VIRGINIA:

In the Court of Appeals of Virginia on **Wednesday** *the* **28th** *day of* **November, 2012**.

Eric Dee Abshire, Appellant,

against Record No. 0422-12-2
Circuit Court No. CR11000298-00

Commonwealth of Virginia, Appellee.

From the Circuit Court of Orange County

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. and II. A jury convicted appellant of first-degree murder, and he argues the trial court erred in denying his motion to set aside the verdict because the evidence was insufficient to prove he was responsible for the injuries that caused the victim's death. He also argues the evidence failed to exclude the reasonable hypothesis of innocence that the victim was struck by a car driven by an unknown individual in a hit-and-run accident.

"Circumstantial evidence is as competent and is entitled to as much weight as direct evidence, provided it is sufficiently convincing to exclude every reasonable hypothesis except that of guilt." Coleman v. Commonwealth, 226 Va. 31, 53, 307 S.E.2d 864, 876 (1983).

The alleged conflict in the testimony of experts was a matter for the jury to resolve. Opanowich v. Commonwealth, 196 Va. 342, 354, 83 S.E.2d 432, 440 (1954).

"The credibility of the witnesses and the weight accorded the evidence are matters solely for the fact finder who has the opportunity to see and hear that evidence as it is presented." Sandoval v. Commonwealth, 20 Va. App. 133, 138, 455 S.E.2d 730, 732 (1995).

"On review, this Court does not substitute its judgment for that of the trier of fact. Instead, the jury's verdict will not be set aside unless it appears that it is plainly wrong or without supporting evidence." Canipe v. Commonwealth, 25 Va. App. 629, 644, 491 S.E.2d 747, 754 (1997).

"On appeal, 'we review the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom.'" Archer v. Commonwealth, 26 Va. App. 1, 11, 492 S.E.2d 826, 831 (1997) (quoting Martin v. Commonwealth, 4 Va. App. 438, 443, 358 S.E.2d 415, 418 (1987)). So viewed, the evidence proved that at 1:57 a.m. on November 3, 2006, the emergency call center received a call regarding an incident on Taylorsville Road in a rural area of the county. Amber Lamb made the call at the request of appellant. Appellant went to Lamb's residence and asked her to make the call. Lamb noticed that appellant was wearing a leather motorcycle jacket.

Robert Shifflett, Jr., a member of the volunteer fire department, lived on Taylorsville Road and he heard the call on his home scanner. Shifflett immediately drove to the area, and he saw appellant crouched over a woman's body in the road. The woman was later identified as Justine Abshire, appellant's wife of five months. Appellant was wearing a jacket, and a motorcycle was nearby with its headlight on. Shifflett checked the victim and noticed that she was cold to the touch. Greg Lawson, the captain of the volunteer fire department, arrived next, which was five to seven minutes after the dispatch. Lawson noticed that the victim was cold to touch and was ashy gray.

Trooper Benjamin Hobbs responded to the scene and noticed there were large gashes in the victim's head, but very little blood. Hobbs noticed there were no pieces of vehicle debris, no skid marks, and no evidence of a vehicle being involved in a hit-and-run. Hobbs noticed some drag marks on the road between the victim's car and the victim's body. Hobbs found a working cell phone near the victim. Hobbs noticed two earrings on the road near the body and one shoe several feet away. Due to the lack of debris in the road, Hobbs called Sergeant Les Tyler, a crash team reconstruction team leader. Tyler testified the placement of the body, the earrings, and shoe was not consistent with being struck by a vehicle while standing.

According to Hobbs, appellant repeatedly asked for the victim's cell phone, and he gave it to him, but requested it back after approximately fifteen minutes because the phone might be evidence. Appellant told Hobbs that the victim called him at 1:20 a.m. and said that her vehicle had broken down and she asked him to come and get her. Appellant told Hobbs that he drove to the area on his motorcycle, he arrived at approximately 1:40 a.m., he found the victim on the road, he went to a nearby house, and the individual called 911. The location of the victim's body was five to seven minutes from appellant's house.

The next day, two special agents with the state police interviewed appellant. At the time, appellant was not a suspect. Appellant stated that the victim had excellent credit, that there were no problems with their marriage, and she had a life insurance policy through her job. Appellant stated he arrived home at approximately 11:30 p.m. or midnight and noticed the victim's eyes were puffy due to allergies. Appellant stated he had been at the hospital in Charlottesville visiting his mother, stopped at a storage unit to get his motorcycle, and went for a ride to clear his head. Appellant stated the victim asked about his mother and he told her he did not want to talk about his mother. Appellant told the victim he had gone for a motorcycle ride to clear his head, and the victim said that maybe she needed to take a ride by herself. Appellant stated the victim called him at 1:18 a.m., said that her car stalled, and asked him to come and get her. Appellant stated when he arrived, he saw the victim's body in the road, he sat with her for a while, and then thought about getting help. Appellant stated he did not use his cell phone to call for help because the phone was in the pocket of his jacket and he had placed the jacket over her body.

