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CRIMINAL LAW AND PROCEDURE

Aaron J. Campbell *

INTRODUCTION

This article surveys developments in Virginia criminal law and procedure from June 2014 through June 2015. Of the many judicial opinions and legislative enactments, the author has endeavored to select those with the most impact on the practice of criminal law in Virginia.

I. CRIMINAL PROCEDURE

A. *Pre-Trial*

1. Indictment

In *Howard v. Commonwealth*, the Court of Appeals of Virginia considered whether the defendant was improperly indicted when the grand jury did not read the indictments aloud in open court.¹ After the grand jury deliberated and returned to open court, it presented the bills of indictment as “true bills,” but did not read them verbatim.² A “true bill” becomes a valid indictment when it is “presented in open court.”³ The defendant argued he was not properly indicted because, in his view, “presented in open court” means “read aloud.”⁴ The court of appeals rejected this interpretation and concluded that “[r]eading the indictments aloud verbatim is not required for the indictment to be valid.”⁵ The court

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1. 63 Va. App. 580, 582–83, 760 S.E.2d 828, 828–29 (2014).

2. *Id.* at 582, 760 S.E.2d at 829.

3. *Id.* at 583, 760 S.E.2d at 829 (quoting *Reed v. Commonwealth*, 281 Va. 471, 480, 706 S.E.2d 854, 859 (2011)).

4. *Id.*

5. *Id.* at 585, 760 S.E.2d at 830.

found such a requirement unnecessary since the indictment is read to the defendant at arraignment.⁶

In *Holliday v. Commonwealth*, the Court of Appeals of Virginia decided whether the Commonwealth could bring additional charges by direct indictment after the juvenile defendant had been transferred to circuit court to be tried as an adult.⁷ The defendant was initially charged on juvenile petitions of first-degree murder and use of a firearm in the commission of a felony.⁸ After holding a transfer hearing under Virginia Code section 16.1-269.1(A), the juvenile court certified both charges to the circuit court.⁹ Once in circuit court, the Commonwealth obtained direct indictments on two conspiracy counts.¹⁰ The defendant unsuccessfully moved to quash these additional indictments.¹¹

The defendant argued that Virginia Code section 16.1-269.1 prevents the Commonwealth from seeking a direct indictment in circuit court without first proceeding in juvenile court, and since the juvenile court no longer had jurisdiction, the conspiracy charges could not be brought in either court.¹² If accepted, the “net effect” of the defendant’s argument would require the Commonwealth to file all ancillary charges in juvenile court or be forever barred from bringing those charges.¹³ However, the court of appeals rejected this argument by first agreeing that the juvenile court was divested of jurisdiction over any ancillary charges when it certified the first-degree murder charge.¹⁴ Additionally, the court stated that the General Assembly did not intend to create a “jurisdictional vacuum” by foreclosing the Commonwealth from going forward with ancillary charges once the defendant was to be tried in circuit court as an adult.¹⁵ The court thus concluded,

6. *See id.*

7. 64 Va. App. 168, 169, 766 S.E.2d 742, 743 (2014).

8. *Id.*

9. *See id.* at 169–70, 766 S.E.2d at 743.

10. *See id.* at 169, 766 S.E.2d at 743.

11. *Id.*

12. *Id.* at 171, 766 S.E.2d at 744.

13. *Id.*

14. *Id.*

15. *Id.* at 172, 766 S.E.2d at 744.

“the Code confers jurisdiction on the circuit court to proceed on the murder charge and *all* ancillary charges.”¹⁶

2. Joinder of Offenses

In *Walker v. Commonwealth*, the Supreme Court of Virginia held that the defendant’s four drug distribution charges could not be tried together because they failed to constitute a “common plan” under Rule 3A:6(b).¹⁷ The charges stemmed from four purchases of crack cocaine by an undercover police informant over the course of thirteen days.¹⁸ Prior to trial, the defendant unsuccessfully moved to sever the charges into four trials.¹⁹ The Court of Appeals of Virginia upheld the trial court’s decision not to sever, determining that the offenses constituted a “common plan within the meaning of Rule 3A:6(b).”²⁰ The court of appeals observed that each sale followed a similar pattern: the defendant waited for the informant to contact him about buying crack cocaine; the defendant set a location for the sale; each sale was for approximately one gram; and all the sales took place in the same general geographic area.²¹ The court of appeals also inferred that the defendant provided a discount price on the drugs to “create a return customer.”²² According to the court of appeals, this constituted “a plan that tied the offenses together and demonstrated that the object of each offense was to contribute to the achievement of a goal that was not obtainable by the commission of any of the individual offenses.”²³

For several reasons, the supreme court reversed the court of appeals.²⁴ Notably, the supreme court was not persuaded the defendant had “a particular ‘goal not obtainable by the commission

16. *Id.*

17. 289 Va. ___, ___, 770 S.E.2d 197, 201 (2015).

18. *See id.* at ___, 770 S.E.2d at 197–98.

19. *Id.* at ___, 770 S.E.2d at 198.

20. *Id.* The court of appeals also found that justice did not require separate trials for the purposes of Rule 3A:10(c). *Id.* The supreme court did not reach this second requirement for joinder of offenses. *Id.* at ___, 770 S.E.2d at 201.

21. *Id.* at ___, 770 S.E.2d at 198 (citing *Walker v. Commonwealth*, Record No. 1051-13-2, 2014 Va. App. LEXIS 112, at *9–10 (Mar. 25, 2014)).

22. *Id.* (quoting *Walker*, 2014 Va. App. LEXIS 112, at *10).

23. *Id.* (quoting *Walker*, 2014 Va. App. LEXIS 112, at *14).

24. *Id.* at ___, 770 S.E.2d at 201.

of any of the individual offenses.”²⁵ The court defined a “common plan” as “a series of acts done with a relatively specific goal or outcome in mind.”²⁶ The court explained that “[t]his goal or outcome exists when the constituent offenses occur sequentially or interdependently to advance some common, extrinsic objective,” such as when a bank robber breaks into the bank president’s home, steals the keys to the bank, and then burglarizes the bank.²⁷ The court further noted that, “[t]he key factor . . . is that the goal furthered by the offences must be *extrinsic* to at least one of them.”²⁸ This factor was absent in this case, the court concluded, because “[p]rofiting from the sale of drugs, including cultivating return customers, is *intrinsic* to the offense of selling drugs.”²⁹

3. Right to Counsel

The defendant in *Brown v. Commonwealth* argued that the trial court “violated his Sixth Amendment rights by denying him a continuance, on the day of trial, for the purported purpose of substituting court appointed counsel with retained counsel of his choosing.”³⁰ At the start of the trial, the defendant’s appointed counsel informed the trial court that because of new employment she would be unable to represent the defendant at any potential sentencing hearing.³¹ Counsel told the trial court that the defendant wanted to retain counsel rather than have his legal representation split up.³² The defendant, however, “presented no evidence and made no proffer that his financial status had changed.”³³ The trial court denied the continuance motion, stating that defense

25. *Id.* at __, 770 S.E.2d at 200 (quoting *Spence v. Commonwealth*, 12 Va. App. 1040, 1044, 407 S.E.2d 916, 918 (1991)). The supreme court was also not persuaded that the case was distinguishable from *Spence*, nor was the court persuaded that the pattern of the transactions was “sufficiently specific to establish an unusual and unifying modus operandi.” *Id.* at __, 770 S.E.2d at 199–200.

26. *Id.* at __, 770 S.E.2d at 200 (quoting DAVID P. LEONARD, *THE NEW WIGMORE: A TREATISE ON EVIDENCE* § 9.2.2., at 572 (2009)).

27. *Id.* at __, 770 S.E.2d at 200–01.

28. *Id.* at __, 770 S.E.2d at 201.

29. *Id.* The dissenting opinion was unwilling to say that the trial court abused its discretion in trying the four charges together. *Id.* (Kelsey, J., dissenting).

30. 288 Va. 439, 441, 764 S.E.2d 58, 59 (2014).

