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Annual Survey of Virginia Law: Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

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I. INTRODUCTION

During the past year, the Court of Appeals of Virginia continued to be the major contributor to the development of substantive and procedural criminal law in the Commonwealth. Many of the court's decisions concerned the characterization of police-citizen encounters in the context of both Fourth Amendment law and the rights of an accused under *Miranda v. Arizona*.[1] A number of cases concerned the admissibility of uncharged misconduct, and the numerous double jeopardy opinions involved case-by-case application of *Grady v. Corbin*,[2] *Blockburger v. United States*,[3] and related statutes. A growing body of procedural law concerned the propriety of impanelling jurors of dubious impartiality. Many of the court's opinions illustrated deficiencies in the preservation of presenting issues for appellate review.

II. FOURTH AMENDMENT

A. *Detentions and Arrests*

A number of cases decided in 1992 involved the question of whether a police-citizen encounter was a seizure under the Fourth Amendment.[4] In *Commonwealth v. Satchel*,[5] the Court of Appeals of Virginia adopted a deferential standard of appellate review, discussing the circumstances to be considered in making the determination.[6] Relying on the holding in *Baldwin v. Commonwealth*,[7] the court reversed the circuit court, holding that the police officer did

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1. 384 U.S. 436 (1966).

2. 495 U.S. 508 (1990).

3. 284 U.S. 299 (1932).

4. *See, e.g.*, Carson v. Commonwealth, 244 Va. 293, 421 S.E.2d 415 (1992), (*affirming* Carson v. Commonwealth, 13 Va. App. 280, 410 S.E.2d 412 (1991); Grinton v. Commonwealth, 14 Va. App. 846, 419 S.E.2d 860 (1992) (a police-citizen encounter at a toll booth on Interstate 95 was consensual).

5. 15 Va. App. 127, 422 S.E.2d 412 (1992).

6. *Id.* at 131, 422 S.E.2d at 415.

not seize the defendant when he approached Satchel, and asked him first what he had in one hand, and then the other hand.[8] The court explained that despite its deferential standard of review, it found no credible evidence in the record to support the trial court's finding.[9]

What began as a consensual encounter became a seizure in *Payne v. Commonwealth*.[10] Despite the officer's request, the defendant refused to open his fist. Thwarted and concerned, the officer grabbed Payne's wrist to pry open his hand. This contact changed the nature of the confrontation. Because there existed no objectively reasonable basis for suspecting the defendant to be armed and dangerous, the search of his hand, which contained cocaine, was unreasonable.[11]

The question in *Burgess v. Commonwealth*[12] was whether the duration of the detention altered the character of the investigative seizure.[13] The court of appeals held that the forty-minute delay was of no consequence because the officer "diligently pursued a means of investigation that was likely to confirm or dispel [his] suspicion[] quickly."[14]

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7. 243 Va. 191, 413 S.E.2d 645 (1992) (officer's shining floodlight on two men walking away from his car and directing them to return and produce identification did not constitute a seizure under the Fourth Amendment).

8. The defendant had walked away from the scene when the officer had arrived, and was unsuccessfully trying to open the door of an apartment when the officer followed him onto the porch of the apartment and asked "What's in your hand, pal?" *Satchel*, 15 Va. App. at 129, 422 S.E.2d at 413.

9. *Id.* at 132, 422 S.E.2d at 415. This opinion was the subject of a dissent which argued that "a talismanic reference to *Baldwin*" should not supplant the trial court's factual determination of the coercive effect of the officer's conduct, and that the record supported the court's finding. *Id.* at 134, 422 S.E.2d at 416 (Benton, J., dissenting). The reason for the deference urged by the dissent was included in the Court's reasoning in Hogan v. Commonwealth, 15 Va. App. 355, 365, 423 S.E.2d 841, 848 (1992): "The trial court heard the evidence, observed the witnesses and concluded that the officers acted in good faith and with sufficient reason." *Id.*

10. 14 Va. App. 86, 414 S.E.2d 869 (1992).

11. *Id.* at 89-90, 414 S.E.2d at 870-71. *See* Bolda v. Commonwealth, 15 Va. App. 315, 317-18, 423 S.E.2d 204, 206 (1992) for a review of Virginia cases in which it was considered reasonable for officers to have believed that an unidentified object encountered during a frisk might be a weapon, justifying removal. *See also* Nesbit v. Commonwealth, 15 Va. App. 391, 424 S.E.2d 239 (1992).

12. 14 Va. App 1018, 421 S.E.2d 664 (1992).

13. The defendant contended that his forty-minute detention constituted a full custodial arrest without probable cause. *Id.* at 1021, 421 S.E.2d at 665-66.

14. *Id.* at 1022, 421 S.E.2d at 666 (quoting United States v. Sharpe, 470 U.S. 675, 686 (1985)).

The announcement of official authority and the command to the defendant to do as instructed by a police officer effected a detention within the meaning of the Fourth Amendment.[15] An investigatory detention, based on an anonymous tip, was approved in *Quigley v. Commonwealth*.[16] In *Hatcher v. Commonwealth*,[17] the court held officers had a reasonable suspicion justifying the detention where they observed the defendant get out of a car, which had engaged in high speed evasive maneuvers, and walk quickly away although the defendant was not the driver.[18] In *Layne v. Commonwealth*[19] the fact that the basis for the investigatory detention was a misdemeanor committed in another jurisdiction, and not in the officer's presence, did not defeat the propriety of the detention.

In *Riley v. Commonwealth*,[20] the police officer saw the defendant exit his car, turn his back to the officer, make a motion toward his waistband, and then begin to walk away. The officer saw no object, but believed that the defendant was trying to hide a weapon. He followed the defendant in his police car, shining a bright light on him. The defendant turned to face the car, but when the officer got out to walk toward the defendant, he began to walk away. The officer identified himself and told the defendant to stop. During the subsequent pat-down, the officer found cocaine in Riley's pocket. Riley was charged and convicted despite his objection that his detention and the frisk were unlawful.[21]

The court of appeals agreed with the defendant, finding that the officer had no particularized knowledge of the defendant's involvement in criminal activity. His presence in a high crime area was

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15. Woodson v. Commonwealth, 14 Va. App. 787, 421 S.E.2d 1 (1992).

16. 14 Va. App. 28, 32, 414 S.E.2d 851, 853 (1992). *See also* Harmon v. Commonwealth, 15 Va. App. 440, 425 S.E.2d 77 (1992) (concerning investigative detentions).

17. 14 Va. App. 487, 419 S.E.2d 256 (1992).

18. Interestingly, the detention was not justified under the more stringent requirement of the code. The code grants authority to an officer to detain a person only if he "reasonably suspects" that the person "is committing, has committed or is about to commit a felony or possesses a concealed weapon." VA. CODE ANN. § 19.2-83 (Repl. Vol. 1990). The court's holding on this issue raised the question of whether suppression was the proper remedy for violating a state procedural statute. The court found that excluding the evidence was not required for this type of breach because the defendant was not deprived of his constitutional rights. *Hatcher*, 14 Va. App. at 493, 419 S.E.2d at 259. *Accord* Penn v. Commonwealth, 244 Va. 218, 420 S.E.2d 713 (1992), *affirm'g* Penn v. Commonwealth, 13 Va. App. 399, 412 S.E.2d 189 (1991). *Cf.* Turner v. Commonwealth, 14 Va. App. 737, 748 n.3, 420 S.E.2d 235, 242 n.3 (1992).

19. 15 Va. App. 23, 421 S.E.2d 215 (1992).

20. 13 Va. App. 494, 412 S.E.2d 724 (1992).

21. *Riley*, 13 Va. App. at 496, 412 S.E.2d at 725.

insufficient to impute wrongdoing or to color his conduct as criminal.[22]

B. *Consent*

The standard for measuring the scope of an individual's consent to a search is that of "objective reasonableness — what the typical reasonable person [would] have understood by the exchange between the officer and the suspect."[23] The scope of an individual's consent to search arose in *Bolda v. Commonwealth*.[24] The officer in *Bolda* asked the defendant whether he possessed any weapons. When Bolda answered that he did not, the officer asked if he could search his person. The court of appeals held that the officer's conclusion that Bolda's assent constituted consent to a general search was objectively unreasonable.[25]

C. *Search Warrants*

Code of Virginia section 19.2-56 extinguishes "absolutely" the validity of a search warrant which is not executed within fifteen days from the date it is issued.[26] In *Turner v. Commonwealth*,[27] the defendant had argued that the passage of eleven days between issuance and execution violated the requirement of Code of Virginia section 19.2-56 that a warrant be executed "forthwith." The court of appeals disagreed, noting that the requirement was only directory, and that the standard it promulgated was meant to be both flexible and practical. Accordingly, "forthwith" was defined to direct the execution of a search warrant "with reasonable dispatch and without undue delay . . . as soon as reasonably practicable under the circumstances."[28] In *Turner*, the police complied with this requirement. The search warrant identified a person and an

22. *Id.* at 498-99, 412 S.E.2d at 726. *Cf.* Nesbit v. Commonwealth, 15 Va. App. 391, 424 S.E.2d 239 (1992).

23. Florida v. Jimeno, 111 S. Ct. 1801, 1803-04 (1991) ("The scope of a search is generally defined by its expressed objective."). *Id.* at 1804.

24. 15 Va. App. 315, 423 S.E.2d 204 (1992).

25. The officer's search was limited to weapons and therefore the officer's removing and opening a bag in Bolda's pocket was inappropriate. *Id.* at 319, 423 S.E.2d at 207. By contrast, the consent to search in Grinton v. Commonwealth, 14 Va. App. 846, 419 S.E.2d 860 (1992) was a general consent which, without limitation, permitted the officer to search closed containers found in the defendant's car.

26. VA. CODE ANN. § 19.2-56 (Repl. Vol. 1990).

27. 14 Va. App 737, 420 S.E.2d 235 (1992).

