

2016

Virginia Practice Series: Jury Instructions

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VIRGINIA PRACTICE SERIES™

Volume 4

JURY INSTRUCTIONS

2016-2017 Edition

Issued November 2016

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What's New in the 2016-2017 Edition

In the Criminal Area

The U.S. Supreme Court held that when the trial court issues an erroneous instruction, a sufficiency of evidence challenge must still be assessed against the actual elements of the charged offense, not against the elements set forth in the erroneous instruction. See, *Musacchio v. U.S.*, 136 S.Ct. 709, 193 L. Ed.2d 639 (2016).

This edition contains two new instructions covering eyewitness identifications. *Payne v. Commonwealth*, 65 Va. App. 194, 776 S.E.2d 442 (2015) approved a “bare bones” instruction, while noting that a number of other jurisdictions use more detailed instructions, particularly in dealing with cross-racial identifications. The type of detailed instruction used in the Fourth Circuit is set out in section 59:21.

Although premeditated murder and murder by lying in wait are both forms of first degree murder in Virginia, *Tisdale v. Commonwealth*, 65 Va. App. 478, 778 S.E.2d 554 (2015) held that while an instruction on voluntary intoxication as a defense to premeditation is proper, no such instruction may be given when the a charge is murder by lying in wait.

The elements of burglary require breaking into a dwelling as opposed to within a dwelling. But *Beck v. Commonwealth*, 66 Va. App. 259, 784 S.E.2d (2016) clarified that joint access to common areas in a multi-unit apartment complex does not mean a resident cannot burglarize other units within the complex.

The distinction between larceny by false pretenses and larceny by trick has often proved troublesome in the past. In a helpful opinion, *Reid v. Commonwealth*, 65 Va. App. 745, 781 S.E.2d 373 (2016) explained that “the requirement that the defendant obtain ownership of the property, rather than mere possession, distinguishes the offense of larceny by false pretenses from the offense of larceny by trick.” (Under the specific facts of the case - if the transfer of currency was so that the defendant would use it on behalf of the victim, it was larceny by trick. But if the currency was to be used for the defendant’s own benefit, it was false pretenses).

In the Civil Area

Commentary stating it is erroneous for a trial court to include judicial estoppel in a jury instruction where parties are different from those in original case and to incorporate previously undisclosed expert opinion on future medical treatment in jury instruction on damages.

Commentary noting that submitting a jury instruction to the court is equivalent to making an oral motion pursuant to Virginia Code § 8.01-271.1. Failure to comply with the statute's terms can result in court imposed sanctions; however, it is an abuse of judicial discretion to sanction an attorney the court finds inadvertently submitted a jury instruction with an error.

A jury instruction where a defendant's negligence is excused by a superseding cause.

Acknowledgment

Author Margaret Ivey Bacigal would like to express her appreciation to Kaitlyn Potter, her student research assistant, for her help with this book.

Margaret Ivey Bacigal

Preface

Virginia Practice Series—Jury Instructions is a continuation and update of previous editions, which won widespread approval among the bench and bar for almost 40 years.

As in the past, this book is primarily confined to the most common areas of jury trial work, torts and criminal law. Where possible, the language of the instructions is taken directly from reported cases or case records. Where this is not possible, we have set out instructions that should meet both the general rules regarding the form of instructions and the specific substantive legal rules. In the latter cases, close attention has been paid to statements that the Supreme Court and the Court of Appeals have made indicating how a proffered instruction might be improved. The suggested instructions try to balance specificity with flexibility, so that they can readily be adapted to the precise circumstances of each case. Nearly every suggested instruction is followed by a comment that sets forth the legal authority underlying the instruction and, in some cases, an extensive discussion of the law.

This publication will be recompiled on an annual basis. Any changes or expansions of the law will be included in amended or additional instructions, comments, and citations. We look forward to carrying on a tradition that, since 1964, has been of great assistance to the bench and bar of Virginia.