31. *Id.*

32. *Id.*

33. *Id.* at 442, 764 S.E.2d at 60.

counsel was “very competent,” and “it was not uncommon for a different attorney to represent a defendant at sentencing”³⁴

On appeal, the Supreme Court of Virginia observed that a defendant’s Sixth Amendment right to counsel “does not guarantee that an indigent defendant will receive representation by counsel of his own choosing.”³⁵ Rather, “[t]he Sixth Amendment guarantees a criminal defendant ‘the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.’”³⁶ “[T]he right to choice of counsel ‘does not extend to defendants who require [court appointed] counsel.’”³⁷ Here, by not presenting evidence or making a proffer that his financial status had changed, the defendant failed to establish he had a choice of counsel.³⁸ The court thus held that his “continuance request was deficient, as a matter of law, because, when made, he established no factual predicate for seeking substitution of other counsel in place of his court appointed counsel under the authority of the Sixth Amendment.”³⁹

B. Trial

1. Venue and Judicial Notice

In *Williams v. Commonwealth*, the Supreme Court of Virginia declined to infer that the trial court took judicial notice of the crime’s venue.⁴⁰ At trial, an undercover Norfolk police officer testified that the defendant sold the officer cocaine.⁴¹ Because the officer never testified that the location of the sale was in the City of Norfolk, defense counsel moved to strike based on a lack of venue.⁴² The prosecutor responded by arguing that the officer’s testimony was sufficient for the trial court to take judicial notice of

34. *Id.* at 441, 764 S.E.2d at 59–60.

35. *Id.* at 442, 764 S.E.2d at 60.

36. *Id.* (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624–25 (1989)).

37. *Id.* (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006)).

38. *See id.*

39. *Id.* at 443, 764 S.E.2d at 61.

40. 289 Va. ___, ___, 771 S.E.2d 675, 677, 681 (2015).

41. *Id.* at ___, 771 S.E.2d at 677.

42. *Id.*

venue.⁴³ The trial court simply overruled the motion to strike without commenting on the request to take judicial notice.⁴⁴

The Court of Appeals of Virginia held that while the trial court never explicitly stated it was taking judicial notice of the location of the sale, it “can be safely inferred” the trial court took judicial notice of that fact because it overruled the defendant’s motion to strike.⁴⁵ The supreme court disagreed, pointing out that while “a trial court may take ‘judicial notice of geographical facts that are matters of common knowledge, or shown by maps in common use,’” the prosecutor never asked the trial court to do either.⁴⁶ Instead, the prosecutor argued that the evidence already in the record was sufficient for the trial court to find venue.⁴⁷ The supreme court was “unable to discern whether the trial court decided to take judicial notice of the location of the offense, or whether the trial court simply accepted the Commonwealth’s sufficiency argument on the issue of venue”⁴⁸ Because the record did not clearly reflect what action the trial court took, the supreme court held that the evidence was insufficient to prove venue.⁴⁹

2. Statute of Limitations for Lesser-Included Offenses

Taylor v. Commonwealth involved an issue of first impression in Virginia: whether a defendant can be convicted of a lesser-included offense that would have been time-barred if brought at the time the prosecution commenced.⁵⁰ At the conclusion of the defendant’s bench trial on a felony indictment, the trial court ruled that there was insufficient evidence to convict her of that crime, but there was sufficient evidence to convict her of a lesser-included misdemeanor.⁵¹ The defendant maintained she could not

43. *Id.* at __, 771 S.E.2d at 677–78.

44. *Id.* at __, 771 S.E.2d at 678.

45. *Id.* (citing *Williams v. Commonwealth*, 63 Va. App. 458, 466, 758 S.E.2d 553, 556–57 (2014)).

46. *Id.* at __, 771 S.E.2d at 679 (quoting *McClain v. Commonwealth*, 189 Va. 847, 853, 55 S.E.2d 49, 52 (1949)).

47. *Id.*

48. *Id.*

49. *See id.* at __, 771 S.E.2d at 679–81. In the dissent’s opinion, the “trial court implicitly took judicial notice of venue by overruling [the] motion to strike” *Id.* at __, 771 S.E.2d at 681 (Powell, J., dissenting).

50. *See* 64 Va. App. 282, 286, 767 S.E.2d 721, 723 (2015).

51. *Id.* at 284–85, 767 S.E.2d at 722–23.

be convicted of the lesser charge because the one-year statute of limitations for misdemeanors had run before her prosecution had commenced.⁵² The Court of Appeals of Virginia agreed and joined the overwhelming majority of courts that have concluded that one cannot be convicted of a lesser-included offense upon a prosecution for the greater crime when the prosecution is commenced after the limitations period has run on the lesser offense.⁵³

3. Testimony

In *Turner v. Commonwealth*, the Court of Appeals of Virginia considered whether allowing a child victim of sexual battery to write certain portions of her testimony violated the defendant's Sixth Amendment Confrontation Clause right.⁵⁴ Prior to trial, the Commonwealth filed a motion in limine to allow the victim to write portions of her testimony.⁵⁵ The trial court granted the motion on the condition "that the Commonwealth attempt to elicit an oral response from [the victim] before she would be allowed to respond in writing."⁵⁶ At trial, the victim responded in writing to some of the questions about what had happened to her.⁵⁷

The defendant argued "that the trial court's decision to allow [the victim] to write portions of her testimony violated his rights under the Confrontation Clause of the Sixth Amendment."⁵⁸ In particular, the defendant argued that he was denied the right to view the victim's demeanor as she wrote portions of her testimony.⁵⁹ The court of appeals disagreed, finding that the record showed the "[defendant], his counsel, and the trial judge retained an uninhibited view of [the victim] throughout her testimony"⁶⁰ The court explained that "while the Confrontation Clause guarantees a right to observe an adverse witness' demeanor while she is testifying, it does not guarantee the right to observe an adverse witness' demeanor in whatever way, and to whatever ex-

52. *Id.* at 285, 767 S.E.2d at 723.

53. *Id.* at 285–87, 290, 767 S.E.2d at 723–24, 726.

54. See 63 Va. App. 401, 403, 758 S.E.2d 81, 82 (2014).

55. *Id.* at 404, 758 S.E.2d at 82.

56. *Id.*, 758 S.E.2d at 83.

57. *Id.* at 405, 758 S.E.2d at 83.

58. *Id.* at 406–07, 758 S.E.2d at 84.

59. *Id.* at 407, 758 S.E.2d at 84.

60. *Id.* at 408, 758 S.E.2d at 84.

tent, a defendant prefers.”⁶¹ It was enough that the defendant had an uninhibited view of the witness during her testimony and was afforded the opportunity to cross-examine her.⁶²

4. Exclusion of Jurors

The Court of Appeals of Virginia clarified an “ancient rule” of juror exclusion in *Brown v. Commonwealth*.⁶³ Following lunch on the first day of the defendant’s trial, one of the regular jurors informed the trial court that a young woman told the juror that her grandparents lived down the street from the juror’s house.⁶⁴ The juror, realizing that the young woman was with the defendant’s party, felt uneasy that the woman knew where she lived.⁶⁵ The prosecutor, out of concern that the juror may have been considering “things other than the law and the evidence,” moved for the trial court to excuse the juror for cause and replace her with an alternate juror.⁶⁶ Before deliberations, the trial court replaced the juror with an alternate juror over the defendant’s objection.⁶⁷

On appeal, the defendant argued that even if there was reasonable doubt as to the juror’s impartiality, “by ancient rule, any reasonable doubt as to a juror’s qualifications must be resolved in favor of the accused.”⁶⁸ The court of appeals found the defendant’s reliance on this “ancient rule” misplaced.⁶⁹ As the court observed, “the ‘ancient rule’ . . . has never provided an accused with the ability to *keep* a juror whose impartiality can be reasonably questioned on the jury.”⁷⁰ Instead, “the original justification of the rule, and its application in subsequent cases, demonstrate that its purpose is to ‘insure [a juror’s] *exclusion* “from the jury when there is a reasonable doubt about that juror’s [impartiality]””⁷¹ The defendant’s argument failed because application of

61. *Id.* at 410, 758 S.E.2d at 85.

