IN THE

COURT OF APPEALS

OF

VIRGINIA

RECORD NO. 1319-23-4

LIAM WALLACE BATES,

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee.

OPENING BRIEF

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LIAM WALLACE BATES,

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v.

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Appellee.

OPENING BRIEF

Appellant, Liam Bates, Defendant in the Fairfax County Circuit Court, is aggrieved by his convictions for attempted sodomy and sodomy after a jury trial held from January 30, 2023 to February 7, 2023 and sentencing hearing held on July 28, 2023.

STATEMENT OF MATERIAL PROCEEDINGS

On June 21, 2022, Mr. Bates, then 19-years-old, was indicted on one count of rape in violation of Va. Code § 18.2-61 through mental incapacity or physical helplessness and one count of oral sodomy in violation of Va.

Code § 18.2-67.1 through mental incapacity or physical helplessness. The complainant in both counts, W.M., is an adult male. R. 37.

On January 20, 2023, the Commonwealth moved to amend Count I of the indictment, without objection, to anal sodomy in violation of Va. Code § 18.2-67.1 because the prosecutor asserted that under Virginia law rape is impossible between two "members of the male sex." R. 53-54, 58.

On January 20, 2023, Mr. Bates, by counsel, filed his Designation of Expert Witnesses that listed Dr. Elie Aoun, M.D., a forensic psychiatrist specializing in treatment of LGBTQ+ people, who would provide testimony as to socio-emotional difficulties experienced by LGBTQ+ people regarding rejection and "about the fears that are typical [of LGBTQ+ people] and the behaviors associated with those fears when confronted with the possibility of discovery (i.e. being forced out of the closet)." R. 56-57.

On January 25, 2023, Mr. Bates, by counsel, provided the Commonwealth his witness list, which included a male witness, D.A., who is gay and dated W.M. in middle school and another male witness who also had a relationship with W.M. in middle school. R. 64-66, R. 865-67, R. 1294-98.

On January 30, 2023, the day of trial, the Commonwealth filed a Motion in Limine to Exclude Defense Evidence and Testimony Violative of the Provisions of Va. Code § 18.2-67.7 (Rape Shield), alleging that Dr. Aoun and the two male witnesses that dated W.M. in middle school, who would provide testimony concerning W.M.'s sexual orientation, should be barred by the Rape Shield statute. R. 64-66. The trial court ruled the defense evidence was subject to the Rape Shield statute and prohibited defense counsel from referring to it in opening statements or cross-examining witnesses as to W.M.'s sexual orientation unless the Commonwealth or its witnesses opened the door by adducing evidence of W.M.'s heterosexuality. However, the trial court did not rule on the ultimate admissibility of the witnesses' testimony. R. 846-882.

On January 30, 2023, Mr. Bates proceeded to trial by jury.

On February 1, 2023, the trial court held a Rape Shield hearing and heard D.A.'s testimony outside the jury's presence. D.A., a gay man, testified that he dated D.A. in middle school, that W.M. publicly identified as a pansexual in middle school, and that W.M. had also dated a trans man before and after the person's transition in middle school. R. 1295. The trial court granted the Commonwealth's motion in limine upon finding that

D.A.'s testimony was not relevant or probative and that other prosecution evidence had not opened the door to Mr. Bates's evidence. R. 1272-1317.

On February 7, 2023, the jury returned verdicts of guilty.

On July 14, 2023, Mr. Bates moved, by counsel, to set aside the verdict, which motion was denied in a lengthy memorandum opinion and order. R. 385-453.

On July 28, 2023, the trial court sentenced Mr. Bates to 10 years' incarceration with all but 5 years suspended on Count I, and to 15 years with all but 5 years and 7 months suspended incarceration on Count II, to run consecutively for a total active sentence of 10 years and 7 months. The trial court conditioned the suspended sentences on good behavior and compliance with supervised probation for ten years. In addition to other strictures, including sex offender treatment, the trial court ordered that Mr. Bates have no unsupervised contact with minor children except as approved by probation. R. 521-23.

The Appellant timely noted his appeal. This Opening Brief follows.

ASSIGNMENTS OF ERROR

I. The trial court erred in excluding D.A.'s testimony of W.M.'s same sex attraction because such evidence demonstrated that W.M. had a motive to fabricate the allegations against Appellant, which is admissible under the Rape Shield statute, Va. Code § 18.2-67.7(B), such evidence rebutted evidence of the complainant witness's prior sexual conduct introduced by the prosecution, which is admissible under the Rape Shield statute, Va. Code § 18.2-67.7(A)(3) and precluding such evidence deprived the Appellant of his constitutional rights to cross-examine and confront the witnesses against him in violation of the Sixth Amendment and to put forth a complete defense in violation of the Due Process Clause of the Fourteenth Amendment. R. 340-65; 1946-47.

II. The trial court erred in finding that the Alex Gerber Text Message Exhibit did not open the door to evidence of W.M.'s same sex attraction, depriving the Appellant of his statutory right to admit evidence regarding W.M.'s motive to fabricate the allegations against Appellant, Va. Code § 18.2-67.7(B), and his constitutional rights to cross-examine and confront the witnesses against him in violation of the Sixth Amendment and to put forth a complete defense in violation of the Due Process Clause of the Fourteenth Amendment where: 1) the exhibit satisfied every element the trial court stated needed to be met in order for the door to be opened to evidence of "homosexuality", 2) the Commonwealth entered the exhibit through its own witness, 3) the text message stated that W.M. was heterosexual, and 4) further stated that W.M.'s heterosexuality was a reason to doubt that he consented to sexual activity. R. 340-65.

III. The trial court erred in granting the Commonwealth's requested Attempted Sodomy instruction where Attempted Sodomy is not a lesser-included offense of Sodomy because Attempted Sodomy requires a higher *mens rea* element than that which is required to prove the completed crime of Sodomy and

violated the Appellant's constitutional and statutory right under Va. Code § 19.2-217 to a Grand Jury. R. 321-27.

IV. The trial court erred in denying the motion to set aside the verdict as to the sufficiency of the evidence for the Attempted Sodomy count because no rational trier of fact could have found beyond a reasonable doubt from the evidence that Appellant harbored the specific intent to penetrate W.M.'s anus. R. 239-242.

STATEMENT OF FACTS

On January 30, 2023, Liam Bates pleaded not guilty and was tried by a jury on one count of Anal Sodomy in violation of Va. Code § 18.2-67.1 and one count of Oral Sodomy in violation of Va. Code § 18.2-67.1 against the complainant, W.M., who is male. That same day, prior to trial, the Commonwealth moved *in limine* to exclude defense witnesses as violative of the Rape Shield statute, Va. Code § 18.2-67.7. R. 64-66. In the motion, the Commonwealth alleged that through its discussions with the complainant, W.M., it had determined that two male witnesses on the Defense witness list would be called to testify regarding W.M.'s sexual orientation. The Commonwealth proffered in the motion:

> 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.

R. 65.

Additionally, the Commonwealth proffered to the court in oral argument:

> One of the things that I was able to verify is the two witnesses, lay witness that are on the Defense witness list, there are two that according to my understanding 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.

R. 859.

The Commonwealth also sought to exclude the testimony of Appellant's proposed expert, Dr. Elie Aoun, a forensic psychiatrist specializing in treatment of LGBTQ+ people. Dr. Aoun would provide testimony "about the fears that are typical [of LGBTQ+ people] and the behaviors associated with those fears when confronted with the possibility of discovery (i.e. being forced out of the closet)." R. 56-57. The Commonwealth proffered to the trial court that the Defense wanted to introduce evidence of W.M.'s prior relationships and related expert testimony because "the theory of the Defense is that this was consensual and [W.M. is] actually a closet homosexual and he's created this scenario that we are trying this case all the way through in order to protect his ability to stay in the closet." R. 860.

The Defense, in response to questions from the trial court, proffered that the two lay witnesses had dated W.M. in middle school. R. 865-67. The Defense also argued that the proposed testimony was not subject to the Rape Shield statute because it did not concern actual sexual acts. R. 856-58.

Without holding a Rape Shield hearing, the trial court ruled that the defense evidence was subject to the Rape Shield statute, prohibited the Defense from referencing this evidence in opening statement, and prohibited the Defense from cross-examining the Commonwealth's witnesses on W.M.'s prior same-sex relationships unless the Commonwealth opened the door by introducing evidence that W.M. was heterosexual. R. 875-80. The trial court would hold a Rape Shield hearing later in the trial after the Commonwealth's case-in-chief. R. 1272.

The Commonwealth's Case-In-Chief

At trial, the Commonwealth alleged that Mr. Bates accomplished the sodomy charges against W.M. through his physical helplessness and/or mental incapacity due to W.M.'s intoxication. The evidence established that on December 31, 2021, Mr. Bates, W.M. and several other friends attended a New Year's Eve party at a friend's home. Mr. Bates was the designated driver for the night. Everyone agreed that W.M. consumed a number of

alcoholic beverages throughout the evening and that he became intoxicated. As the party wound down, W.M. went to sleep on the porch around midnight for a while before getting into Mr. Bates's car, with Robert Hochstetter, to be driven home by Mr. Bates. R. 753-54.

