VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 28th day of June, 2018.

Justin Keith Cornell, Appellant,

against Record No. 171695
Court of Appeals No. 2007-16-1

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of the City of Virginia Beach shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

Costs due the Commonwealth
by appellant in Supreme
Court of Virginia:

Attorney's fee $1,200.00 plus costs and expenses

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: 

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 5th day of October, 2018.

Justin Keith Cornell, Appellant,

against Record No. 171695
Court of Appeals No. 2007-16-1

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 28th day of June, 2018 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: 

Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on **Friday** *the* **30th** *day of* **June, 2017**

Justin Keith Cornell, Appellant,

against Record No. 2007-16-1
Circuit Court No. CR15-3376

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Virginia Beach

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is denied for the following reasons:

I. Appellant, who was convicted of second-degree murder in violation of Code § 18.2-32 contends the court erred in finding that proper venue was in Virginia Beach and thus the court "lacked subject matter jurisdiction."

Ordinarily, "the prosecution of a criminal case shall be had in the county or city in which the offense was committed." Code § 19.2-244. When a murder occurs "under circumstances which make it unknown where such crime was committed," the crime may be prosecuted where the victim's body is found. Code § 19.2-247. "Since venue does not represent an element of the offense, the Commonwealth need not prove it beyond a reasonable doubt." Taylor v. Commonwealth, 58 Va. App. 185, 190, 708 S.E.2d 241, 243 (2011) (citations omitted). To establish venue, "the Commonwealth must produce evidence sufficient to give rise to a 'strong presumption' that the offense was committed within the jurisdiction of the court, and this may be accomplished by either direct or circumstantial evidence." Cheng v. Commonwealth, 240 Va. 26, 36, 393 S.E.2d 599, 604 (1990). Under that standard, "venue has been sufficiently proven when its location is the only reasonable inference that can be drawn from the evidence." Randall v. Commonwealth, 183 Va. 182, 188, 31 S.E.2d 571, 573 (1944) (citing Hart v. Commonwealth, 131 Va. 726, 109 S.E. 582 (1921)).

"On appeal, we will consider the evidence in the light most favorable to the Commonwealth, as it prevailed in the trial court." Whitehurst v. Commonwealth, 63 Va. App. 132, 133, 754 S.E.2d 910, 910 (2014). So viewed, the evidence established that appellant and Brianna Armstrong worked together and were romantically involved. Armstrong was married, however, to Corey Creek. Creek last saw Armstrong alive on May 7, 2015 around 5:00 p.m. Armstrong did not report to work on May 8, 2015. Creek tried to call Armstrong, her father, and other friends in an effort to locate her. On May 9, 2015, Creek reported Armstrong missing. Creek called people on Armstrong's recent call list and spoke with appellant. Appellant initially denied seeing Armstrong "in a while." Appellant ultimately told Creek that he had seen Armstrong on the evening of May 7, 2015 and that they had been drinking.

On May 14, 2015, the police found Armstrong's car in a parking lot near appellant's apartment in Virginia Beach. The police also found large knives and swords, a large dark stain on a hallway carpet, and a bra belonging to Armstrong in appellant's apartment. Although appellant initially stated it had "been a while" since he had seen Armstrong, he later admitted that she had been there May 7, 2015.

On May 31, 2015, a bicyclist on the Dismal Swamp Canal Trail in Chesapeake observed several garbage bags that contained human remains later identified as Armstrong's. Some of the bones and body parts were missing, including the throat. Police collected items of evidence at that location, including "Up and Up" brand trash bags, paperwork with appellant's name, blue latex gloves, carpet, and men's underwear. Police later collected additional items of evidence from appellant's apartment, including Up and Up brand trash bags, blue latex gloves, and two receipts dated May 16, 2015, documenting purchases of cleaning supplies, repair materials, and the rental of a rug cleaning machine.

Dr. Babatunde Stokes performed an autopsy of Armstrong's remains. Dr. Stokes testified he concluded the cause of death was

> unspecified criminal violence with decapitation, dismemberment, so the limbs are dismembered, post-mortem mutilation, there were --there were multiple cuts in the body, and concealment. So in terms of the actual mechanism how did she die, I'm not sure of the exact mechanism, but I didn't see any evidence of natural disease or heart attack or stroke, liver disease, or something like that

> that killed her. I didn't see any evidence of -- well, we talked about the trauma, the bruising on her buttocks and on her thighs, but I didn't see like a skull fracture or evidence of accumulation of blood inside of her head that made me think that she died as a result of a blow to the neck. I wasn't able to examine the organs, the structures of the neck, because they were skeletonized, but the post-mortem treatment of the body, the decapitation, the dismemberment, the concealment, the post-mortem mutilation led me to believe that she died as a result of some type of criminal violence. So that's why I say unspecified criminal violence with decapitation, dismemberment, post-mortem mutilation, and concealment contributing.

