally deceiving the jury in order to win his case. The Court finds the allegation to be without merit.

ii. <u>The Commonwealth Did Not Violate the Court's Rape Shield Rulings.</u>

In its initial closing argument, the Commonwealth made the following statement: "W.M. is not coming out. W.M.'s got no place to come out from." (3) In its rebuttal closing argument, the Commonwealth made the following statement: "W.M. doesn't have a history [of being gay]. The defendant now argues that these two statements constitute a "flagrant disregard" for the Court's rulings. The Court disagrees.

1. <u>The Court's Rape Shield Rulings were *Evidentiary* Rulings.</u>

The defense pins its claim on one word ("argument") in one phrase to assert that the Commonwealth engaged in the "intentional circumvention" of the Court's rulings. In doing so, the defense gives the rulings this Court made at the Rape Shield hearings an interpretation fundamentally at odds with their *full* text, their *substantive* reach, and their *actual* meaning.

At the Rape Shield hearing on January 30, 2023, the Court made a number of rulings, using similar though not identical language. But what *is* identical in each of these rulings is that the Court was making *evidentiary* rulings – meaning what evidence could be offered during the evidentiary phase of the trial. They were not rulings to restrict the Commonwealth's closing argument or to forbid the Commonwealth from making certain arguments entirely. Consider these statements by the Court:

- The Court told the Commonwealth: "[Y]ou're welcome to offer that testimony [that W.M. is heterosexual], I'm not in any way restricting you from doing so, but

if you do offer that testimony, *certainly the Defense can offer testimony that it's not true.*"[249]

- The Court told the defendant's trial counsel: "I don't see the relevance at all that the alleged victim is homosexual or bisexual unless that door is opened. If the door is opened, then it becomes relevant *assuming that the evidence you wish to offer is probative, and it may not be.*"[250]

- The Court stated: "The Commonwealth is welcome to open the door if they wish, but if they do open [the] door, in other words, if one of the assertions the Commonwealth makes through its witnesses or argument or opening statement is that the alleged victim was heterosexual and that's additional evidence that he didn't grant consent, which they're welcome to do, but I see that as opening the door, and in that event, the – well, the door is open."[251]

- And what if the door *was* opened? In that event, the defense could offer evidence that W.M. was homosexual, but the Court cautioned the defendant's trial counsel: "*[W]hat's admissible or not is a decision I'm not making now . . . because the evidence has to be probative and relevant*, but we can cross that bridge."[252]

- The Court told the Commonwealth: "And I want to be absolutely clear. I'm in no way restricting … you from eliciting testimony that [W.M.] is a heterosexual male, it's … completely up to you. *But if you do . . . If you do, obviously to me it's obvious that the defense has a right to challenge it. Now, whether or not the evidence would be admissible or not is a separate question.*"[253]

This was an "if-then" conditional statement: *If* the Commonwealth "opened the door," *then* the defense could offer evidence in rebuttal. By definition, *evidence* can only be offered and admitted during the *evidentiary* phase of a trial, which of course precedes, not succeeds, closing argument.

To illustrate this point, consider what happened when the Commonwealth offered, and the Court admitted, the unredacted version of the Alex Gerber Discord text messages. It led the Court to convene a second Rape Shield hearing on February 1, 2023, to determine if the door had been "opened," and, if so,

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[249] S. Tr. 1/30/23, at 24. (Emphasis Added.)

[250] *Id.* at 30. (Emphasis Added.)

[251] *Id.* at 32.

[252] *Id.* (Emphasis Added.)

[253] *Id.* at 33-34.

whether the *evidence* offered by the defense was relevant or irrelevant.[254] This is precisely what the Court's Rape Shield rulings contemplated.

The defense asserts, however, that because the Court referenced the word "argument" when it made the "if" portion of the conditional statement, it meant that the Court was *prohibiting* the Commonwealth from making any reference to W.M.'s sexual orientation in its closing argument – even if such reference was rooted in exhibits that were offered and admitted at trial.

If the Court had intended to take the extraordinary step of censoring the Commonwealth's closing argument, it would have said so – *and it would have been wrong*. The Commonwealth – just like the defense – has the right to rely, in its final summation, on the evidence admitted at trial, and to argue the inferences that it believes logically flow from the evidence admitted at trial. "Counsel is always entitled to quote evidence of record in support of an inference he urges the jury to adopt. Whether the inference is justified by the predicate is a question for the jury." *Wise v. Commonwealth*, 230 Va. 322, 333 (1985). In this case, both the Gerber text messages (Commonwealth's Exhibit 6) and the SANE report (Commonwealth's Exhibit 8) – the two documents upon which the Commonwealth relied – were in the "evidence of record."