Robert Hochstetter testified that he consumed 5-8 alcoholic drinks prior to midnight and that he possibly smoked marijuana in the car on his way to the party. R. 750:1-10; R. 765:16-20. The car ride home appears to have been a continuation of the lively atmosphere and ribaldry at the party. Music was playing and there was texting and calling of friends.[1] R. 1428, 1618-20. Mr. Hochstetter testified that he was pretty drunk and agreed that he was drunk during the car ride home. R. 767:10-12; 773:6-7. On cross-examination, Mr. Hochstetter testified that, during the car ride, W.M. was speaking to him but Mr. Hochstetter was mostly silent. R. 773:14-19. On re-direct, he stated that W.M. was speaking, but incoherent. R. 791:2-11. When they arrived at Mr. Hochstetter's home, Mr. Hochstetter went inside and contacted Nolan Coughlin, who lived nearby, to ask if he wanted to go for a walk. R. 758; 1029:14-16.

[1] Alex Gerber, a friend, agreed that his phone was blowing up from texts and calls from the friends trying to get him to come out. R. 1618-20.

When Mr. Hochstetter went to meet Mr. Coughlin, he noticed that Mr. Bates's car was still parked in his driveway. Upon approaching the car, Mr. Hochstetter could see that there were people inside, but he could not recall whether there was a light on inside the vehicle. R. 778:1-3. It was close to 3:00 a.m., dark outside, and the car had tinted windows. R. 779:1-17. He testified that he saw Mr. Bates on top of W.M. R. 761:2-4. He could not tell whether W.M. was on his back or on his side. R. 782:19-20. He testified that W.M.'s head was facing the passenger side, but that he may have previously said W.M.'s head was facing the driver's side. R. 783:1-18. He testified that he did not see Mr. Bates doing anything that he would describe as "thrusting" but "only observed minor movements." R. 761: 9-15; 788: 16-20. He believed that he watched for approximately ten seconds before either he or Mr. Coughlin knocked on the window. R. 782:9-14; 787:2-4. When they did, Mr. Bates opened the door,[2] exited the car and asked, "Are you

[2] Mr. Hochstetter testified on direct that "I was able to see [Mr. Bates] over [W.M.] in a position over him in the back seat and I believe that was when we opened the door." R. 761:2-4. On cross, Mr. Hochstetter stated that Mr. Bates opened the door. R. 785:20-22, 787:15-17. Mr. Hochstetter could not even confirm which back door Mr. Bates opened. R. 787:18-20. Mr. Coughlin stated Mr. Bates opened the driver's side door. R. 997:19-21.

okay with this?" R. 763:7-13. Mr. Bates got into the driver's seat of the car and drove off. R. 763:21-22.[3]

On direct examination, Nolan Coughlin testified that, prior to midnight, he had approximately four glasses of wine and champagne rosé. R. 992:1-12. He further testified that around 2:30 a.m. that morning, he approached the car with Mr. Hochstetter and saw Mr. Bates in the backseat of the car on top of W.M. R. 996:4-9. However, on cross examination, Mr. Coughlin said "I can remember identifying that Liam was in the car, but it is difficult for me to remember identifying him as the top person at this moment." He repeated that "I remember identifying Liam and Will in the car, but it's hard for me to remember when I identified them who was where . . . ." R. 1069:1-14. He also testified that although he said in a controlled call with Mr. Bates that he saw Mr. Bates "thrusting," he did not have an actual memory of Mr. Bates thrusting. R. 1005:4-16. Mr. Coughlin testified that, initially, he thought that any sexual activity was consensual. R. 1027:12-14.

[3] Mr. Hochstetter claimed that Mr. Bates "appeared to be quite panicked" and quickly drove off. R. 763:27. Mr. Coughlin claimed Mr. Bates seemed distressed and said nothing about him driving off quickly on direct examination. R. 998:11, 998:18-19.

W.M. testified that he did not "particularly" remember the events that occurred from when he left the party to when he woke up the next morning. R. 802:19-22; 803:1-2. Upon waking up, he testified that he was experiencing "significant pain in and around" his anus. R. 803:9-13. He went to his computer and noticed that he had a message from Mr. Coughlin, alleging that W.M. may have been sexually assaulted by Mr. Bates. R. 928:2-4.[4]

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[4] The Commonwealth interceded during Defense counsel's cross examination to limit any testimony about W.M.'s sexuality, thereby keeping the "door shut" to Mr. Bates's proffered testimony regarding W.M.'s same-gender attraction. Defense counsel asked W.M. a series of questions about whether W.M. remembered initiating the sexual encounter with the Defendant, including telling the Defendant that he was brave to come out, kissing him, and taking his own shirt off; W.M. denied any recollection of those actions. R. 956-57. Defense counsel then asked "if you don't recall that you did them, is it fair to say that you could have done them?" W.M. replied that "I wouldn't go that far, no." R. 957. Defense counsel then asked: "Why not?" W.M. began answering: "I was not attracted to --" R. 957. The Commonwealth, seeing W.M. might open the door, interjected and asked to approach the bench, where the Commonwealth complained that "we are dangerously close to her [defense counsel] effectively back-dooring the possibility of getting witnesses this Court has said would not be relevant." R. 957. The Court determined there was nothing improper about Defense counsel's question and noted that the court would need to hear W.M.'s answer before making any determination as to whether the door would be opened. R. 957-63. Before proceeding with cross examination, the court took a recess and permitted W.M. to speak with the Commonwealth. R. 963-65. When Defense counsel then renewed the series of questions, W.M.—now on notice that his initial interrupted answer ran a risk of opening the

Lynn Mayer, W.M.'s mother, testified that W.M. arrived home in the early morning hours. She stated that when he opened the door, he was holding a case of beer.[5] She claimed that he was disheveled, incoherent, and cans began dropping out of his case of beer. Ms. Mayer testified that W.M. was completely unable to walk on his own such that he almost fell multiple times and ended up folding over the top of a shop vac in the kitchen. She helped him upstairs to his bedroom and then returned downstairs to pick up the beer cans, heard a noise, and returned upstairs to find that W.M. had walked out of his bedroom, which was inconsistent with her testimony that he could not walk on his own. She claimed that she helped him to the bathroom, which he entered and exited by himself. Ms. Mayer noted W.M.'s hoodie was on inside out and asked him to remove it. W.M. removed his hoodie and was not wearing a shirt underneath. She testified that he told her that he did not know what happened to his shirt and then said: "Where's my

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door—changed his testimony and stated it was "possible" that he did those things, rather than denying them based on who he was attracted to. Compare R. 956-57 with R. 965-68.

[5] On W.M.'s controlled call with Mr. Bates, Mr. Bates stated that he sent W.M. into his home with a bag of beers and he didn't know what happened to them. W.M. stated that "Oh, yeah, I handled that," arguably inconsistent with his claim that he lacked any memory of the night after he left the party. Commonwealth's Exhibit 3, R. 2087-88 at minute 4:54-5:02.

shirt?" Ms. Mayer asked W.M. for his phone and he gave it to her. R. 969-974.

Alex Gerber Text Message and SANE Exam

In its case-in-chief, the Commonwealth admitted into evidence a text conversation between Mr. Bates and Alex Gerber, another friend. R. 1094:12-13. In the exchange, Mr. Gerber described an earlier encounter between Mr. Bates and W.M in which W.M. had purportedly rebuffed Mr. Bates's advances. In the conversation, Mr. Gerber says, "[Y]ou have a history of both being gay and being interested in [W.M.]/[W.M] has neither of those things…" to explain why he believed Mr. Bates sexually assaulted W.M. Commonwealth Exhibit 6, R. 2092-94. Defense counsel argued to the trial court that the Commonwealth opened the door to evidence regarding W.M.'s sexuality by introducing this exhibit. R. 1095:7. The court withheld its ruling until the later Rape Shield hearing. The Commonwealth also admitted into evidence the SANE report which contained a question ("Question 10") showing that W.M. indicated his last consensual sexual intercourse to be "vaginal." Commonwealth's Exhibit 8, R. 2096; R. 1112-13.

Rape Shield Hearing

After the Commonwealth's case-in-chief, the trial court held a Rape Shield hearing on February 1, 2023. At the hearing, the Defense argued the Alex Gerber text message opened the door to rebuttal evidence as to W.M.'s sexuality. The Defense also offered testimony of D.A., a male, who testified that W.M. publicly self-identified in middle school as "pansexual," meaning that he was open to having romantic relationships with people regardless of their gender. R. 1295-96. D.A. testified that he and W.M. dated in seventh grade when they were both 12-years-old. R. 1295-96. He said that W.M. was physically affectionate with him in school. W.M. would rest his head on D.A.'s shoulder during class and the two would cuddle. D.A. also testified that W.M. sent him romantic messages on Instagram, where they communicated every day. After dating for two weeks, D.A. testified that he received a text message from W.M. ending the relationship. R. 1296. When D.A. asked him why, W.M. said because W.M.'s parents found out about the relationship and "[W.M.] had to end it." R. 1296. D.A. also testified that W.M., before dating D.A., "dated someone who came out as a trans man while they dated and then continued dating them." R. 1295.

