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Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

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INTRODUCTION

This Article surveys recent developments in criminal procedure and law in Virginia. Because of space limitations, the authors have limited their discussion to the most significant published appellate decisions and legislation.

I. CRIMINAL PROCEDURE

A. *Admissibility of Evidence*

In *Nottingham v. Commonwealth*, the appellant argued that the trial court erred in refusing to permit the defense to play the entirety of a videotaped interview of the sexual assault victim, conducted the day following the attack.[1] The appellant alleged that the victim was relaxed and laughing during the interview, which demonstrated a "prior inconsistent demeanor," contrasting sharply with her "emotional" testimony at trial.[2] The Court of Appeals of Virginia determined that the trial court had not abused its discretion in refusing to play the entirety of the videotape because the court permitted defense counsel to ask the interviewing police officer about the victim's demeanor.[3] The court also considered the fact that the appellant had not sought any redactions of the video, which included the victim interacting with the forensic nurse examiner and other hearsay testimony.[4] As such, the appellate court affirmed the judgment of the trial court.[5]

B. *Appellate Procedure*

In *Nicholson v. Commonwealth*, the appellant challenged the Court of Appeals of Virginia's ruling that her notice of appeal was fatally defective.[6] The appellant was charged on a summons with driving on a suspended license, fifth offense, under both a local ordinance and state statute.[7] When she appealed her case to the circuit court, the circuit court issued various orders styled as

1. 73 Va. App. 221, 231, 857 S.E.2d 917, 921 (2021).
2. *Id.*
3. *Id.* at 232, 857 S.E.2d at 922.
4. *Id.*
5. *Id.* at 233, 857 S.E.2d at 922.
6. 300 Va. 17, 19, 858 S.E.2d 821, 822 (2021).
7. *Id.* at 20, 858 S.E.2d at 822.

"Commonwealth of Virginia v. Samantha Ann Nicholson."[8] However, her circuit court conviction order was styled as "Albemarle v. Samantha Ann Nicholson," the "Local Ordinance" box being marked to describe the charge, but the applicable Code of Virginia section was listed instead of the local ordinance.[9] The appellant's notice of appeal listed the Commonwealth of Virginia as the appellee.[10] Ultimately, the Court of Appeals of Virginia sua sponte held the notice to be facially deficient because it listed the Commonwealth as a litigant but was appealing a county ordinance.[11] The Supreme Court of Virginia reversed the court of appeals, holding that the notice "was sufficient to identify the case being appealed" because "[i]t listed her name, the date of the final order, the court in which the conviction originated, and the correct docket number."[12] Additionally, listing the incorrect party was not a fatal defect and was subject to waiver.[13]

C. *Bail*

In *Commonwealth v. Davis*, the Court of Appeals of Virginia reversed the Richmond City Circuit Court's order granting a $10,000 bond.[14] The court found that the circuit court failed to "articulate any conclusion regarding whether [the appellant] had rebutted the presumption against bail, let alone a basis for such a conclusion, if reached."[15] The court of appeals further held that the circuit court gave inappropriate weight in its bail determination to the twenty months of pre-trial delays because those delays were "caused exclusively" by the appellant's own pretrial motions.[16] Ultimately, the court determined, the record indicated that the circuit court failed to weigh all of the factors listed in Code of Virginia section 19.2-120(E) and inappropriately based its bail determination solely on its view that the appellant had been in jail for "a long time."[17]

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 21, 858 S.E.2d at 823.
12. *Id.* at 24, 858 S.E.2d at 824.
13. *Id.*
14. 73 Va. App. 711, 714, 865 S.E.2d 429, 430 (2021).
15. *Id.* at 719, 865 S.E.2d at 433.
16. *Id.* at 719–20, 865 S.E.2d at 433.
17. *Id.*

In *Commonwealth v. Thomas*, the Court of Appeals of Virginia held that the trial court abused its discretion by admitting Thomas to bail while he was pending trial for charges of rape and forcible sodomy.[18] At the time of Thomas' bail hearing, section 19.2-120(A) provided that there was a presumption against bail if a defendant was charged with an act of violence as defined in Code of Virginia section 19.2-297.1, or if a defendant was charged with an offense for which the maximum sentence is life imprisonment.[19] Both rape and forcible sodomy are defined as acts of violence under section 19.2-297.1, and both are punishable by possible life sentences.[20]

The court of appeals held that the trial court abused its discretion by admitting Thomas to bail where there was significant evidence favoring the denial of bail, a lack of evidence favoring release on bail, and the presumption against bail.[21] Finally, the court of appeals held that the circuit court made no factual findings as required by the Supreme Court of Virginia to support its conclusion that Thomas had carried his burden that he was neither a flight risk nor a danger to the public.[22]

D. *Competency*

In *Clark v. Commonwealth*, the Court of Appeals of Virginia determined that the trial court abused its discretion when it denied a second motion for a competency evaluation.[23] The court explained that the trial court "explicitly failed to consider counsel's representations, a relevant factor that should have been given significant weight."[24] The trial court repeatedly asked counsel for "evidence" and rejected counsel's "conclusions" and "opinions," despite Code of Virginia section 19.2-169.1 specifically referencing counsel's repre-

18. 73 Va. App. 121, 123, 131, 855 S.E.2d 879, 880, 884 (2021).

19. *Id.* at 128, 855 S.E.2d at 882. Section 19.2-120 was amended by the General Assembly in 2021 to remove the presumption against bail. 2021 Va. Acts, Spec. Sess. I, ch. 337 (codified as amended at VA. CODE ANN. § 19.2-120 (Cum. Supp. 2021)).

20. *Thomas*, 73 Va. App. at 128, 855 S.E.2d at 882 (citing VA. CODE ANN. §§ 18.2-61, -67.1 (2021)); VA. CODE ANN. § 19.2-297.1 (Cum. Supp. 2021).

21. *Thomas*, 73 Va. App. at 131, 855 S.E.2d at 884.

22. *Id.* (first citing Shannon v. Commonwealth, 289 Va. 203, 206, 768 S.E.2d 433, 436 (2015); and then citing Lawlor v. Commonwealth, 285 Va. 187, 213, 738 S.E.2d 847, 861–62 (2013)).

23. 73 Va. App. 695, 701, 865 S.E.2d 421, 424 (2021).