2. The Commonwealth's Argument was in Direct Response to the Evidence and Arguments of the Defendant.

In closing argument, the Commonwealth always has the right "to combat, and to argue the evidence and the fair inferences from it ...." *Jackson v. Commonwealth,* 193 Va. 664, 675 (1952). *See also Timmons v. Commonwealth*, 204 Va. 205, 216-217 (1963). The passages about which the defendant now complains did just that.

Specifically, the Commonwealth's closing argument were a *direct* response to either evidence which the defendant had presented during the evidentiary phase of the trial, or to arguments that defendant's trial counsel made in her closing argument. Consider just the following three examples:

a. Example 1

During opening statement, the defendant's trial counsel described what happened in the back seat of the defendant's car as a "romantic tryst." By the time the defendant testified, however, that "romantic tryst" had been transformed into "forcible sodomy," with Mr. Bates being the victim and W.M. being the assailant. The defendant now claimed that W.M. forced the defendant to perform fellatio on him, even leaving a bruise on the defendant's neck. The defense also called a college friend to testify to having seen the bruise, and that the defendant told her he had gotten it when "his neck was like pushed to the ground," and that it was the defendant's friend who had "done it to him." Tr. 2/2/23, at 184.

In closing argument, the Commonwealth said the following:

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[254] The Court exercised its discretion to reserve judgment on the first issue (whether the door had been opened) until after it had heard the proposed testimony of D.A. and then, after hearing further argument, announced its decision on both issues.

MR. CLINGAN: Do you know what else [the defendant] doesn't do? He doesn't say, "W.M., I've been there. It's hard to come out. It's hard to come out. I get it. It's going to be hard but you got to think about it, dude. You got to think about it. *After the things you did to me in that car you really have to think about it. This is our friendship on the line."* He doesn't say any of that because W.M. is not coming out. W.M.'s got no place to come out from. He knows it.[255]

The defendant now claims this was an improper closing argument, but it was in *direct* response to the defendant's claim that he was forcibly sodomized by W.M. The Commonwealth told the jury that *if* what the defendant *claimed* to have happened had *actually* happened, the controlled call between W.M. and the defendant would have gone very differently.

As to the Commonwealth's statement – "He knows it" – there were three pieces of admitted evidence that the Commonwealth could reasonably have relied upon to support this statement. First, there was the defendant's text message to Alex Gerber that "W.M. has only presented himself as straight."[256] Second, there was the incident in Hendersonville, North Carolina, in which W.M. rebuffed the defendant's romantic advance, an advance that the defendant himself confirmed.[257] Third, W.M. told the SANE nurse that the defendant had, in the past, kept "feeding me drinks and kept trying to kiss me, but i would tell him no every time."[258] The Commonwealth's statement in closing argument – "He knows it" – was a reasonable inference from these exhibits and testimony.

b. <u>Example 2</u>

In closing argument, the defendant's trial counsel underlined and emphasized the defendant's claim that it was the defendant – not W.M. – who was a victim of forcible oral sodomy:

Let's move on to the forced oral sodomy. Mr. Clingan came here and told you that W.M. [was] too drunk to consent to oral sex. Only Liam did not attempt to perform oral sex willingly. Liam Bates told you that. Told you that W.M. pushed his head down. Told you that W.M. forced his head down and used, frankly awful language while doing it. He told you that W.M. grabbed the back of his neck and forced it down. It was forcible sodomy and Liam didn't do the forcing.[259]

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[255] Tr. 2/6/23, at 32. (Emphasis Added.)

[256] Commonwealth Exh. 6.

[257] Tr. 2/3/23, at 130.

[258] Commonwealth Exh. 8.

[259] Tr. 2/6/23, at 66-67.