The Defense had also previously provided the court with the expert designation of its witness, Dr. Elie Aoun, a forensic psychiatrist specializing in psychiatric treatment of people who are LGBTQ+, who would have testified, in part, "about the fears that are typical [of LGBTQ+ people], and the behaviors associated with those fears when confronted with the possibility of discovery (i.e. being forced out of the closet). R. 1278:12; Defense Witness Expert Designation, R. 56-57.

The court ultimately determined that the Commonwealth had not opened the door by introducing the Alex Gerber Text Exhibit, even though it was evidence that W.M. was heterosexual, reasoning that W.M. "did not testify that he is heterosexual and doesn't engage in any kind of gay Conduct." R. 1309. Contradictorily, the trial court had previously ruled, prior to trial, that "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. R. 879 (emphasis added). The trial court also held that D.A.'s testimony regarding his relationship with W.M. was

irrelevant. R. 1309. In light of this ruling, neither D.A. nor Dr. Aoun, who were present for trial, were called as witnesses.

The Appellant's Case-In-Chief

Mr. Bates testified that before leaving the party, W.M. took a nap for one hour and fifteen minutes. R. 1425:9-19. He testified that, during the drive home, W.M. was inquiring about what happened while he was asleep and that W.M. and Mr. Hochstetter were joking about the music playing in the car. R. 1428:2-8. After dropping Mr. Hochstetter off, Mr. Bates testified that W.M. was not ready to go home, so they talked in the car. R. 1428:15-19. Eventually, W.M. began to compliment and kiss Mr. Bates. R. 1431-33. W.M. requested oral sex from Mr. Bates and when he declined, W.M. grabbed Mr. Bates by his neck and pushed his head towards his penis. R. 1434. Mr. Bates performed oral sex on him briefly, but then requested that they stop and return to kissing. R. 1434. They removed some of their clothing, W.M. climbed on top of Mr. Bates and that is when they were interrupted by Mr. Hochstetter and Mr. Coughlin. R. 1439-40. Mr. Bates testified that he had a bruise on his neck from when W.M. grabbed him that

he showed to his friend, Kelly Rappaport, and that he told her what happened. R. 1452-53.

Ms. Rappaport testified that she observed a bruise on Mr. Bates's neck within days of the party, that it did not appear to be a hickey and that Mr. Bates told her that he got it from a friend over New Year's when the friend pushed Mr. Bates's neck towards the ground. R. 1371; 1508.

Contested Jury Instruction

At the close of evidence, the Commonwealth offered an Attempted Anal Sodomy jury instruction, which was granted over the Defense's objections and after lengthy argument. R. 1680-1696; 1708-1718. Defense counsel objected on grounds of insufficient evidence to support the instruction.

Defense counsel further argued: "Your Honor, I think there is either a sodomy or there is not a sodomy. I don't think - it feels at this juncture - it feels *at this juncture the Commonwealth is trying to move the goalpost* . . . ." R. 1686 (emphasis added). Surprised by the Commonwealth's proposed instruction, Defense counsel argued: "The fact of the matter is that the evidence the Commonwealth put forward requires a defense against forcible anal sodomy, which is what we are here to discuss. This is just an eleventh

hour issue because the Commonwealth is insecure in its case." R. 1692. Defense counsel provided the trial court with a copy of Sharpe v. Commonwealth in support of her argument. No. 0148-92-2, 1993 WL 302476 (Va. Ct. App. Aug. 10, 1993) (unpublished) R. 1713. As she provided the case to the court, counsel explained, "So the case itself is about lesser included and what can be contemplated as a lesser included instruction. But I wanted to spotlight, specifically, the insert in the example of what constitutes an attempt." R. 1713. In Sharpe, this Court considered whether sexual battery is a lesser-included offense of attempted rape and determined that it was not because attempted rape requires no touching and sexual battery does not require the specific intent to rape. Sharpe, No. 0148-92-2 *2, 1993 WL 302476 (Va. Ct. App. Aug. 10, 1993).

The trial court questioned whether attempted sodomy was a lesser included offense to sodomy. R. 1709:11-12. In response, the Commonwealth affirmatively stated that attempted sodomy was a lesser included offense under Blockburger. R. 1709:13-16.

Closing Arguments

During closing argument, the Commonwealth used the Alex Gerber Text Exhibit and W.M.'s response to Question 10 of the SANE report

together to explicitly argue to the jury that W.M. is heterosexual, and therefore, that he did not consent to homosexual activity with Mr. Bates. In a bench conference regarding Question 10 on the SANE Report, which occurred during trial, the Commonwealth represented to the court that it did not believe that the exhibit affected the court's Rape Shield ruling. R. 1773:3-12, 1824-25. Further, in an earlier bench conference regarding the Alex Gerber Text Message Exhibit, the Commonwealth directly stated to the court that it was "surprised" that the exhibit had not been redacted and that its purpose for admitting the exhibit was to lay the foundation for W.M.'s testimony regarding a separate incident. R. 1610. Yet, during its closing argument, the Commonwealth used both exhibits to explicitly argue to the jury that W.M. did not consent to sexual activity with Mr. Bates because W.M. is heterosexual.

In its initial closing, the Commonwealth argued:

> Do you know what else [Mr. Bates] 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 all 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.*

R. 1773:3-12 (emphasis added). Here, the Commonwealth specifically told the jury that W.M. was not coming out (of the closet) because W.M. had "no place to come out from." If W.M. has no closet to come out from, then he is either heterosexual or openly LGBTQ+. In its rebuttal closing, the Commonwealth further emphasized that it was the former rather than the latter:

> 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 Will isn't (inaudible). 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 were [sic] it says no. Sure enough, maybe he didn't. Fine. The DNA expert explains. We know there's no DNA there. But what's that on number 10 talking about [W.M.]'s history. [W.M.] doesn't have a history.

R. 1824-25.

The Commonwealth continued its argument that W.M. is heterosexual by specifically noting the fact that the Defense did not read the Alex Gerber Text Exhibit in its entirety. In response to this omission, the Commonwealth

continued reading by saying, "[W.M.] has neither of those things," referring to W.M. not being attracted to Mr. Bates and not having a "history" of being gay. R. 1825. Then, the Commonwealth asked the jury, "How do we know [W.M.] is not (inaudible)?"[6] R. 1825.

Next, the Commonwealth directly challenged the jury regarding W.M.'s sexuality by instructing them, "Don't believe me[?]," which impermissibly suggested to the jury that the Commonwealth had personal knowledge of W.M.'s heterosexuality. The Commonwealth continued, "Don't believe Alex. Let's go to the SANE exam. Look at the SANE report." R. 1825. Question 10 of the SANE report showed W.M.'s last sexual intercourse to be "vaginal." R. 2096. The Commonwealth purposefully selected the word "history", first used in the Alex Gerber Text Exhibit, to argue that Question 10 was "talking about history" and "[W.M.] doesn't have a history", meaning that W.M. is heterosexual.

Mr. Bates invited none of the Commonwealth's arguments because Defense counsel neither stated nor suggested during closing argument that W.M. had a history of same gender attraction. R. 1788-1817. Because of the

[6] It is Appellant's position that the Commonwealth said "gay" and so asserted in his Objections to Transcripts filed with the trial court. R. 532. It does not appear that the trial court ruled on Appellant's objections.

stage of the proceedings, Mr. Bates had no ability to offer any contrary evidence because the trial court had excluded D.A. and other testimony concerning W.M.'s pansexuality.

Jury Verdict and Sentencing

After deliberations, the jury returned guilty verdicts as to Attempted Anal Sodomy and Oral Sodomy. R. 1845. The trial court imposed a total sentence of 25 years on the charges with all but 10 years and 7 months suspended conditioned on good behavior for 10 years, supervised probation for 10 years, sex offender treatment, no contact with W.M. or his family, and no unsupervised contact with minors without prior approval from probation. R. 521-23.

ARGUMENT

I. The trial court erred in excluding D.A.'s testimony of W.M.'s same sex attraction because such evidence demonstrated that W.M. had a motive to fabricate the allegations against Appellant, which is admissible under the Rape Shield statute, Va. Code § 18.2-67.7(B), such evidence rebutted evidence of the complainant witness's prior sexual conduct introduced by the prosecution, which is admissible under the Rape Shield statute, Va. Code § 18.2-67.7(A)(3), and precluding such evidence deprived the Appellant of his constitutional rights to cross-examine and confront the witnesses against him in violation of the Sixth Amendment and to put forth a complete defense in violation of the Due Process Clause of the Fourteenth Amendment.