24. *Id.* at 710, 865 S.E.2d at 428.

sentations as a basis for probable cause.[25] Accordingly, the court of appeals reversed Clark's convictions and remanded the case.[26]

E. *Confrontation Issues*

In *Cortez-Rivas v. Commonwealth*, the appellant challenged his rape conviction, asserting that his confrontation rights were violated when the Commonwealth failed to "produce as a witness a police officer who translated for a detective at the scene of the crime."[27] Although one officer translated for the appellant at the scene of the crime, another officer reviewed the body camera footage, independently translated the statements, and generated a transcript of the interview.[28] At trial, the officer who generated the transcript testified about statements the appellant made at the scene of the crime.[29] The Supreme Court of Virginia held that "[t]he fact that [the officer who] originally translated at the scene [did not testify at trial] . . . is immaterial for Confrontation Clause purposes" because none of his statements were offered into evidence, and the officer who subsequently translated the interview testified.[30]

In *Logan v. Commonwealth*, the supreme court held that a return of service on a preliminary protective order was not testimonial evidence and therefore was not subject to exclusion under the Confrontation Clause of the Sixth Amendment.[31] The court found that the primary purpose at the time the return was made was administrative, as service was necessary to notify Logan that he was subject to a protective order, to confer jurisdiction on the court, and to give effect to the order; thus, it was not intended to "create an out-of-court substitute for trial testimony."[32]

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25. *Id.* at 710–11, 865 S.E.2d at 428–29; VA. CODE ANN. § 19.2-169.1(A) (Cum. Supp. 2021).

26. *Id.* at 711, 865 S.E.2d at 429.

27. 300 Va. 442, 443, 867 S.E.2d 769, 769 (2022).

28. *Id.* at 443–44, 867 S.E.2d at 769–70.

29. *Id.* at 444, 867 S.E.2d at 770.

30. *Id.* at 445, 867 S.E.2d at 770.

31. 299 Va. 741,743, 858 S.E.2d 176, 177 (2021).

32. *Id.* at 746–47, 858 S.E.2d at 179–80 (quoting Ohio v. Clark, 576 U.S. 237, 245 (2015)).

F. *Continuances*

In *Bailey v. Commonwealth*, the Court of Appeals of Virginia affirmed the trial court's judgment in denying Bailey's motion for a continuance.[33] Bailey had appealed his misdemeanor conviction to the circuit court and signed the notice of appeal because he was *pro se*.[34] The notice of appeal advised him that he was required to promptly communicate with the circuit court clerk to subpoena witnesses if he did not have a lawyer, and that he was required to be present and ready for trial on the hearing date listed.[35]

When Bailey arrived for trial four months later with counsel, his counsel requested a continuance because he had been retained only three days prior and had not been able to subpoena two witnesses for Bailey.[36] The Commonwealth objected, arguing that it was prepared to go forward and that Bailey was aware that he needed to be present and ready for trial on that date.[37] The trial court denied Bailey's motion for a continuance, but offered to move Bailey's case to the end of the docket to allow Bailey and his counsel additional time to prepare.[38] When the case was later recalled and before the court accepted Bailey's plea of not guilty, the court asked Bailey if he had an opportunity to speak with his lawyer about the charge against him, including any defenses, and whether he was prepared "to go forward today."[39] Bailey answered affirmatively.[40] The court proceeded with trial, and allowed Bailey's counsel to proffer what the testimony of the two witnesses would have been.[41] Thereafter, the trial court convicted Bailey.[42] With respect to his motion for a continuance, the court of appeals found that the denial could not be said to be an abuse of discretion when Bailey was aware of the trial date, knew he was required to be ready for trial, and was told to communicate with the clerk if he needed to subpoena witnesses and did not have an attorney.[43] The court of appeals further held

33. 73 Va. App. 250, 254, 858 S.E.2d 423, 425 (2021); Bailey also challenged the denial of his motion to reconsider. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 254–55, 858 S.E.2d at 425–26.
37. *Id.* at 255, 858 S.E.2d at 426.
38. *Id.* at 255–56, 858 S.E.2d at 426.
39. *Id.* at 256, 858 S.E.2d at 426.
40. *Id.*
41. *Id.* at 256–57, 858 S.E.2d at 426–27.
42. *Id.* at 257, 858 S.E.2d at 427.
43. *Id.* at 265–66, 858 S.E.2d at 431.

that the record failed to establish that Bailey suffered any prejudice, because the proffered testimony of the witnesses did not negate the Commonwealth's evidence.[44] As such, the court of appeals affirmed the trial court's judgment.[45]

In *Barrow v. Commonwealth*, the trial court denied the appellant's request for a continuance in a deferred disposition case made in June 2020, despite the declaration of a judicial emergency in March 2020 due to the COVID-19 outbreak, which the appellant alleged amounted to an abuse of discretion.[46] The court of appeals disagreed, noting that while the emergency order directed trial courts to "liberally" grant continuances for any cause resulting from COVID-19 and thus give substantial weight to COVID-19 as a factor, the trial court here properly considered the impact COVID-19 had on the case but determined that it had little effect given the appellant's failure to complete any of the requirements of her deferred sentence.[47]

G. *Expert Witnesses*

In *McDaniel v. Commonwealth*, the Commonwealth qualified an expert in "blood spatter analysis" who testified as to the nature of bloodstains left in the murdered victim's residence.[48] The Court of Appeals of Virginia held that the expert was properly qualified, as she had relevant academic degrees and vocational training.[49] The court also determined that the trial court did not err by allowing the expert to base her conclusions solely on photographs, as she testified that she had been trained on interpreting photographs and had based her conclusions in other cases on photographs around ninety-five percent of the time.[50] Lastly, the court held that the appellant's argument that the expert had based part of her opinion regarding the photograph on a conversation she had with the prosecutor only went to the weight the jury would assign her

44. *Id.* at 266–67, 858 S.E.2d at 431.

45. *Id.* at 267, 858 S.E.2d at 431.

46. 73 Va. App. 149, 152–54, 857 S.E.2d 152, 153–54 (2021).

47. *Id.* at 153–56, 857 S.E.2d at 154–55 (quoting Fifth Order Modifying and Extending Declaration of Judicial Emergency in Response to COVID-19 Emergency, Supreme Court of Virginia 5 (June 1, 2020) (effective June 8, 2020), https://www.vacourts.gov/news/items/covid/2020_0601_scv_amendment_to_fifth_order.pdf [https://perma.cc/32PB-TSGS].

48. 73 Va. App. 299, 306–07, 858 S.E.2d 828, 832 (2021).

49. *Id.* at 308–12, 858 S.E.2d at 833–34.