Then the defendant's trial counsel repeated it:

> **W.M. pushed Liam's head down. He grabbed him. He put his hand on the back of his neck, his thumb on the side of his neck and he pushed it down. Liam told you that he pulled his head up. He told you he didn't like it.**[260]

In light of these defense arguments – these accusations – the Commonwealth's statement in its rebuttal argument – that W.M. did not have a "history" of being gay – can only be characterized as a rather mild response.

c. <u>Example 3</u>

In closing argument, the defendant's trial counsel explicitly asserted that the sole reason her client was on trial was because he was gay. In doing so, trial counsel made sexual orientation – not only that of her client but implicitly that of W.M. as well – a central issue in the trial. This is what the defendant's trial counsel stated in her closing argument:

> **I told you when we began this trial that if there had been two straight men in that SUV on January 1st we would not be here today. And I stand by that. There's no greater proof of that than the rebuttal evidence the Commonwealth introduced on Friday. Let's start with Alex Gerber. The Commonwealth has tendered a Discord conversation between Alex and Liam, where Liam is attempting to explain to Alex what happened on the morning of January 1st. Alex recounted an incident from Hendersonville, North Carolina that he was not even present for and tells Liam straight out, "Meanwhile you have a history of both being gay and being interested in W.M." You have a history of both being gay and be[ing] interested in W.M. There it is. Alex Gerber hit the nail on the head. Liam liked W.M. Therefore it is more probable that Liam anally sodomized W.M. in an SUV on a residential driveway on New Year's Day.**[261]

In making this argument, defendant's trial counsel placed the issue of sexual orientation squarely before the jury. The Commonwealth had just as much right to argue its relevance to the case as did the defense.

Even more significantly, the defense in closing argument omitted the *next* sentence that Alex Gerber wrote in his text message. As stated above, the defendant's trial counsel quotes Mr. Gerber as texting the following to the defendant: "Meanwhile you have a history of both being gay and being interested in W.M." This is quoted to support a claim that the prosecution was only initiated because the defendant is gay. But the immediate next sentence – which the defense omitted in its closing argument -- makes clear that the

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[260] *Id.* at 67-68.

[261] *Id.* at 71-72.

sentence the defense did quote is simply the predicate for what followed: "W.M. has neither of those things."[262]

By leaving out that sentence – "W.M. has neither of those things" – the defense used the Alex Gerber text message to argue that the prosecution was tainted from the start by anti-gay bias. The defense converted Alex Gerber's text message from what it was, *i.e.*, a comparison (the defendant has a "history" of being gay; W.M. does not), to what it was not, *i.e.*, a condemnation (the defendant's "history" of being gay is the *real* problem here). The defendant had the right to quote Alex Gerber. But so did the Commonwealth.

And, lest there be any confusion about the point the Commonwealth was making in its rebuttal closing, here is how the passage ended: "Liam Bates's sexual orientation is not on trial here. Don't let anybody convince you otherwise. Liam Bates's actions are on trial here."[263] That was a direct response to the defense closing argument.

iii. The Commonwealth Did Not Impermissibly Suggest to the Jury that it had Personal Knowledge of W.M.'s Heterosexuality.

The defense accuses the Commonwealth of "impermissibly" suggesting to the jury that the Commonwealth had "personal knowledge of W.M.'s heterosexuality."[264] This is based on the following passage from the Commonwealth's closing argument:

> **MR. CLINGAN: Mr. Gerber's text message, Commonwealth's Exhibit 6. We talked about this and counsel brought this up. She said that the text message says from Alex, "Beyond that I find it nearly impossible that W.M. advanced onto you because of the fact that he aggressively rejected your advances in the recent past. Like at the mountains with Tess you came onto W.M. while he was under the influence and yet he rejected you and was upset for weeks about the incident. Meanwhile, you have a history of both being gay and being interested in W.M." That's where it stops. But the next one. "W.M. has neither of those things." How do we know W.M. isn't (inaudible). *Don't believe me.* Don't believe Alex. Let's go to the SANE exam. Look at the SANE report.[265]**

It is that phrase – "Don't believe me" – that the defendant points to as impermissibly suggesting that the Commonwealth had personal knowledge of W.M.'s heterosexuality. The Court disagrees. The phrase – "Don't believe me" – may be inartful, but the Court does not understand it to be an expression by ACA Clingan of either his personal belief or his personal knowledge that W.M. is heterosexual. Rather,

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[262] Commonwealth Exh. 6.

[263] Tr. 2/6/23, at 83-84.

[264] Def.'s Mot. to Set Aside the Verdict, at 24.

[265] Tr. 2/6/23, at 83-84. (Emphasis Added.)

the Court understands it to be a statement to the jury that it does not need to accept the Commonwealth's representation as to what the evidence shows. Instead, the jury could just "[l]ook at the SANE report."[266]

There were, however, actual examples in the record of counsel expressing personal belief and personal knowledge, but they came from the defense, not the Commonwealth.[267]

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[266] *Id.* at 84. The Court also notes that it does not find any merit in the defendant's claim that the Commonwealth misled the Court with regard to Question 10 in the SANE report. (Question 10 asked W.M. to indicate the nature of his last consensual sexual activity. W.M. answered that it was "vaginal.")