Appellant's cell phone records showed 157 calls were made on November 2, 2006, with 132 calls making a connection. There were two periods when no calls were made, which were between 10:04 p.m. and 11:23 p.m. and between 12:08 a.m. and 1:19 a.m. The records showed that appellant's cell phone accessed a cell tower in Ruckersville at 10:04 p.m. and not a cell tower near the hospital where his mother was a patient. Appellant's brother testified he saw appellant leaving a gas station in Ruckersville at approximately 10:00 p.m. and heading in the direction of his home. Allison Crawford, the mother of appellant's children, testified appellant called at approximately 11:30 p.m. on November 2, 2006, and they talked until

approximately midnight. During the conversation, appellant asked if they could renew their relationship. Crawford declined, stating that he was married, and appellant told her that the marriage was a mistake.

Witnesses testified that the victim's car was approximately 600 feet from her body, the doors were unlocked, the key was in the ignition, a heavy winter jacket was in the back seat despite the fact that the outside temperature was less than thirty degrees, and an open pocketbook was on the front passenger seat. Hobbs testified the car's engine started right up, he put the car in gear and the car moved forward and in reverse. A technician at a car dealership examined the car's computer and found no evidence of the car having stalled or failing to start.

Steven Swartz, the victim's father, reviewed her financial status at the time of her death, and he became aware of a number of insurance policies that benefited appellant. Swartz testified at the time of the victim's death, she was insolvent, she was maxed out on her credit cards, five checks had bounced, and she made a recent withdrawal from her retirement account. Individuals representing insurance companies testified about insurance policies and the benefit to appellant if the victim's death was from a hit-and-run accident. Evidence was presented regarding a civil lawsuit where appellant hoped to collect a financial judgment. Evidence was presented showing that appellant forged the victim's signature concerning an insurance claim on appellant's dump truck.

The Commonwealth presented testimony from appellant's friend where appellant stated that his marriage had been a mistake and he missed Crawford. On November 3, 2006, appellant also showed the friend several partially nude photographs of women and joked that the victim's family would not want to see the photographs. The Commonwealth presented evidence that appellant disappeared the morning after his wedding and he did not appear for family gatherings after the wedding.

The defense presented evidence that a resident of the road heard vehicles, including a pickup truck, in the vicinity of the victim's body at approximately midnight and at approximately 1:00 a.m.

Three medical experts testified extensively regarding the results of the autopsy. Dr. Todd Luckosevic testified in the Commonwealth's case-in-chief, Dr. Jonathan Arden testified for the defense, and Dr. Frances

Field testified for the Commonwealth in rebuttal. All three experts agreed that the victim died from blunt force trauma to the head, chest, abdomen, pelvis, and extremities. The fatal injuries were too severe to have been caused by human hands and were most likely the result of an impact with an automobile and the victim was alive when the fatal wounds were inflicted. The wound to the victim's head was not fatal.
Dr. Luckosevic testified the overall pattern of injuries was not consistent with being hit by a vehicle while standing. Dr. Arden testified the victim could have been struck while standing if the vehicle had a high bumper. Dr. Arden testified the lack of blood at the scene could be explained if the victim was hit by a high bumper and propelled through the air to strike her head, thus, fracturing her spinal column and dying without blood loss. Dr. Field testified there was no evidence of a spinal column fracture, the victim's head and facial wounds would have bled extensively, and a body still loses blood after death.

In denying appellant's motion to set aside the verdict, the trial judge stated that he reviewed the evidence. The trial judge stated evidence showed appellant was the last person to see the victim alive, he was the first person to see her dead, and he was the only person on the road when the victim was found. There was evidence of marital problems, financial problems, and appellant would gain financially with the victim's death. There was also evidence of staging on the roadway, and there was no evidence the victim's car stalled on the roadway. The trial judge found that the medical evidence regarding the victim's injuries showed the injuries were consistent with being run over by a vehicle while not standing. The trial judge found that the jury evaluated the defense evidence and necessarily rejected appellant's defense that he did not run over the victim and that she could have been killed by an unknown hit-and-run driver. The trial judge found that there was sufficient evidence supporting the jury's verdict.

The jury heard the testimony of the witnesses and observed their demeanor. During appellant's ten-day trial, the jury was presented with circumstantial evidence regarding the victim's death. The jury necessarily evaluated the evidence and rejected appellant's defense that an unknown hit-and-run driver struck and killed the victim and he did not cause the victim's death. It was for the jury to evaluate the conflict in the testimony of the medical experts, which it resolved in favor of the Commonwealth. It was also for the jury to

determine whether appellant's hypothesis of innocence was credible, and the jury determined it was not credible. There was sufficient evidence supporting the jury's verdict. The Commonwealth's evidence was competent, was not inherently incredible, and was sufficient to prove beyond a reasonable doubt that appellant was guilty of first-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.

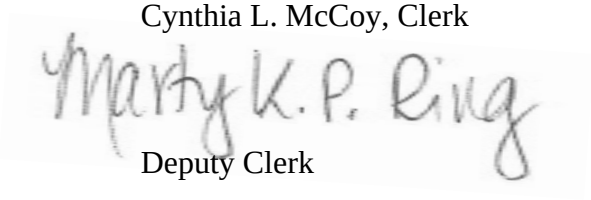
The Commonwealth shall recover of the appellant the costs in the trial court.

This Court's records reflect that David B. Hargett, Esquire, is counsel of record for appellant in this matter.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: 

Deputy Clerk