50. *Id.* at 312–13, 858 S.E.2d at 834–35.

testimony because the appellant had not objected to the admission of the photograph; accordingly, the court of appeals affirmed.[51]

In *Stevens v. Commonwealth*, Stevens was convicted of three counts each of object sexual penetration, aggravated sexual battery, and taking indecent liberties with a child, stemming from abuse of a close family member when she was between four and six years old.[52] The victim did not report the abuse until she was twenty years old.[53] At trial, the Commonwealth called an expert witness who testified that it is "very common" for victims of child abuse to delay reporting.[54] The expert also testified that young children "often confuse details about the abuse" in forming memories of the events.[55]

On appeal, Stevens challenged the admissibility of the Commonwealth's expert's testimony.[56] The court of appeals concluded that the expert witness was qualified because the expert had ample experience as a child forensic interviewer, sufficient education and training, and reviewed studies of child sexual abuse on a weekly basis.[57] The court of appeals also found that testimony of memory formation was within the expert's expertise because "the issue of memory formation and retention is inextricably linked to a child's disclosure of sexual abuse."[58]

H. *Fourth Amendment Searches and Seizures*

In *Long v. Commonwealth*, a confidential informant advised police that her daughter was involved with Lauren Jarrell, who was involved in several drug overdose cases in the area.[59] Police were aware that the overdose cases occurred at area hotels.[60] The informant advised police that she and her daughter shared a vehicle, and she had placed a GPS tracking device on it because she was concerned her daughter was involved in drug transactions with

51. *Id.* at 314–17, 858 S.E.2d at 836–37.
52. 72 Va. App. 546, 551–52, 850 S.E.2d 393, 395–96 (2020).
53. *Id.* at 552, 850 S.E.2d at 396.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 554–55, 850 S.E.2d at 397.
58. *Id.* at 559, 850 S.E.2d at 399.
59. 72 Va. App. 700, 705, 853 S.E.2d 65, 68 (2021).
60. *Id.*

Jarrell.[61] The informant regularly advised police of the whereabouts of the vehicle, and police corroborated this information.[62] One night, the informant called an off-duty police officer and informed him that her daughter was in jail, but the car was moving and later parked at an area hotel.[63] The off-duty officer went to the hotel, observed the vehicle, and noticed that there was a person in the passenger seat; Jarrell was in the passenger seat of a neighboring car, and Long was in the driver seat.[64] The off-duty officer called local police and requested a "stop out" of the suspicious vehicle.[65] Police eventually recovered evidence causing Long to be charged with transporting a controlled substance, possession with the intent to distribute marijuana, and conspiracy to distribute a controlled substance.[66]

The Court of Appeals of Virginia held the officers had reasonable, articulable suspicion because the confidential informant's information exhibited "sufficient indicia of reliability."[67] The court emphasized that the officer and the informant had been working together for approximately a month, the informant regularly provided information to the officer which was correct and corroborated by the officer, the officer located the vehicle at the location where the informant said it would be, and the officer recognized Jarrell in the neighboring vehicle.[68] The court of appeals also concluded that the arresting officer could rely on the observations and knowledge of the off-duty officer pursuant to the collective knowledge doctrine, which permits an officer to act on the observations of another.[69] The court affirmed Long's convictions.[70]

In *Merid v. Commonwealth*, the Supreme Court of Virginia affirmed Merid's convictions for first-degree murder and abduction by force for the reasons stated in the opinion of the court of

61. *Id.* at 705–06, 853 S.E.2d at 68.
62. *Id.* at 706, 853 S.E.2d at 68.
63. *Id.*
64. *Id.* at 706–07, 853 S.E.2d at 68–69.
65. *Id.* at 707, 853 S.E.2d at 69.
66. *Id.* at 708, 853 S.E.2d at 69.
67. *Id.* at 710, 853 S.E.2d at 70–71 (quoting Giles v. Commonwealth, 32 Va. App. 519, 523, 529 S.E.2d 327, 329 (2000)).
68. *Id.* at 710–11, 853 S.E.2d at 70–71.
69. *Id.* at 716, 853 S.E.2d at 73.
70. *Id.* at 718–19, 853 S.E.2d at 74–75.

appeals.[71] After receiving concerning text messages about joining their dead mother and being unable to contact Merid, Merid's brother contacted police for a welfare check.[72] When police arrived with Merid's brother, they observed the car Merid drove—which was registered to another person—in the parking lot of the apartment building.[73] Police knocked on the door and heard a male voice answer, saying he needed to get dressed.[74] As officers continued knocking, they heard an "alarming" garbling noise, as well as moans.[75] Police forced open the door and observed Merid on the couch, stabbing himself repeatedly in the throat.[76] Police wrestled the knife away from Merid and called paramedics.[77] When the paramedics arrived, police conducted a security sweep of the bedroom, the only other room of the apartment they had not seen, and discovered a woman's body tied to a chair.[78] Merid was tried and convicted for the abduction and murder of the woman.[79]

Merid moved to suppress the evidence recovered as a result of the entry and sweep of the apartment.[80] The court of appeals determined that the initial entry into the apartment complied with the emergency aid exception to the Fourth Amendment.[81] Moreover, the sweep of the bedroom was no more intrusive than necessary to ensure the safety of the paramedics and check to see if anyone else in the apartment needed assistance.[82] The court of appeals concluded that once officers have entered pursuant to the emergency aid exception to the Fourth Amendment, they may conduct a reasonable, cursory sweep of the premises.[83] In this case, the officers reasonably believed that Merid may have been trying to commit suicide, and once inside, they acted reasonably.[84]

71. 300 Va. 77, 77, 858 S.E.2d 825, 825 (2021), *aff'g* 72 Va. App. 104, 119, 841 S.E.2d 873 (2020).
72. Merid v. Commonwealth, 72 Va. App. 104, 109, 841 S.E.2d 873, 875–76 (2020).
73. *Id.* at 109–10, 841 S.E.2d at 876.
74. *Id.* at 110, 841 S.E.2d at 876.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 110–11, 841 S.E.2d at 876.
79. *Id.* at 111, 841 S.E.2d at 876–77.
80. *Id.* at 111, 841 S.E.2d at 876.
81. *Id.* at 112–13, 841 S.E.2d at 877–78.
82. *Id.* at 114–17, 841 S.E.2d at 878–79.
83. *Id.*
84. *Id.* at 116–19, 841 S.E.2d at 879–80.

The Court of Appeals of Virginia, in *Mitchell v. Commonwealth*, held that a law enforcement officer had reasonable, articulable suspicion to initiate a traffic stop of a vehicle when the officer saw the driver, ran the tags, and discovered the registered owner had an outstanding warrant, and the driver matched the description of the registered owner.[85] The court expressly overturned *Worley v. Commonwealth* in light of the holding in *Kansas v. Glover*.[86]

In *Ingram v. Commonwealth*, the Court of Appeals of Virginia reviewed the denial of Ingram's motion to suppress based on the good faith doctrine.[87] Police officers responded to a call reporting a dog running at large near a house and a second dog that had been hit by a car in the same area.[88] The officers went up some stairs and knocked at a door on the second floor of the house.[89] The officers heard dogs barking inside the home, but there was no response to the knock.[90] The officers went down the stairs and observed a dog peering over a missing window frame in the first-floor door.[91] One of the officers approached the first-floor door and observed that the floor was "filthy," and he could see a dead dog from outside the home.[92] Officers also observed four dogs on a hill near the house, and three of those four dogs were "visibly malnourished."[93] Police obtained a search warrant for the home and discovered fourteen dogs, two of which were dead, and most of the live dogs had worms and were malnourished.[94]

Ingram argued that police had violated her Fourth Amendment rights by entering the curtilage of the home and engaging in a search without a warrant.[95] The court of appeals concluded that police had initially done no more than a member of the public could do by approaching the home to knock on the door.[96] The officers were within the scope of implied license when they approached the

85. 73 Va. App. 234, 240, 249, 858 S.E.2d 415, 418, 423 (2021).