The Commonwealth brought Question 10 to the Court's attention out of concern that it had been overlooked by the Court and counsel in connection with the Court's previous day's Rape Shield hearing. The Court asked both ACA Clingan and Ms. Fuller whether they thought it had any effect on the Court's previous Rape Shield rulings. Neither thought it did. Tr. 2/2/23, at 3-5.

The defendant now argues that ACA Clingan misled the Court because, in closing argument, he cited Question 10 as further evidence that W.M. was not gay. *See* Def.'s Mot. to Set Aside the Verdict, at 22-26, and Def.'s Reply to Commonwealth's Resp. at 5-6. In the defense's view, the Commonwealth's statement to the Court and the Commonwealth's statement to the jury cannot be reconciled; thus, ACA Clingan must have misled the Court. The Court disagrees. Commonwealth Exhibit 8 – the SANE report – was offered by the Commonwealth and admitted by the Court, *without objection*. Tr. 1/31/23, at 213-214. Both sides argued its contents to the jury, as they each had a right to do. That was not inconsistent with Mr. Clingan and Ms. Fuller *both* expressing the view that W.M.'s answer to Question 10 did not impact on the Court's previous Rape Shield rulings.

[267] *See, e.g.*, the following excerpts from the defendant's Opening Statement and Closing Argument:

Tr. 1/30/23, at 172-73:
"It's our firm belief that if Liam Bates were straight, we might not even be here today."

Tr. 1/30/23, at 173-174:
"I have thought about it, we have run it through, I have no idea how they can be so certain, but I know Liam Bates and by the time this is over, you will, too, and when you see him, when you hear him, you're going to realize that he could never hurt anyone, he's just not constitutionally built for it. He would never do this…."

Tr. 2/6/23, at 51:
"Let's take Nolan Coughlin for example. I find it very difficult to accept Nolan's rationale. I hope you do too because it's concerning."

Tr. 2/6/23, at 56:
"I talked to my client. Honest to God, I do not even know why we are here. I do not know how this could happen."

e. **Finally, the Defendant's Claims of Improper Closing Argument Have Been Waived Because there was No Timely Objection, No Request for a Cautionary Instruction and No Motion for a Mistrial.**

The Court addresses this issue last, rather than first, even though it is actually *dispositive.* The reason the Court addresses this issue last is because it does not want to suggest or imply that it is only because of a procedural default that the Court cannot grant the defendant the relief he seeks. Nevertheless, for the reasons set out in this section of the Court's Opinion, the defendant's claims of improper closing argument – even if they were meritorious claims – have been waived.

There was no objection made by the defendant's trial counsel to either the Commonwealth's initial closing argument or the Commonwealth's rebuttal closing argument. Nor was there a motion for a mistrial. Nor was there a request for a cautionary instruction. The law is clear: this failure is fatal. *See, e.g.*, *Tizon v. Commonwealth*, 60 Va. App. 1, 13 (2012) (*quoting* Ronald J. Bacigal, *Criminal Procedure* §17:26, at 545 (2011-12) (footnote omitted):

> A motion for a mistrial 'must be made at the time an objectionable element is injected into the trial of the case.' It is too late to move for a mistrial after the Commonwealth and defense have rested, after the jury has retired, or at the conclusion of counsel's opening or closing statement.

See also Martinez v. Commonwealth, 241 Va. 557, 559 n.2 (1991) (citation omitted) ("This Court has repeatedly held that errors assigned because of a prosecutor's improper comments or conduct during argument will not be considered on appeal unless the accused timely moves for a cautionary instruction or for a mistrial."); *Yeatts v. Commonwealth*, 242 Va. 121, 137 (1991) (citation omitted) ("Making a timely motion for mistrial means making the motion 'when the objectionable words were spoken.'"); and *Pullen v. Nickens*, 226 Va. 342, 346-47 (1983) ("If counsel believes that an argument requires or justifies a mistrial, he has the duty to move promptly before conclusion of the argument so that the trial court may determine what corrective action, if any, should be taken."). Significantly, "[t]here appears to be no

exception in Virginia law to the strict application of this rule." *Bennett v. Commonwealth*, 29 Va. App. 261, 281 (1999).[268]

Here, no objection was made. No cautionary instruction was requested. No mistrial was sought. Therefore, this argument is waived.[269] Nevertheless, the defense – in an effort to avoid the unavoidable consequences of the defendant having made no timely objection or other request for relief – argues that the Court should grant the defendant the relief he seeks anyway.