28. *Id.* at 743, 420 S.E.2d at 239.

address. The officers made six trips to the address during the eleven-day period, without executing the warrant, before finding the individual present. It was not unreasonable for them to delay execution until they learned that he arrived.[29]

A search warrant was properly executed in *Commonwealth v. Viar*,[30] where the court of appeals found that the "knock and announce" rule was inapplicable. The trial court erred in *Commonwealth v. Moss*[31] in ruling that a search warrant became stale after five days passed from the date of issuance. The record disclosed no basis for this conclusion. Probable cause continued to exist and the delay did not violate the "forthwith" requirement of Code of Virginia section 19.2-56.[32]

D. *Miscellaneous*

In *Mier v. Commonwealth*,[33] the Court of Appeals of Virginia suggested the possible characterization of a private security guard as an agent of the police.[34] In *Mills v. Commonwealth*,[35] the court accorded surprising deference to the trial court's finding that a friend and informant of the sheriff was not acting as an agent of the Commonwealth. The opinion discusses the factors the trial court should evaluate to make this factual determination.[36]

The Court of Appeals of Virginia considered various other Fourth Amendment issues in 1992. It held that there is no reasonable expectation of privacy in airspace, and hence, a reasonable and articulable suspicion is not necessary before police may use a drug dog to sniff around an item believed to contain drugs.[37] The Fourth Amendment only prohibits the Commonwealth or its agents from conducting an unreasonable search, and there is no state action where a private citizen installs a phone trap.[38] The search warrant in *Morke v. Commonwealth* was valid because it described the items sought with sufficient particularity and the of-

29. *Id.* at 747, 420 S.E.2d at 241.
30. 15 Va. App. 490, 425 S.E.2d 86 (1992).
31. 14 Va. App. 750, 420 S.E.2d 242 (1992).
32. *Id.* at 752, 420 S.E.2d at 243.
33. 12 Va. App. 827, 407 S.E.2d 342 (1991).
34. *Id.* at 833 n.1, 407 S.E.2d at 346 n.1.
35. 14 Va. App. 459, 418 S.E.2d 718 (1992).
36. *Id.* at 464, 418 S.E.2d at 720.
37. Brown v. Commonwealth, 15 Va. App. 1, 421 S.E.2d 877 (1992) (en banc).
38. Morke v. Commonwealth, 14 Va. App. 496, 502-03, 419 S.E.2d 410, 414 (1992).

ficers did not exceed the scope of the warrant's authorization.[39] Police-created exigencies were discussed in *Quigley v. Commonwealth*.[40]

Closed containers were lawfully searched in *Hogan v. Commonwealth*.[41] The appellate court did not accept the defendant's argument that the search was made in bad faith, as a pretext to a drug investigation. Instead, the court deferred to the trial court, which "heard the evidence, observed the witnesses and concluded that the officers acted in good faith and with sufficient reason."[42] Nevertheless, the court's language left open the availability of a bad faith argument, noting that nothing in the record established that there was any motive, other than concern for personal safety, prompting the search or that impounding the car or the inventory search was made in bad faith.[43]

III. Fifth Amendment

Although routine traffic stops and questioning usually do not amount to custodial interrogation,[44] there is no *per se* rule to this effect.[45] In *Cherry v. Commonwealth*,[46] a police officer stopped the defendant on a tip that he had cocaine in his car. The officer told Cherry that he had been stopped as part of a narcotics investigation. The fact that Cherry had been told the nature of the investigation was a relevant consideration to the determination of custody. The defendant under these circumstances would not reasonably have expected only a brief detention, accompanied by a license and registration check, related questions, and then the freedom to leave. Although the detention was not a routine traffic stop, what occurred was not necessarily custodial interrogation.

The next step in the court's analysis was an objective consideration of the circumstances of the defendant's detention.[47] In this

39. *Id.* at 502, 419 S.E.2d at 414.

40. 14 Va. App. 28, 38-41, 414 S.E.2d 85, 857-58 (1992).

41. 15 Va. App. 355, 423 S.E.2d 841 (1992).

42. *Id.* at 365, 423 S.E.2d at 848. *Cf.* Satchel v. Commonwealth, 15 Va. App. 127, 422 S.E.2d 412 (1992).

43. *Id.* at 364, 423 S.E.2d at 847.

44. Berkemer v. McCarty, 468 U.S. 420, 440 (1984). Routine traffic stops characteristically involve brief detentions at the roadside by one or two officers under circumstances in which the driver does not feel "completely at the mercy of the police." Cherry v. Commonwealth, 14 Va. App. 135, 138-39, 415 S.E.2d 242, 243-44 (1992).

45. *Cherry*, 14 Va. App. at 139, 415 S.E.2d at 242.

46. *Id.* at 135, 415 S.E.2d at 242.

47. *See* Wass v. Commonwealth, 5 Va. App. 27, 33, 359 S.E.2d 836, 839 (1987).

case, the two police officers possessed the legal justification necessary to make an investigative detention of Cherry. They asked him to step out of his vehicle, but did not place him under formal arrest or restrain him in any fashion. The detention occurred in a public setting, Cherry was permitted to comfort his daughter, a passenger in the car, and had been detained only briefly when the officer asked the question which drew the *Miranda* objection. In view of these factors, the court of appeals affirmed the trial court's determination that Cherry was not in custody at the time the question was posed.[48]

The Court of Appeals of Virginia accorded no deference to the trial court's finding in *Commonwealth v. Milner*,[49] reversing the court's determination that the defendant had been subjected to custodial interrogation without the benefit of the *Miranda* warnings. Despite the fact that the defendant was not free to leave, and was searched for weapons, the officer's actions "did not subject the defendant to a restraint on freedom of movement 'of the degree associated with a formal arrest.' "[50] Similarly, in *Hatcher v. Commonwealth*,[51] the defendant was not considered to have been subjected to custodial interrogation where the officer commanded him to stop, picked up a "stem" and asked to whom it belonged.[52]

Cases involving the putative waiver of constitutional rights prompt a strained deference to trial court findings.[53] Waivers in hospital settings are particularly problematic.[54] In *Williams v.*

48. *Cherry*, 14 Va. App. at 141-42, 415 S.E.2d at 245.

49. 13 Va. App. 556, 413 S.E.2d 352 (1992).

50. *Id.* at 559, 413 S.E.2d at 354.

51. 14 Va. App 487, 419 S.E.2d 256 (1992).

52. *Id.* at 488, 419 S.E.2d at 257. The court of appeals considered that the encounter occurred in a neutral setting on a public street, and involved a lone police officer addressing a group of four men, with no actual physical restraint. The challenged interrogation consisted of only one question, to which the defendant did not respond. The *Miranda* objection arose because after the defendant was arrested and cuffed, and while he was being transported to the police station, he made an incriminating statement that was allegedly in response to the unanswered question asked on the scene. This argument was rejected because the statement was deemed an initiation of conversation by the defendant. *Id.* at 495, 419 S.E.2d at 261.

53. *See, e.g.*, Mundy v. Commonwealth, 11 Va. App. 461, 390 S.E.2d 525 (1990). *But see* Harrison v. Commonwealth, 244 Va. 576, 423 S.E.2d 160 (1992).

54. *See, e.g.*, Williams v. Commonwealth, 14 Va. App. 208, 415 S.E.2d 856 (1991); Venable v. Commonwealth, 12 Va. App. 358, 404 S.E.2d 374 (1991). But see Commonwealth v. Peterson, 15 Va. App. 486, 424 S.E.2d 722 (1992), where the court of appeals affirmed the trial court's finding that asserting police authority when the defendant was "especially susceptible overbore his will," and rendered his statements involuntary. *Id.* at 488, 424 S.E.2d at 724.

Commonwealth,[55] the defendant was advised of his *Miranda* warnings at the hospital. He voluntarily waived his rights[56] and then verbally abused the sheriff, for which he was arrested. At the police station he was questioned without the benefit of additional warnings. His earlier waiver, the efficacy of which was unaltered by his conduct, was presumed to have continued. The abuse of the sheriff was not an expression of the defendant's intent to revoke his prior waiver.[57]

In *Mills v. Commonwealth*,[58] the defendant was charged with killing a Lee County sheriff's deputy. At a suppression hearing, both he and a deputy testified that he had requested counsel after being advised of his *Miranda* rights. An FBI agent testified that the defendant said "I don't know if I could talk about that without an attorney."[59] Other law enforcement agents testified that the defendant made no request for counsel. The trial court resolved the conflict, finding that the defendant did not request counsel, and that he knowingly and intelligently waived his right to counsel. Reviewing the evidence in the light most favorable to the Commonwealth, the prevailing party, the court of appeals affirmed the trial court, finding that the holding was supported by credible evidence.[60]

Determining whether a confession is voluntary is a question of law which will be independently reviewed by an appellate court considering the totality of the circumstances.[61] On the other hand, the question of whether a waiver of *Miranda* rights was made knowingly and intelligently is a question of fact on which a trial court's finding is entitled to a presumption of correctness.[62]

The strange events which occur in hospital settings are not confined to rights waivers. In a Richmond emergency room, the curtain separating two hospital beds was pulled aside, permitting the inadverent observation (and identification) of the defendant by his shooting victim (and return attacker). The efforts of the Commonwealth to compel the surgical removal of the victim's bullet from the defendant unsuccessfully culminated in Winston v. Lee, 470 U.S. 753 (1985).

55. 14 Va. App. 208, 415 S.E.2d 856 (1992).

56. The opinion does not indicate whether the waiver was express or imputed.

57. *Id.* at 210, 415 S.E.2d at 858.

58. 14 Va. App. 459, 418 S.E.2d 718 (1992).

59. *Id.* at 467, 418 S.E.2d at 722.

60. *Id.* at 469, 418 S.E.2d at 723-24. *See also* Bolding v. Commonwealth, 15 Va. App. 320, 423 S.E.2d 212 (1992) (holding that the defendant did not invoke his right to counsel when he asked whether a lawyer could be appointed at that moment).

61. Harrison v. Commonwealth, 244 Va. 576, 580, 423 S.E.2d 160, 162 (1992).

62. *Id.* at 581, 423 S.E.2d at 163.

In *Harrison v. Commonwealth*,[63] the defendant remained silent after he was advised of his *Miranda* rights. The Supreme Court of Virginia agreed that a waiver could not be presumed from silence, but assumed for the purpose of its opinion that the silence was an implicit invocation of those rights.[64] The defendant later asked the officers what would happen to him. The officers told him that they wanted his cooperation against his codefendants, and that his assistance could help him. The defendant gave a complete statement, and the Supreme Court of Virginia held that a waiver of his rights was implicit in the giving of the statement.[65] Although the defendant was "visibly depressed" when he reopened his dialogue with the police, his distress did not amount to a state of mental incompetence or insanity which would dictate a finding of involuntariness. The court found no indication that the defendant's waiver was coerced by the officers.[66]

Three cases in 1992 concerned the scope of the Fifth Amendment. Code of Virginia section 19.2-270[67] confers "use" immunity, a protection that is not co-extensive with the Fifth Amendment privilege against self-incrimination. Thus, it cannot be used to overcome the assertion of this privilege by a witness during cross-examination.[68]

The appellate standard of review of a court's finding in a *Kastigar*[69] hearing is "clearly erroneous and not supported by the evidence."[70] In *Welsh v. Commonwealth*,[71] the defendant was granted immunity and compelled to testify in federal grand jury and trial proceedings. The defendant argued that the Commonwealth failed to prove that his immunized testimony was not used to indict or prosecute him. The court of appeals affirmed the court's *Kastigar* finding, weighing the precautions taken by Virginia authorities to

63. *Id.* at 576, 423 S.E.2d at 160.

64. *Id.* at 582, 423 S.E.2d at 163-64.