86. *Id.* at 244, 248–49, 858 S.E.2d at 422–23; Worley v. Commonwealth, No. 1913-94-2, 1996 Va. App. LEXIS 47 (Jan. 30, 1996) (unpublished opinion); Kansas v. Glover, 140 S. Ct. 1183 (2020)

87. 74 Va. App. 59, 67–68, 866 S.E.2d 55, 59–60 (2021).

88. *Id.* at 65, 866 S.E.2d at 58.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 66, 866 S.E.2d at 59.

94. *Id.* at 66–67, 866 S.E.2d at 59.

95. *Id.* at 68, 866 S.E.2d at 60.

96. *Id.* at 69–70, 866 S.E.2d at 60–61.

doors of the home.[97] Additionally, the court found no issue with law enforcement's search of the hill for the four dogs because a search of an open field does not implicate the Fourth Amendment.[98] The court of appeals found sufficient evidence to sustain Ingram's convictions for animal cruelty because the evidence showed that Ingram had deprived the dogs of "necessaries" for a significant period of time.[99]

In *Moreno v. Commonwealth*, the Court of Appeals of Virginia affirmed the trial court's denial of a motion to suppress evidence obtained from a warrantless "ping" of the defendant's cell phone, which provided law enforcement officials with the defendant's real-time Cell Site Location Information ("CSLI").[100] The court noted that the Supreme Court of the United States expressly declined to address "real-time CSLI" in *Carpenter v. United States*.[101] The court of appeals assumed without deciding that the acquisition of real-time CSLI data requires a warrant, but nonetheless upheld the denial of the motion to suppress because "probable cause and exigent circumstances," namely evidence suggesting a need to pursue the defendant as a fleeing murder suspect, "justified the warrantless 'ping' of [the defendant's] cell phone."[102]

I. *Indictments*

In *Mackey v. Commonwealth*, Mackey was charged with violating Code of Virginia section 18.2-374.3(C), which prohibits the use of a communications system to solicit a person the accused knows or believes to be younger than fifteen years old.[103] At the conclusion of a bench trial, the trial court determined that the evidence was ambiguous as to whether the victim told Mackey that she was fifteen or about to be fifteen.[104] The court, therefore, convicted Mackey of violating section 18.2-374.3(D), which prohibits the same activity, but where the accused knows or has reason to

97. *Id.* at 70–71, 866 S.E.2d at 61.

98. *Id.* at 75–76, 866 S.E.2d at 63.

99. *Id.* at 77, 866 S.E.2d at 64.

100. 73 Va. App. 267, 270, 273, 858 S.E.2d 432, 433–34 (2021).

101. *Id.* at 275, 858 S.E.2d at 436 (quoting Carpenter v. United States, 138 S. Ct. 2206, 2220 (2018)).

102. *Id.* at 275–77, 858 S.E.2d at 436.

103. 74 Va. App. 348, 351, 869 S.E.2d 61, 62 (2022); VA. CODE ANN. § 18.2-374.3(C) (2021).

104. *Mackey*, 74 Va. App. at 351, 869 S.E.2d at 62.

believe that the victim is at least fifteen years old, but younger than eighteen.[105] At a subsequent hearing, the circuit court offered two explanations: that subsection D was a lesser-included offense than subsection C, or that it had amended the indictment to conform with the evidence.[106]

The Court of Appeals of Virginia determined that section 18.2-374.3(D) is not a lesser-included offense of section 18.2-374.3(C), noting that the knowledge requirement differs between the statutes, and subsection D requires an element that subsection C does not.[107] Additionally, the court of appeals determined that Code of Virginia section 19.2-231 permits amendment of the indictment, but then the defendant must be arraigned again.[108] Moreover, the circuit court never explained it was amending the indictment until after the verdict.[109] Accordingly, the court of appeals reversed and dismissed Mackey's conviction.[110]

J. *Juries*

In *Blowe v. Commonwealth*, the Court of Appeals of Virginia determined that the appellant was not prejudiced by a court clerk's communication regarding sentencing made to a jury.[111] During sentencing, in the trial court, the jury asked if it was required to impose a sentence on one conviction, to which the court clerk responded that they had to sentence the appellant consistent with the instructions given to them by the trial court but did not notify the court or parties.[112] The court of appeals affirmed, noting that the clerk's statement occurred after the guilt phase, was an accurate statement of the law, was not a comment on the evidence or testimony, and was what the trial court found it would have stated to the jury in response to the question; thus, the appellant was not prejudiced.[113] Further, the appellant was sentenced to the

105. *Id.*; VA. CODE ANN. § 18.2-374.3(D) (2021).
106. *Id.*
107. *Id.* at 355–57, 869 S.E.2d at 64–65; VA. CODE ANN. § 18.2-374.3(C)–(D) (2021).
108. *Id.* at 357, 869 S.E.2d at 65; VA. CODE ANN. § 19.2-231 (2015).
109. *Id.* at 357–58, 869 S.E.2d at 65–66.
110. *Id.* at 359, 869 S.E.2d at 66.
111. 72 Va. App. 457, 473, 849 S.E.2d 131, 139 (2020).
112. *Id.* at 463, 849 S.E.2d 131, 134–35.
113. *Id.* at 470–71, 849 S.E.2d at 138.

mandatory minimum and had no right to jury nullification; thus, he received the minimum sentence allowed by law.[114]

In *Nottingham v. Commonwealth*, Nottingham was convicted of rape, forcible sodomy, malicious wounding, and three counts of the use of a firearm in the commission of a felony.[115] The trial court had instructed the jury, in part, that a conviction for rape or forcible sodomy could be supported by the uncorroborated testimony of the victim, if believed.[116] The Court of Appeals of Virginia agreed, concluding that the jury instruction accurately stated the law and did not inappropriately focus the jury's attention on the victim's testimony.[117] Moreover, the jury instruction did not duplicate another given instruction concerning the jury's assessment of witness credibility.[118]

In *Pena Pinedo v. Commonwealth*, the Supreme Court of Virginia determined that the appellant in a robbery case was not entitled to a jury instruction on a claim of right defense, which would negate the intent to steal, because the appellant could not have a bona fide or "good faith" right to the stolen property, money which was the proceeds of illegal drug sales.[119]

K. *Plea Agreements*

In *Smallwood v. Commonwealth*, the Supreme Court of Virginia affirmed Smallwood's conviction following his guilty plea.[120] Pursuant to the terms of the plea agreement, Smallwood pled guilty to possession of heroin and received a "first-offender" disposition pursuant to Code of Virginia section 18.2-251.[121] As part of the plea agreement, Smallwood agreed to pay court costs.[122] Upon fulfillment of the conditions of the plea agreement, the circuit court would dismiss the charge.[123] The circuit court accepted Smallwood's guilty plea and deferred its finding for one year, which was