First, the defendant argues that the failure to object or move for an immediate mistrial was simply a "mistake" by trial counsel and should not stand in the way of setting aside the verdict. Second, defense counsel argues that the contemporaneous objection rule is an appellate rule, not a trial court rule, and therefore is inapplicable to the Defendant's Motion to Set Aside the Verdict. Third, the defendant argues that the failure to contemporaneously object or move for a mistrial is of no significance because the moment the Commonwealth made its allegedly objectionable argument, it was already too late for the Court to take effective remedial action. Fourth, the defendant argues that the impropriety of the Commonwealth's closing argument was so "egregious" that the Court had a duty to *sua sponte* intervene to "correct" the Commonwealth's misconduct, even absent any objection from the defendant. Fifth, and final, the defendant argues that the Commonwealth's prosecutorial misconduct during closing argument was so flagrant, so calculated, and so deplorable that the Court should set aside the verdict as a form of punishment to ensure that *this* prosecutor and *all* prosecutors never engage in such conduct again.

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[268] Rule 5A:8 of the Rules of the Supreme Court of Virginia addresses the preservation requirement for appellate review: "No ruling of the trial court or the Virginia Workers' Compensation Commission will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review."

The "good cause exception is applied when an appellant did not have the opportunity to object to an alleged error during the proceedings below." *Flanagan v. Commonwealth*, 58 Va. App. 681, 694 (2011) (citations omitted). A mistake by defendant's trial counsel – if in fact a mistake had occurred (as opposed to the exercise of strategic judgment) – would not constitute "good cause."

As to the "ends of justice" exception, it is "narrow and is to be used sparingly." *Id.* "In order to avail oneself of the exception, a defendant must affirmatively show that a miscarriage of justice has occurred, not that a miscarriage *might* have occurred." *Redman v. Commonwealth*, 25 Va. App. 215, 221 (1997) (citation omitted) (Emphasis in Original).

Neither exception is applicable in this case. The defendant had the *opportunity* to object but did not do so. And the defendant has not "affirmatively" shown that a miscarriage of justice has occurred.

[269] It should be emphasized here that even if the defendant's trial counsel had made an objection, and the Court had overruled the objection, the issue would not have been preserved for appeal unless trial counsel *also* made a timely motion for a mistrial or a cautionary instruction. *See, e.g.*, *Morris v. Commonwealth*, 14 Va. App. 283, 287 (1992).

The Court finds none of these arguments to be meritorious.

i. **Defense Argument 1: Defense counsel at Trial Made a "Mistake" by Not Objecting.**[270]

The matter before the Court is not a habeas corpus proceeding based on ineffective assistance of counsel. Whether trial counsel's failure to object was a mistake or a tactical judgment is not a matter now before the Court, nor could it affect the resolution of the motion to set aside the verdict.

Having said that, it is worth noting that there are many tactical and strategic reasons why counsel will not object, seek a cautionary instruction, or move for a mistrial even when such actions would be justified – and this is especially the case in the presence of a jury. An objection may have the paradoxical effect of emphasizing the precise evidence or argument that counsel are seeking to exclude. There is always the risk that jurors will wonder: *Why is counsel trying to keep us from hearing this evidence or argument?* Moreover, there is the additional, and certainly genuine, risk that the Court will overrule the objection, thereby not only drawing the jury's attention to the evidence or argument but communicating to the jury that the objection was unjustified. Similarly, cautionary instruction may focus the jury on an argument that jurors might not have attached any significance to – *until the cautionary instruction was given.*[271]

The decision to seek or not seek a mistrial – even when justified – presents even more challenging strategic considerations, especially when it comes at the end of a protracted trial. There are many tactical reasons why defense counsel may choose not to seek a mistrial. For example, the evidence might have "come in" particularly well at the trial – with no guarantee that the evidence will come in just as well at a retrial. After all, the Commonwealth may have called witnesses at an initial trial who have never testified before and were nervous and came across as uncertain and hesitant. At a retrial, those same witnesses would have the benefit of already having been through the crucible of cross-examination and would therefore have a far better idea what to expect. For another example, the defense might have been

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[270] That was the term used by defense counsel at oral argument to explain trial counsel's failure to object to the Commonwealth's closing argument.