Standard of Review

This Court reviews evidentiary issues, including exclusion of evidence pursuant to the Rape Shield statute, for abuse of discretion. Howard v. Commonwealth, 74 Va. App. 739, 753 (2022); Ortiz v. Commonwealth, 276 Va. 705, 712, 717-20 (2008) (applying abuse of discretion standard to review trial court's exclusion of evidence under the Rape Shield statute). "[T]he abuse of discretion standard requires a reviewing court to show enough deference to a primary decisionmaker's judgment that the court does not reverse merely because it would have come to a different result in the first instance." Lawlor v. Commonwealth, 285 Va. 187, 212 (2013). This deference does not extend when a trial court fails to consider "a relevant factor that should have been given significant weight" or considers an "irrelevant or improper factor," among other errors. Id. at 213 (internal quotation marks and citation omitted).

Argument

At trial, the central issue was whether W.M. was mentally incapacitated or physically helpless. The Defense theory was that W.M. was neither, but that he was attracted to males, did not want this information to be publicly known, consensually engaged in sexual activity with Mr. Bates

and was untruthful regarding his memory loss after being caught. Mr. Bates testified that W.M. initiated and consented to sexual conduct, and W.M. claimed that he did not remember. The Defense argued that W.M. was the instigator of the physical contact between two longtime friends, but was precluded from offering evidence or effectively cross-examining W.M. about his motive to fabricate these damning allegations. The trial court incorrectly assumed that Mr. Bates's proffered evidence of W.M.'s motive to fabricate was part of an "alternative theory," R. 429, ignoring entirely that this evidence was critical to supporting Mr. Bates's primary—and sole—defense regarding consent, depriving him of his statutory and constitutional rights to cross examine witnesses and present a complete defense. This error left Mr. Bates and his counsel unable to answer for the jury the central question raised by their defense theory: if W.M. came onto Mr. Bates, why did he lie about it? The trial court's erroneous exclusion of this highly relevant evidence prejudiced Mr. Bates in a case that turned on witness credibility.

The Sixth Amendment protects a defendant's right to cross-examine witnesses and to attack their credibility through impeachment. The United States Supreme Court has made clear on multiple occasions that this fundamental trial right cannot be overruled by state statute. Olden v.

Kentucky, 488 U.S. 227 (1988); Davis v. Alaska, 415 U.S. 308 (1974); Chambers v. Mississippi, 410 U.S. 284 (1973). Likewise, the Virginia Supreme Court has held that when there is tension between the constitutional rights of the accused and a state statute, the state statute must yield. Clinebell v. Commonwealth, 235 Va. 319, 325 (1988).

Virginia's Rape Shield law provides statutory grounds for the exclusion of "general reputation or opinion evidence of the complaining witness's unchaste character or prior sexual conduct" in certain sexual assault trials. Va. Code § 18.2-67.7. However, the statute contains specifically enumerated statutory exceptions, including that "[n]othing contained in this section shall prohibit the accused from presenting evidence relevant to show that the complaining witness had a motive to fabricate the charge against the accused." Va. Code § 18.2-67.7(3)(B). Virginia Supreme Court Justice D. Arthur Kelsey, then sitting in the Suffolk Circuit Court, explained that:

> When placed against the backdrop of the accused's constitutional rights, the 'motive to fabricate' ground [of the Rape Shield statute] should be read broadly. The court thus should pass only on the factual and legal relevance of the evidence, not on its credibility or persuasive force. In doing so, the Court must ask whether "a reasonable doubt about the defendant's guilt" could exist if the fact finder "accepted the defendant's version" of the events. Framed this way, *the issue*

> *is whether the proffered evidence has "any tendency to establish a fact which is properly at issue" under the Rape Shield Law.*

Commonwealth v. Beverly, 52 Va. Cir. 255 (Cir. Ct. Suffolk 2000), 2000 WL 765084, at *4 (2000) (internal citations omitted) (citing League v. Commonwealth, 9 Va. App. 199 (1989) aff'd en banc 10 Va. App. 428 (1990); Evans v. Commonwealth, 14 Va. App. 118, 121 (1992) (citation omitted)).

Evidence of W.M.'s prior same-gender relationships and fear of parental disapproval and his desire to remain in the closet were relevant and material to W.M.'s motive to fabricate this sexual assault allegation against Mr. Bates. Despite the broad latitude the trial court should have extended to Mr. Bates in exercising his constitutional rights, it erroneously prohibited him from offering relevant and admissible evidence. The trial court excluded evidence that W.M. self-identified as "pansexual" in middle school, meaning that W.M. was attracted to people regardless of their gender identity and expression. R. 1295. For example, W.M. dated a fellow student who came out as a trans man while they were dating, and W.M. continued the young adult romantic relationship during and after the transition. R. 1295, 1304-06. W.M. also dated D.A., another male, at the end of seventh grade. R. 1292-

96. After dating D.A. for two weeks, W.M. told D.A. that W.M.'s parents had found out about the relationship and that [W.M.] had to end it, which W.M. did. R. 1296. And shortly before trial, W.M. himself corroborated this evidence by disclosing to the Commonwealth that he was questioning whether or not he was gay during the same time period that D.A. testified to being in a same-sex relationship with W.M. R. 65, 859.

Based on these facts, the defense should have been permitted to elicit and argue that the reason W.M. ended his homosexual relationship with D.A. was because his parents do not approve of homosexuality. W.M.'s preliminary hearing testimony that he had never done anything to indicate to Mr. Bates that W.M. was considering homosexuality could have been impeached by D.A.'s testimony that W.M.'s public same-gender relationships while they were in middle school suggested that he experienced and acted upon same-gender attraction. Furthermore, W.M. could have been impeached regarding his denial to the Commonwealth of "dating" D.A., and such denial could have been demonstrative evidence supporting the defense theory that W.M. wanted to remain in the closet and did not want evidence of his homosexual activity to be known, especially to his parents.

Other sister courts have ruled that a complainant's fear of parental disapproval of their sexual activity is admissible evidence of the complainant's motive to fabricate, overcoming similar state Rape Shield statutes' exclusion. See, e.g., State v. Stephen F., 152 P.3d 842, 848 (Neb. Ct. App. 2007) (finding "the teenage girl's fear of punishment from her parents for engaging in premarital sex tends to prove her motivation to fabricate a claim of rape to cover up consensual sex"); Commonwealth v. Stockhammer, 570 N.E.2d 992, 876-80 (Mass. 1991) (same); State v. Delawder, 344 A.2d 446, 227-28 (Md. Ct. Spec. App. 1975) (same). Similarly, a desire to be perceived of as heterosexual can demonstrate a motive to fabricate. In Commonwealth v. McGregor, 655 N.E. 2d 1278 (Mass. Ct. App. 1995), the defendant in a sexual assault case was precluded from introducing evidence that the complainant admitted to being bisexual, admitted to engaging in homosexual relations to obtain drugs and expressed a desire for others not to know of his bisexuality. The defendant argued to the trial court that evidence of his past homosexual activities tended to show that the complainant consented to homosexual activity with him. Id. at 1279-80. The appellate court found that the proposed evidence was inadmissible to show consent, but found that the evidence was admissible to demonstrate

a motive to fabricate. Although the defendant did not argue "motive to fabricate" before the trial court, the appellate court reversed the conviction as a "miscarriage of justice," finding that "[c]ounsel specifically sought to use the prior statements, albeit for the wrong reason." Id. at 1280.

Like in McGregor, the trial court here failed to consider how the proffered evidence of W.M.'s past same sex relationship and its termination was relevant to his motive to lie. In each of its reasons for excluding the evidence, the trial court abused its discretion by either failing to consider the correct inquiry or considering irrelevant and improper factors. The trial court's lengthy ruling on Mr. Bates's post-trial Motion to Set Aside the Verdict repeats and expands upon the same errors made during trial.

The court's first stated reason for excluding the evidence turns entirely on the trial court's assessment of "proof relevant to whether W.M. consented," R. 427, which ignores its relevance to W.M.'s motive to fabricate or to rebutting the prior sexual conduct—allegations that W.M. was not homosexual and had never done anything to indicate to Mr. Bates that he was—introduced by the prosecution. In its next three stated reasons, the court relies exclusively on its conception of the evidence's persuasiveness and credibility, R. 427-28, instead of its *relevance*. Beverly, 2000 WL

765084, at *4. For example, the trial court is somehow incredulous that seventh graders have romantic relationships, while simultaneously suggesting that such relationships could only be demonstrated by significant sexual activity rather than age-appropriate cuddling. R. 427-28. The court is clear: it is imposing its own assessment of the "weight" of this evidence, not conducting the required relevance analysis of whether it has "any tendency to establish a fact which is properly at issue." Id. In its fifth stated reason, the court again explicitly returns to consideration of relevancy to Mr. Bates's consent defense, denouncing his testimony of W.M. instigating sexual contact as "sinister." R. 428-29. None of this has any bearing on the relevance of the proffered evidence to W.M.'s motive to fabricate, and to rebut the prosecution's evidence that W.M. "had no history of being gay."