65. *Id.* at 582, 423 S.E.2d at 163.

66. The decision is significant because the supreme court recognized that "the methods used to induce a waiver of *Miranda* rights, like those used to induce a confession, may sometimes constitute coercive police activity." *Id.* at 583, 423 S.E.2d at 164.

67. VA. CODE ANN. § 19.2-270 (Cum. Supp. 1993).

68. Gosling v. Commonwealth, 14 Va. App. 158, 415 S.E.2d 870 (1992).

69. Kastigar v. United States, 406 U.S. 441 (1972).

70. Welsh v. Commonwealth, 14 Va. App. 300, 308, 416 S.E.2d 451, 456 (1992).

71. *Id.* at 300, 416 S.E.2d at 451.

avoid exposure to the immunized testimony, and the independent sources of the Commonwealth's case.[72]

The remedy for a breach of a cooperation/immunity agreement by the government is left to the discretion of the trial court, and may include the dismissal of the indictment or the suppression of the evidence obtained as a result of the agreement.[73] In *Commonwealth v. Sluss*,[74] the Commonwealth failed to show that the defendant had violated the conditions of the immunity agreement. The representation by the Commonwealth that a breach had occurred was not sufficient, and was supported by no evidence. Because the Commonwealth failed to prove that the defendant had breached the agreement, he was entitled to immunity. Thus, the trial court did not abuse its discretion by ordering the suppression of the statements given by the defendant to the Commonwealth's agents.[75]

A defendant who pleads guilty waives his right against compulsory self-incrimination with respect to matters germane to the offense. The trial court in *Edmunson v. Commonwealth*,[76] did not err by requiring the defendant to answer questions regarding his statements to probation officers. Unlike the invocation of the Fifth Amendment *Miranda* right to counsel, the assertion of the Sixth Amendment right to counsel is charge-specific. The invocation of that right with respect to one charge does not bar police interrogation of an uncounseled defendant with respect to an unrelated charge.[77]

Other cases decided during the past year concerned questions raised by police interrogation. The victim in *Wilson v. Commonwealth*,[78] was unable to identify the defendant. Hoping to elicit a confession, a police detective lied to the defendant by telling him that he had been positively identified by the victim. Although the

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72. *Id.* at 308-10, 416 S.E.2d at 456-57. The defendant cited a number of specific instances of taint, which the appellate court characterized as creating only "an abstract possibility of taint," which the Commonwealth was not required to negate. *Id.* at 311, 416 S.E.2d at 458. The Commonwealth need only prove by a preponderance of the evidence that the immunized testimony was not used and that the evidence which was admitted was derived solely from independent sources. *Id.* at 312, 416 S.E.2d at 458.

73. Commonwealth v. Sluss, 14 Va. App. 601, 606, 419 S.E.2d 263, 266 (1992).

74. *Id.* at 601, 419 S.E.2d at 263.

75. *Id.* at 607, 419 S.E.2d at 267.

76. 13 Va. App. 476, 412 S.E.2d 727 (1992).

77. Jackson v. Commonwealth, 14 Va. App. 414, 417 S.E.2d 5 (1992).

78. 13 Va. App. 549, 413 S.E.2d 655 (1992).

appellate court did not condone the conduct of the detective in tricking the defendant, the misrepresentation did not render the confession involuntary.[79]

In *Varher v. Commonwealth*,[80] the defendant's act of nodding his head during interrogation did not constitute a confession.[81] It was a "non-verbal expression" that may have indicated only an "acknowledgment or understanding of the information being conveyed."[82] Also, by stating that he had "really messed up" after being confronted with the officer's suspicions, the defendant "may have been acknowledging guilt of this offense or another offense being investigated, or he may have merely been expressing his concern for having placed himself in a compromising position."[83] Other meanings could just as reasonably have been attributed.[84]

IV. Due Process

Due process challenges to eyewitness identifications question whether an identification procedure is unduly suggestive and whether the resulting in-court identification is reliable.[85] The Court of Appeals of Virginia has shown no hesitancy in scrutinizing trial court findings of reliability.[86] In *Smallwood v. Commonwealth*,[87] not only was the witness's identification unreliable, the evidence was insufficient to support the conviction without the identification.[88]

The defendant in *Palmer v. Commonwealth*,[89] refused to appear in a physical lineup. His failure to comply with a court order was

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79. *Id.* at 554-55, 413 S.E.2d at 658. *See also* Hall v. Commonwealth, 14 Va. App 65, 72, 415 S.E.2d 439, 443 (1992).

80. 14 Va. App. 445, 417 S.E.2d 7 (1992).

81. *Id.* at 448, 417 S.E.2d at 8.

82. *Id.*

83. *Id.*, 417 S.E.2d at 9.

84. *Id.*

85. *See* Neil v. Biggers, 409 U.S. 188 (1972).

86. *See, e.g.*, Curtis v. Commonwealth, 11 Va. App. 28, 396 S.E.2d 386 (1990); Wise v. Commonwealth, 6 Va. App. 178, 367 S.E.2d 197 (1988).

87. 14 Va. App. 527, 418 S.E.2d 567 (1992).

88. The court of appeals noted that due process required "more than simply a trial ritual." *Id.* at 533, 418 S.E.2d at 570. *But cf.* Doan v. Commonwealth, 15 Va. App. 87, 422 S.E.2d 398 (1992) (holding pretrial identification was not caused by unduly suggestive identification procedure); Palmer v. Commonwealth, 14 Va. App. 346, 416 S.E.2d 52 (1992) (holding evidence of eyewitness identification was sufficient).

89. 14 Va. App. 346, 416 S.E.2d 52 (1992).

properly admitted at his trial, demonstrating consciousness of guilt.[90]

A recurring issue in criminal litigation is the admissibility of uncharged or other misconduct evidence. Generally this evidence is considered irrelevant if the sole purpose is to establish criminal propensity or bad character, or if its prejudicial effect outweighs its probative value. The prosecutorial art has been to argue that the evidence is admissible for one of the many valid reasons which exist as exceptions to this general rule.

During the defendant's trial for robbery in *Parker v. Commonwealth*,[91] evidence was presented that the car in which he had escaped (and in which his fingerprints were found) had been stolen. The court of appeals found no error in the admission of this evidence, as the fact that the car was stolen corroborated the Commonwealth's theory that the car was used to escape from the bank. Further, there was no evidence that the defendant had stolen the car, so there was little or no prejudice to the defendant.[92] Similarly, there was no error in *Witt v. Commonwealth*,[93] in permitting audio tapes which showed evidence of other crimes to demonstrate the defendant's knowledge of how to dismantle alarm systems. Any prejudice was outweighed by the legitimate probative value of the evidence.[94]

The trial court in *LaForce v. Commonwealth*,[95] found that evidence of the defendant's prior misconduct was relevant to the crime charged because it showed intent and guilty knowledge, and negated the defense of good faith or innocent bystander.[96] The trial court instructed the jury that it could not consider the evidence as establishing criminal character or disposition, but only to establish motive, intent or knowledge. The court of appeals disagreed with the trial court's findings, holding that the evidence was not probative of the issues for which it was admitted.[97] The instruction did not cure the error for this same reason.[98]

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90. *Id.* at 348, 416 S.E.2d at 53. His argument that the admission of this evidence constituted comment on his failure to testify was not discussed by the court.

91. 14 Va. App. 592, 421 S.E.2d 450 (1992).

92. *Id.* at 594, 421 S.E.2d at 452.

93. 15 Va. App. 215, 422 S.E.2d 465 (1992).

94. *Id.* at 221, 422 S.E.2d at 469.

95. 14 Va. App. 588, 419 S.E.2d 261 (1992).

96. *Id.* at 590, 419 S.E.2d at 262.

97. *Id.*

98. *Id.*

Rebuttal evidence of conduct similar to what the defendant claimed was an accident should not have been admitted in *Knick v. Commonwealth.*[99] Crucial to this holding was the lack of similarity of outcome, and the appellate court's conclusion that the evidence was logically relevant only to the defendant's propensity for violence.[100] As in *LaForce,*[101] a limiting instruction could not have cured the error, which was found to be not harmless.[102]

In *White v. Commonwealth,*[103] the court of appeals had held that the trial court erred in permitting the Commonwealth to summarize the confession of a confederate rather than admitting the confession in its entirety.[104] In *Lemons v. Commonwealth,*[105] a different result was obtained from the initial panel of the appellate court where defense counsel sought to introduce the entire text of a witness' statement instead of a summary of the exculpatory portion.[106] Upon rehearing en banc,[107] the court held that its opinion in *White* controlled. It vacated the convictions, remanded the case to the trial court for its in-camera examination and inclusion in the record of the verbatim statement. It further ordered the trial court to determinate the statement's materiality and assess whether full disclosure would have produced a different outcome.[108]

Due process arguments were considered in connection with other issues. In *Robinson v. Commonwealth,*[109] the argument that "eve-

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99. 15 Va. App. 103, 421 S.E.2d 479 (1992).

100. *Id.* at 105, 421 S.E.2d at 480-81.

101. 14 Va. App. 588, 419 S.E.2d 261 (1992).

102. *Knick,* 15 Va. App. at 105, 421 S.E.2d at 481. *See also* Nicholas v. Commonwealth, 15 Va. App. 188, 422 S.E.2d 790 (1992) in which the evidence that the defendant had fired the same gun in a shooting 13 hours before had little probative value with respect to identity. The prejudice of proving prior misconduct by the defendant outweighed whatever probative value existed. The court of appeals noted that the jury may have been so inflamed that it punished the defendant for both the charged and the uncharged acts. *Id.* at 193, 422 S.E.2d at 794.

103. 12 Va. App. 99, 402 S.E.2d 692, *aff'd,* 13 Va. App. 284, 410 S.E.2d 412 (1991) (en banc).

104. *White,* 12 Va. App. at 102, 402 S.E.2d at 694.

105. 13 Va. App. 668, 414 S.E.2d 842 (1992).

106. The panel held that the trial court did not err in not ordering full production, noting that counsel was free to interview the witnesses and that the trial court had expressed a willingness to reconsider its ruling if the witnesses refused to be interviewed. More importantly, the appellate court was unconvinced that a reasonable probability existed that had the verbatim statement been produced, a different result as to punishment or guilt would have resulted. *Id.* at 671, 414 S.E.2d at 844.

107. Lemons v. Commonwealth, 14 Va. App. 1009, 420 S.E.2d 525 (1992).

108. *Id.* at 1009-10, 420 S.E.2d at 526.