[271] *See, e.g., Thomas v. Commonwealth*, 44 Va. App. 741, 752 (2005) (citation omitted) ("Experienced trial lawyers know that cautionary instructions, even when perfectly worded, sometimes highlight problematic evidence and, thus, as Thomas's counsel concluded in this case, 'do more harm than good.' For this reason, 'counsel may wish to avoid such an instruction for sound tactical reasons.'")

successful in excluding exceptionally relevant evidence due to the Commonwealth's failure to produce it on time.[272] In addition, defense counsel and the defendant must weigh the collateral consequences of a mistrial motion being granted: Criminal charges will hang over the defendant for additional months; a second protracted trial will need to take place (with all that entails); the defendant will continue to have his liberty restrained, even if on bond.

The final reason this argument does not have merit is that it assumes that the Court would have sustained the objection and, if asked, would have granted a mistrial or a cautionary instruction. Even if that were true, the case law cited above is clear that the failure to make the objection or to move for a mistrial or to seek a cautionary instruction waives a subsequent claim of error *regardless* of whether the defendant would have prevailed if he had timely raised it. Indeed, an appellate court will not even reach the question of whether "the Commonwealth's argument was, in fact, improper" when it has found that the issue was waived. *See, e.g., Bennett v. Commonwealth*, 29 Va. App. 261, 281-82 (1999).

ii. Defense Argument 2: The Contemporaneous Objection Rule Only Applies to Appellate Courts

The defendant argues that the contemporaneous objection rule applies only to appellate courts, and does not constrain a trial court at all. The Court does not agree. The rationale for the contemporaneous objection rule is that it permits the trial court to fix an evidentiary or argument problem at a time *when it can make a difference*. Timely objections – and the steps a trial court takes to address meritorious objections – avoids mistrials and retrials. A trial court considering a motion to set aside a verdict is no more able to rewind the trial to the point when it would have "made a difference" than an appellate court. The verdict is in. The jury has been excused and disbanded. The trial is over. At this point, the trial court considering a motion to set aside a verdict and an appellate court considering reversal of a conviction are in virtually identical postures when it comes to the available remedy. In both cases, it is to grant a new trial (or, on a sufficiency of evidence issue, enter an acquittal).

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[272] Nor is this some improbable hypothetical. It is precisely what happened on February 3, 2023, the final day of evidence in the trial. The Commonwealth sought to use at trial a photograph which had extraordinary probative value. The photograph was of the defendant, Emma Welther and W.M., and was taken around 1:30 a.m. on January 1, 2023. It shows Ms. Welther and the defendant on each side of the defendant, with W.M.'s arms draped over their shoulders as they carried him to the defendant's car. As only a photograph can, it showed the true inebriated, incapacitated and helpless state of W.M. shortly before the events in question. It is clear from the photograph that W.M. could not walk on his own and had to be supported on each side. This photograph, had it been admitted at trial, would have reinforced the credibility of Emma Welther, who testified that even after W.M. was roused awake on the porch of Emma's home, he could not walk on his own. And, at the same time, it had the potential to undermine the defendant's credibility. When the defendant was asked at trial if W.M. needed assistance to get to the defendant's car, the defendant said he did not know. The jury could certainly have reasonably concluded that this was not a truthful statement given the photographic evidence that it was the defendant himself who assisted W.M. to the car. Nevertheless, the Court excluded the photograph from the trial for one reason and one reason only – it was not turned over by the prosecutor to the defense in time. Tr. 2/3/23, at 55-67. At a retrial, however, that would not be an issue.

Certainly, there may be situations where an objection can properly *and for the first time* be brought before the trial court in a motion to set aside a verdict. But objections to the trial court's evidentiary rulings or to improper closing arguments must be made when the evidentiary ruling is made (and can be modified if necessary) or when the improper closing argument is made (and can be subject to a cautionary instruction and admonishment to counsel to cease and desist from further improper arguments). *See, e.g.*, *Harward v. Commonwealth*, 5 Va. App. 468, 473-74 (1988) ("Among the purposes underlying the contemporaneous objection rule are to enable the trial court to prevent error, to cure alleged error with prompt and decisive instruction, and to prevent compounding any harmful consequences by dwelling on irrelevant matters.").