During the autopsy, Dr. Stokes recovered several pieces of green and red plastic from Armstrong's body. A forensic specialist testified that she recovered red and green material from the back seat and trunk of appellant's car, as well as from the carpet pieces found with Armstrong's body. Another forensic scientist testified that the green plastic recovered from Armstrong's body, the carpet, and appellant's car were consistent with samples obtained from an artificial Christmas tree found in appellant's apartment.

Dr. Elayne Pope testified that she examined several of Armstrong's bones and noted tool markings made with an edged weapon. Further forensic analysis determined that a blood stain on appellant's carpet contained Armstrong's DNA. However, testing of the large carpet stain did not result in any conclusive DNA evidence. The forensic scientist opined that cleaning agents, like those appellant purchased, and use of a rug cleaning machine could interfere with the results. DNA found in the men's underwear collected with Armstrong's body matched appellant's DNA and photographs of underwear found at appellant's residence matched the brand and style of underwear found with Armstrong's body. Finally, data extracted from appellant's cell phone showed that the phone was used to access Google Maps on May 31, 2015 around 3:00 a.m. in the area where the bicyclist found Armstrong's body.

Appellant asserts that the Commonwealth's evidence does not prove that the murder occurred in Virginia Beach. Appellant claims that because Dr. Stokes could not conclusively identify a cause of death, there was no evidence that the murder occurred at his Virginia Beach apartment. Appellant avers Chesapeake was the proper venue because that was where authorities recovered Armstrong's body.

Code § 19.2-247, however, applies only when the location of the murder is unknown. Viewed in the light most favorable to the Commonwealth, the evidence showed that green plastic material was found in Armstrong's remains, on carpet found with Armstrong's body, and in appellant's car. The green plastic material matched the artificial Christmas tree located at appellant's residence. Armstrong's blood was on the carpet in appellant's apartment. Appellant had numerous knives and swords in his residence, and he had latex gloves and trash bags matching those found with Armstrong's body. Police also found two receipts showing that appellant purchased cleaning products and rented a carpet cleaner shortly after Armstrong disappeared. This evidence was sufficient to give rise to the strong presumption that appellant murdered Armstrong in his apartment in Virginia Beach. Accordingly, the court did not err by finding Virginia Beach was the proper venue.

II. and III. Appellant argues the court erred in finding the evidence sufficient to support his conviction for second-degree murder. He contends that the Commonwealth's evidence failed to establish that he acted with malice and that Armstrong's death was criminal in nature.

"When considering on appeal the sufficiency of the evidence presented below, we 'presume the judgment of the trial court to be correct' and reverse only if the trial court's decision is 'plainly wrong or without evidence to support it.'" Kelly v. Commonwealth, 41 Va. App. 250, 257, 584 S.E.2d 444, 447 (2003) (*en banc*) (quoting Davis v. Commonwealth, 39 Va. App. 96, 99, 570 S.E.2d 875, 876-77 (2002)). Appellant asserts that Dr. Stokes could not identify the mechanism that caused Armstrong's death and could not rule out natural or non-criminal causes of death. Thus, appellant argues that malice could not be inferred from the killing itself or that the death was criminal in nature.

Viewing the evidence in the light most favorable to the Commonwealth, Whitehurst, 63 Va. App. at 133, 754 S.E.2d at 910, the evidence established that Dr. Stokes observed bruising and multiple cuts on Armstrong's body. Although he could not state the exact mechanism of death, he also stated that there was no evidence that Armstrong died of natural causes. He concluded from the decapitation, disarticulation,

dismemberment, and concealment of Armstrong's body parts that Armstrong died from "unspecified criminal violence."

"The authorities are replete with definitions of malice, but a common theme running through them is a requirement that a wrongful act be done 'willfully or purposefully.'" Vaughan v. Commonwealth, 7 Va. App. 665, 674, 376 S.E.2d 801, 806 (1989) (quoting Williamson v. Commonwealth, 180 Va. 277, 280, 23 S.E.2d 240, 241 (1942)). "Killing with malice but without premeditation and deliberation is murder in the second degree." Elliot v. Commonwealth, 30 Va. App. 430, 436, 517 S.E.2d 271, 274 (1999) (citing Perricllia v. Commonwealth, 229 Va. 85, 91, 326 S.E.2d 679, 683 (1985)).