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November 2016

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Part I

PRINCIPLES GOVERNING INSTRUCTIONS TO JURY

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In General

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§ 1:1 Office of the instruction

Research References

West's Key Number Digest, Criminal Law ☞769; Trial ☞182
C.J.S., Criminal Law §§ 1302 to 1304; Trial §§ 484 to 486, 488, 492, 498,
500

The office of an instruction is to enlighten the jury as to the law in a particular case and to assist the jury in understanding the issues.¹

It should define for the jury and direct their attention to the legal principles that apply and govern the facts proved or presumed in the case and aid them in reaching a proper verdict.²

[Section 1:1]

¹Taylor v. Com., 12 Va. App. 419, 404 S.E.2d 78, 80 (1991) ("The purpose of an instruction is to furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict, so far as it is competent for the court to assist them."); Gaalaas by

Gaalaas v. Morrison, 233 Va. 148, 156, 353 S.E.2d 898, 902 (1987); Atwell v. Watson, 204 Va. 624, 633, 133 S.E.2d 552, 559 (1963).

²Adams v. Plaza Theatre, 186 Va. 403, 409, 43 S.E.2d 47, 50 (1947); see also, Gaalaas by Gaalaas v. Morrison, 233 Va. 148, 156, 353 S.E.2d

These principles should be so stated that they will impartially inform the jury in clear, concise and succinct language,³ complete and without conflict.⁴ Where the court can see that this has been accomplished, and the law of the case fairly submitted to the jury, it would be beside the mark to stop and inquire whether it was done by one instruction or by more than one.⁵

§ 1:2 The model instruction

Research References

West's Key Number Digest, Criminal Law ◊805; Trial ◊228
C.J.S., Criminal Law § 1309; Trial §§ 581, 593 to 602

The model instruction is a simple, impartial, clear concise statement of the law applicable to evidence in the case then on trial. Such instructions aid juries in reaching right conclusions, while many others that unfortunately have received judicial sanction are couched in technical language of doubtful meaning that serves only to confuse, mystify and mislead jurors, while they likewise furnish unnecessary and unprofitable exercise for the judges.¹

In 1992, the General Assembly passed a statute, which stated that it was declaratory of existing law, providing that a proposed jury instruction may not be withheld from the jury merely because it does not conform with the official Model Jury Instructions.²

§ 1:3 Form and manner of instructing

Research References

West's Key Number Digest, Criminal Law ◊805; Trial ◊228
C.J.S., Criminal Law § 1309; Trial §§ 581, 593 to 602

The recognized practice in Virginia is for the court to give written instructions requested by the litigants, when satisfied that they correctly state the law applicable to the evidence, and to

898, 902 (1987); *Southers v. Price*, 211 Va. 469, 473, 178 S.E.2d 685, 688 (1971); *Cooper v. Com.*, 2 Va. App. 497, 345 S.E.2d 775 (1986).

³*Williams v. Blue Bird Cab Co.*, 189 Va. 402, 407, 52 S.E.2d 868, 870 (1949); *H. J. Heinz Co. v. W. B. Shafer, Inc.*, 188 Va. 320, 334, 49 S.E.2d 298, 304 (1948).

⁴*Tolston v. Reeves*, 200 Va. 179, 185, 104 S.E.2d 754, 758 (1958); *Hamilton v. Glemming*, 187 Va. 309, 314, 46 S.E.2d 438, 441 (1948).

⁵*Kirby v. Moehlman*, 182 Va. 876, 886, 30 S.E.2d 548, 551 (1944); *Henderson v. Foster*, 139 Va. 543, 559, 124 S.E. 463 (1924); *Higgins v. Whitmore*, 116 Va. 414, 423, 82 S.E. 180 (1914).

[Section 1:2]

¹*Gottlieb v. Com.*, 126 Va. 807, 813, 101 S.E. 872 (1920); see also, *Whitmer v. Marcum*, 214 Va. 64, 67, 196 S.E.2d 907, 909 (1973).

²Va. Code Ann. § 8.01-379.2.

give oral instructions only if such instructions are requested or to clarify a general statement contained in the written instructions. The giving of oral instructions is not approved.¹ The Supreme Court Rules specifically require that, in a felony case, jury instructions must be in writing.²

It is not the practice in Virginia for a court unasked to charge the jury upon the law of the case, although the mere fact that it does so cannot of itself be assigned as error.³ The practice is a wise one in general, for it is extremely difficult to deliver charges to the jury without conveying to them some intimation of the opinion of the judge upon the evidence, or using some phrase or expression that may constitute ground for just exception.⁴

Trial courts are not infrequently at fault in failing to give precisely in their usual form approved instructions that in a measure have become standardized.⁵ The omissions that are sometimes made and the additions that are sometimes inserted in such instructions are the fruitful cause of trouble in many instances and of reversal in others.⁶