114. *Id.* at 472–73, 849 S.E.2d at 139.
115. 73 Va. App. 221, 224, 857 S.E.2d 917, 918 (2021).
116. *Id.* at 227–28, 857 S.E.2d at 920.
117. *Id.* at 229, 857 S.E.2d at 920–21.
118. *Id.* at 229–31, 857 S.E.2d at 921.
119. 300 Va. 116, 123, 860 S.E.2d 53, 57 (2021).
120. 300 Va. 426, 429, 867 S.E.2d 297, 298 (2022).
121. *Id.* at 429, 867 S.E.2d at 298.
122. *Id.*
123. *Id.*

subsequently extended for six months.[124] At a status hearing, the circuit court noted that Smallwood had complied with all of the provisions of the plea agreement, except for the payment of court costs.[125] The circuit court inquired into Smallwood's ability to pay, and the parties agreed to a one-year continuance.[126] At a hearing one year later, Smallwood had not paid any of the court costs, and the court convicted Smallwood.[127] On appeal, the supreme court concluded that the trial court had properly made an inquiry into Smallwood's ability to pay, and Smallwood had failed to provide any evidence that he was not in the financial position to pay the court costs.[128] The court also determined that payment of court costs was a valid condition under section 18.2-251.[129]

L. *Right to Counsel*

In *Ruff v. Commonwealth*, the Court of Appeals of Virginia affirmed the trial court's judgment, and found that the trial court allowed Ruff contemporaneous communication with his attorney while the child victim was testifying via closed-circuit television.[130] The issue of what constituted "contemporaneous communication" under Code of Virginia section 18.2-67.9 was a question of first impression before the court.[131] The court of appeals determined that the requirements of section 18.2-67.9 demand that the defendant must be able to communicate with his attorney during the testimony.[132] In the instant case, the trial court provided Ruff with a telephone on which he could press any two numbers which would cause the phone to ring in the anteroom where his counsel was present to cross-examine the victim.[133] The court of appeals held that providing a defendant with a telephone to communicate with defense counsel met the statutory requirements.[134]

124. *Id.* at 429–30, 867 S.E.2d at 298–99.
125. *Id.* at 430–31, 867 S.E.2d at 299.
126. *Id.* at 431, 867 S.E.2d at 299.
127. *Id.*
128. *Id.* at 433–34, 867 S.E.2d at 300–01.
129. *Id.* at 435, 867 S.E.2d at 301.
130. 73 Va. App. 405, 413, 860 S.E.2d 414, 418 (2021).
131. *Id.* at 411, 860 S.E.2d at 417; VA. CODE ANN. § 18.2-67.9 (2021).
132. *Id.* at 411–12, 860 S.E.2d at 417; § 18.2-67.9.
133. *Id.* at 412, 860 S.E.2d at 417.
134. *Id.* at 413, 860 S.E.2d at 418.

M. *Right to Silence*

In *Thomas v. Commonwealth*, the Court of Appeals of Virginia affirmed the denial of Thomas's motion to suppress statements made to police, finding that Thomas was not subject to coercive police conduct that would compel a reasonable person to incriminate himself in violation of the Fifth Amendment and that Thomas voluntarily waived any invocation of the right to silence.[135] Detectives questioned Thomas as they took a DNA swab and continued asking him questions after it was complete.[136] After several moments, Thomas stated, "Imma stop talking."[137] The questioning continued, and Thomas eventually admitted his involvement in a murder.[138]

In affirming the trial court's judgment, the court of appeals assumed without deciding that "[i]mma stop talking" was a clear and unambiguous assertion of his right to remain silent.[139] The court of appeals held that the conduct of the detectives did not amount to compelled self-incrimination when the detectives made statements regarding Thomas's charges and their potential penalties and referenced another minor defendant being treated more leniently.[140] The court also found that Thomas voluntarily waived his right to silence when he re-opened the conversation with the detectives.[141]

N. *Rule on Witnesses*

In *Ndunguru v. Commonwealth*, the Court of Appeals of Virginia held that the trial court did not abuse its discretion when it allowed a witness to testify.[142] The witness had heard part of another witness's testimony, but the overheard testimony did not adulterate the witness's testimony.[143] The court explained that "[w]ithout adulteration there can be no prejudice to a defendant."[144]

135. 72 Va. App. 560, 586–87, 850 S.E.2d 400, 413 (2020).
136. *Id.* at 572, 850 S.E.2d at 405.
137. *Id.*
138. *Id.* at 572–73, 850 S.E.2d at 405–06.
139. *Id.* at 575, 850 S.E.2d at 407.
140. *Id.* at 586, 850 S.E.2d at 412.
141. *Id.*
142. 73 Va. App. 436, 444, 861 S.E.2d 75, 79 (2021).
143. *Id.* at 443, 861 S.E.2d at 79.
144. *Id.*

O. *Sentencing*

In *Cox v. Commonwealth*, the Court of Appeals of Virginia determined that Code of Virginia section 19.2-301 does not independently require a circuit court to order a psychosexual evaluation prior to sentencing.[145] The court of appeals determined that Code of Virginia section 19.2-301 must be read in conjunction with section 19.2-300.[146] Section 19.2-300 provides that prior to sentencing, a court may order or must order upon "application" of the Commonwealth, the defendant, or counsel for the defendant, deferral of sentencing for the completion of a psychosexual evaluation conducted pursuant to section 19.2-301.[147] As such, section 19.2-301 does not independently require a psychosexual evaluation, and Cox's motion for one was untimely as it was filed after the sentencing hearing.[148]

In *Fletcher v. Commonwealth*, the Court of Appeals of Virginia vacated Fletcher's sentence for abduction where the Spotsylvania County Circuit Court sentenced Fletcher to twenty years in prison with fourteen years suspended.[149] However, abduction is a Class 5 felony, punishable by "a term of imprisonment of not less than one year nor more than [ten] years, or . . . confinement in jail for not more than [twelve] months and a fine of not more than $2,500, either or both."[150] Because Fletcher's sentence for abduction was in excess of the statutory maximum, it was void ab initio.[151] Accordingly, the court of appeals vacated Fletcher's sentence for abduction and remanded for a new sentencing hearing for that conviction.[152]

P. *Severance*

In *Brooks v. Commonwealth*, the Court of Appeals of Virginia affirmed the judgment of the trial court, denying Brooks's motion to sever the charges against him, which arose out of six separate

145. 73 Va. App. 339, 348, 859 S.E.2d 690, 695 (2021).
146. *Id.* at 345–46, 859 S.E.2d at 694.
147. *Id.*; VA. CODE ANN. § 19.2-300 (2015).
148. *Cox*, 73 Va. App. at 343, 348, 859 S.E.2d at 693, 695; VA. CODE ANN. § 19.2-301 (2015).
149. 72 Va. App. 493, 510–12, 849 S.E.2d 594, 602–03 (2020).
150. VA. CODE ANN. § 18.2-10(e) (Cum. Supp. 2020).
151. *Fletcher*, 72 Va. App. at 511, 849 S.E.2d at 602.
152. *Id.* at 511, 849 S.E.2d at 602–03.