The trial court's refusal to apply the correct legal framework is only amplified by its misunderstanding of the purpose of the proposed evidence. The court incorrectly dismissed the motive to fabricate evidence as an "alternative theory," improperly characterizing it as a "thin reed" based on the assertion that W.M. broke up with D.A. because his parents disapproved of a same sex relationship. R. 429-30. This evidence of motive to fabricate was not part of an alternate theory; it was necessary to support Mr. Bates's

only defense theory. But the court did the opposite of what the law requires it to do in considering relevance: instead of analyzing whether this evidence had any tendency to demonstrate W.M.'s motive to fabricate, it affirmatively made up its own "reasons why parents might not want their 12-year-old child to be in any type of relationship." R. 430. By this very same logic, one reason parents might not want their seventh grader to date someone of the same sex is because they disapprove of such relationships, and this evidence was therefore relevant. That should have been the end of the court's inquiry, because it should "not [pass] on [the proffered evidence's] credibility or persuasive force." Id. The defense was under no obligation to *disprove* all of the reasons the court found evidence might *not* be relevant: it was only required to make a sufficient proffer to demonstrate relevance, which it did through both D.A.'s testimony and the notice of the expert testimony of Dr. Aoun.

With this evidence, the jury would have had both lay witness and expert testimony to help explain why W.M. might go to such great lengths to deny acting on a same gender attraction, which would have strengthened Mr. Bates's defense. And the jury would have heard evidence rebutting the prosecution's evidence that W.M. "had no history of being gay." Ultimately,

these issues should have been before the jury to determine the weight and credibility of evidence and argument that Mr. Bates was constitutionally entitled to offer. Without the trial court's erroneous rulings, it is highly likely that at least one juror would have had at least one reasonable doubt about convicting, and Mr. Bates is therefore entitled to a new trial. See Commonwealth v. White, 293 Va. 411, 421 (2017).

II. The trial court erred in finding that the Alex Gerber Text Message Exhibit did not open the door to evidence of W.M.'s same sex attraction, depriving the Appellant of his statutory right to admit evidence regarding W.M.'s motive to fabricate the allegations against Appellant, Va. Code § 18.2-67.7(B), and his constitutional rights to cross-examine and confront the witnesses against him in violation of the Sixth Amendment, and to put forth a complete defense in violation of the Due Process Clause of the Fourteenth Amendment where: 1) the exhibit satisfied every element the trial court stated needed to be met in order for the door to be opened to evidence of "homosexuality", 2) the Commonwealth entered the exhibit through its own witness, 3) the text message stated that W.M. was heterosexual, and 4) further stated that W.M.'s heterosexuality was a reason to doubt that he consented to sexual activity.

Standard of Review

This evidentiary issue is reviewed for abuse of discretion, like Issue I, supra.

Argument

Just as the trial court abused its discretion by applying the wrong legal analysis to exclude relevant, admissible evidence, it also failed to apply the appropriate analysis to admit rebuttal evidence regarding W.M.'s same-gender attraction after the prosecution opened the door by admitting evidence that W.M. had no "history of being gay." The trial court made clear rulings delineating when rebuttal evidence would be allowed if the Commonwealth opened the door, and then completely ignored them, instead shifting blame to the defense for declining to agree to a harmful redaction of the prosecution's exhibit. This omission prejudiced Mr. Bates, leaving him unable to respond either by effectively impeaching W.M. or by demonstrating through his own proffered witnesses W.M.'s motive to fabricate.

During the first closed hearing concerning the Commonwealth's motion in limine, the trial court determined that the Defense was precluded from offering or eliciting evidence regarding W.M's sexual orientation unless the Commonwealth opened the door to such evidence. The court made clear:

> [I]f 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.

R. 879 (emphasis added). The court's ruling, correctly, did not limit the source of "opening the door" to W.M.'s testimony.

Despite this ruling, in its case-in-chief, the Commonwealth introduced as an exhibit, through Alex Gerber, a text conversation that he had with Mr. Bates after learning of the alleged incident. In that text conversation, Mr. Gerber explains that he "find[s] it nearly hard to believe that [W.M.] advanced on" Mr. Bates, in part, because, "[Mr. Bates has] a history of both being gay and being interested in [W.M.]/[W.M] has neither of those things…" Commonwealth Exhibit 6, R. 2092-94. The meaning of this message from Mr. Gerber in this context is very clear. Mr. Gerber was saying to Mr. Bates, "I don't believe W.M. consented to sexual activity with you, because you like guys and W.M. doesn't like guys."

Mr. Gerber's statements regarding W.M.'s and Mr. Bates's respective sexual orientations were all the more damaging to the Defense, because they were not couched as only Mr. Gerber's opinion or belief. Rather, they were stated as definitive facts—W.M.'s public "history." Mr. Gerber's long-

standing and close relationship with W.M. added a significant basis of knowledge and credibility to his assertions. Mr. Gerber testified that W.M. and Mr. Bates had been his friends "since grade school" and that he communicated with them both almost every day "whether in person, calling, Facetime, text and also [through] a program [called] 'Discord'," up until the date of the alleged offense. R. 1090. The jury was well aware that at least half of Mr. Gerber's statement—that Mr. Bates is gay—was true. Therefore, they had no reason to doubt the accuracy of Mr. Gerber's statement regarding W.M.'s sexual orientation and lack of history of any same-gender attraction.

The Alex Gerber Text Exhibit met each and every element that, on January 30, 2023, the trial court stated needed to be met in order for the door to be opened. It was (1) an assertion, (2) by the Commonwealth, (3) made through its witness, (4) that W.M. was heterosexual, and (5) that his heterosexuality was evidence of a lack of consent. But instead of applying this standard to the evidence, on February 1, 2023, just two days later, the court changed the standard.

In the closed Rape Shield hearing, the court ruled, erroneously, that in order for the Commonwealth to have opened the door to evidence of W.M.'s

sexuality, W.M. needed to have testified to being heterosexual. The court said,

> [W.M.] did not testify that he is heterosexual and doesn't engage in any kind of gay conduct, and therefore, it's another proof that he did not give consent, which the Commonwealth had the freedom to offer, but chose not to offer. What you have is, Alex saying he did not have history of being gay. And I don't believe Alex's statement opens the door to testimony that allegedly is probative on the issue of whether or not [W.M.] is gay.

R. 1314-15.

In denying Mr. Bates's Motion to Set Aside the Verdict, the trial court again repeated that neither W.M. nor any other witness "testified" that W.M. was gay, that it was only a few lines in an exhibit, and that the Commonwealth did not ask its witnesses any questions about the exhibit. R. 425-26. The court's reliance on the source and scope of the evidence cannot justify its ruling.

In State v. Williams, the Ohio Supreme Court held that it was error to exclude defense evidence of the complainant's heterosexual sexual activity in a sexual assault case where the complainant testified that she was gay and does not engage in sexual conduct with men. 487 N.E.2d 560, 562-63 (1986). The court stated:

> The contested issue in this case is *consent*, which directly relates to an element of the crime of rape. The victim testified on direct examination that she *never* consents to sex with men. The testimony proffered by appellee directly refutes this contention . . . . [T]his evidence is submitted for more than mere impeachment of a witness' credibility. The victim's credibility is indeed being impeached; however, the proffered evidence has a more important purpose, which is to negate the implied establishment of an element of the crime charged.

Id. (emphasis in original).

In State v. Lessley, the court found that it was error not to allow the Defense to enter evidence of the complainant's heterosexual sexual conduct after she testified to being a lesbian. 601 N.W.2d 521 (1999). The court said that the evidence "regarding [the complainant's] sexual preference and experience permitted the jury to draw an inference that she did not consent to sexual relations with [the defendant]" and that it was irrelevant whether that was the prosecution's intention upon introducing the evidence or not. 601 N.W.2d at 527-28.

Although it was the complainant who offered the evidence in both Williams and Lessley, this is a distinction without a difference. The *source* of the evidence from within the prosecution's case makes no legal difference because the effect is the same—which is to establish or destroy an element of the offense or defense. If the court were only to permit rebuttal evidence

when the complainant, himself, has offered such evidence, the Commonwealth would easily be able circumvent contrary defense evidence by calling witnesses other than the complainant to testify about the complainant's sexual orientation. This is why the Rape Shield statute allows rebuttal evidence to the prosecution's evidence of the complaining witness's prior sexual conduct, *regardless of the source*. Va. Code § 18.2-67.7(A)(3) (allowing "[e]vidence offered to rebut *evidence of the complaining witness's prior sexual conduct introduced by the prosecution*") (emphasis added).

The trial court reaffirmed and expanded on its rulings in denying Mr. Bates's Motion to Set Aside the Verdict. Once again, the court failed to explain how the exhibit did not meet the criteria the trial court established, but abused its discretion by refusing to impose. The trial court's primary reason in its post hoc Memorandum Opinion and Order appears to be that Defense counsel refused to have the exhibit redacted, after repeatedly explaining the serious prejudice of a potential redaction. R. 424-25, 1315-17. Defense counsel should not have been put in a position where they had to choose between the prejudice of a redaction, or the prejudice of not being able to respond to admitted evidence. Nothing in the court's correct, initial ruling required Defense counsel to agree to redacting or withdrawing the

Commonwealth's admitted evidence before asserting Mr. Bates's right to respond to that evidence. The trial court further suggests that because defense counsel did not highlight the evidence that W.M. had no "history of being gay," whether by asking W.M. or Mr. Gerber, it could not have opened the door. R. 426. Defense counsel's subsequent choices after they were barred from admitting evidence that W.M. had a history of public same-gender attraction cannot support the court's preexisting ruling that the evidence didn't open the door in the first place.