> Malice is not confined to ill will, but includes any action flowing from a wicked or corrupt motive, done with an evil mind or wrongful intention, where the act has been attended with such circumstances as to carry in it the plain indication of a heart deliberately bent on mischief. Malice is implied from any willful, deliberate and cruel act against another.

Williams v. Commonwealth, 13 Va. App. 393, 398, 412 S.E.2d 202, 205 (1991). Further, the trier of fact is permitted to infer malice from the evidence. Vaughan, 7 Va. App. at 674, 376 S.E.2d at 806.

Although the dismemberment and mutilation occurred post-mortem, the jury could reasonably infer from these circumstances that appellant acted with malice. The evidence of the condition of Armstrong's body with multiple cuts and bruising, also proved criminal actions. Nothing indicated any disease or natural cause of death. These circumstances supported Dr. Stokes' conclusion that Armstrong died as a result of criminal violence, though he could not identify the specific mechanism. The evidence, taken in its entirety, proved that Armstrong died by a malicious act of criminal violence. Accordingly, the court did not wrongly determine there was sufficient evidence of malice and criminal agency to support the second-degree murder conviction.

IV. Appellant maintains the court erred in prohibiting the defense from presenting hearsay evidence that another person may have killed the victim.

Appellant sought to introduce the testimony of a witness who had prior email and telephone communications with Armstrong, in which Armstrong expressed her fear of her first husband. Appellant's

counsel conceded that the email communications were hearsay, but argued, however, that the telephone conversations were admissible under the excited utterance exception. Counsel also argued that the witness could testify as to any actions he took in response to what Armstrong told him on those several occasions. Despite the court asking counsel several times what the substance of the witness' testimony would be, counsel did not proffer the details of the expected testimony other than to state the witness became concerned for Armstrong's safety and that he drove to Armstrong's home to make sure she was safe.

"The admissibility of evidence is within the broad discretion of the trial court, and a ruling will not be disturbed on appeal in the absence of an abuse of discretion." Blain v. Commonwealth, 7 Va. App. 10, 16, 371 S.E.2d 838, 842 (1988).

> In Virginia, when "testimony is rejected before it is delivered, an appellate court has no basis for adjudication unless the record reflects a proper proffer." Whittaker v. Commonwealth, 217 Va. 966, 968, 234 S.E.2d 79, 81 (1977). "When an appellant claims a trial court abused its discretion in excluding evidence, we cannot competently determine error - much less reversible error - without 'a proper showing of what that testimony would have been.'" Tynes v. Commonwealth, 49 Va. App. 17, 21, 635 S.E.2d 688, 689 (2006) (citation omitted); see also Commonwealth Transp. Comm'r v. Target Corp., 274 Va. 341, 348, 650 S.E.2d 92, 96 (2007).

Ray v. Commonwealth, 55 Va. App. 647, 649-50, 688 S.E.2d 879, 880-81 (2010).

> Absent a proffer showing "harm was done," we are "forbidden to consider the question." Scott v. Commonwealth, 191 Va. 73, 78-79, 60 S.E.2d 14, 16 (1950). This is because "a proffer allows us to examine both the 'admissibility of the proposed testimony,' and whether, even if admissible, its exclusion 'prejudiced' the proffering party." Tynes, 49 Va. App. at 21, 635 S.E.2d at 689-90 (quoting Molina v. Commonwealth, 47 Va. App. 338, 368, 624 S.E.2d 83, 97 (2006)). "We can perform this examination only when the proponent proffers the testimony he expected to elicit, rather than merely his theory of the case." Id. (citation omitted). "To be sure, even when 'we are not totally in the dark concerning the nature of the evidence,' we still must 'know enough about the specifics' to be able to 'say with assurance' that the lower court committed prejudicial error." Id. at 22, 635 S.E.2d at 690 (citation omitted); see Owens v. Commonwealth, 147 Va. 624, 630, 136 S.E. 765, 767 (1927).

Id. at 650, 688 S.E.2d at 881 (footnote omitted).

Appellant failed to proffer the substance of the witness' testimony other than general statements that the witness became concerned for Armstrong's safety based on her "excited utterances" and that he followed

up by checking on her. This Court cannot determine the admissibility of Armstrong's possible excited utterances when the contents of those statements and the circumstances surrounding them are not proffered into evidence. Likewise, we cannot evaluate whether the witness' actions taken as a result of his conversations were relevant and admissible without a detailed proffer. Absent a proper proffer, this Court cannot consider this assignment of error. Accordingly, the court did not err by refusing to allow the defense witness' testimony.