62. *Id.*

63. *See* 64 Va. App. 59, 65, 764 S.E.2d 297, 300 (2014).

64. *Id.* at 62, 764 S.E.2d at 298.

65. *See id.*

66. *Id.* at 62–63, 764 S.E.2d at 298.

67. *Id.* at 63–64, 764 S.E.2d at 299.

68. *Id.* at 65, 764 S.E.2d at 300 (quoting *Green v. Commonwealth*, 262 Va. 105, 117, 546 S.E.2d 446, 452 (2001)).

69. *Id.*

70. *Id.* at 66, 764 S.E.2d at 300 (emphasis added).

71. *Id.* (quoting *Wright v. Commonwealth*, 73 Va. (32 Gratt.) 941, 943–44 (1879)).

the rule would result in dismissing the juror from the jury, not retaining her.⁷²

5. Jury Instructions

In *King v. Commonwealth*, the Court of Appeals of Virginia, sitting en banc, found that the trial court erred in failing to properly instruct the jury on the defense of accident.⁷³ At trial, the Commonwealth and the defendant presented two different versions of how the defendant shot her husband in the right forearm.⁷⁴ The husband testified he woke up to a gunshot and the defendant with a gun in her hand.⁷⁵ In contrast, the defendant testified that the firearm discharged during a struggle with her husband.⁷⁶ Relying upon the defense of accident to her charge of malicious wounding, the defendant proffered a jury instruction on the accident defense.⁷⁷ The trial court rejected the defendant's proffered jury instruction because it reasoned that the other instructions adequately conveyed to the jury that malicious wounding has to be an intentional act.⁷⁸

The court of appeals held that the defendant was entitled to her requested jury instruction on the defense of accident "because it was supported by more than a scintilla of the evidence and would have legally entitled her to acquittal under the circumstances if believed by the jury."⁷⁹ The court rejected the Commonwealth's argument that since the given instructions on malice required an intentional act, the jury's verdict reflected a decision that the defendant's actions were not accidental.⁸⁰ The court of appeals reasoned that "the risk of juror confusion would be heightened if a jury were left to discern the legal principle of 'accident' by negative inference from the finding instruction covering the elements of the offense."⁸¹

72. *Id.* at 67, 764 S.E.2d at 300–01.

73. *See* 64 Va. App. 580, 583, 770 S.E.2d 214, 216 (2015).

74. *Id.* at 584, 770 S.E.2d at 216.

75. *Id.*

76. *Id.* at 584–85, 770 S.E.2d at 216–17.

77. *Id.* at 585, 770 S.E.2d at 217.

78. *Id.* at 586, 770 S.E.2d at 217.

79. *Id.* at 591, 770 S.E.2d at 220.

80. *See id.* at 588–89, 591–92, 770 S.E.2d at 218–20.

81. *Id.* at 591–92, 770 S.E.2d at 220.

C. Sentencing

1. Deferred Dispositions

Recently, the Supreme Court of Virginia considered whether the trial court had authority to make a deferred disposition in both *Hernandez v. Commonwealth*⁸² and *Starrs v. Commonwealth*.⁸³ In *Harris v. Commonwealth*, the Court of Appeals of Virginia addressed an issue not squarely addressed by *Hernandez* or *Starrs*: the actual merits of a deferred disposition request.⁸⁴ During the defendant's bench trial for driving a motor vehicle after being declared a habitual offender, defense counsel asked the trial court to take the case under advisement and refrain from making a formal finding of guilt.⁸⁵ The trial court denied the request on the merits.⁸⁶

The defendant's argument on appeal addressed, in part, whether "the trial court 'abused its discretion when it *failed* to take the matter under advisement'"⁸⁷ This argument differed from *Hernandez* and *Starrs* because, as the court of appeals explained, those cases "determine *how far* into the trial proceedings . . . a trial court's authority to defer a disposition extends," and not whether the defendants' deferred disposition requests had any merit.⁸⁸ The court of appeals found no merit to the defendant's request, characterizing it as "nothing more than a guilty defendant's attempt to escape (or delay) an inevitable conviction through judicial clemency."⁸⁹ The court stressed that a trial court's authority to defer a disposition does not give a trial court the power of judicial clemency.⁹⁰ Accordingly, the court of appeals held that "a trial court's narrow authority to defer a disposition does not in any way diminish its greater duty to render a timely and lawful judgment that faithfully applies the relevant facts and

82. 281 Va. 222, 223, 707 S.E.2d 273, 273 (2011).

83. 287 Va. 1, 4, 752 S.E.2d 812, 814 (2014).

84. 63 Va. App. 525, 533, 759 S.E.2d 29, 33 (2014).

85. *See id.* at 527, 759 S.E.2d at 30.

86. *Id.* at 531, 759 S.E.2d at 32.

87. *Id.* at 532, 759 S.E.2d at 32.

88. *Id.* at 533, 759 S.E.2d at 33.

89. *See id.* at 536, 759 S.E.2d at 34.

90. *See id.*

the controlling law.”⁹¹ The court further declared that “a trial court cannot simply acquit a defendant through an act of judicial clemency (or judicial nullification), where the evidence proves the defendant’s guilt beyond a reasonable doubt and where no statutory authority exists to allow the trial court to dismiss the charge.”⁹²

2. Mandatory Life Sentences for Juvenile Offenders

In 2012, the Supreme Court of the United States held in *Miller v. Alabama* that a sentencing scheme mandating “life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’”⁹³ In *Jones v. Commonwealth*, the Supreme Court of Virginia took up whether Virginia’s sentencing scheme for capital murder ran afoul of *Miller*.⁹⁴ The supreme court concluded it did not.⁹⁵

When the defendant was seventeen years old, he pled guilty to capital murder in exchange for a sentence of life without the possibility of parole.⁹⁶ Twelve years later, the defendant sought to vacate his sentence on the basis that *Miller* applied retroactively to his case.⁹⁷ The supreme court never reached the issue of whether *Miller* applied retroactively, ruling instead that Virginia’s sentencing scheme for capital murder did not actually impose a mandatory minimum sentence of life without the possibility of parole.⁹⁸ The court held that, because a trial court has the ability under Virginia Code section 19.2-303 to suspend part or all of the life sentence imposed for a Class 1 felony conviction, the sentencing scheme was not a mandatory life without the possibility of parole scheme.⁹⁹ Thus, even if *Miller* did apply retroactively, the court decided it did not affect Virginia’s sentencing scheme.¹⁰⁰

91. *Id.* at 536–37, 759 S.E.2d at 34.

92. *Id.* at 537, 759 S.E.2d at 34.

93. 132 S. Ct. 2455, 2460 (2012).

94. *See* 288 Va. 475, 477, 763 S.E.2d 823, 823 (2014).

95. *See id.*

96. *Id.* at 478, 763 S.E.2d at 824.

97. *Id.* at 477, 763 S.E.2d at 823.

98. *See id.* at 479, 763 S.E.2d at 824.

99. *Id.* at 480–81, 763 S.E.2d at 825–26.

100. *Id.* at 481, 763 S.E.2d at 826.