Finally, the court's ruling repeats the same errors regarding the Commonwealth opening the door that it made in considering relevance. In its Order, the court strains to explain how the proffered evidence that W.M. had a public history of dating both another man and a trans man was not responsive to the Commonwealth's evidence that W.M. had no "history of being gay." R. 425-26. Functionally, the trial court again impermissibly imported analysis of the evidence's weight and credibility into its alleged test for admissibility. Beverly, 2000 WL 765084, at *4. Because the court itself apparently cannot comprehend that a history of same-gender attraction would undermine to a jury Mr. Gerber's assertion that W.M. had no "history

of being gay,"[7] even if W.M. identified as "pansexual" rather than "homosexual," it incorrectly concluded that the Commonwealth simply had not opened the door.

Once the door was opened, Mr. Bates's proffered evidence rebutting the Commonwealth's assertion that W.M. had no "history of being gay" and demonstrating his motive to fabricate should have been admitted. The trial court's relevancy determination, which it styles as an "independent" basis for excluding this evidence, is wrong for all of the reasons above, supra Issue I. And for those same reasons, Mr. Bates's was prejudiced. Instead of functioning as a neutral gatekeeper and allowing admissible evidence to be presented to the jury—the fact-finder tasked with determining its weight and credibility—the trial court abused its discretion by acting arbitrarily, contradicting its own rulings, and failing to apply the relevant legal framework. Mr. Bates's convictions must be reversed.

[7] "Gay" is often used as an umbrella term for anyone who is not heterosexual.

III. The trial court erred in granting the Commonwealth's requested Attempted Sodomy instruction where Attempted Sodomy is not a lesser-included offense of Sodomy because Attempted Sodomy requires a higher *mens rea* element than that which is required to prove the completed crime of Sodomy and violated the Appellant's constitutional and statutory right under Va. Code § 19.2-217 to a Grand Jury.

Standard of Review

This legal issue is reviewed de novo. Watson v. Commonwealth, 298 Va. 197, 207 (2019); Findlay v. Commonwealth, 287 Va. 111, 114 (2014).

Argument

Mr. Bates was indicted and tried on the completed crime of Sodomy. The trial judge granted an Attempted Sodomy instruction over his objection. This instruction was improper because Attempted Sodomy is not a lesser-included offense of Sodomy. "[T]he accused can be convicted under the indictment only of the greater offense or of such lesser offenses." Ashby v. Commonwealth, 208 Va. 443, 445 (1968) (citing Stapleton v. Commonwealth, 140 Va. 475, 486 (1924)). To qualify as a lesser-included offense, the elements of the purported lesser offense must be entirely subsumed within the elements of the greater offense. Forness v. Commonwealth, 882. S.E. 2d. 201, 202 (Va. 2023). Attempted Sodomy is not a lesser-included offense of Sodomy because Attempted Sodomy contains a higher *mens rea* element

than the completed crime of Sodomy. When the defendant is '"convicted of charges not included in the indictment, . . . per se reversible error [has occurred], 'and no finding of actual prejudice is necessary." Scott v. Commonwealth, 49 Va. App. 68, 77 (Va. Ct. App. 2006) (quoting United States v. Fletcher, 74 F.3d 49, 53 (4th Cir. 1996)).

A. ATTEMPTED SODOMY IS NOT A LESSER-INCLUDED OFFENSE OF SODOMY.

"Attempted crimes are specific intent crimes." Bennett v. Commonwealth, 35 Va. App. 442, 450 (2001). To sustain a conviction for an attempted crime, the Commonwealth is required to prove "the specific intent in the person's mind to commit the particular crime for which the attempt is charged." Wynn v. Commonwealth, 5 Va. App. 283, 292 (1987). For Attempted Sodomy by Mental Incapacitation and/or Physical Helplessness, the Commonwealth must prove that the defendant harbored the specific intent to commit the crime of Sodomy against an individual who was mentally incapacitated and/or physically helpless.

On the other hand, many completed crimes, including Sodomy, are general intent crimes. Bowden v. Commonwealth, 52 Va. App. 673, 678 (2008) (citation omitted). A general intent crime only requires a showing that the defendant knowingly and intentionally committed the acts

constituting the crime, not that the defendant had the specific intent to bring about the harm. Calokoh v. Commonwealth, 76 Va. App. 717, 733 (2023) ("[T]he crime of rape does not require proof that the defendant harbor a specific intent to have intercourse without the victim's consent, only the general intent evidenced by the act of committing the offense itself.") (quoting Gonzalez v. Commonwealth, 45 Va. App. 375, 382 (2005) (en banc)); Velasquez v. Commonwealth, 276 Va. 326, 329-330 (2008).[8] Therefore, an "attempt" is only a lesser-included offense of the completed crime when the completed crime is a specific intent crime. If the completed crime is a general intent crime, an "attempt" is not a lesser-included offense because the "attempt" has a heightened *mens rea* requirement that is lacking in the greater offense. See, e.g., Brown v. People, 239 P.3d 764, 769 (Supreme Ct. Col. 2010) (describing the distinction between specific intent crime of attempted first degree murder and lesser included, general intent crime of attempted second degree murder); Seeley v. State, 715 P.2d 232,

[8] See also Bates v. State, 679 P.2d 672, 676 (Ct. App. Id. 1984) ("Specific intent to commit the rape is an element of both attempted rape and assault with intent to rape *where the rape itself is not consummated*." (emphasis added)); Boyd v. State, 572 P.2d 276, 279 (Okl. Ct. App. 1977), *overruled on other grounds* Nicholson v. State, 421 P.3d 890 (Okla. Crim. App. 2018) ("The felonious intent to commit rape is the essence of the offense [of attempted rape].").

239 (Supreme Ct. Wy. 1986) (holding that attempted sexual assault, a specific intent crime, is not a lesser included offense of sexual assault, a general intent crime); Com. v. Aldrich, 36 N.E.3d 575, 580 (Mass. App. Ct. 2015) ("caution[ing] against reflexively treating attempt as a lesser included offense" because "[i]n some circumstances, where one crime carries a requirement of specific intent and another is a general intent crime . . . each has an element that the other does not").

In People v. Braslaw, the California appellate court analyzed whether Attempted Rape of an Intoxicated Person is a lesser-included offense of Rape of an Intoxicated Person and determined that it was not. 183 Cal. Rptr. 3d 575 (Cal. App. Dep't Super. Ct. 2015).[9] The court based its ruling on the fact that the Attempted Rape offense requires proof of a higher *mens rea* element than the completed Rape offense. In its decision, the court noted that the differing *mens rea* requirements for each offense are "illustrated by the way in which a defendant's beliefs can affect guilt." Id. at 584. The

[9] Braslaw noted that there is a "nonintuitive aspect of the relationship between attempts and completed crimes: while it might seem an attempt would naturally be a lesser included offense, this is not necessarily so. Attempts are only lesser included offenses if the sole distinction between the attempt and the completed offense is completion of the act constituting the crime." 183 Cal. Rptr. 3d at 583.

completed offense of Rape of an Intoxicated Person requires that the defendant knew or should have known that the complainant lacked the capacity to consent,[10] which limits a "mistake of fact defense" to those mistakes which are reasonable. Contrarily, for a specific intent crime, the defendant's good faith, but unreasonable, mistake of fact can constitute a defense. Braslaw, 183 Cal. Rptr. 3d at 584. Here, the Attempted Sodomy jury instruction should not have been given because it was not a lesser-included offense of Sodomy.

B. VIRGINIA CODE § 19.2-286 DOES NOT AUTHORIZE TRYING DEFENDANT ON A CHARGE THAT IS NOT A LESSER INCLUDED OFFENSE OF THAT CHARGED IN THE INDICTMENT.

The trial court reasoned that Virginia Code § 19.2-286 authorized the granting of an Attempted Sodomy instruction, but it neglected to address the constitutional implications raised by such an interpretation. R. 391. Virginia Code § 19.2-286 provides as follows:

> On an indictment for a 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

[10] Likewise, Virginia law only requires that defendant knew or should have known that the complainant was mentally incapacitated or physically helpless. Virginia Model Jury Instructions 44.320, 44.340.

> subsequent prosecution for an attempt to commit such felony, or of being an accessory thereto.

The trial court stated that it was required to "presume that the legislature chose, with care, the words it used when it enacted the relevant statue" and that the language of Va. Code § 19.2-286 is "unequivocal and without exception." R. 391 (citation omitted). For that reason, the trial court decided that it "need not reach the question of whether Attempted Sodomy is a lesser included offense of Sodomy." R. 391.