109. 14 Va. App. 91, 414 S.E.2d 866 (1992).

rything [the defendant] said today is the first time," was not a comment on the defendant's post-arrest silence which so infected the trial with unfairness as to deny due process.[110] The loss of potentially exculpatory photographs was not a denial of due process, absent a showing of bad faith by the police.[111] The trial court erred where it found the defendant not guilty of the charged offense, but at the same time, revoked a previously suspended sentence without notice of a revocation hearing, an opportunity to be heard or present evidence, or to obtain new counsel.[112] Statutory vagueness was discussed in *Welsh v. Commonwealth*,[113] as was the critical importance of a transfer hearing to a juvenile defendant,[114] for whom fundamental fairness required appointing a mental health expert of his own choosing.[115]

V. DOUBLE JEOPARDY

The Sixth Amendment's prohibition of double jeopardy protects defendants against multiple punishments and multiple prosecutions for the same offense.[116] In *Grady v. Corbin*,[117] the United States Supreme Court held that a subsequent prosecution is barred by the double jeopardy clause if the government seeks to "establish an essential element" of the instant prosecution by proving conduct which constitutes an offense for which the defendant has been previously prosecuted.[118] This protection only ex-

110. *Id.* at 93, 414 S.E.2d at 867.

111. Williams v. Commonwealth, 14 Va. App. 208, 210, 415 S.E.2d 856, 858 (1992).

112. Copeland v. Commonwealth, 14 Va. App. 754, 756, 419 S.E.2d 294, 295 (1992).

113. 14 Va. App. 300, 317-18, 416 S.E.2d 451, 461 (1992). *See also* Parnell v. Commonwealth, 15 Va. App. 342, 342, 423 S.E.2d 837, 838 (1992) (barring defendant from raising vagueness for the first time on appeal).

114. Anderson v. Commonwealth, 15 Va. App. 226, 421 S.E.2d 900 (1992).

115. *Id.* at 229, 421 S.E.2d at 901-02. The defendant's mental condition was material to the transfer determination. The Commonwealth appealed the juvenile and domestic relations court's decision not to transfer the case and asked that a particular psychologist be appointed to evaluate the defendant. The order appointing the requested expert provided that he should "where appropriate . . . assist in the development of an insanity defense." *Id.* at 230, 421 S.E.2d at 902. Nevertheless, the appellate court noted that the defendant's perception of the expert's neutrality was certainly affected by the Commonwealth's specific request. *Id.* at 230, 421 S.E.2d at 902.

116. U.S. CONST. AMEND. VI.

117. 475 U.S. 508 (1990).

118. *Id.* at 521. *See, e.g.*, Clayton Motors v. Commonwealth, 14 Va. App. 470, 417 S.E.2d 317 (1992). In *Clayton Motors*, the defendant was prosecuted for both robbery and the lesser included offense of larceny. Because the same theft was the subject of the two charges, the double jeopardy prohibition barred convictions for both charges and the lesser included charge was dismissed. *Id.* at 470, 417 S.E.2d at 316.

tends to successive prosecutions,[119] and the various attempts of defendants to invoke this protection by causing successive proceedings have been of no avail.[120]

Where the convictions occur in a single prosecution, the protection against multiple punishment is applicable, and the test articulated in *Blockburger v. United States*,[121] is determinative. In *Sullivan v. Commonwealth*,[122] the defendant's conviction of one of two robberies of two individuals was barred where there was only one theft.[123] The *Blockburger* test was satisfied in *Johnson v. Commonwealth*[124] because the charges of assault and abduction require proof of different facts.[125]

Note that the burden is on the defendant to prove his allegations of prior jeopardy and the identity of the offenses involved. This burden is customarily discharged by producing the record or transcript of the earlier trial. Cooper v. Commonwealth, 13 Va. App. 642, 644, 414 S.E.2d 435, 436 (1992).

119. *See, e.g.*, Freeman v. Commonwealth, 14 Va. App. 126, 414 S.E.2d 871 (1992) (holding that a prosecution for burglary is not barred because it was a concurrent, not successive, prosecution with the charge of petit larceny, which was dismissed in the general district court). The rule is also subject to a "jurisdictional exception," and does not apply when the various crimes are not subject to a common jurisdiction. Curtis v. Commonwealth, 13 Va. App. 622, 626, 414 S.E.2d 421, 423 (1992)(en banc).

120. *See, e.g.*, Walker v. Commonwealth, 14 Va. App. 203, 415 S.E.2d 446 (1992). The defendant had pleaded guilty to robbery, and moved to quash the charge of malicious wounding which arose out of the same set of circumstances. He argued that the two proceedings were successive prosecutions. The appellate court disagreed, noting that to hold otherwise would permit the use of the double jeopardy clause by "other defendants . . . as a sword." *Id.* at 205, 415 S.E.2d at 447. The court found that the defendant, not the government, had caused the two proceedings to occur by his maneuvering. *Id.* at 205, 415 S.E.2d at 447. *See also* Rea v. Commonwealth, 14 Va. App. 940, 421 S.E.2d 464 (1992)(defendant arraigned simultaneously on charges of capital and first degree murder for the same homicide pleaded guilty to the latter and sought, unsuccessfully, to invoke a double jeopardy bar). Stevens v. Commonwealth, 14 Va. App. 238, 415 S.E.2d 881 (1992)(prosecution for conspiracy to commit murder was not precluded where defendant, upon arraignment for that charge and malicious wounding, pled guilty to one and not guilty to the other.

121. 284 U.S. 299 (1932). The traditional test is that the prosecution of two offenses arising from the same act is not barred if each offense requires the proof of an element which the other does not. This is not the end of the inquiry. Even if the offenses are the same under *Blockburger*, the question remains whether the General Assembly intended cumulative punishments for the two offenses. Blythe v. Commonwealth, 222 Va. 722, 725-26, 284 S.E.2d 796, 797 (1981).

122. 14 Va. App. 1044, 420 S.E.2d 724 (1992).

123. The court suggested that a clearer objection would have been that the evidence was insufficient to establish the commission of a second robbery. *Id.* at 1047, 420 S.E.2d at 726.

124. 13 Va. App. 515, 412 S.E.2d 731 (1992).

125. The offense of assault required proof of an attempt or offer to do bodily harm, conduct not required by the offense of abduction, which required proof of an asportation or detention by force, threat, or intimidation. *Id.* at 517, 412 S.E.2d at 732. The conduct in *Johnson* which supported the assault conviction was different from the conduct which was used to establish the corresponding element in the abduction charge. *Id.* at 517, 412 S.E.2d

Code of Virginia section 19.2-294 bars multiple convictions for crimes arising from the "same act." In *Hall v. Commonwealth*,[126] the court of appeals held that the bar applies only to successive prosecutions for the same act.[127] The en banc reversal of the panel decision in *Lash v. Commonwealth*[128] held that convictions for reckless driving and eluding a police officer were based on separate acts and were not barred by the statutory prohibition.[129]

VI. TRIALS

As in the past several years, the number of cases raising questions of trial procedure remained unabated.

A. *Jurors*

Reasonable doubt with respect to whether a juror is qualified must be resolved in the defendant's favor.[130] A potential juror in *Moten v. Commonwealth*[131] answered on voir dire that she could "try" to keep an open mind, but was "not sure" if she could put her personal feelings aside. To the trial court's suggestive question, she agreed that she could "stand indifferent." Stating that "expected answers" and "mere assent" do not rehabilitate a prospective juror, the court of appeals reversed, holding that the juror should have been excluded for cause.[132]

A defendant's conviction was reversed in *Williams v. Commonwealth*,[133] where several jurors should have been excluded for cause even though they indicated that they thought they could give the

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at 732. *See also* Phoung v. Commonwealth, 15 Va. App. 457, 424 S.E.2d 712 (1992) (holding abduction and robbery are distinct offenses).

126. 14 Va. App. 892, 421 S.E.2d 455 (1992)(en banc).

127. *Id.* at 894, 421 S.E.2d at 457. The court overruled the panel decision in *Lash v. Henrico County*, holding that the section applied even where the convictions were obtained in a single trial. *Id.* at 894, 421 S.E.2d at 457.

128. 14 Va. App. 926, 421 S.E.2d 851 (1992)(en banc).

129. *Id.* at 929, 421 S.E.2d at 853. *See also* Moore v. Commonwealth, 14 Va. App. 198, 415 S.E.2d 247 (1992) (holding that a double jeopardy protection did not bar prosecution for the offense of driving as an habitual offender even though the defendant had been convicted of two other moving violations).

130. Moten v. Commonwealth, 14 Va. App. 956, 959, 420 S.E.2d 250, 252 (1992) ("[u]sing or permitting the use of leading questions . . . in the voir dire of a prospective juror may taint the reliability of the juror's responses"). *Id.* at 959, 420 S.E.2d at 252 (quoting from McGill v. Commonwealth, 10 Va. App. 237, 242, 391 S.E.2d 597, 600 (1990)).

131. 14 Va. App. 956, 420 S.E.2d 250 (1992).

132. *Id.* at 959, 420 S.E.2d at 252.

133. 14 Va. App. 208, 415 S.E.2d 856 (1992).

defendant a fair trial.[134] The opinion is significant for two reasons. First, it contains an excellent discussion of when a juror can be expected to sit impartially, including an explanation of how the circumstances of each juror in this case created a reasonable doubt that he could fairly perform his duties. Second, the information considered by the appellate court in reviewing the trial court's action was gained through a thorough voir dire distinct from the yes/no and conclusory type examination to which practitioners have been customarily confined. This case provides at least implicit authority for more open-ended questions on voir dire.[135]

Other irregularities in the impaneling of jurors may cause reversal. Code of Virginia section 19.2-262(2) provides that a jury in a felony case shall consist of twelve persons drawn from a panel of twenty.[136] In *Fuller v. Commonwealth*,[137] the trial court erred in impaneling a jury of twelve from a panel of eighteen, even though the prosecutor waived two of his peremptory strikes.[138] Striking a juror does not cure the error in impaneling him, even if the juror is struck by the Commonwealth after the defendant's motion to excuse is denied.[139]

Evidence was proffered in *Witt v. Commonwealth*[140] that during the testimony of a witness for the Commonwealth, someone in the audience made threatening gestures to the witness, and that such gestures may have been seen by the jury. The trial court erred in refusing to poll the jury.[141] The trial court was not required, however, to summon a juror to investigate misconduct where the affidavit in support of the motion made no allegation that the juror received extrajudicial information.[142] Neither was a reasonable doubt of impartiality established by evidence of startled glances among the venire when they saw the defendant, who several of the

134. *Id.* at 214, 415 S.E.2d at 860. "In determining whether a juror is free from prejudice, nothing should be left to inference or doubt." *Id.* at 213, 415 S.E.2d at 859.

135. *Cf.* McGann v. Commonwealth, 15 Va. App. 448, 424 S.E.2d 706 (1992).

136. VA. CODE ANN. § 19.2-262(2) (Cum. Supp. 1993).

137. 14 Va. App. 277, 416 S.E.2d 44 (1992).