3. Sentencing Verdicts

The Court of Appeals of Virginia reversed and remanded a pair of cases for new sentencing hearings because of defective sentencing verdicts. In *Webb v. Commonwealth*, the jury's sentencing verdict was defective because it was not unanimous.¹⁰¹ When the jury returned the sentencing verdict, defense counsel asked to have the jury polled.¹⁰² During this polling, "[t]he clerk asked the jury to 'answer yes if this is your verdict.'"¹⁰³ When calling the jurors' names, one of the jurors answered, "[n]o."¹⁰⁴ Neither the judge nor the attorneys made any "response to the jury's lack of unanimity."¹⁰⁵

The defendant challenged his sentencing verdict on appeal, arguing he was "entitled to a unanimous jury verdict at sentencing."¹⁰⁶ The court of appeals agreed.¹⁰⁷ The court looked to Virginia Code section 19.2-295, which generally provides the defendant "with a statutory right to have a jury ascertain his punishment"¹⁰⁸ The court then looked to Virginia Code section 19.2-295.1, which states that "[i]f the jury cannot agree on a punishment," then a new sentencing hearing must be held either by a new jury, or if the parties and the court agree, by the judge.¹⁰⁹ Based on these two statutes, the court concluded that the right to a unanimous sentencing verdict is guaranteed by statute in Virginia.¹¹⁰ Because the defendant was deprived of this right, the court held that a "miscarriage of justice occurred" and remanded the case for a new sentencing hearing.¹¹¹

In *Commonwealth v. Greer*, the court of appeals found the sentencing verdict defective because the jury refused to sentence the

101. See 64 Va. App. 371, 374, 768 S.E.2d 696, 697–98 (2015).

102. *Id.*, 768 S.E.2d at 698.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 374–75, 768 S.E.2d at 698.

107. *Id.* at 379, 768 S.E.2d at 700.

108. *Id.* at 376, 768 S.E.2d at 699.

109. *Id.* at 377–78, 768 S.E.2d at 699 (quoting VA. CODE ANN. § 19.2-295.1 (Cum. Supp. 2015)); see also VA. CODE ANN. § 19.2-257 (Repl. Vol. 2008 & Cum. Supp. 2015) (allowing the judge to preside over the new sentencing hearing if the parties and the court agree).

110. See *id.* at 377–79, 768 S.E.2d at 699–700.

111. *Id.* at 379, 768 S.E.2d at 700.

defendant in accordance with the law.¹¹² The jury convicted the defendant of possessing a firearm after having been convicted of a violent felony, which requires a mandatory minimum sentence of five years.¹¹³ Despite being instructed about the five-year mandatory minimum sentence, the jury returned with a verdict of two years.¹¹⁴ The Commonwealth sought to set aside the sentencing verdict and impanel a new jury, but the trial court denied the request.¹¹⁵ The court of appeals reversed, holding that “the jury’s sentence of two years was erroneous and the trial court’s imposition of that sentence was void *ab initio*.”¹¹⁶ The court of appeals stressed that “[o]nce guilt has been determined, both judge *and jury* are constrained by the sentencing limits set by the legislature.”¹¹⁷ Thus, the court of appeals concluded that the trial judge “was obligated to reject the jury’s verdict and to impanel a new jury to determine punishment within the limits established by the legislature”¹¹⁸

4. Probation Terms

In *Murry v. Commonwealth*, the Supreme Court of Virginia considered the reasonableness of “a probation condition requiring [the defendant] to submit to warrantless, suspicionless searches of his person, property, residence, and vehicle at any time by any probation or law enforcement officer.”¹¹⁹ The circuit court convicted the defendant of a number of sexual offenses against his stepdaughter.¹²⁰ The court imposed the probation condition, and overruled the defendant’s objection to it, because it concluded that the defendant had groomed his victim from an early age and had successfully concealed his behavior from his family and the community for many years.¹²¹ The court wanted “law enforcement to have

112. 63 Va. App. 561, 564, 760 S.E.2d 132, 133 (2014).

113. *Id.* at 565, 760 S.E.2d at 134.

114. *Id.* at 565–66, 760 S.E.2d at 134.

115. *Id.* at 567, 760 S.E.2d at 134–35.

116. *Id.* at 569, 760 S.E.2d at 135.

117. *Id.* at 572, 760 S.E.2d at 137.

118. *Id.* at 579, 760 S.E.2d at 140–41.

119. *See* 288 Va. 117, 120, 762 S.E.2d 573, 575 (2014).

120. *Id.*

121. *See id.* at 121, 762 S.E.2d at 575.

the ability to go directly into his house at any time to see what he's doing."¹²²

The supreme court found the probation condition unreasonable in light of the nature of the offense, the defendant's background, and the surrounding circumstances.¹²³ In doing so, the court applied a balancing test weighing the probationer's expectation of privacy against the government's interest in rehabilitation and protection of society.¹²⁴ On the defendant's side of the balance, the court noted that "probationers retain some expectation of privacy, albeit diminished."¹²⁵ In this case, the probation condition imposed a significant degree of intrusion on the defendant's expectation of privacy as a probationer; in fact, it extinguished any Fourth Amendment rights the defendant may have had as a probationer.¹²⁶ On the other side of the balance, the court noted that "the Commonwealth has a legitimate interest in ensuring that [the defendant] completes a meaningful period of rehabilitation and that society not be harmed by [the defendant] being at large as a sex offender . . ."¹²⁷ The court, however, concluded those interests did not outweigh the "total surrender" of the defendant's Fourth Amendment rights.¹²⁸

II. CRIMINAL LAW

A. *Fourth Amendment*

In *Mason v. Commonwealth*, the Court of Appeals of Virginia reheard the case en banc, and in a closely divided decision, held that a police officer had reasonable suspicion for a traffic stop when the officer pulled over a motorist for an "opaque parking pass measuring five inches long and three inches wide" hanging from a rear-view mirror.¹²⁹ Prior to trial, the defendant sought to suppress evidence from the traffic stop, arguing that it was un-

122. *Id.*

123. *Id.* at 130, 762 S.E.2d at 581.

124. *Id.* at 123–25, 762 S.E.2d at 577–78. The court applied the framework established in *United States v. Knights. Id.* (citing *United States v. Knights*, 534 U.S. 112 (2001)).

125. *Id.* at 126, 762 S.E.2d at 578.

126. *Id.* at 126–27, 762 S.E.2d at 579.

127. *Id.* at 127, 762 S.E.2d at 580.

128. *Id.*

129. *See* 64 Va. App. 292, 295–97, 767 S.E.2d 726, 728–29 (2015).

constitutional.¹³⁰ At the suppression hearing, the police officer testified he saw the “dangling object” hanging from the rearview mirror and believed he had the right to pull over the vehicle based on Virginia Code section 46.2-1054, which prohibits any object from being “suspended from any part of the motor vehicle in such a manner as to obstruct the driver’s clear view of the highway through the windshield, the front side windows, or the rear window.”¹³¹ The trial court ruled that a reasonable officer could suspect that the parking pass dangling from a rearview mirror might violate section 46.2-1054.¹³²

In upholding the trial court’s denial of the suppression motion, the court of appeals rejected the defendant’s contention “that an officer making an investigatory stop must actually articulate, from the witness stand, the articulable facts and then explain, in his personal opinion, why these facts prompted him to be suspicious.”¹³³ The court went on to explain in depth why a reasonable officer could suspect that the parking pass blocked the driver’s field of vision of the roadway.¹³⁴ The court emphasized its holding “does not endorse any *per se* rule authorizing traffic stops whenever an object of any kind is observed dangling from a vehicle’s rearview mirror.”¹³⁵ For example, the court suggested if the object were a “high school graduation tassel or a tiny chain locket” the outcome would be different.¹³⁶ But for the object in this case—a five-by-three-inch opaque parking pass hanging from a rearview mirror of a sedan—the court concluded the stop was justified.¹³⁷

130. *Id.* at 295, 767 S.E.2d at 728.

131. *Id.* at 297–28, 767 S.E.2d at 729–30 (quoting VA. CODE ANN. § 46.2-1054 (Repl. Vol. 2013 & Cum. Supp. 2015)).

132. *See id.* at 300, 767 S.E.2d at 730.

133. *Id.* at 303, 767 S.E.2d at 732.

134. *See id.* at 305–06, 767 S.E.2d at 733.

135. *Id.* at 307, 767 S.E.2d at 734.

136. *Id.* at 308, 767 S.E.2d at 734–35.