The trial court's citations were accurate statements of law; however, they were irrelevant to the issue, which was one of constitutional dimension. Regardless of how clear a statute may be, it must be read in a manner consistent with the Constitution. Commonwealth v. Doe, 278 Va. 223, 229 (2009) ("[C]ourts have a duty when construing a statute to avoid any conflict with the Constitution." (citations omitted)). In Commonwealth v. Dalton, the Virginia Supreme Court held:

> The Due Process Clause of the Constitution of the United States and the Constitution of Virginia mandate that an accused be given proper notification of the charges against him . . . . *It is firmly established . . . that an accused cannot be convicted of a crime that has not been charged, unless the crime is a lesser-included offense of the crime charged*. Thus, neither the Commonwealth nor the accused is entitled to a jury instruction on an offense not charged, unless the offense is a lesser-included offense of the charged offense.

259 Va. 249, 253 (2000) (emphasis added).

It was critical that the trial court address whether Attempted Sodomy is a lesser-included offense of Sodomy, because if it is not, it was a Due Process violation for the jury to be instructed on Attempted Sodomy. But by concluding its analysis prematurely, the trial court never reached the constitutional infirmity.

A close reading of the court's language and legal reasoning in Dalton illustrates that the court determined Va. Code § 19.2-286 does not authorize instructing the jury on an offense that is not a lesser-included offense of that charged in the indictment. In Dalton, the defendant was charged with murder and requested an "accessory after the fact" jury instruction pursuant to Va. Code § 19.2-286, but the trial court refused. Id. at 251. The Court of Appeals, relying on Va. Code § 19.2-286, reversed the trial court, holding that "a defendant, who has not been charged with the crime of being an accessory after the fact to a charged offense, has a right to an accessory-after-the-fact jury instruction if it is supported by the evidence." Id. at 251-52 (citation omitted). The Virginia Supreme Court reversed the Court of Appeals, holding that it is a Due Process violation for a defendant to be put

to trial for a crime for which he is not indicted if it is not a lesser-included offense. Id. at 253-55.

In response to Mr. Bates's argument that his due process rights were violated by failing to receive notice of the charge, the trial court concluded that "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." R. 391. However, the Dalton court reviewed Va. Code § 19.2-286 and noted that the General Assembly modified the statute in 1975, substituting the words "accessory thereto" for "accessory after the fact." The court said that "[b]y limiting the statute's application to accessories before the fact, any conflict between the statute and the notification requirements of due process were avoided."[11] Id. at 254. If the

[11] This interpretation by the Virginia Supreme Court is problematic because it is inconsistent with the plain meaning of the words in the statute. The statute's change in language from the term "accessory after the fact" to the term "accessory thereto" does not support an interpretation that the statute only addresses "accessories before the fact." Rather, it broadened the class of crimes to both accessories before and after the fact. More likely, by applying the statute to only accessories before the fact, the Virginia Supreme Court was *reading* the statute so as to not violate Due Process. See Dalton, 259 Va. at 258 (Koontz, J. dissenting) ("The only conclusion which this inclusive language, the legislative history of the section, and the principle that recodifications do not make substantive changes unless noted supports is that § 19.2-286 includes accessories before and after the fact.").

Dalton court believed that naming "accessory after the fact" in Va. Code § 19.2-286 provided sufficient constitutional due process notice that one could be convicted of that offense, then there was no potential "conflict between the statute and the notification requirements of due process," requiring statutory amendment. Instead, this language in Dalton means that the Virginia Supreme Court found that due process is not satisfied, even if the potential offense is explicitly listed in § 19.2-286, when the offense is not a lesser-included offense of that charged in the indictment.

The dissent in Dalton argued that there is no due process violation when it is the defendant who requests an "accessory after the fact" instruction because there is no notice issue, and Va. Code § 19.2-286 permits a defendant to do so. Id. at 255-57. The dissent also agreed with the majority that Va. Code § 19.2-286 does not permit the Commonwealth to request the instruction. Id. at 257. For our purposes, the major takeaway of Dalton is that all seven justices agreed that Va. Code § 19.2-286 does not permit the Commonwealth to obtain a jury instruction for an offense that is not a lesser-included offense, because such a reading violates the Due Process Clause.

C. THE CASES CITED BY THE TRIAL COURT SHOULD NOT PERSUADE THIS COURT THAT IT WAS PROPER TO GRANT AN ATTEMPTED SODOMY INSTRUCTION.

The trial court listed the cases of Cates v. Commonwealth, 111 Va. 837 (1910), Joyner v. Clarke, No. 2:17CV661, 2018 WL 8804472 and Willoughby v. Smyth, 194 Va. 267 (1952) in support of its decision to grant an Attempted Sodomy instruction, but none of these cases adequately address the issues. R. 392. The trial court stated that Cates "held that an individual charged with rape could be convicted of attempted rape . . . ." R. 392. However, this a tremendous oversimplification of the case. In Cates, the defendant was charged with Rape and convicted of Attempted Rape at trial. 111 Va. 837, 838 (1910). He successfully moved for the verdict to be set aside and was tried again on Rape and convicted. Id. He assigned error to the fact that, at his second trial, he was tried for Rape again instead of Attempted Rape, relying upon a code section that held after a mistrial "the accused shall not be tried for any higher offense than that of which he was convicted on the last trial." Id. (citation omitted). The question was whether Rape was a "higher offense" than Attempted Rape, considering the fact that they both had identical punishments. Id. at 839-40. The court held that "the intention to commit a felony, and the doing of some act towards its commission, without actually committing it, must from its very nature be an offense of a lower grade than the consummated or principal felony." Id. at

842. While it is true that the Cates court said that Attempted Rape was "necessarily included" in the charge of Rape, it did not come to that conclusion by analyzing the respective elements of each offense. Instead, it "reflexively treat[ed] attempt as a lesser included offense" by concluding that one must necessarily attempt a crime before actually completing it. See Commonwealth v. Aldrich, 36 N.E.3d 575, 580 (Mass. App. Ct. 2015).

The trial court's reliance on Joyner v. Clarke, is also unpersuasive. No. 2:17CV661, 2018 WL 8804472. In Joyner, the defendant argued that his Double Jeopardy rights were violated when the trial court convicted him of Rape at a bench trial, vacated that conviction and then convicted him of Attempted Rape. Joyner argued that Attempted Rape was not a lesser-included offense of Rape. The Joyner court did not conduct any analysis on whether Attempted Rape was a lesser-included offense of Rape. Rather, it relied on Va. Code § 19.2-286 to support its holding that Joyner could be convicted of Attempted Rape on a Rape indictment. Joyner did not make a due process argument, as Appellant does here, and the Joyner court did not engage in any analysis regarding the constitutionality of the statutory scheme. Additionally, Joyner cites to Cates, which, as previously argued,

does not evaluate whether Attempted Rape contains any elements not contained in Rape.

The last case the trial court cites as an example of where an attempt instruction was justified by a predecessor of Va. Code § 19.2-286 is Willoughby v. Smyth, 194 Va. 267 (1952). However, this case is irrelevant to Appellant's arguments. In Willoughby, the defendant was charged with Storebreaking with Intent to Steal (Burglary) but convicted of an attempt. Storebreaking with Intent to Steal is a specific intent crime. See, Velasquez v. Commonwealth, 276 Va. 326, 329 (2008) ("Both statutory burglary and common-law burglary are specific-intent crimes . . . ."). As stated above, if the consummated crime is a specific intent crime, an attempt is a lesser-included offense. The issue before this court is that Sodomy is a general intent crime and its attempt is not a lesser-included offense. Therefore, Willoughby is inapplicable.

D. GRANTING AN ATTEMPTED SODOMY INSTRUCTION VIOLATED APPELLANT'S STATUTORY RIGHT TO BE INDICTED BY THE GRAND JURY PURSUANT TO VA. CODE § 19.2-217.

Mr. Bates also raised in his Motion To Set Aside the Verdict, but the trial court did not address, the fact that he was deprived of his statutory right

to grand jury indictment for the Attempted Sodomy charge. Pursuant to Va. Code § 19.2-217:

> [N]o person shall be put upon trial for any felony, unless an indictment or presentment shall have first been found or made by a grand jury in a court of competent jurisdiction or unless such person, by writing signed by such person before the court having jurisdiction to try such felony or before the judge of such court shall have waived such indictment or presentment, in which event he may be tried on a warrant or information.

Permitting the Commonwealth to try an individual on a felony offense that is not a lesser-included offense unlawfully bypasses the grand jury without the accused's consent, which is required by Va. Code § 19.2-217. The accused would be made to face trial for an offense where probable cause has not been found by the grand jury, in violation of the statute. In accordance with settled principles of statutory construction, the court "may not adopt an interpretation of one statue that conflicts with the plain language of another." Washington v. Commonwealth, 272 Va. 449, 458 (2006). Therefore, the only consistent reading of Va. Code § 19.2-286 is that it only applies to those offenses which are lesser-included offenses of that which is charged in the indictment for which the grand jury found probable cause.