138. *Id.* at 278, 416 S.E.2d at 44. The court of appeals approved the practice of waiving strikes when necessary, unless a defendant insists on the statutory mandate. *Id.* at 281-82, 416 S.E.2d at 47.

139. *Id.* at 281, 416 S.E.2d at 46.

140. 15 Va. App. 215, 422 S.E.2d 465 (1992).

141. *Id.* at 225, 422 S.E.2d at 471.

142. Hall v. Commonwealth, 14 Va. App. 65, 415 S.E.2d 439 (1992).

prospective jurors had acquitted in an earlier trial, in the custody of the sheriff as he was led into the courtroom.[143]

Surprisingly little litigation arose over the application of *Batson v. Kentucky*.[144]

B. *Speedy Trial*

Code of Virginia section 19.2-243 provides for trial of criminal cases within five or nine months, depending upon whether the defendant is incarcerated.[145] It is the fact of incarceration which controls, regardless of any connection of that incarceration to the instant offense.[146] The pretrial delay in *Adkins v. Commonwealth*[147] was not explained by any order or docket entries in the record. The testimony of a witness's recollection of the reason for the delay was insufficient.[148]

C. *Mistrials*

The defendant in *Kitze v. Commonwealth*[149] had put on evidence of irresistible impulse and pleaded not guilty by reason of insanity. During closing argument, the prosecutor told the jury that if it found the defendant not guilty, he would go free. The defendant's motion for a mistrial was properly denied, and the er-

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143. Fuller v. Commonwealth, 14 Va. App. 277, 416 S.E.2d 44 (1992).

144. 476 U.S. 79 (1986). *But see* Winfield v. Commonwealth, 14 Va. App. 1049, 421 S.E.2d 468 (1992) (en banc), where the appellate court lifted the stay of the panel's mandate in Winfield v. Commonwealth, 12 Va. App. 446, 404 S.E.2d 398 (1991), and affirmed the trial court's finding of fact that the Commonwealth's Attorney satisfied the *Batson* requirements. The *Winfield* court adopted the standard of review espoused by a plurality in Hernandez v. New York, 111 S. Ct. 1859 (1991), where the trial court's decision on discriminatory intent is a finding of fact which will not be overturned on appeal absent a determination that it was clearly erroneous. The adoption of this standard, "without serious analysis," was the subject of vehement dissent. *Winfield*, 14 Va. App. at 1065, 421 S.E.2d at 478 (Coleman, J. dissenting).

145. VA. CODE ANN. § 19.2-243 (Cum. Supp. 1993).

146. Jones v. Commonwealth, 13 Va. App 566, 569, 414 S.E.2d 193, 195 (1992). In this case, the delay was properly attributable to the defendant's request for a psychiatric evaluation and lack of cooperation. *Id.* at 570-71, 414 S.E.2d at 195-96. The defendant's Sixth Amendment claim was discussed and rejected. *Id.* at 570-71, 414 S.E.2d at 195-96. *See also* Williamson v. Commonwealth, 13 Va. App. 655, 414 S.E.2d 609 (1992) (holding no denial of speedy trial rights under § 19.2-243, the Sixth Amendment, or the Interstate Agreement on Detainers).

147. 13 Va. App. 519, 414 S.E.2d 188 (1992).

148. *Id.* at 522, 414 S.E.2d at 189.

149. 15 Va. App. 254, 422 S.E.2d 601 (1992), *rev'd* 1993 WL 356759, at *1 (Va. Sept. 17, 1993).

ror was corrected by the trial court's instruction that the jury was not to concern itself with what might happen after the verdict.

The prosecutor's repeated improper questions concerning the defendant's involvement in unrelated drug transactions in *Robinson v. Commonwealth*,[150] created a manifest probability that the jury was prejudiced and the defendant was denied a fair trial.[151] A new trial was granted in another case where the defendant had tried unsuccessfully to interview a friend of the rape victim, who came forward after the trial with exculpatory information.[152]

C. *Evidence*

Many of the year's cases from the Court of Appeals of Virginia concerned common evidentiary questions, particularly questions related to authentication requirements,[153] hearsay,[154] expert testimony,[155] and relevance.[156]

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150. 13 Va. App. 574, 413 S.E.2d 885 (1992).

151. *Id.* at 575, 413 S.E.2d at 886. The court of appeals expressly declined to state whether a retrial would be barred by the prohibition against double jeopardy, noting that its remand of the case did not foreclose the question. *Id.* at 575 n.1, 413 S.E.2d at 886 n.1.

152. Gatling v. Commonwealth, 14 Va. App. 60, 414 S.E.2d 862 (1992). Although the witness was present at trial on a Commonwealth's subpoena, he did not testify, and the defendant was understandably reluctant to call him as a witness without knowing what he would say. The court suggested a potential issue not pertinent to this case regarding the sufficiency of a proffer to present evidence in support of a motion for a new trial. *Id.* at 61 n.1, 414 S.E.2d at 863 n.1.

153. Brooks v. Commonwealth, 15 Va. App. 407, 424 S.E.2d 566 (1992) (concerning videotape); Kitze v. Commonwealth, 15 Va. App. 254, 422 S.E.2d 601 (1992) (concerning circumstantial authentication of a letter); Witt v. Commonwealth, 15 Va. App. 215, 422 S.E.2d 465 (1992) (requiring foundation for admission of duplicate tapes from a body wire); Proctor v. Commonwealth, 14 Va. App. 937, 419 S.E.2d 867 (1992) (copy of a certificate of laboratory analysis was not properly authenticated); Jackson v. Commonwealth, 13 Va. App. 599, 414 S.E.2d 419 (1992) (carbon copy is not a "copy" within the meaning of VA. CODE ANN. § 8.01-391(c) (Repl. Vol. 1992)); Riley v. Commonwealth, 13 Va. App. 494, 412 S.E.2d 724 (1992) (failing to object to the absence of proof of due execution waives the requirement of proof of authenticity).

154. Neal v. Commonwealth, 15 Va. App. 416, 425 S.E.2d 521 (1992) (concerning a search warrant affidavit); Knick v. Commonwealth, 15 Va. App. 103, 421 S.E.2d 479 (1992) (relating to adoptive admission); Clark v. Commonwealth, 14 Va. App. 1068, 421 S.E.2d 28 (1992) (dealing with present sense impression); Hooker v. Commonwealth, 14 Va. App. 454, 418 S.E.2d 343 (1992) (admitting hearsay improperly caused reversal).

155. Hubbard v. Commonwealth, 243 Va. 1, 413 S.E.2d 875 (1992); Papuchis v. Commonwealth, 15 Va. App. 281, 422 S.E.2d 419 (1992) (expert relying on facts not in evidence to develop an opinion); Knick v. Commonwealth, 15 Va. App. 103, 421 S.E.2d 479 (1992) (expert's opinion that the evidence was consistent with the defendant's version of the events was inadmissible opinion on the ultimate fact in issue); Schooler v. Commonwealth, 14 Va. App. 418, 417 S.E.2d 110 (1992) (admitting opinion of accident reconstruction expert was improper).

In *Mason v. Commonwealth*,[157] the Commonwealth had argued that the defendant's proffered testimony was inadmissible because it presented evidence in mitigation of punishment. Because the testimony pertained to the defendant's motivation and state of mind, it went to his culpability, and was admissible despite any effect it may have had on his sentence.[158] The trial court in another case erred by not admitting evidence that a victim had offered to drop charges in exchange for money.[159] The court of appeals reasoned that the offer was probative of the victim's perception of the incident, and that his perception was material as it "necessarily influenced" his recounting of what occurred.[160]

The necessity of a *Weimer*[161] analysis was created by defense objections to the cross-examination of the defendant's reputation witness.[162]

A variety of other evidentiary issues were the subject of discussion or holdings.[163]

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156. Irving v. Commonwealth, 15 Va. App. 178, 180, 422 S.E.2d 471, 473 (1992) (discussing logical and legal relevance) (Benton, J., dissenting); Evans v. Commonwealth, 14 Va. App 118, 415 S.E.2d 851 (1992) (defining relevancy); Morris v. Commonwealth, 14 Va. App. 283, 416 S.E.2d 462 (1992) (en banc) (photographs of the defendant and another individual were relevant to prove acquaintance and did not depict the defendant engaged in any illegal activity). *But see Morris*, 14 Va. App. at 288-89, 416 S.E.2d at 465 (Benton, J. dissenting); Varker v. Commonwealth, 14 Va. App 445, 417 S.E.2d 7 (1992) (discussing circumstantial evidence).

157. 14 Va. App. 609, 419 S.E.2d 856 (1992).

158. *Id.* at 614, 419 S.E.2d at 860.

159. Turner v. Commonwealth, 13 Va. App. 651, 653, 414 S.E.2d 437, 438 (1992).

160. *Id.*

161. Weimer v. Commonwealth, 5 Va. App. 47, 360 S.E.2d 381 (1987).

162. Gravely v. Commonwealth, 13 Va. App. 560, 414 S.E.2d 190 (1992). In addition to making the determinations described in *Weimer*, the trial court should also inform the jury of the limited purpose of evidence developed during such a cross. *Id.* at 563, 414 S.E.2d at 192.

163. Brooks v. Commonwealth, 15 Va. App. 407, 424 S.E.2d 566 (1992) (concerning unfair emphasis); Rader v. Commonwealth, 15 Va. App. 325, 423 S.E.2d 207 (1992) (concerning the admissibility of building code violations to prove fraudulent intent); Doan v. Commonwealth, 15 Va. App. 87, 422 S.E.2d 398 (1992) (relating to the admissibility of a transcript of the previous testimony of a witness allegedly unavailable as an inmate within the Department of Corrections); Johnson v. Commonwealth, 15 Va. App. 73, 422 S.E.2d 593 (1992) (discussing the proper basis of inferences); Mostyn v. Commonwealth, 14 Va. App. 920, 420 S.E.2d 519 (1992) (defendant's reputation for "not using drugs" was inadmissible); Archie v. Commonwealth, 14 Va. App. 684, 420 S.E.2d 718 (1992) (concerning sodium amytal); Baugh v. Commonwealth, 14 Va. App. 368, 417 S.E.2d 891 (1992) (relating to the admissibility of district court's certificate of events in trial *de novo* of contempt conviction); Toro v. City of Norfolk, 14 Va. App. 244, 416 S.E.2d 29 (1992) (survey results in obscenity prosecution were not relevant where survey questions were inadequate); Hanson v. Commonwealth, 14 Va. App. 173, 416 S.E.2d 14 (1992) (postmark evidence is admissible to prove the date it was

E. *Instructions*

A trial court has an affirmative duty to instruct a jury with respect to a principle of law vital to the defense of an accused,[164] and with respect to a lesser included offense.[165] The rule in the latter respect is that the instruction is required so long as a factual element must be proved which is not required for the lesser offense. A conflict in the evidence as to that element is not required.[166] On appeal, the standard of review on questions of refused instructions requires a consideration of the evidence in the light most favorable to the defendant.[167]

F. *Sentencing*

The opinions of the Court of Appeals of Virginia concerning sentencing issues considered either the conditions of suspended periods of incarceration[168] or revocation of suspended sentences.[169]

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affixed); Hall v. Commonwealth, 14 Va. App. 65, 415 S.E.2d 439 (1992) (evidence of a friend's method of establishing a false alibi was too speculative and prejudicial to justify admission in the defendant's murder trial); Scafetta v. Arlington County, 13 Va. App. 646, 414 S.E.2d 443 (1992) (requiring judicial notice of official publications of the United States and its agencies); Simpson v. Commonwealth, 13 Va. App. 604, 414 S.E.2d 407 (1992) (collateral evidence elicited during cross-examination is conclusive and an objection is not required to preserve right to object to attempt to rebut the collateral matter).