larcenies.[153] The court found that the trial court did not err in finding a common scheme and a common plan among the six larcenies.[154] While the offenses had taken place across five months, the Commonwealth presented GPS evidence from Brooks's vehicle that placed it outside each of the victims' residences at the time the offenses took place.[155] Five of the six thefts also took place within a six-mile radius.[156] In each instance, tires and rims were stolen from relatively new, low-mileage SUVs and trucks that had been parked overnight and were left on gray cinder blocks; older tires and rims were ignored.[157] Any vehicle equipped with lug nut locks had a window broken and the lug nut lock keys taken.[158] Thus, the court held that justice did not require separate trials because evidence of the other crimes would likely have been admissible in each of the separate trials under Rule 2:404.[159]

II. CRIMINAL LAW

A. *Assault and Battery on a Law Enforcement Officer*

In *Carter v. Commonwealth*, the Supreme Court of Virginia affirmed Carter's conviction for assault and battery on a law enforcement officer.[160] Law enforcement had been dispatched to Carter's home, but the lone officer who arrived did not know the reason for the emergency call. Carter was standing in the doorway of the home, yelling at another individual who was on the front porch.[161] Other individuals were also present and screaming at one another.[162] Carter continued screaming and yelling.[163] The officer eventually stood at the threshold to Carter's home "with his body in the frame of the door."[164] Carter yelled profanities and attempted to slam the door, but the officer had placed his foot in the way

153. 73 Va. App. 133, 139, 856 S.E.2d 599, 602 (2021).
154. *Id.* at 144, 856 S.E.2d at 605.
155. *Id.* at 143, 856 S.E.2d at 605.
156. *Id.* at 144, 856 S.E.2d at 605.
157. *Id.*
158. *Id.*
159. *Id.* at 148, 856 S.E.2d at 607 (citing VA. R. EVID. 2:404).
160. 300 Va. 371, 373, 866 S.E.2d 817, 818 (2021).
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 374, 866 S.E.2d at 818.

of the closing door.[165] Carter tried to shut the door several more times, slamming the door into the officer's foot each time.[166] The supreme court rejected Carter's argument that she was lawfully using force to expel a trespasser, finding that the officer was lawfully present on Carter's porch and that Carter never issued a command to leave before she resorted to violence.[167]

B. *Carjacking*

In *Fletcher v. Commonwealth*, Fletcher followed and passed a woman leaving a gas station on a two-lane highway and slammed on his brakes, forcing the woman to stop.[168] When the woman attempted to turn around, she inadvertently backed into a ditch; Fletcher backed up so that his car was perpendicular to the woman's in a "T" shape, blocking her in.[169] Fletcher approached the woman's window with a tire iron, demanding "that she get out and follow him"; she refused.[170] Fletcher swung the tire iron at the window three times, leaving scratches.[171] At that point, another vehicle approached; while Fletcher moved his car out of the way, two men exited the newly arriving car in response to the woman's calls for help.[172] Fletcher left and was later convicted of carjacking, attempted malicious wounding, and abduction.[173]

On appeal, Fletcher argued that there was insufficient evidence to support his convictions for carjacking and attempted malicious wounding.[174] Code of Virginia section 18.2-58.1 prohibits carjacking and provides, in part, that carjacking means "the intentional seizure or seizure of control of a motor vehicle of another."[175] The Commonwealth may, therefore, prove carjacking through either the seizure of the automobile or the seizure of control of it.[176] The Court of Appeals of Virginia determined that a "seizure" of an auto

165. *Id.*
166. *Id.*
167. *Id.* at 376–77, 866 S.E.2d at 819–20.
168. 72 Va. App. at 499, 849 S.E.2d at 597.
169. *Id.*
170. *Id.* at 500, 849 S.E.2d at 597.
171. *Id.*
172. *Id.*
173. *Id.* at 498, 849 S.E.2d at 596.
174. *Id.* at 501, 849 S.E.2d at 597. Fletcher also raised challenges to the element of malice. *Id.*
175. VA. CODE ANN. § 18.2-58.1 (2021).
176. *Fletcher*, 72 Va. App. at 502, 849 S.E.2d at 598.

mobile occurs where the carjacker takes possession of it, such as entering the car and driving away, whereas a carjacker "seizes control" of an automobile where they have power or restraint over the vehicle, such as taking the keys.[177] Accordingly, the court concluded that Fletcher seized control of the woman's automobile in this case when he blocked her car in the ditch.[178]

C. *Carrying a Concealed Weapon*

In *Myers v. Commonwealth*, the Supreme Court of Virginia reversed Myers's conviction for carrying a concealed weapon, finding that the firearm was secured in a backpack in the vehicle, which allowed Myers to invoke the statutory exception to criminal liability that is codified in Code of Virginia section 18.2-308(C)(8).[179] The court declined to explore whether the firearm was about Myers's person, and instead reversed on Myers's statutory exception argument.[180] The supreme court stated that the exceptions in subsections B, C, and D of section 18.2-308 serve as affirmative defenses to the subsection A crime.[181]

D. *Child Cruelty*

In *Mollenhauer v. Commonwealth*, the Court of Appeals of Virginia held the evidence was sufficient to convict the appellant of child cruelty under Code of Virginia section 40.1-103.[182] The court explained that a conviction under section 40.1-103 "does not require proof that the appellant *personally* tortured or cruelly treated [the child], only that she 'cause[d] or permit[ted]' the actions constituting torture or cruel treatment to occur."[183]

The appellant, along with her husband and son, cared for her grandchildren, including S.M., the victim.[184] A Department of Social Services investigation discovered that "S.M. had more bruises than typical for children her age," "the family restricted [her]

177. *Id.* at 504, 849 S.E.2d at 599.
178. *Id.* at 504–05, 849 S.E.2d at 599.
179. 299 Va. 671, 674, 857 S.E.2d 805, 807 (2021); VA. CODE ANN. § 18.2-308(C)(8) (2021).
180. *Id.* at 676, 857 S.E.2d at 808.
181. *Id.* at 677–78, 857 S.E.2d at 809.
182. 73 Va. App. 318, 322, 859 S.E.2d 680, 682–83 (2021).
183. *Id.* at 335, 859 S.E.2d at 688.
184. *Id.* at 323, 859 S.E.2d at 683.

access to food," "kept her locked in a cage-like enclosure at night," and she arrived at daycare at least twice with a black eye and was nervous when asked what had happened.[185] S.M.'s family did not provide adequate amounts of food for S.M. while she was at daycare.[186] A physician testified that she diagnosed S.M. with "a failure to thrive resulting from nutritional neglect," and "S.M.'s history and medical records were 'consistent with [a] medical diagnosis of child torture.'"[187] The court held that these actions met the definition of "cruelly treated," which it defined as "engaging in behavior toward another that causes physical or emotional pain or suffering in that other person."[188]