E. APPELLANT SUFFICIENTLY PRESERVED HIS OBJECTION AT TRIAL, OR IN THE ALTERNATIVE, THE "ENDS OF JUSTICE" EXCEPTION SHOULD APPLY.

At trial, Mr. Bates's counsel objected to the granting of an Attempted Sodomy instruction. R. 1680-1696; 1708-1718. Although Defense counsel did not use the specific language of it being a "due process" violation because of lack of notice, she did articulate synonymous language. In response to the proposed jury instruction, Defense counsel said, "Your Honor, I think there is either a sodomy or there is not a sodomy. I don't think - it feels at this juncture - it feels *at this juncture the Commonwealth is trying to move the goalpost* . . . ." R. 1686 (emphasis added). Defense counsel also argued, "The fact of the matter is that the evidence the Commonwealth put forward requires a defense against forcible anal sodomy, which is what we are here to discuss. This is just an eleventh hour issue because the Commonwealth is insecure in its case." R. 1692. These were clearly objections to notice and due process concerns.

Although Defense counsel did not directly raise the issue of Attempted Sodomy not being a lesser-included offense of Sodomy, she provided the trial court with a copy of Sharpe v. Commonwealth in support of her argument. No. 0148-92-2, 1993 WL 302476 (Va. Ct. App. Aug. 10, 1993) (unpublished) R. 1713. As she provided the case to the court, counsel explained, "So the case itself is about lesser included and what can be

contemplated as a lesser included instruction. But I wanted to spotlight, specifically, the insert in the example of what constitutes an attempt." R. 1713. In Sharpe, the court considered whether sexual battery is a lesser-included offense of attempted rape and determined that it was not because attempted rape requires no touching and sexual battery does not require the specific intent to rape. Sharpe, No. 0148-92-2 *2, 1993 WL 302476 (Va. Ct. App. Aug. 10, 1993). This Court should find that Defense counsel sufficiently preserved the issues.[12]

If the Court were to hold that Mr. Bates's counsel failed to adequately preserve his objection, the "ends of justice" exception should apply to the facts of this case. Va. Sup. Ct. R. 5A:18. In order to avail oneself of the "ends of justice exception," it must be shown that the error is "clear, substantial and material." Brown v. Commonwealth, 8 Va. App. 126, 131 (Va. Ct. App. 1989). The court found that standard to be met in Bass v. Commonwealth. Record No. 1442-14-2 (Va. Ct. App. July 7, 2015) (unpublished). In Bass, the defendant was charged with Attempted Robbery, but the trial court erroneously instructed the jury on Robbery and the jury

[12] The Commonwealth, directly told the trial court that attempted sodomy *was* a lesser included of sodomy, which Mr. Bates asserts was legally incorrect. R. 1709:11-16.

convicted him of Robbery. Id. Bass failed to object at trial to the erroneous jury instruction and the unlawful verdict, but raised the issue for the first time on appeal. Id. at *2. Nevertheless, the Court of Appeals applied the "ends of justice" exception, reversed his conviction and held: "[Bass] was indicted and arraigned for attempted robbery. The completed offense of robbery was not charged in the indictment. Thus, [Bass] was convicted of a crime not charged in the indictment, and we must reverse the conviction." Id. at *6.[13]

The only difference between Appellant's case and Bass is that Bass was convicted of an uncharged, more severe offense and Appellant was convicted of an uncharged, less severe offense. However, the grade of offense is irrelevant to the court's holding in Bass. The "ends of justice" exception was appropriate in that case because Bass was convicted of an offense for which he was not charged. Appellant was also convicted of an

[13] Bass cited to two published cases in support of its holding - Legette v. Commonwealth, 33 Va. App. 221 (2000) ("ends of justice exception" applied when defendant charged with unlawful wounding but pronounced guilty of malicious wounding and sentenced to a term that exceeded the statutory maximum for unlawful wounding) and Ferguson v. Commonwealth, 51 Va. App. 427, 434 (2008) (*en banc*) ("ends of justice" exception applied when sentence in excess of the statutory maximum).

offense for which he was not charged, and this Court should apply the "ends of justice" exception to correct the error.

F. Remedy

The jury, upon convicting Mr. Bates of attempted sodomy in Count I, necessarily acquitted him of completed sodomy. See Jeffers v. United States, 432 U.S. 137, 150-51 (1977) (plurality opinion); Brown v. Ohio, 432 U.S. 161, 168–169 (1977). As such, the appropriate remedy upon finding that the jury was improperly instructed as to attempted sodomy is dismissal of Count I.

IV. The trial court erred in denying the Motion To Set Aside the Verdict as to the sufficiency of the evidence for the Attempted Sodomy count because no rational trier of fact could have found beyond a reasonable doubt from the evidence that Appellant harbored the specific intent to penetrate W.M.'s anus.

Standard of Review

This Court considers sufficiency challenges narrowly, "examin[ing] the evidence in the light most favorable to the Commonwealth . . . [and] granting it all reasonable inferences fairly deducible therefrom." Jordan v. Commonwealth, 286 Va. 153, 156 (2013). Nevertheless, the Court must reverse when no "rational trier of fact could have found the essential elements

of the crime beyond a reasonable doubt. Stevens v. Commonwealth, 46 Va. App. 234, 249 (2005).

Argument

"For a conviction of attempted sodomy . . . there must have been proof of some attempted contact with the anus of the victim." Howard v. Commonwealth, 221 Va. 904, 909 n.2 (1981); see Valentin v. Commonwealth, Record No. 1791-13-3, 2015 WL 424684 at *5 (Va. Ct. App. Feb. 3, 2015) (unpublished) (finding sufficient evidence of this element where defendant admitted to touching the complainant's buttocks and the complainant testified that defendant tried to enter her while she was bent over and naked).

The Commonwealth relied entirely on circumstantial evidence regarding this element. However, as the court correctly instructed the jury, "When the Commonwealth relies upon circumstantial evidence, the circumstances proved must be consistent with guilt *and inconsistent with innocence*. It's not sufficient that the circumstances proved create a suspicion of guilt, however strong, or even a probability of guilt." R. 1749:3-8. See also Vasquez v. Commonwealth, 291 Va. 232, 250 ("When examining an alternative hypothesis of innocence, the question is not

whether 'some evidence' supports the hypothesis, but whether a rational factfinder could have found the incriminating evidence renders the hypothesis of innocence unreasonable.") (citing Commonwealth v. Hudson, 265 Va. 505, 513 (2003)). Here, no rational factfinder could have reasonably determined that the evidence was entirely inconsistent with Mr. Bates doing something other than attempting to anally penetrate W.M.

The evidence in this case is that Mr. Bates abjectly denied attempting to contact W.M.'s anus. W.M. did not provide any testimony regarding what occurred inside the car. Neither eyewitness could testify whether or not W.M. was wearing pants, or whether or not Mr. Bates's penis was erect or whether or not his penis was even exposed. There was no evidence regarding what part of Mr. Bates, if any, was touching what part(s) of W.M. Specifically, there was no evidence of either an intent to or an attempt to contact W.M.'s anus. On the evidence as presented there were any number of things that could have been occurring in the car, including simply heavy petting or grinding—which would fall far short of an attempt to anally sodomize, even if both parties were fully naked.

The trial court went to great lengths to detail the circumstantial evidence in this case, but it did not and could not explain how it made a

hypothesis of innocence of attempted sodomy unreasonable. R. 406-09. As a result, Mr. Bates's conviction for Count I must be vacated.

CONCLUSION

For the reasons stated above, the trial court erred, requiring the reversal of Appellant's convictions. Upon reversing Appellant's convictions, this Court should order dismissal of Count I (Attempted Sodomy) for the reasons stated above and remand the matter for a new trial on Count II (Oral Sodomy).

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE WITH RULE 5A:19(f) and 5A:20

1. The Appellant's name is Liam Wallace Bates. He is currently incarcerated at the Fairfax County Adult Detention Center.
2. Counsel for Appellant are Kimberly Stover and Joseph King, King, Campbell, Poretz & Mitchell PLLC, 118 N. Alfred St., Alexandria, VA 22314, 703-683-7070, kim@kingcampbell.com & jking@kingcampbell.com.
3. The appellee is the Commonwealth of Virginia. Counsel for the Appellee is Kimberly Anne Hackbarth (VSB# 47752), Senior Assistant Attorney General, Office of the Attorney General, 202 North Ninth Street, Richmond, Virginia 23219, 804-786-2071, oagcriminallitigation@oag.state.va.us & khackbarth@oag.state.va.us. Her bar number is 77214.
4. An electronic version of this brief, in PDF, was filed with the Clerk of the Court of Appeals of Virginia and served on opposing counsel on this 18th day of December, 2023. The electronic brief was filed in compliance with the VACES Guidelines.
5. Counsel for Appellant is retained.

6. Counsel certifies that this brief is 13,338 words (including footnotes, but not including cover page, tables, and certificate).
7. Counsel filed a Motion for Leave to exceed the 12,300 word limit; however, such motion has not been ruled upon at the time of this filing.
8. Counsel does not wish to waive oral argument.

/s/ Kimberly Stover
Kimberly Stover