164. Campbell v. Commonwealth, 14 Va. App. 988, 421 S.E.2d 652 (1992) (en banc).

165. Martin v. Commonwealth, 13 Va. App. 524, 414 S.E.2d 401 (1992) (en banc).

166. *Id.* at 528, 414 S.E.2d at 403. In *Martin*, the defendant's words and actions were not disputed, but his specific intent was an issue. *See also* Boone v. Commonwealth, 14 Va. App. 130, 415 S.E.2d 250 (1992)(reversing conviction because of court's failure to instruct the jury on the lesser-included offense).

167. *Boone*, 14 Va. App. at 131, 415 S.E.2d at 251. In Clay v. Commonwealth, 13 Va. App. 617, 414 S.E.2d 432 (1992), the court of appeals suggested that some instructions may only be offered by a particular party, apart from the question of whether evidence would support the giving of the instruction. *Id.* at 621, 414 S.E.2d at 434.

168. Deal v. Commonwealth, 15 Va. App. 157, 421 S.E.2d 897 (1992) (the restitution condition of a suspended sentence was not excessive or improperly payable to a third party); Bassett v, Commonwealth, 13 Va. App. 580, 414 S.E.2d 419 (1992) (court's statement indicating a blanket refusal to consider mitigating factors taken out of context); Robinson v. Commonwealth, 13 Va. App. 540, 413 S.E.2d 661 (1992) (guidelines are but a factor to be used by the trial judge as he sees fit and the stated reasons for departure evinced no abuse of discretion).

169. Connelly v. Commonwealth, 14 Va. App. 888, 420 S.E.2d 244 (1992) (no abuse of discretion in finding that the defendant failed to abide by the terms of his one year probation where he submitted a urine screen positive for marijuana); Preston v. Commonwealth, 14 Va. App. 731, 419 S.E.2d 288 (1992) (revocation improper where the only basis was a misdemeanor conviction which had been appealed *de novo*); Bryce v. Commonwealth, 13 Va. App. 589, 414 S.E.2d 417 (1992) (misrepresentating identity at the time of sentencing justified revocation of a suspended sentence).

G. *Miscellaneous*

In *Davis v. Commonwealth*,[170] the defendant's conviction was reversed where the Commonwealth failed to prove venue in a prosecution for receiving stolen property. No evidence linked the defendant to the break-in, or proved that he bought or sold the subject of the larceny in South Boston. The Commonwealth argued that because larceny is a continuing offense, the defendant could be tried in the county where the theft occurred. The Court of Appeals of Virginia held that a defendant charged with receiving stolen goods must be tried in those jurisdictions in which he received or possessed the stolen items.[171]

The various circumstances and theories which mandate recusal were discussed in *Welsh v. Commonwealth*.[172] In *Parrish v. Commonwealth*,[173] the trial court misapplied the plea agreement under the terms of which the defendant had pleaded guilty to a reduced charge of possession of cocaine. Upon his subsequent breach, the trial court vacated the conviction and found the defendant guilty of possession of cocaine with intent to distribute. The court erred in taking this action because the breach occurred only with respect to a condition of the suspended sentence.[174]

A defendant is entitled to a trial by jury upon a plea of not guilty, even though he intends to admit his guilt during his testimony.[175] Ordering a defendant to shave his beard, cut his hair, and participate in a lineup does not violate his First Amendment freedom of expression, if his appearance is one of personal preference, and not for the purpose of expressing an idea.[176] The trial court in *Garrett v. Commonwealth*[177] correctly refused to determine if several robberies were part of a common scheme within the meaning of Code of Virginia section 53.1-151(B)(1). In *Clark v. Commonwealth*,[178] the court's unnecessary interjection into the defendant's argument, with no objection by the Commonwealth, was improper.

170. 14 Va. App. 709, 419 S.E.2d 285 (1992).
171. *Id.* at 714, 419 S.E.2d at 288.
172. 14 Va. App. 300, 416 S.E.2d 451 (1992).
173. 14 Va. App. 23, 415 S.E.2d 234 (1992).
174. *Id.* at 27, 415 S.E.2d at 236.
175. Mason v. Commonwealth, 14 Va. App. 609, 419 S.E.2d 856 (1992).
176. Palmer v. Commonwealth, 14 Va. App. 346, 416 S.E.2d 52 (1992).
177. 14 Va. App. 154, 415 S.E.2d 245 (1992).
178. 14 Va. App. 1068, 421 S.E.2d 28 (1992).

The prosecutor's argument in *Thurston v. City of Lynchburg*[179] was improper. There was no abuse of discretion in the trial court's limitation of cross-examination in *Smith v. Commonwealth*.[180]

VII. APPEALS

A number of recent Court of Appeals of Virginia decisions illustrated the consequences of failing to preserve issues for appellate review. These decisions chiefly concerned three problem areas: failing to make necessary filings within the time limits set by the Rules; failing to object or move for specific relief; and failing to object with the requisite specificity.

One consequence of the court's willingness to dismiss appeals not properly presented has been the development of an area of appellate law pertaining to the perfection of appeals following habeas corpus awards of belated appeals. Describing one recurrent problem,[181] the court held that if a timely notice of appeal was filed on direct appeal, but the appeal was dismissed for failure to perfect the appeal, a subsequent notice of appeal need not be filed.[182] If the notice of appeal was not filed initially in a timely manner, it must be so filed upon a grant of a belated appeal.[183]

Another troublesome area is created by a failure to present appellate review.[184] Where a statement of facts is used instead of a transcript, it must be filed within fifty-five days. The "entry" of the statement is insufficient, and local custom will not absolve a litigant who does not adhere strictly to the Rules of Court.[185] However, a transcript or proffer is not always necessary.[186]

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179. 15 Va. App. 475, 424 S.E.2d 701 (1992).

180. 15 Va. App. 507, 425 S.E.2d 95 (1992).

181. Sanchez v. Commonwealth, 14 Va. App. 256, 260, 416 S.E.2d 705, 708 (1992).

182. *Id.* at 260, 416 S.E.2d at 708.

183. *Id.* at 260, 416 S.E.2d at 708. *See also* D'Allesandro v. Commonwealth, 15 Va. App. 163, 423 S.E.2d 199 (1992) (dismissing appeal because notice was not timely filed). *D'Allesandro* illustrates the importance of an order modifying, vacating, or suspending the sentencing order within twenty-one days.

184. *See* McGann v. Commonwealth, 15 Va. App. 448, 424 S.E.2d 706 (1992) (barring review because defense counsel failed to proffer testimony expected to be adduced through cross-examination).

185. Anderson v. Commonwealth, 13 Va. App. 506, 413 S.E.2d 75 (1992).

186. *See, e.g.*, Craig v. Commonwealth, 14 Va. App. 842, 419 S.E.2d 429 (1992) (proffer of anticipated evidence was not necessary because the nature of the response to the prohibited questions did not matter); Woodson v. Commonwealth, 14 Va. App. 787, 790-91, 421 S.E.2d 1, 3 (1992) (transcript of pretrial suppression hearing was unnecessary where trial transcript was sufficient to resolve the issue).

In order to preserve an issue for appellate review, the complaining party must object and clearly state the relief sought.[187] An objection to improper argument is not sufficient unless the defendant moves for a mistrial or a cautionary instruction,[188] even if the objection is overruled.[189] Litigants must state the nature of their objection precisely, and must abandon efficient and customarily understood short-form objections. The objection "to the hearsay" in *Buck v. Commonwealth*,[190] was not sufficiently specific. In another case, a panel of the court of appeals reversed, holding that the use of a mug shot was prejudicial to the defendant's right to a fair trial.[191] En banc, the court affirmed the trial court, because the "other crime" nature of the mug shot was objected to on relevancy grounds and lacked the requisite specificity.[192]

Unlike error concerning the impaneling of an unqualified juror,[193] other rulings are not reviewable if events at trial render them moot. The claim of improper impeachment by prior conviction which the trial court had ruled it would permit in *Doan v. Commonwealth*[194] was not reviewed by the appellate court because the defendant decided not to testify.

Some matters are preserved for review in a common sense manner. The question of sufficiency of the evidence to support a conviction is preserved by counsel's arguing it in closing to the bench in a trial without a jury.[195] In *Martin v. Commonwealth*,[196] the defendant was not required by Supreme Court of Virginia Rule

187. Parnell v. Commonwealth, 15 Va. App. 342, 349, 423 S.E.2d 834, 838 (1992) (barring review of challenge to the constitutionality of a statute because the issue must be raised first in the trial court). *See also* Clark v. Commonwealth, 14 Va. App. 1068, 1073, 421 S.E.2d 28, 31 (1992) (barring review, in the absence of an objection or motion for a mistrial, of defendant's meritorious claim that the trial judge improperly interjected himself during counsel's argument); Singleton v. Commonwealth, 14 Va. App. 947, 419 S.E.2d 866 (1992) (dismissing appeal because no objection or motion was made when a polled juror stated that she had a reasonable doubt, but agreed with the verdict).

188. Moore v. Commonwealth, 14 Va. App. 83, 414 S.E.2d 859 (1992).

189. Morris v. Commonwealth, 14 Va. App. 283, 416 S.E.2d 462 (1992). *See also* Parker v. Commonwealth, 14 Va. App. 592, 421 S.E.2d 450 (1992). In *Parker*, the defendant objected to the fact that an alternate juror had been allowed to participate for some time in deliberations. Although the objection was overruled, the question was not preserved for review because the defendant did not move for a mistrial. *Id.* at 286, 421 S.E.2d at 464.

190. 14 Va. App. 10, 15, 415 S.E.2d 229, 233 (1992).

191. Irving v. Commonwealth, 13 Va. App. 414, 412 S.E.2d 712 (1991).

192. Irving v. Commonwealth, 15 Va. App. 178, 422 S.E.2d 471 (1992)(en banc).

193. *See supra* notes 130-44 and accompanying text.

194. 15 Va. App. 87, 422 S.E.2d 398 (1992).