E. *Conspiracy*

In *Commonwealth v. Richard*, the Supreme Court of Virginia considered whether a scintilla of evidence existed to warrant the granting of two jury instructions regarding the single buyer/seller exception to conspiracy liability, where the evidence showed that Richard and another individual agreed to sell methamphetamine to a third party in exchange for a Pontiac.[189] The court held that Wharton's Rule does not apply in cases where "no congruence exists between the conspiratorial agreement and the agreement that makes up the substantive offense"; accordingly, because Richard and her compatriot agreed with each other to sell the methamphetamine separate and apart from the actual sale to the third party, the circuit court did not err by denying the instructions.[190]

F. *Defrauding an Innkeeper*

In *Smith v. Commonwealth*, the Court of Appeals of Virginia held that the evidence was sufficient to prove that the appellant had the requisite intent to "cheat or defraud" a hotel owner at the time she "[p]ut up at a hotel," in violation of Code of Virginia section 18.2-188.[191] The court rejected the appellant's argument that

185. *Id.*
186. *Id.*
187. *Id.* at 326, 859 S.E.2d at 684.
188. *Id.* at 335–36, 859 S.E.2d at 689.
189. 300 Va. 382, 385–88, 866 S.E.2d 820, 822–23 (2021).
190. *Id.* at 391–92, 866 S.E.2d at 825.
191. 72 Va. App. 523, 532, 535–37, 850 S.E.2d 381, 386, 387–88 (2020) (quoting VA. CODE ANN. § 18.2-188(1) (Cum. Supp. 2020)).

she must have harbored an intent to defraud when she first checked in at the hotel, holding instead that "the Commonwealth was required to prove only that she had the necessary criminal intent prior to any one of her daily transactions" to arrange her continued stay at the hotel.[192]

G. *Escape*

In *King v. Commonwealth*, the appellant contended that he was not in the custody of any court, jail, or law enforcement officer pursuant to Code of Virginia section 18.2-479(B) while participating in the home incarceration program; thus, he could not be convicted of felony escape for removing his home ankle monitor.[193] The Court of Appeals of Virginia disagreed, noting that, for custody determinations, the "proper inquiry is whether the 'officer has lawfully curtailed the individual's freedom of movement to a degree associated with a formal arrest.'"[194] Applying that test here, the court found that the appellant's freedom of movement was heavily restricted while on home incarceration; thus, he was in custody and therefore was guilty of escape.[195]

H. *Exploitation*

In *Tomlin v. Commonwealth*, the Court of Appeals of Virginia found the evidence sufficient to support the defendant's conviction for abuse or neglect of an incapacitated adult but reversed the defendant's conviction for financial exploitation of an incapacitated adult.[196] With respect to the financial exploitation conviction, the court of appeals found that evidence that the victim "was mentally incapacitated with respect to healthcare decisions could not, by itself, justify the trial court in finding beyond a reasonable doubt that she was also mentally incapacitated with respect to financial matters."[197] The court noted that the record contained no evidence addressing the victim's mental capacity in financial matters.[198]

192. *Id.* at 535, 850 S.E.2d at 387.
193. 73 Va. App. 349, 353, 859 S.E.2d 695, 697–98 (2021).
194. *Id.* at 354, 859 S.E.2d at 698 (quoting White v. Commonwealth, 267 Va. 96, 105, 591 S.E.2d 662, 667–68 (2004)).
195. *Id.* at 354–56, 859 S.E.2d at 698–99.
196. 74 Va. App. 392, 398, 869 S.E.2d 898, 901 (2022).
197. *Id.* at 402–04, 869 S.E.2d at 903–04.
198. *Id.* at 404, 869 S.E.2d at 904.

With respect to the abuse or neglect conviction, the court found the evidence sufficient to conclude that the victim's "bed sores presented a risk of death significant enough to make them a 'life-threatening . . . condition.'"[199]

I. *Possession of Marijuana*

In *Thompson v. Commonwealth*, the appellant argued that subsection D in Code of Virginia section 18.2-247, which defines "marijuana" and states that "[m]arijuana shall *not* include" certain substances, required the Commonwealth to prove that the substance alleged to be marijuana was not one of these exceptions.[200] The Court of Appeals of Virginia disagreed, finding that Code of Virginia section 18.2-263 explicitly does not require the Commonwealth to negate any of the exceptions in Code of Virginia section 18.2-24, but places the burden on the defendant to prove any exception.[201] As the defendant had not shown that the substance tested met any of those exceptions, the certificate of analysis stating the substance recovered on him was marijuana was sufficient.[202]

J. *Possession of Paraphernalia*

In *Allison v. Commonwealth,* the Court of Appeals of Virginia reversed the appellant's conviction for possession of controlled paraphernalia, in violation of Code of Virginia section 54.1-3466.[203] The court held that in order to secure a conviction for possession of controlled paraphernalia, the Commonwealth must prove not only that an individual possessed an "'instrument or implement or combination thereof' adapted for administering injections of controlled dangerous drugs, but also that the item in question was possessed 'under circumstances that reasonably indicate an intention to use such [item] for purposes of illegally administering any controlled drug.'"[204] Because the Commonwealth did not present evidence or

199. *Id.* at 405–09, 869 S.E.2d at 905–09.

200. 73 Va. App. 721, 726–27, 865 S.E.2d 434, 436–37 (2021) (quoting 2019 Va. Acts chs. 653 & 654 (codified as amended VA. CODE ANN. § 18.2-247 (Cum. Supp. 2019))).

201. *Id.* at 728–29, 865 S.E.2d at 437.

202. *Id.* at 731–33, 865 S.E.2d at 439.

203. 73 Va. App. 414, 415, 861 S.E.2d 64, 65 (2021).

204. *Id.* at 421–22, 861 S.E.2d at 68–69 (quoting VA. CODE ANN. § 54.1-3466(A)(i) (Cum. Supp. 2021)).

circumstances indicating that the appellant "intended to use the syringe in his possession to illegally administer a controlled drug," the court reversed the appellant's conviction.[205]

K. *Rape*

In *Poole v. Commonwealth*, Poole argued that the evidence was insufficient to sustain his conviction for raping his wife.[206] He asserted that the Supreme Court of Virginia had not overruled existing precedent, specifically citing two cases from 1984 that required, the Commonwealth to prove a *de facto* end to the marriage as an additional element of the offense when a husband is accused of raping his wife.[207] The Court of Appeals of Virginia concluded that Code of Virginia section 18.2-61 had been amended multiple times since 1984; and in 2005, the General Assembly amended section 18.2-61(A) such that a person was guilty of rape by having forcible sex with another, "whether or not his or her spouse."[208] The Commonwealth, therefore, did not need to prove additional elements to sustain his conviction.[209] Moreover, there was sufficient evidence demonstrating that Poole raped his wife.[210] The court affirmed his conviction.[211]

L. *Reckless Driving*

In *Commonwealth v. Cady*, the Supreme Court of Virginia reversed a decision of a panel of the Court of Appeals of Virginia and reinstated the defendant's conviction for reckless driving in violation of Code of Virginia section 46.2-852.[212] The supreme court found that a reasonable jury could have determined that the driver had not been looking at the road for a significant period of time when he collided with a motorcycle.[213] The evidence showed that

205. *Id.* at 423, 861 S.E.2d at 69.