137. *Id.* at 307, 767 S.E.2d at 734. The dissent would have reversed the case for two reasons: (1) the officer’s failure to investigate the existence of the alleged criminal activity and (2) the officer’s testimony articulated no facts from which one could infer reasonable suspicion of criminal activity. *Id.* at 312, 767 S.E.2d at 736 (Humphreys, J., dissenting).

B. *Specific Crimes*

1. Burglary

In *Grimes v. Commonwealth*, the defendant stole copper pipe from the crawl space underneath a house.¹³⁸ The question before the Supreme Court of Virginia was whether the defendant entered a “dwelling house” for purposes of statutory burglary under Virginia Code section 18.2-91.¹³⁹ The defendant maintained that he did not actually break into a dwelling house, but rather went underneath it.¹⁴⁰ The defendant argued the crawl space did not constitute part of the dwelling house because there was no access between the crawl space and the remaining portion of the house, and because the crawl space was not suitable for habitation.¹⁴¹

The supreme court concluded that the crawl space was “structurally part of the house.”¹⁴² The court reasoned that “[i]t is physically contained within the four exterior walls, i.e., the vertical plane, of the house; it is under the same roof; and it contains integral utilities, such as plumbing and ductwork, that are needed in a dwelling house.”¹⁴³ Accordingly, the court determined that “when an area of a house is ‘functionally interconnected with and immediately contiguous to other portions of the house,’ it constitutes part of the dwelling house.”¹⁴⁴

2. Child Pornography

In *Kelley v. Commonwealth*, the Supreme Court of Virginia considered an argument that the defendant did not distribute child pornography over the internet using peer-to-peer software but rather merely downloaded it.¹⁴⁵ According to the defendant, “the evidence was insufficient to prove distribution because the peer-to-peer software he used to access and download child pornography automatically placed the child pornography files into a

138. 288 Va. 314, 316, 764 S.E.2d 262, 263 (2014).

139. *Id.* at 318, 764 S.E.2d at 264.

140. *Id.* at 316, 764 S.E.2d at 263.

141. *Id.* at 318, 764 S.E.2d at 264–65.

142. *Id.* at 318, 764 S.E.2d at 265.

143. *Id.*

144. *Id.* (quoting *Burgett v. State*, 314 N.E.2d 799, 803 (Ind. Ct. App. 1974)).

145. See *Kelley v. Commonwealth*, 289 Va. ___, ___, 771 S.E.2d. 672, 672–73 (2015).

shared folder accessible to other users of the software.”¹⁴⁶ The supreme court disagreed, concluding that the defendant distributed child pornography when he downloaded the files into his shared folder where anyone, including law enforcement, could access it.¹⁴⁷ The defendant could have prevented others from downloading those files by changing the settings on his computer, but he did not do so.¹⁴⁸ Thus, in the court’s opinion, it did not matter whether the defendant’s shared folder containing the child pornography was created as a default option by the software.¹⁴⁹

3. Counterfeit Currency

In *Hawkins v. Commonwealth*, the Supreme Court of Virginia considered “the sufficiency of the evidence required to support a conviction for possession of counterfeit currency in violation of [Virginia] Code § 18.2-173.”¹⁵⁰ Here, the police went to a pool hall to find and arrest the defendant on several outstanding warrants.¹⁵¹ As the officers approached the defendant, he “put his right hand into the right pocket of his shorts.”¹⁵² An officer drew his weapon and ordered the defendant to remove his hand from his pocket.¹⁵³ The defendant removed his hand and threw a “large sum of money” on the floor.¹⁵⁴ The defendant insisted the money, which turned out to be counterfeit, did not belong to him.¹⁵⁵

Under Virginia Code section 18.2-173, the Commonwealth must prove the defendant possessed the forged bills, knew they were forged, and had the intent to utter or employ them as true.¹⁵⁶ The supreme court held that all three requirements were satisfied in this case.¹⁵⁷ As for possession of the bills, the supreme court upheld the trial court’s finding that officers saw the defend-

146. *Id.* at ___, 771 S.E.2d at 672–73.

147. *Id.* at ___, 771 S.E.2d at 674–75.

148. *Id.* at ___, 771 S.E.2d at 675.

149. *See id.* at ___, 771 S.E.2d at 675.

150. 288 Va. 482, 484, 764 S.E.2d 81, 82 (2014).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 485, 764 S.E.2d at 83.

155. *Id.*

156. *Id.* (quoting VA. CODE ANN. § 18.2-173 (Repl. Vol. 2014 & Cum. Supp. 2015)).

157. *See id.* at 486–87, 764 S.E.2d at 83–84.

ant holding the bills.¹⁵⁸ With regards to whether the defendant knew the bills were counterfeit, the supreme court stated the trial court could reasonably infer the defendant's guilty knowledge from his attempt to abandon the counterfeit money when the police approached him.¹⁵⁹ Lastly, as to whether the defendant intended to utter the forged bills, the court relied upon several circumstances that the federal courts have held will support a finding of the requisite intent: "possession of a large number of counterfeit bills; taking counterfeit bills to a commercial establishment, where cash transactions are likely [such as a pool hall]; and segregating counterfeit bills from genuine currency."¹⁶⁰

4. Distribution of Imitation Controlled Substances

In *Powell v. Commonwealth*, the Supreme Court of Virginia considered whether sufficient evidence existed to "sustain a conviction for distribution of an imitation Schedule I or II controlled substance where the substance actually distributed was a Schedule VI controlled substance."¹⁶¹ The defendant sold an undercover police officer a clear plastic baggie containing a "white rock[-like] substance" that resembled crack cocaine.¹⁶² The substance was actually half of a quetiapine pill.¹⁶³ Quetiapine is a Schedule VI controlled substance under Virginia's Drug Control Act.¹⁶⁴

To be convicted of distributing an imitation controlled substance under code section 18.2-247(B), the substance cannot be a "controlled substance subject to abuse."¹⁶⁵ Since quetiapine is a controlled substance, the issue for the supreme court was whether quetiapine is "subject to abuse."¹⁶⁶ The court looked to the language of the Drug Control Act and observed that, unlike con-

158. *Id.* at 486, 764 S.E.2d at 83.

159. *See id.* at 486-87, 764 S.E.2d at 84 (citing *Ruiz v. United States*, 374 F.2d 619, 620 (5th Cir. 1967) ("Probably the strongest evidence of guilty knowledge is an attempt to abandon counterfeit currency when detection is feared.")).

160. *Id.* at 487, 764 S.E.2d at 84 (internal citations omitted).

161. 289 Va. 20, 22, 766 S.E.2d 736, 737 (2015).

162. *Id.* at 23, 766 S.E.2d at 737.

163. *Id.* at 23-24, 766 S.E.2d at 737.

164. *Id.* at 23, 27, 766 S.E.2d at 737, 739 (citing VA. CODE ANN. § 54.1-3455(2) (Repl. Vol. 2013 & Cum. Supp. 2015)).

165. *Id.* at 26, 766 S.E.2d at 739 (quoting VA. CODE ANN. 18.247(B)(ii) (Repl. Vol. 2014 & Cum. Supp. 2015)).

166. *Id.* at 29, 766 S.E.2d at 741.

trolled substances under Schedules I-V, Schedule VI substances do not include the factor of “potential for abuse.”¹⁶⁷ Based on the absence of this language in Schedule VI, the court concluded that quetiapine “is not a controlled substance subject to abuse as defined by the Drug Control Act.”¹⁶⁸ The court therefore upheld the defendant’s conviction of selling an imitation controlled substance.¹⁶⁹

5. Driving Under the Influence

The Supreme Court of Virginia continues to define the parameters of what constitutes driving under the influence (“DUI”) in violation of Virginia Code section 18.2-266. In *Sarafin v. Commonwealth*, a majority of the court upheld the defendant’s DUI conviction when the defendant was intoxicated while sitting behind the wheel of a vehicle parked in his private driveway with the keys in the ignition.¹⁷⁰ In recent years, the court has held that a defendant operates a vehicle for purposes of Code section 18.2-266 when the vehicle is parked with the key in the ignition.¹⁷¹ However, until now the court had not definitively decided “whether Code § 18.2-266 is violated when the operation of the vehicle occurs on a private way.”¹⁷²

Examining the plain language of code section 18.2-266, the supreme court decided there is no explicit “on a highway” requirement to DUI.¹⁷³ As the court observed, the statute applies equally to motor vehicles, engines, and trains.¹⁷⁴ Since trains are operated on privately-owned tracks, the court reasoned that reading in a public highway requirement would effectively read engines or

167. *Id.*, 766 S.E.2d at 740.