195. Fortune v. Commonwealth, 14 Va. App. 225, 416 S.E.2d 25 (1992). *See also* Harris v. Commonwealth, 13 Va. App. 593, 413 S.E.2d 354 (1992) (sufficiency issue was preserved

5A:18[197] to object to the court's refusal to give a defense instruction. The "ends of justice" exception to the Rule was applied in *Campbell v. Commonwealth*.[198]

Three opinions contained implied caveats. Having asked the trial court to find the defendant guilty of a misdemeanor instead of a felony, the defendant could not sustain an appeal arguing that the evidence was insufficient to support the misdemeanor conviction which he had requested.[199] In *Kitze v. Commonwealth*,[200] the defendant conceded at trial that if his expert relied on a letter from a prior attorney in evaluating the defendant, the letter was admissible. The appellate court suggested that this statement of the law was not accurate, but deemed it the "law of . . . [the] case."[201] In *Hubbard v. Commonwealth*,[202] the Supreme Court of Virginia declined to reach the merits of an issue on appeal. The court explained its application of the rule that "where an accused unsuccessfully objects to evidence which he considers improper and then on his own behalf introduces evidence of the same character, he thereby waives his objection."[203]

The Commonwealth was successful in most of its en banc appeals in the court of appeals,[204] and a body of law has begun to develop concerning these appeals.[205]

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where the motion to strike was made at the close of the Commonwealth's evidence, and in final argument, but not at the close of the defendant's case).

196. 13 Va. App. 524, 414 S.E.2d 401 (1992).

197. VA. S. CT. R. 5A:18.

198. Campbell v. Commonwealth, 14 Va. App. 988, 421 S.E.2d 652 (1992)(en banc).

199. Manns v. Commonwealth, 13 Va. App. 677, 414 S.E.2d 613 (1992).

200. 15 Va. App. 254, 422 S.E.2d 601 (1992).

201. *Id.* at 264, 422 S.E.2d at 607.

202. 243 Va. 1, 413 S.E.2d 875 (1992).

203. *Id.* at 9, 413 S.E.2d at 879.

204. *See* Commonwealth v. Satchell, 15 Va. App. 127, 422 S.E.2d 412 (1992) (concerning interlocutory appeal). This case was remanded and tried, and is now on direct appeal with a petition for appeal pending for consideration. *See also* Commonwealth v. Viar, 15 Va. App. 490, 425 S.E.2d 86 (1992); Commonwealth v. Moss, 14 Va. App. 750, 420 S.E.2d 242 (1992). *But see* Commonwealth v. Peterson, 15 Va. App. 486, 424 S.E.2d 722 (1992); Commonwealth v. Sluss, 14 Va. App. 601, 419 S.E.2d 263 (1992).

205. *See, e.g.*, Brown v. Commonwealth, 15 Va. App. 1, 421 S.E.2d 877 (1992) (en banc) (petition for rehearing in the same appellate court is not an appeal prohibited by Art. VI, Section I of the Virginia Constitution); Commonwealth v. Sluss, 14 Va. App. 601, 419 S.E.2d 263 (1992) (the court of appeals may affirm a correct ruling reached for the wrong reason if the issue was before the court and the facts were resolved by the judge); Driscoll v. Commonwealth, 14 Va. App. 449, 417 S.E.2d 312 (1992) (an appellee is subject to Rule 5A:18 only when it asserts an error upon which it seeks to reverse a judgment).

The Court of Appeals of Virginia continued to rely upon a diverse number of authorities in its opinions, including treatises,[206] dictionaries,[207] journals,[208] federal opinions,[209] and, as it did twice in 1991, the reasoning of a California court.[210] Certain sensitivities and possible opportunities for argument were evident in several opinions. The court had harsh language for a prosecutor's actions,[211] considered information not available through customarily restricted voir dire,[212] and considered a question asked by a deliberating jury to conclude that error was not harmless.[213] In at least one case, the court's reasoning incorporated a defendant's particularly repugnant attitude.[214]

VIII. CRIMES

A. *Drugs*

In *Smith v. Commonwealth*,[215] the Supreme Court of Virginia ruled that the defendant's constant presence in an area notorious

206. *E.g.*, WAYNE R. LAFAVE, SEARCH & SEIZURE (2d ed. 1987), *cited in* Quigley v. Commonwealth, 14 Va. App. 28, 36 n.7, 414 S.E.2d 851, 855 (1992) (Benton, J., dissenting); JOHN H. WIGMORE, EVIDENCE, (Tillers rev. 1983), *cited in* Hanson v. Commonwealth, 14 Va. App. 173, 416 S.E.2d 14 (1992). The most cited work is CHARLES E. FRIEND, THE LAW OF EVIDENCE IN VIRGINIA (3d ed. 1988).

207. *E.g.*, BLACKS LAW DICTIONARY (6th ed. 1990), *cited in* Claxton v. Commonwealth, 15 Va. App. 152, 154, 421 S.E.2d 891, 893 (1992); WEBSTER'S 3D NEW INTERNATIONAL DICTIONARY, *cited in* Kitze v. Commonwealth, 15 Va. App. 254, 262, 422 S.E.2d 601, 606 (1992) (quoting Rollins v. Commonwealth, 207 Va. 575, 580, 151 S.E.2d 622, 625 (1966).

208. *E.g.*, Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427 (1980), *cited in* Archie v. Commonwealth, 14 Va. App. 684, 693, 420 S.E.2d 718, 723 (1992).

209. *See, e.g.*, Fuller v. Commonwealth, 14 Va. App. 277, 280, 416 S.E.2d 44, 46 (1992) (citing case from the Eighth Circuit); Toro v. City of Norfolk, 14 Va. App. 244, 249, 416 S.E.2d 29, 32 (1992) (citing case from the Fourth Circuit). *See also* Hatcher v. Commonwealth, 14 Va. App. 487, 419 S.E.2d 256 (1992) (quoting portion of Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977) which cited the results of a study concerning police officer shootings).

210. *See* Dalton v. Commonwealth, 14 Va. App. 544, 549, 418 S.E.2d 563, 566 (1992).

211. Robinson v. Commonwealth, 13 Va. App. 574, 577-79, 413 S.E.2d 885, 887-88 (1992).

212. Williams v. Commonwealth, 14 Va. App. 208, 415 S.E.2d 856 (1992).

213. Hooker v. Commonwealth, 14 Va. App. 454, 418 S.E.2d 343 (1992). Error was also found not to be harmless in Papuchis v. Commonwealth, 15 Va. App. 281, 422 S.E.2d 419 (1992) (concerning admission of hearsay), and Simpson v. Commonwealth, 13 Va. App. 604, 414 S.E.2d 407 (1992) (discussing impeachment of defendant).

214. *See* Gallimore v. Commonwealth, 15 Va. App. 288, 422 S.E.2d 613 (1992), where a police officer asked the defendant "[y]ou realize that this lie you told got an innocent man killed?" The defendant replied, "So? — I didn't know the son-of-a-bitch." *Id.* at 293, 422 S.E.2d at 616.

215. 217 Va. 336, 228 S.E.2d 562 (1976).

for drug trafficking had no relevance to his drug charge. Unlike the defendant in *Smith*, the defendant in *Brown v. Commonwealth*[216] possessed drugs at the time of his arrest and the Commonwealth's attorney argued successfully that, under the circumstances, his presence in a drug-prone area permitted the inference that he was engaged in drug distribution. In *Coe v. Commonwealth*,[217] similar evidence was held to be relevant, because it corroborated abundant evidence of guilt. What emerged from the reconciliation of previous decisions was the rule in *Brown* that evidence of a defendant's connection to a "sinister location," in itself, is irrelevant. This evidence becomes admissible when it is considered with other evidence of illegal activity.[218]

A defendant's statement, in which he admitted to previous drug purchases for resale, was admissible despite the fact that it contained evidence of other misconduct.[219] The evidence of prior conduct was probative of intent and was an inextricable part of the statement.[220]

In drug possession cases, ownership or occupancy of the premises within which drugs are found is insufficient, standing alone, to prove a defendant's possession of those drugs.[221] These factors are considerations, however, and an inference that a transient would not be likely to leave drugs of great value in a location not under his dominion and control can be drawn from proof of a defendant's ownership of premises where drugs are found.[222] Other appellate cases involving drugs concerned either the definition of terms or the sufficiency of the evidence.[223]

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216. 15 Va. App. 232, 421 S.E.2d 911 (1992).

217. 231 Va. 83, 86, 340 S.E.2d 820, 822 (1986).

218. *Id.* at 234, 421 S.E.2d at 912.

219. Satterfield v. Commonwealth, 14 Va. App. 630, 420 S.E.2d 228 (1992).

220. *Id.* at 630, 420 S.E.2d at 228.

221. Burchette v. Commonwealth, 15 Va. App. 432, 425 S.E.2d 81 (1992).

222. Brown v. Commonwealth, 15 Va. App. 1, 9, 421 S.E.2d 877, 883 (1992)(en banc). *See also* Harmon v. Commonwealth, 15 Va. App. 440, 446-47 (1992); *Burchette*, 15 Va. App. at 435, 425 S.E.2d at 81 (1992).

223. *See* Brooks v. Commonwealth, 15 Va. App. 407, 424 S.E.2d 566 (1992); Lewis v. Commonwealth, 15 Va. App. 337, 423 S.E.2d 371 (1992) (mere evidence of possessing money insufficient to support conviction of attempt to distribute marijuana); Timmons v. Commonwealth, 15 Va. App. 196, 421 S.E.2d 894 (1992) (instruction was too broad where it defined "firearm" as "any object" appearing to have capability of firing a projectile); Hinton v. Commonwealth, 15 Va. App. 64, 421 S.E.2d 35 (1992) (testimony of a witness that she smoked cocaine purchased from the defendant was not sufficient to prove that the substance was cocaine absent other direct or circumstantial evidence); Brown v. Commonwealth, 15 Va. App. 1, 421 S.E.2d 877 (1992) (en banc) (evidence sufficient to prove intent to distribute,

B. *Homicide*

The Supreme Court of Virginia continued to affirm capital murder convictions in 1992,[224] and the Court of Appeals of Virginia found the evidence to be sufficient in each of its homicide cases.[225] In *Gallimore v. Commonwealth*,[226] the evidence was sufficient to show that the defendant acted with "reckless and utter disregard for the life and personal safety of all the persons she had incited by her deceit,"[227] and that her actions formed a concurring, proximate cause of the victim's death.

The circumstantial factors which may be considered in determining whether a defendant formed a premeditated and specific intent to kill were discussed in *Archie v. Commonwealth*.[228]

B. *Burglary, Larceny, and Fraud*

In *Varker v. Commonwealth*,[229] the insufficient circumstantial evidence of the defendant's guilt of burglary consisted of his latent fingerprints at the scene and his equivocal statements to the police. No "breaking" occurred in *Doan v. Commonwealth*,[230] where the defendant entered an open door and there was no evidence of a constructive breaking. In *Burgess v. Commonwealth*,[231] the defendant's presence as a passenger in a car he knew was stolen was insufficient to prove his guilt of its larceny.