Raising objections to the Court's evidentiary rulings or to the prosecutor's closing argument months after the trial is over is simply too late to be considered. *See, e.g.*, *Boblett v. Commonwealth*, 10 Va. App. 640, 651 (1990) (citation omitted) ("The fact that this argument was raised initially in a post-trial motion to set aside the verdict does not alter our decision. In order for an objection to be timely, it must be made when the evidence is offered or the ruling given."); and *Hogue v. Commonwealth*, No. 1259-21-3, 2022 WL 16556702, at *3 (Va. Ct. App. Nov. 1, 2022) (citation omitted) ("Any challenge to the admissibility of evidence that is raised for the first time in a post-trial motion to set aside the verdict is untimely and waives the issue for appellate review.").

iii. Defense Argument 3: There was No Remedial Action the Court Could Have Taken Anyway.

This third argument is essentially this: The prosecutorial misconduct in this case was so egregious and prejudicial that there was nothing the Court could have done about it anyway, so there was no harm in trial counsel's failure to make a contemporaneous objection. The Court disagrees.

First, for the reasons stated in the previous section of this Opinion, the Court does not find the prosecutor's closing argument to be improper, let alone egregious and prejudicial.

Second, improper closing arguments are routinely addressed *immediately* and *effectively* through cautionary instructions. "[E]rror arising from an improper question or improper conduct of counsel may usually be cured by prompt and decisive action of the trial court without granting a motion for a mistrial." *Black v. Commonwealth,* 223 Va. 277, 286 (1982). "[I]t is always to be presumed that the jury followed an explicit cautionary instruction promptly given ...." *Spencer v. Commonwealth*, 240 Va. 78, 95 (1990). *See also Muhammad v. Warden of Sussex I State Prison*, 274 Va. 3,18 (2007) (citation omitted) ("It is presumed that a jury will follow the instructions given by the trial court."). In the instant case, there is no reason to believe that if the Commonwealth had, in fact, made an improper argument, it could not have been cured by a cautionary instruction. The defendant responds that this is "highly unlikely,"[273] but that does not make it so.

Third, the Court – if it had deemed improper an argument made by the Commonwealth – could have instructed the prosecutor to desist from making any further arguments along the same improper line. In the instant case, the defendant asserts that the Commonwealth made improper closing argument

[273] Def.'s Reply to Commonwealth's Resp., at 16 n.15.

statements in *both* its initial closing and rebuttal closing. A timely objection at the time of the allegedly improper initial closing argument statement, if sustained, could have resulted in an instruction to the Commonwealth not to make similar arguments in rebuttal.

Finally, upon a timely motion by the defendant's trial counsel, the Court – had it deemed it appropriate and necessary to do so – could have granted an immediate mistrial. Granting an immediate mistrial during closing argument is not the same as granting a motion to set aside a verdict, at least not in this case. Granting a mistrial would likely have permitted a retrial on both counts. Setting aside the verdict would not permit a retrial on both counts, as charged in the Amended Indictment, since the defendant's conviction on Attempted Sodomy necessarily constitutes an acquittal on Sodomy.

iv. Defense Argument 4: The Court should have *sua sponte* intervened to "correct" the Commonwealth's Closing Argument Misconduct, even absent any objection from the Defense.

In his reply brief, the defendant asserts the following: "[I]f the right to a fair trial is to mean anything, it must mean that the sitting trial judge has the authority to and should correct or intervene when it observes blatant, reversible constitutional error, whether or not an objection has been made."[274]

The Court certainly does not disagree with the general principle that the trial judge has a duty to intervene if necessary to protect a defendant's right to a fair trial. What the Court does take issue with is the assumption that the Court observed "blatant, reversible constitutional error" in *this* case. As the Court has made clear in the preceding sections of this Opinion, it disagrees with the defendant's assertion that the Commonwealth's argument was either improper or constituted "reversible constitutional error," blatant or otherwise.

Moreover, even if it was true that the Commonwealth's argument was improper, the fact that the defendant's trial counsel did not object is not just some inconvenient fact to be cast aside as the occasion may require. The defendant, in the Defendant's Motion to Set Aside the Verdict, relies on case law concerning whether or not a trial judge had the duty to "grant" a mistrial.[275] The term "grant" presumes that a motion for a mistrial was made. Here, none was made, and that is a particularly consequential fact. For a Court to *sua sponte* grant a mistrial presents a serious Double Jeopardy issue. As the Supreme Court of Virginia stated: "The Double Jeopardy Clause also grants a defendant the right to have his trial completed by a particular tribunal . . .which means 'the right … to have his trial completed before the first

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[274] *Id.* at 16.