168. *Id.* at 29–30, 766 S.E.2d at 740–41.

169. *Id.* at 31, 766 S.E.2d at 741.

170. 288 Va. 320, 322, 331, 764 S.E.2d 71, 72, 77 (2014).

171. See *Enriquez v. Commonwealth*, 283 Va. 511, 516–17, 722 S.E.2d 252, 255 (2012); *Nelson v. Commonwealth*, 281 Va. 212, 219, 707 S.E.2d 815, 818 (2011).

172. *Sarafin*, 288 Va. at 327, 764 S.E.2d at 75.

173. *Id.* at 327–28, 764 S.E.2d at 75.

174. *Id.*, 764 S.E.2d at 76.

trains out of the statute, or require the court to carve out a “private way” exception for motor vehicles.¹⁷⁵ The court refused to do either.¹⁷⁶

6. Felony Eluding

In *Jones v. Commonwealth*, the Court of Appeals of Virginia decided whether the defendant committed felony eluding in violation of Virginia Code section 46.2-817(B).¹⁷⁷ Here, the police initiated a traffic stop for a possible DUI.¹⁷⁸ After the police activated the emergency lights and sirens, the defendant stopped the vehicle in a parking lot of a 7-Eleven.¹⁷⁹ One officer approached the driver’s side; another officer approached the passenger side.¹⁸⁰ The officer on the driver’s side asked for license and registration, but the defendant did not respond.¹⁸¹ The officer then asked the defendant to remove the keys from the ignition and hand them to him.¹⁸² The defendant removed the keys but kept them in his hand.¹⁸³ The passenger said to the defendant, “[j]ust go.”¹⁸⁴ The officer then reached into the vehicle to try to get the keys, but before he could grab them, the defendant drove away from the scene.¹⁸⁵ Both officers were partially inside the vehicle and were only able to break free just as the vehicle sped out of the parking lot.¹⁸⁶

On appeal, the defendant argued he could not be convicted of felony eluding under Virginia Code section 46.2-817(B) because he initially stopped by pulling the vehicle into the parking lot of

175. *Id.* at 328–29, 764 S.E.2d at 76.

176. *Id.* Two justices authored dissenting opinions. Justice Mims wrote that “the Court has taken the final step toward construing Code § 18.2-266 to punish a person for merely occupying, rather than operating, a motor vehicle.” *Id.* at 334, 764 S.E.2d at 79 (Mims, J., dissenting). Justice McClanahan wrote that the majority had “jettison[ed] the half-century-old highway requirement in the DUI statute . . .” *Id.* (McClanahan, J., dissenting).

177. 64 Va. App. 361, 363, 768 S.E.2d 270, 271 (2015).

178. *Id.* at 363–64, 768 S.E.2d at 271.

179. *Id.* at 364, 768 S.E.2d at 271.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 364, 768 S.E.2d at 271–72.

186. *Id.* at 364–65, 768 S.E.2d at 272.

the 7-Eleven.¹⁸⁷ According to the defendant, “the fact that he ‘subsequently placed the keys in the ignition and sped away does not trigger Section 46.2-817(B),’ since ‘[s]ection (B) prohibits escaping or eluding police officers *only* in disregard to a signal to stop a motor vehicle.’”¹⁸⁸ The court of appeals found that this argument overlooked the evidence that the defendant drove the vehicle “in a willful and wanton disregard of *subsequent* signals to stop.”¹⁸⁹ Both officers reached into the vehicle in an effort to retrieve the keys while the defendant continued to speed out of the parking lot.¹⁹⁰ Thus, the court concluded that a rational trier of fact could find beyond a reasonable doubt that the defendant drove the motor vehicle in a willful and wanton disregard of visible signals to stop.¹⁹¹

7. Murder

In *Holley v. Commonwealth*, the trial court found the defendant guilty of both first-degree felony murder and second-degree murder in the killing of a man during an armed burglary.¹⁹² The Court of Appeals of Virginia, sitting en banc, unanimously held that “the Double Jeopardy Clause precludes a conviction and punishment for both second-degree murder and first-degree felony murder when there is only one victim.”¹⁹³ The court explained that “under the common law of homicide, the units of prosecution are dead bodies, not theories of aggravation.”¹⁹⁴ Thus, under the common law, the defendant could not be convicted of two murders for one killing.¹⁹⁵ The court rejected the Commonwealth’s position that the enactment of the felony-murder statute, Virginia Code section 18.2-32, had displaced the common law.¹⁹⁶ The court concluded that by enacting the felony murder statute, “the General Assembly did not intend to displace the common law’s conception of homicide as a unitary crime with regard to murder and felony

187. *Id.* at 366, 768 S.E.2d at 273.

188. *Id.*

189. *Id.* at 369, 768 S.E.2d at 274.

190. *Id.*

191. *See id.*

192. 64 Va. App. 156, 159, 765 S.E.2d 873, 874 (2014).

193. *Id.* at 158, 765 S.E.2d at 874.

194. *Id.* at 161, 765 S.E.2d at 875.

195. *Id.*

196. *See id.* at 161, 164, 765 S.E.2d at 875, 877.

murder;” rather, “the provision was enacted to *mitigate* the harshness of the common law’s punishment for the crime of homicide.”¹⁹⁷ Because the defendant could not be convicted of first-degree felony murder and second-degree murder of the same person, the court reversed his lesser convictions of second-degree murder and use of a firearm in the commission of second-degree murder.¹⁹⁸

8. Resisting Arrest

In *Joseph v. Commonwealth*, the Court of Appeals of Virginia held that the crime commonly known as “resisting arrest” requires more than just resistance.¹⁹⁹ During a traffic stop, a police officer determined the defendant had outstanding warrants.²⁰⁰ As the officer went to search the defendant, he “backed up on to [sic] the officer.”²⁰¹ The officer tried to get the defendant to place his hands behind his back and handcuff him, but the defendant repeatedly pulled away and repelled the officer’s efforts to handcuff him.²⁰² The defendant, however, “‘did not leave the scene’ and remained ‘continuously in . . . close proximity’” to the officer throughout the encounter.²⁰³

On appeal, the parties and the court of appeals agreed the evidence was insufficient to support the defendant’s conviction for resisting arrest since he never fled from the officer.²⁰⁴ Under the resisting arrest statute, Virginia Code section 18.2-479.1(B), the Commonwealth must prove a defendant who is “intentionally preventing or attempting to prevent a lawful arrest is specifically doing so by *fleeing* from the officer.”²⁰⁵ The court applied the plain meaning of the word “flee” and held that “fleeing from a law enforcement officer requires a form of running away or physically departing from the officer’s immediate span of control.”²⁰⁶ Thus,

197. *Id.* at 164, 765 S.E.2d at 877.

198. *Id.* at 166–67, 765 S.E.2d at 878.

199. *See* 64 Va. App. 332, 333, 768 S.E.2d 256, 256 (2015).

200. *Id.* at 334, 768 S.E.2d at 257.

201. *Id.*

202. *Id.* at 334–35, 768 S.E.2d at 257.

203. *Id.*

204. *Id.* at 336, 768 S.E.2d at 257–58.

205. *Id.* at 337–38, 768 S.E.2d at 258.