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and thorough discussion of sufficiency cases); Williams v. Commonwealth, 14 Va. App. 666, 418 S.E.2d 346 (1992) (evidence insufficient to prove that the defendant fraudulently obtained controlled substances); Jefferson v. Commonwealth, 14 Va. App. 77, 414 S.E.2d 860 (1992) (the Commonwealth need not prove that the defendant had ready access to either item in order to prove simultaneous possession of a firearm and cocaine); Harris v. Commonwealth, 13 Va. App. 593, 413 S.E.2d 354 (1992) (where drugs were only found in defendant's proximity, the evidence was insufficient to show constructive possession).

224. Jenkins v. Commonwealth, 244 Va. 445, 423 S.E.2d 360 (1992); Mueller v. Commonwealth, 244 Va. 386, 422 S.E.2d 380 (1992); Satcher v. Commonwealth, 244 Va. 220, 421 S.E.2d 821 (1992); Davidson v. Commonwealth, 244 Va. 129, 419 S.E.2d 656 (1992); Thomas v. Commonwealth, 244 Va. 1, 419 S.E.2d 656 (1992).

225. *See, e.g.*, Jones v. Commonwealth, 15 Va. App. 384, 424 S.E.2d 563 (1992) (concerning felony murder); Hall v. Commonwealth, 14 Va. App. 65, 415 S.E.2d 439 (1992).

226. 15 Va. App. 288, 422 S.E.2d 613 (1992).

227. *Id.* at 294, 422 S.E.2d at 616.

228. 14 Va. App. 684, 689, 420 S.E.2d 718, 721 (1992). Factors to be considered include the following: the brutality of the attack; the disparity in size and strength between the defendant and the victim; the defendant's lack of remorse; and the defendant's efforts to avoid detection and motive. *Id.* at 689, 420 S.E.2d at 721.

229. 14 Va. App. 445, 417 S.E.2d 7 (1992).

230. 15 Va. App. 87, 422 S.E.2d 398 (1992).

231. 14 Va. App. 1018, 1023, 421 S.E.2d 664, 667 (1992).

Payment due at a particular stage of construction does not in itself prove that the payment is an advance for work to be completed or payment for work which has been performed.[232] However, the evidence was sufficient to sustain the defendant's conviction of construction fraud in *Rader v. Commonwealth*.[233] Similarly, the very circumstantial evidence in *Johnson v. Commonwealth*[234] was sufficient to prove his guilt of burglary and larceny.[235]

An intent to defraud is an element of the crime of forgery of public documents.[236] The trial court's error in admitting hearsay to prove the defendant's identity was not harmless in a prosecution for petit larceny as a third or subsequent offense.[237] What constitutes a "storehouse" within the meaning of Code of Virginia section 18.2-90[238] was defined in *Dalton v. Commonwealth*.[239]

C. *Rape*

In *Evans v. Commonwealth*,[240] a rape prosecution, the court of appeals held that the trial court erred in applying the rape shield statute[241] to exclude evidence that the victim had contracted a venereal disease, which the defendant had proffered to show a motive to fabricate. The evidence was sufficient to prove attempted rape in *Fortune v. Commonwealth*,[242] but the dissent argued persuasively that the Commonwealth had failed to exclude the reasonable hypothesis that the defendant was attempting to force the victim to engage in oral sodomy, not intercourse.[243]

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232. Rader v. Commonwealth, 15 Va. App. 325, 423 S.E.2d. 207 (1992).

233. *Id.* at 332, 423 S.E.2d at 212.

234. 15 Va. App. 73, 422 S.E.2d 593 (1992).

235. *Id.* at 77, 422 S.E.2d at 595. *See also* Welch v. Commonwealth, 15 Va. App. 518, 425 S.E.2d 101 (1992) (evidence sufficient to fulfill asportation requirements in a retail setting); Hanson v. Commonwealth, 14 Va. App. 173, 191, 416 S.E.2d 14, 25 (1992) (testimony regarding the value of pawned rings evidence sufficient to prove value in grand larceny prosecution).

236. Campbell v. Commonwealth, 14 Va. App. 988, 990, 421 S.E.2d 652, 653 (1992).

237. Hooker v. Commonwealth, 14 Va. App. 454, 418 S.E.2d 343 (1992).

238. VA. CODE ANN. § 18.2-90 (Cum. Supp. 1993).

239. 14 Va. App. 544, 548-49, 418 S.E.2d 563, 565 (1992).

240. 14 Va. App. 118, 415 S.E.2d 851 (1992).

241. VA. CODE ANN. § 18.2-67.7 (Repl. Vol. 1988).

242. 14 Va. App. 225, 416 S.E.2d 25 (1992).

243. *Id.* at 230, 416 S.E.2d at 28 (Moon, J., dissenting).

D. *Robbery*

The defendant in *Braxton v. Commonwealth*[244] had tried to finesse a robbery by telling the bank teller "I'm not going to hurt you. I want to make a withdrawal." The evidence was sufficient to sustain his conviction for attempted robbery.[245]

The fact that the theft of money in *Clay v. Commonwealth*[246] was from the physical custody of a bank automatic teller machine did not undermine the defendant's conviction of robbery.

E. *Motor Vehicle Offenses*

The traffic cases decided by the court of appeals primarily concerned habitual offender charges[247] and driving under the influence of alcohol.[248] Actual notice of adjudication as a habitual offender is an element of the offense of driving after having been declared an habitual offender as defined by Code of Virginia section 46.2-357.[249] *Breeden v. Commonwealth*[250] reversed a DUI conviction because the Commonwealth failed to establish that the blood test requested by the defendant was unavailable. In *Johnson v. Commonwealth*,[251] the defendant's conviction of failing to stop at the scene of an accident was affirmed even though the defendant and the victim knew each other and were antagonists in a domestic dispute.[252] Nevertheless, in view of the rationale underlying the iden-

244. 13 Va. App. 585, 586, 414 S.E.2d 410, 411 (1992).

245. *Id.*

246. 13 Va. App. 617, 619, 414 S.E.2d 432, 434 (1992).

247. *See* Hall v. Commonwealth, 15 Va. App. 170, 421 S.E.2d 887 (1992) (transcript of DMV record, which included a copy of the habitual offender order, satisfied statutory authentication requirements); Sos v. Commonwealth, 14 Va. App. 862, 419 S.E.2d 426 (1992) (driving on a revoked license was a proper predicate offense for declaring an habitual offender); Driscoll v. Commonwealth, 14 Va. App. 449, 417 S.E.2d 312 (1992) (defendant was properly adjudicated an habitual offender); Flaherty v. Commonwealth, 14 Va. App. 148, 415 S.E.2d 867 (1992) (habitual offender proceeding imposes a forfeiture and the pertinent statutes must be strictly construed against the Commonwealth); Sink v. Commonwealth, 13 Va. App. 544, 546-47, 413 S.E.2d 658, 659 (1992) (the Commonwealth has no discretion in enforcing the Habitual Offender Act).

248. *See* Claxton v. City of Lynchburg, 15 Va. App. 152, 421 S.E.2d 891 (1992) (confession of defendant combined with testimony of arresting officer as to his physical condition and strong odor of alcohol evidence was sufficient for a DUI conviction); Hoambrecker v. Commonwealth, 13 Va. App. 511, 412 S.E.2d 729 (1992) (arrest within one mile of municipal limits was proper, and circumstantial evidence was sufficient to support conviction).

249. Reed v. Commonwealth, 15 Va. App. 467, 424 S.E.2d 718 (1992).

250. 15 Va. App. 148, 421 S.E.2d 674 (1992).

251. 14 Va. App. 769, 418 S.E.2d 729 (1992).

252. *Id.* at 772, 418 S.E.2d at 731.

tification and assistance requirements of the statute, the evidence was sufficient to prove the defendant's guilt of the offense.[253]

F. *Miscellaneous*

The language "totally and permanently disabled" in the malicious wounding provision of the Code of Virginia section 18.2-51.2[254] means the "inability to do substantially all of the material acts necessary to the prosecution of any occupation for remuneration or profit in substantially the customary and usual manner in which such occupation is prosecuted."[255] The word "testimony" used in the perjury provision of the Code of Virginia[256] "encompasses any material declaration made under oath, whether ex parte or in an adversary proceeding subject to cross-examination."[257]

In an abusive language case alleging a violation of Code of Virginia section 18.2-416,[258] the evidence was insufficient where the parties were not close enough, separated by fifty-five to sixty feet for the encounter to be "face-to-face."[259] The evidence was sufficient to prove the offense of possession of a sawed-off shotgun in violation of Code of Virginia section 18.2-299, even though it was inoperable, missing a firing pin.[260]

A defendant's unrebutted evidence that he was incarcerated in another state required reversal of his conviction for failure to appear for court.[261] In other cases, the evidence was sufficient to prove guilt of obstruction of justice,[262] escape,[263] and contempt.[264]

IX. Conclusion

To the studious litigant, the 1992 opinions of the Virginia Court of Appeals offer many and varied lessons in trial and appellate ad-

253. *Id.*
254. Va. Code Ann. § 18.2-51.2 (Cum. Supp. 1993).
255. Branch v. Commonwealth, 14 Va. App. 836, 840, 419 S.E.2d 422, 425 (1992).
256. Va. Code Ann. § 18.2-435 (Repl. Vol. 1988).
257. Scott v. Commonwealth, 14 Va. App. 294, 298, 416 S.E.2d 47, 49 (1992).
258. Va. Code Ann. § 18.2-416 (Repl. Vol. 1988).
259. Hershfield v. Commonwealth, 14 Va. App. 381, 385, 417 S.E.2d 876, 878 (1992).
260. Rogers v. Commonwealth, 14 Va. App. 774, 776, 418 S.E.2d 727, 728 (1992) (the court of appeals found that the gun could be made to fire by inserting a small pin or nail without requiring any specific expertise).
261. Riley v. Commonwealth, 13 Va. App. 494, 412 S.E.2d 724 (1992).
262. Woodson v. Commonwealth, 14 Va. App. 787, 795-96, 421 S.E.2d 1, 6 (1992).
263. Mabe v. Commonwealth, 14 Va. App. 439, 417 S.E.2d 899 (1992).
264. Baugh v. Commonwealth, 14 Va. App. 368, 417 S.E.2d 891 (1992).

vocacy. The dedication of this court to an increasingly thorough and reasoned analysis of the myriad of issues accepted for appellate review is tremendously helpful to the practitioner, and is to be commended. Of like benefit is the increasing availability of the Supreme Court of Virginia as the court of last resort.