§ 1:4 Time of giving instructions

Research References

West's Key Number Digest, Criminal Law ⇨801; Trial ⇨220
C.J.S., Criminal Law § 1309; Trial §§ 577, 578

It is always the duty of the court at the proper time to instruct the jury on all principles of law applicable to the pleadings and the evidence.¹

In a civil case, the time of giving instructions rests in the sound discretion of the court but the practice is to instruct the jury at the conclusion of the evidence and before argument. In criminal cases, the Supreme Court Rules require the court to instruct the jury before arguments of counsel.²

It not only is proper for the court to fully and completely respond to an inquiry that comes from the jury after their retirement and deliberation for information touching their duties,³ but it has a duty to amend instructions that appear to be erroneous

[Section 1:3]

¹Drinkard v. Com., 165 Va. 799, 804, 183 S.E. 251 (1936).

²Va. S. Ct. Rules, R. 3A:16(a).

³Poole v. Com., 211 Va. 258, 262, 267, 176 S.E.2d 821, 917 (1970).

⁴Dejarnette v. Com., 75 Va. 867, 877, 1881 WL 6313 (1881).

⁵Smith v. Com., 155 Va. 1111,

1120, 156 S.E. 577 (1931).

⁶Com. v. Thompson, 131 Va. 847, 867, 109 S.E. 447 (1921).

[Section 1:4]

¹Dowdy v. Com., 220 Va. 114, 116, 255 S.E.2d 506, 508 (1979).

²Va. S. Ct. Rules, R. 3A:16(a).

³Witt v. Merricks, 210 Va. 70, 74, 168 S.E.2d 517, 520 (1969); Hebner v.

or misleading.⁴

Sullivan, 194 Va. 259, 265, 72 S.E.2d 689, 692 (1952); Williams v. Com., 85 Va. 607, 609, 8 S.E. 470, 471 (1889).

⁴Blevins v. Com., 209 Va. 622, 627-628, 166 S.E.2d 325, 330 (1969).

See also McLean v. Com., 28 Va. App. 593, 599-600, 507 S.E.2d 640, 643 (1998), opinion withdrawn and vacated on reh'g en banc, 30 Va. App. 322, 516 S.E.2d 717 (1999). Virginia law allows the trial judge "to give a supplemental jury instruction which clarifies an

existing instruction or a principle previously existing before the jury." However, if a supplemental jury instruction "introduces a new theory to the case, the parties should be given an opportunity to argue the new theory." Defendant's conviction reversed because (1) defense was not given an opportunity to argue the new theory raised in the instructions; and (2) the instruction was misleading.

Chapter 2

Province of the Court and Jury

- § 2:1 Duty of the court
- § 2:2 Questions of law
- § 2:3 Mixed questions of law and fact
- § 2:4 Uncontroverted facts
- § 2:5 Function of the jury to ascertain the facts
- § 2:6 —Invasion by the court
- § 2:7 Function of the jury to weigh the evidence
- § 2:8 —Invasion by the court

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§ 2:1 Duty of the court

Research References

C.J.S., Criminal Law §§ 1302 to 1307, 1309 to 1323, 1325 to 1354, 1499, 1540, 1608; Trial §§ 489, 501 to 504, 547 to 650

It is always the duty of the court at the proper time to instruct the jury on all principles of law applicable to the pleadings and the evidence.¹

The harmless error doctrine is never applied when it appears that the jury has been misinstructed, and, had it been properly instructed, it might have returned a different verdict.²

The judge is more than a mere referee between litigants,³ and his or her duty to instruct the jury is an imperative one that can neither be evaded or surrendered.⁴ What instructions should be

[Section 2:1]

¹*Bowers v. May*, 233 Va. 411, 413-414, 357 S.E.2d 29, 30 (1987); *Dowdy v. Com.*, 220 Va. 114, 116, 255 S.E.2d 506, 508 (1979).

²*Rhoades v. Painter*, 234 Va. 20,

24-53, 360 S.E.2d 174 (1987).

³*Moore v. Warren*, 203 Va. 117, 125, 122 S.E.2d 879, 885 (1961).

⁴*Williams v. Lynchburg Traction & Light Co.*, 142 Va. 425, 432, 128 S.E. 732 (1925).