[275] *See* Def.'s Mot. to Set Aside the Verdict, at 18 (Emphasis Added): "In determining *whether a mistrial should be granted*, the court 'must make a factual determination, in light of all the circumstances of the case, whether the defendant's rights [have] been so indelibly prejudiced as to require a new trial." *LeVasseur v. Commonwealth*, 255 Va. 564, 589 (1983). "The decision *whether to grant a mistrial motion* is a matter submitted to the circuit court's sound discretion." *Lewis v. Commonwealth*, 269 Va. 209, 213 (2005).

jury empaneled to try him.'" *Commonwealth v. Washington*, 263 Va. 298, 303 (2002) (citations omitted). As the Supreme Court of the United States stated:

> Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.
>
> Unlike the situation in which a trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused . . . [I]n view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant.

Arizona v. Washington, 434 U.S. 497, 503-05 (1978) (footnotes and citations omitted). Of course, it is unknown whether the defendant would have objected if the Court had *sua sponte* declared an intention to grant a mistrial that neither the defendant's trial counsel nor the Commonwealth had sought. What is not unknown is that for the Court to intervene in this manner risked "compromis[ing] the court's objectivity and interfer[ing] with the prerogative of trial counsel to the detriment of the adversarial system." *Thomas v. Commonwealth*, 44 Va. App. 741, 752 (2005) (rejecting appellant's assertion that the trial judge should have given a cautionary instruction over the objection of defense counsel.).

v. Defense Argument 5: The Court Should Set Aside the Verdict as a Sanction to Deter Future Prosecutorial Misconduct

The defendant's final argument to excuse trial counsel's failure to object is that "the Court should grant the Defense's motion to set aside the verdict as a sanction for the prosecutorial misconduct committed by the Commonwealth."[276] At oral argument, defense counsel argued that this action was warranted as both "specific deterrence" (to deter this particular prosecutor from engaging in misconduct in the future) and "general deterrence" (to deter other prosecutors from engaging in similar misconduct.). The Court disagrees.

First, for the reasons stated in the preceding section of this Opinion, the Commonwealth's closing argument was not improper, nor sanctionable.

Second, even if it were the case that the Commonwealth's closing argument was improper, the Court is not aware of authority that would permit or justify setting aside the jury verdict *as a sanction*. The defendant cites none. The case law that the defendant does cite only supports a court's

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[276] Def. Reply to Commonwealth's Resp., at 17.

unquestionable and unremarkable authority to enforce its own order and to impose sanctions in appropriate cases.

Essentially, the defendant seeks a dramatic and unwarranted expansion of the Exclusionary Rule to punish errant prosecutors, without regard whether to do so grants "the defendant a windfall to which the law does not entitle him." *Lockhart v. Fretwell*, 506 U.S. 364, 370 (1993) (citation omitted) (holding that, in an ineffective assistance of counsel case, it is necessary for a court to also address whether the trial was "fundamentally unfair or unreliable.") *Id.* This trial was neither unfair nor unreliable.

f. Conclusion with Regard to Prosecutorial Misconduct Issue.

For all the foregoing reasons, the Court finds that the Commonwealth's Closing Argument was not improper. The Court also finds that it did not constitute prosecutorial misconduct and was not sanctionable.

VIII. Conclusion

In the early morning hours of January 1, 2022, Liam Bates texted a college friend words to this effect: "Something terrible has happened."[277] On that, all parties apparently agree.

But what happened and how it happened, who was responsible and for what exactly, and the ultimate question of whether the defendant was guilty or not guilty of the serious crimes with which he was charged, were matters placed before this jury. At oral argument, defense counsel began by citing a fundamental principle of constitutional law: A defendant is not entitled to a perfect trial, but a defendant is entitled to a fair trial.[278] This defendant received a fair trial.

The Court, having carefully considered the arguments of the defendant and the Commonwealth, and having reviewed the entire record of this case, DENIES Defendant's Motion to Set Aside the Verdict.

SO ORDERED, this 21 day of July, 2023.

[redacted]
Judge Randy I. Bellows

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[277] Tr. 2/2/23, at 183.

[278] *See, e.g., Commonwealth v. White*, 293 Va. 411, 420 (2017), quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986) (citations omitted) ("As the United States Supreme Court has 'repeatedly stated, 'the Constitution entitles a criminal defendant to a fair trial, not a perfect one.'").