206. *Id.* at 339, 768 S.E.2d at 259.

although the defendant demonstrated resistance and repeated efforts to avoid physical custody, no evidence of flight existed to support a conviction under Virginia Code section 18.2-479.1(B).²⁰⁷

9. Robbery

In *Fagan v. Commonwealth*, the Court of Appeals of Virginia determined whether the defendant committed larceny by trick or robbery when he took a victim's property while impersonating a police officer.²⁰⁸ The defendant and an accomplice pulled over a vehicle using a blue light.²⁰⁹ The defendant tapped on the window of the vehicle with a sheathed knife and said "undercover."²¹⁰ The defendant ordered the occupants out of the car and told them to place their hands on the trunk of the car.²¹¹ The "officers" then frisked the occupants and subsequently took their phones and wallets.²¹²

The appeal focused on the victim who testified that he did not know the men were not police officers until they drove away.²¹³ The defendant argued that he could be guilty of larceny by trick, but not robbery, of this victim.²¹⁴ The court of appeals disagreed, explaining that "[t]he threat of violence is what distinguishes larceny from robbery."²¹⁵ Thus, the dispositive question was not whether the victim was taken in by the defendant's ruse, but rather whether the evidence supports the jury's conclusion that the defendant took the victim's property by intimidation.²¹⁶ The court held that there was sufficient evidence such that a rational juror could find the victim unwillingly parted with his property because

207. *See id.* at 339–40, 768 S.E.2d at 259.

208. *See* 63 Va. App. 395, 396–97, 758 S.E.2d 78, 79 (2014).

209. *Id.* at 396, 758 S.E.2d at 79.

210. *Id.* at 396–97, 758 S.E.2d at 79.

211. *Id.* at 397, 758 S.E.2d at 79.

212. *Id.*

213. *See id.*

214. *Id.*

215. *See id.* at 398, 400, 758 S.E.2d at 80–81.

216. *Id.* at 400, 758 S.E.2d at 80.

of the defendant's intimidation.²¹⁷ The court identified, in particular, the defendant's tapping the handle of a sheathed knife on the window as "an unmistakable gesture of intimidation."²¹⁸

In *Adeniran v. Commonwealth*, the Court of Appeals of Virginia held that assault is not a lesser-included offense of robbery or attempted robbery.²¹⁹ The defendant was convicted of attempted robbery of a prostitute.²²⁰ On appeal, he argued that the trial court erred in refusing to instruct the jury that simple assault is a lesser-included offense of both robbery and attempted robbery.²²¹ The court of appeals found no error in refusing the instruction because not every robbery necessarily includes an assault.²²² It reasoned that, because the common law crime of assault "requires an overt act, *words alone are never sufficient to constitute an assault.*"²²³ By contrast, "words alone can create sufficient intimidation . . . to sustain a conviction of robbery."²²⁴ Therefore, "[b]ecause assault contains an element that robbery does not," the court held that "assault cannot be a lesser-included offense of robbery."²²⁵

10. Sodomy

Toghill v. Commonwealth involved the continued disagreement between state and federal courts over the constitutionality of the anti-sodomy provisions of former Virginia Code section 18.2-361(A).²²⁶ In 2013, the United States Court of Appeals for the Fourth Circuit ruled that the statute was facially unconstitutional under the decision from the Supreme Court of the United

217. *Id.* at 400, 758 S.E.2d at 81.

218. *See id.* at 400, 758 S.E.2d at 80–81.

219. *See* 63 Va. App. 617, 619–20, 761 S.E.2d 782, 783 (2014).

220. *Id.*

221. *Id.* at 621, 761 S.E.2d at 784.

222. *Id.* at 624–25, 761 S.E.2d at 785.

223. *Id.* at 624, 761 S.E.2d at 785 (quoting *Clark v. Commonwealth*, 279 Va. 636, 641, 691 S.E.2d 786, 789 (2010)).

224. *Id.* (citing *Bivins v. Commonwealth*, 19 Va. App. 750, 752, 454 S.E.2d 741, 742 (1995)).

225. *Id.* at 624–25, 761 S.E.2d at 785

226. *See* 289 Va. 220, 224, 768 S.E.2d 674, 675 (2015). The 2014 General Assembly amended Virginia Code section 18.2-361(A) to remove the general provisions forbidding sodomy. *See* Act of Apr. 23, 2014, ch. 794, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 18.2-361 (Repl. Vol. 2014 & Cum. Supp. 2015)).

States in *Lawrence v. Texas*.²²⁷ This decision ran directly counter to a previous ruling by the Supreme Court of Virginia that the statute was constitutional as applied to sodomy cases involving an adult with a minor.²²⁸

In *Toghill*, the supreme court disagreed with the Fourth Circuit and once again ruled that the statute was constitutional.²²⁹ In doing so, the court identified “limiting language” in *Lawrence* that “simply does not afford adults with the constitutional right to engage in sodomy with minors.”²³⁰ Because the defendant solicited sodomy with a person whom he thought was a minor, the court found he lacked standing to assert a facial challenge to the anti-sodomy provisions of former Virginia Code section 18.2-361(A).²³¹

11. Strangulation

In *Dawson v. Commonwealth*, the defendant was convicted of the recently enacted crime of strangulation, found in Virginia Code section 18.2-51.6.²³² The evidence at trial showed that the defendant had applied pressure to the victim’s neck, impeding her breathing and leaving bruises on her neck.²³³ The Court of Appeals of Virginia considered whether the defendant caused a “wounding” or “bodily injury” to the victim.²³⁴ Because the statute did not define either term, the court looked to how the terms had been defined elsewhere in the Virginia Code—in particular, the malicious wounding statute.²³⁵ To prove the victim had been wounded, the court determined that “the Commonwealth must show that the victim’s skin was broken or cut.”²³⁶ Since the victim’s cuts were not caused by the defendant’s act of strangulation, the court of appeals next considered whether the evidence was

227. *MacDonald v. Moose*, 710 F.3d 154, 156, 162, 167 (4th Cir. 2013).

228. *McDonald v. Commonwealth*, 274 Va. 249, 260, 645 S.E.2d 918, 924 (2007).

229. *Toghill*, 289 Va. at 231–32, 768 S.E.2d at 680.

230. *Id.* at 229–30, 768 S.E.2d at 679.

231. *Id.* at 231, 768 S.E.2d at 680.

232. 63 Va. App. 429, 433–34, 758 S.E.2d 94, 97 (2014).

233. *Id.* at 431–33, 758 S.E.2d at 96.

234. *Id.* at 434, 758 S.E.2d at 97.

235. *Id.*

236. *Id.* at 435, 758 S.E.2d at 97 (quoting *Johnson v. Commonwealth*, 58 Va. App. 303, 317, 709 S.E.2d 175, 182 (2011)).

sufficient to show the victim suffered “bodily injury.”²³⁷ As it has done in other cases, the court interpreted “bodily injury” to mean “*any bodily hurt whatsoever*.”²³⁸ The court concluded that the bruises around the victim’s neck constituted a bodily injury that resulted from the defendant applying pressure to her neck.²³⁹

III. LEGISLATION

A. *Affirmative Defenses*

To combat drug and alcohol overdose fatalities, the 2015 General Assembly passed a “safe reporting” law that creates an affirmative defense to certain drug and alcohol related offenses if the defendant, in good faith, seeks or obtains emergency medical attention for an overdose incurred either personally or by another.²⁴⁰ The affirmative defense may be applied to the following offenses: unlawful possession, purchase, or consumption of alcohol; possession of a controlled substance; possession of marijuana; intoxication in public; or possession of controlled paraphernalia.²⁴¹ To invoke the affirmative defense, the defendant must: remain at the scene of the overdose or the location where the overdose victim is transferred to for medical attention until law enforcement arrives; identify himself to law enforcement; and cooperate with a criminal investigation, if requested.²⁴² The affirmative defense, however, cannot be asserted if medical attention was sought during execution of a search warrant or during a lawful search or arrest.²⁴³

The 2015 General Assembly also created a limited medical marijuana affirmative defense for patients with intractable epilep-

237. *Id.*

238. *Id.* (quoting *Luck v. Commonwealth*, 32 Va. App. 827, 831, 531 S.E.2d 41, 43 (2000)).