V. Appellant claims the court erred in allowing the Commonwealth's witness, Dr. Stokes, to testify despite a Brady v. Maryland, 373 U.S. 83 (1963), violation by the Commonwealth. Appellant conceded that the Commonwealth provided information that Dr. Stokes was not board certified three weeks prior to trial. Appellant asserted, however, that the Commonwealth failed to disclose that Dr. Stokes had failed three times and was not eligible to retake the board examination. Appellant learned of this information at the end of the first day of trial and made his Brady motion on the third day of trial.

"There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Coley v. Commonwealth, 55 Va. App. 624, 631, 688 S.E.2d 288, 292 (2010) (quoting Strickler v. Greene, 527 U.S. 263, 281-82 (1999)). However, no Brady violation occurs where defense counsel knew about exculpatory evidence "in sufficient time to make use of [it] at trial." Read v. Virginia State Bar, 233 Va. 560, 564, 357 S.E.2d 544, 546 (1987). Cf. Moreno v. Commonwealth, 10 Va. App. 408, 419, 392 S.E.2d 836, 843 (1990) (where accused receives information in time to use it effectively at trial, and is not otherwise able to demonstrate prejudice, he has not been deprived of fair trial).

C. INVESTIGATION

Appellant learned that Dr. Stokes was not board certified three weeks prior to trial. He had ample time to investigate the circumstances of Dr. Stokes' qualifications. Learning two days before Dr. Stokes' testimony that he was not eligible to take the examination again that year did not prevent appellant from using that information at trial to discredit Dr. Stokes' testimony. Indeed, appellant cross-examined Dr. Stokes

about his qualifications and employment status based on his ineligibility to retake the board certification examination. Because he received the information in sufficient time to use it at trial, there is no Brady violation. Accordingly, the court did not err by allowing Dr. Stokes to testify.

VI. Appellant avers the court erred in finding the evidence sufficient to establish that appellant was guilty of second-degree murder.

> Whether the evidence adduced is sufficient to prove each of th[e] elements [of the offense] is a factual finding . . . . In reviewing that factual finding . . . in the light most favorable to the Commonwealth . . . the question is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In sum, if there is evidence to support the conviction, the reviewing court is not permitted to substitute its judgment, even if its view of the evidence might differ from the conclusions reached by the finder of fact at the trial.

Linnon v. Commonwealth, 287 Va. 92, 98, 752 S.E.2d 822, 825-26 (2014).

Appellant contends the circumstantial evidence did not exclude all reasonable conclusions inconsistent with guilt. Circumstantial evidence is as competent as direct evidence and "is entitled to as much weight." Finney v. Commonwealth, 277 Va. 83, 89, 671 S.E.2d 169, 173 (2009) (quoting Dowden v. Commonwealth, 260 Va. 459, 468, 536 S.E.2d 437, 441 (2000)). Here, the evidence established that Armstrong was at appellant's apartment on May 7, 2015. Her car was parked near appellant's apartment. Her dismembered body was found along the Dismal Swamp Canal Trail. Her body parts were found in a brand of trash bags that matched trash bags found in appellant's apartment. Police discovered blue latex gloves both in the swamp as well as in appellant's apartment. Appellant's underwear was found near Armstrong's body. Authorities recovered green plastic material from Armstrong's body, the carpet, and appellant's car that was the same material as an artificial Christmas tree in appellant's residence. Other personal items belonging to appellant were also found near Armstrong's body.

Further, appellant had a large collection of knives in his home and he was familiar with the muscles and bones of the human body through his employment as a massage therapist. There was a stain of Armstrong's blood on appellant's carpet. Although a larger stain on the carpet yielded no DNA evidence,

appellant had purchased cleaning products and rented a carpet cleaner after Armstrong's disappearance. Most notably, appellant's phone, taken from him when the police executed a search warrant, showed that appellant had accessed the precise location of Armstrong's body on Google Maps hours before the bicyclist discovered Armstrong's body. Circumstantial evidence "is not viewed in isolation." Muhammad v. Commonwealth, 269 Va. 451, 479, 619 S.E.2d 16, 32 (2005). "While no single piece of evidence may be sufficient, the combined force of many concurrent and related circumstances, each insufficient in itself, may lead a reasonable mind irresistibly to a conclusion." Id. (citation omitted). It was reasonable for the jury to conclude that when viewed in its entirety, the evidence excluded all reasonable hypotheses of appellant's innocence. Accordingly, the evidence was sufficient to support appellant's conviction of second-degree murder.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

The trial court shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. The Commonwealth shall recover of the appellant the costs in this Court and in the trial court.

This Court's records reflect that Ronald G. Reel, Esquire, is counsel of record for appellant in this matter.

Costs due the Commonwealth
by appellant in Court of
Appeals of Virginia:

Attorney's fee $400.00 plus costs and expenses.

A Copy,

Teste: Cynthia L. McCoy

Clerk