239. *Id.* at 437, 758 S.E.2d at 98. It should be noted that the Supreme Court of Virginia has granted an appeal in another case where one issue is whether the court of appeals erred in finding that there was no bodily injury where the victim was choked until she was unconscious. *Chilton v. Commonwealth*, No. 1531-13-3, 2014 Va. App. LEXIS 379 (Va. Ct. App. Nov. 18, 2014), *cert. granted*, No. 141820, 2015 Va. LEXIS 39 (Va. Apr. 7, 2015).

240. Act of Mar. 23, 2015, ch. 436, 2015 Va. Acts __, __ (codified at VA. CODE ANN. § 18.2-251.03 (Cum. Supp. 2015)).

241. VA. CODE ANN. § 18.2-251.03(B) (Cum. Supp. 2015).

242. *Id.* § 18.2-251.03(B)(2)–(4) (Cum. Supp. 2015).

243. *Id.* § 18.2-251.03(C) (Cum. Supp. 2015).

sy.²⁴⁴ Under the law, written certification from a doctor will serve as an affirmative defense for epilepsy patients arrested and charged with possession of marijuana in the form of cannabidiol and THC-A oil.²⁴⁵

B. Drones

In 2013, the General Assembly placed a two-year moratorium on law enforcement use of “unmanned aircraft systems,” i.e., drones.²⁴⁶ The 2015 General Assembly replaced the moratorium with a law prohibiting the use of unmanned aircraft systems by law enforcement without a warrant.²⁴⁷ Any evidence obtained in violation of the law is not admissible in any criminal or civil proceeding.²⁴⁸ Law enforcement may use unmanned aircraft systems without a warrant under the following exceptions: during a search under Amber, Senior, and Blue alerts; when necessary to alleviate immediate danger to a person; for training exercises related to such uses; or if a person with legal authority consents to the warrantless search.²⁴⁹ The law does not ban the use of unmanned aircraft systems for non-law enforcement related government purposes such as traffic, flood, or fire assessment.²⁵⁰ The law also does not ban private, commercial, recreational, or educational use of unmanned aircraft systems.²⁵¹ Weaponized unmanned aircraft systems, however, are banned except for certain military training.²⁵²

C. *Enticing Another Person into a Dwelling House with Intent to Commit Certain Felonies*

The 2015 General Assembly created the new crime of enticing another person into a dwelling house with intent to commit cer-

244. Act of Feb. 26, 2015, ch. 7, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 18.2-250.1 (Cum. Supp. 2015); codified at *id.* § 54.1-3408.3 (Cum. Supp. 2015)).

245. VA. CODE ANN. §§ 18.2-250.1, 54.1-3408.3 (Cum. Supp. 2015).

246. Act of Apr. 3, 2013, ch. 796, 2013 Va. Acts 1645.

247. Act of Apr. 30, 2015, ch. 764, 2015 Va. Acts __, __ (codified at VA. CODE ANN. § 19.2-60.1 (Cum. Supp. 2015)).

248. VA. CODE ANN. § 19.2-60.1(E) (Cum. Supp. 2015).

249. *Id.* § 19.2-60.1(C) (Cum. Supp. 2015).

250. *Id.* § 19.2-60.1(D) (Cum. Supp. 2015).

251. *Id.*

252. *Id.* § 19.2-60.1(F)–(G) (Cum. Supp. 2015).

tain felonies.²⁵³ There are two general requirements to the crime: (1) the person commits murder, abduction, aggravated malicious wounding, robbery, rape, forcible sodomy, or object sexual penetration within a dwelling house and (2) that person with the intent to commit one of those felonies enticed, solicited, requested, or otherwise caused the victim to enter such dwelling house.²⁵⁴

D. "Palcohol" Ban

The federal government recently cleared the sale of "palcohol," a powder that can turn a glass of water into an alcoholic drink.²⁵⁵ The 2015 General Assembly, however, banned that product in Virginia.²⁵⁶ Under the new law, no container sold in or shipped into Virginia shall include powder or crystalline alcohol.²⁵⁷ Additionally, the possession, sale, purchase, or use of powdered or crystalline alcohol shall be a Class 1 misdemeanor.²⁵⁸

E. Commercial Sex Trafficking

The 2015 General Assembly passed Virginia's first commercial sex trafficking law.²⁵⁹ Under subsection (A) of the newly created Virginia Code section 18.2-357.1, any person who "solicits, invites, recruits, encourages, or otherwise causes or attempts to cause a person to" engage in prostitution "with the intent to receive money or other valuable thing or to assist another in receiving money or other valuable thing from the earnings" of the solicited person from an act of prostitution is guilty of a Class 5 felony.²⁶⁰ Additionally, "any person who violates subsection (A)

253. Act of Mar. 23, 2015, ch. 392, 2015 Va. Acts __, __ (codified at VA. CODE ANN. § 18.2-50.3 (Cum. Supp. 2015)).

254. VA. CODE ANN. § 18.20-50.3 (Cum. Supp. 2015).

255. "Palcohol" Powdered Alcohol Wins Federal Approval, CBSNEWS (Mar. 11, 2015, 8:27 PM), <http://www.cbsnews.com/news/palcohol-powdered-alcohol-wins-federal-approval/>.

256. Act of Apr. 15, 2015, ch. 735, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 4.1-100, -103 (Cum. Supp. 2015); codified at *id.* § 4.1-302.2 (Cum. Supp. 2015)).

257. VA. CODE ANN. § 4.1-103.19 (Cum. Supp. 2015).

258. *Id.* § 4.1-302.2 (Cum. Supp. 2015).

259. See Act of Mar. 27, 2015, ch. 690, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 9.1-902, 17.1-805, 18.2-46.1, 18.2-356, 18.2-357, 18.2-513, 19.2-215.1, 19.2-386.35 (Cum. Supp. 2015); codified at *id.* § 18.2-357.1 (Cum. Supp. 2015)).

260. VA. CODE ANN. § 18.2-357.1(A) (Cum. Supp. 2015).

through the use of force, intimidation, or deception is guilty of a Class 4 felony.²⁶¹ Finally, any adult who violates subsection (A) with an underage person is guilty of a Class 3 felony.²⁶²

The General Assembly added commercial sex trafficking to the definition of a violent felony for the purposes of the sentencing guidelines, predicate criminal acts for street gangs, Virginia's Racketeer Influenced and Corrupt Organization ("RICO") Act, multi-jurisdiction grand jury, asset forfeiture, and the Sex Offender Registry.²⁶³ The legislation also amended two existing Virginia Code sections on receiving money for procuring a person for prostitution and receiving money from the earnings of a person engaged in prostitution.²⁶⁴ If those crimes involved a minor, then the penalty is increased from a Class 4 felony to a Class 3 felony.²⁶⁵

F. *Venue*

Under the 2015 General Assembly amendments to the criminal venue statute, if an offense has occurred in Virginia and venue cannot be readily determined, then venue may be had in the county or city in Virginia in which the defendant resides, where a non-resident defendant is apprehended, or where a related offense was committed if the defendant is a non-resident and is apprehended outside Virginia.²⁶⁶ Venue for homicide cases was expanded to include the city or county where any part of the body was found.²⁶⁷

261. *Id.* § 18.2-357.1(B) (Cum. Supp. 2015).

262. *Id.* § 18.2-357.1(C) (Cum. Supp. 2015).

263. *See* Act of Mar. 27, 2015, ch. 690, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 9.1-902, 17.1-805, 18.2-46.1, 18.2-356, 18.2-357, 18.2-513, 19.2-215.1, 19.2-386.35 (Cum. Supp. 2015)).

264. *Id.*

265. VA. CODE ANN. § 18.2-357 (Repl. Vol. 2014 & Cum. Supp. 2015).

266. Act of Mar. 26, 2015, ch. 632, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 19.2-244, -247 (Cum. Supp. 2015)).

267. *Id.*