206. 73 Va. App. 357, 360, 860 S.E.2d 391, 392 (2021).

207. *Id.* at 363–64, 860 S.E.2d at 394 (first citing Weishaupt v. Commonwealth, 227 Va. 389, 315 S.E.2d 847 (1984); and then citing Kizer v. Commonwealth, 228 Va. 256, 321 S.E.2d 291 (1984)).

208. *Id.* at 366–67, 860 S.E.2d at 395–96 (citing 2005 Va. Acts ch. 631 (codified as amended at VA. CODE ANN. § 18.2-61 (Cum. Supp. 2005))).

209. *Id.* at 367, 860 S.E.2d at 396.

210. *Id.* at 368–69, 860 S.E.2d at 396–97.

211. *Id.* at 369, 860 S.E.2d at 397.

212. 300 Va. 325, 327, 863 S.E.2d 858, 859 (2021).

213. *Id.* at 329–30, 863 S.E.2d at 861.

the driver had been playing music prior to the collision, that the driver "did not 'remember seeing or striking' the motorcycle," and that the collision occurred on a "straight stretch of road on a clear, sunny day."[214] The supreme court concluded that a rational fact finder could reasonably infer that the accident "was not the result of a 'split-second, momentary failure to keep a lookout,' constituting only simple negligence, but rather a 'lengthy, total, and complete' failure to keep a lookout, satisfying the mens rea requirement for reckless driving."[215]

M. *Refusal to Take a Breath or Blood Test*

In *Green v. Commonwealth*, the Supreme Court of Virginia reversed the defendant's conviction for refusal to take a breath or blood test under Code of Virginia section 29.1-738.2, holding that the Court of Appeals of Virginia erred when it held that the defendant "had been required to challenge the lawfulness of his arrest prior to trial" pursuant to Code of Virginia section 19.2-266.2.[216] At the bench trial, the defendant attempted to cross-examine the arresting officer about whether there was probable cause to arrest him.[217] The trial court held that the defendant had forfeited any right to challenge the lawfulness of his arrest under section 19.2-266.2, which "requires a defendant to raise such a [constitutional] claim prior to trial."[218] Holding that a lawful arrest is a predicate for the application of Virginia's implied consent law, and that "[t]he applicability of the implied-consent statute is not a constitutional question" but a "statutory one," the supreme court reversed, concluding that section 19.2-266.2 did not prohibit the defendant "from challenging the lawfulness of his arrest at trial."[219]

N. *Unlawful Filming*

In *Blackwell v. Commonwealth*, the appellant challenged his convictions under Code of Virginia section 18.2-386.1 for filming a

214. *Id.* at 330, 863 S.E.2d at 861.

215. *Id.* (quoting Cady v. Commonwealth, 72 Va. App. 393, 410, 846 S.E.2d 30, 38 (2020) (Russell, J., dissenting)).

216. 299 Va. 593, 597, 856 S.E.2d 587, 590 (2021).

217. *Id.* at 593, 856 S.E.2d at 588.

218. *Id.* at 593–94, 856 S.E.2d at 588; VA. CODE ANN. § 19.2-266.2 (2015).

219. *Green*, 299 Va. at 596–97, 856 S.E.2d at 589–90.

nonconsenting minor on multiple occasions.[220] He asserted on appeal that the "trial court impermissibly concluded that the age of the victim alone established that she was 'nonconsenting' . . . and that, absent such a conclusion, the evidence was insufficient to establish that the victim was 'nonconsenting.'"[221]

The Court of Appeals of Virginia defined a "nonconsenting person" under the statute as "when the subject of the photograph or videotape evinces, whether by word or action, a desire not to be so photographed or videotaped or otherwise refuses to agree to such activity."[222] It noted that a minor's age alone does not render them nonconsenting; however, it is a factor to consider.[223] The court ultimately upheld Blackwell's conviction under harmless error.[224]

In *Haba v. Commonwealth*, the Court of Appeals of Virginia upheld the appellant's conviction for unlawfully recording a student studying at an area university, in violation of section 18.2-386.1.[225] The court found the evidence sufficient to prove that the victim had a reasonable expectation of privacy when the appellant filmed her nude in her apartment, with her knowledge but without her consent.[226] The court determined that a rational fact finder could have found a reasonable expectation of privacy because the recording took place in the victim's bedroom, a space specifically enumerated in section 18.2-386.1(A), and the appellant was shielding her body from view at the time of the recording.[227] The court rejected the appellant's contention that "his very presence negated the reasonableness of the victim's expectation of privacy in her bedroom," holding that "the known presence of another person does not automatically negate a reasonable expectation of privacy."[228]

In *Johnson v. Commonwealth*, the Court of Appeals of Virginia determined that a victim who was filmed while nude and engaged in consensual sexual activity with appellant but without her consent to be recorded still retained a reasonable expectation of

220. 73 Va. App. 30, 40, 854 S.E.2d 191, 196 (2021). The appellant also challenged the sufficiency of the evidence; however, the court ruled the evidence was sufficient. *Id.*

221. *Id.*

222. *Id.* at 47, 854 S.E.2d at 199.

223. *Id.* at 53, 854 S.E.2d at 202.

224. *Id.*

225. 73 Va. App. 277, 281, 858 S.E.2d 436, 438 (2021).

226. *Id.* at 281–82, 858 S.E.2d at 438–39.

227. *Id.* at 287–88, 858 S.E.2d at 441–42; VA. CODE ANN. § 18.2-386.1(A) (2021).

228. *Haba*, 73 Va. App. at 288–89, 858 S.E.2d at 442.

privacy.[229] The court noted that the General Assembly made the unlawful *creation of images* the gravamen of the offense under section 18.2-386.1(A); accordingly, although the victim had consented to being viewed by the appellant in a state of undress, she had not consented to him making permanent electronic copies of her during their encounters, and thus she retained a reasonable expectation that her sexual activity would remain between her and her partner.[230]

O. *Violation of a Protective Order*

In *McGowan v. Commonwealth*, the Court of Appeals of Virginia upheld the appellant's conviction and held that "bodily injury" in Code of Virginia section 16.1-253.2(C) is defined as "any bodily damage, harm, hurt, or injury; or any impairment of a bodily function, mental faculty, or physical condition."[231] The victim testified at trial that she screamed after McGowan bit her on the leg or knee.[232] The court explained that "the trial court could reasonably infer from [the victim's] testimony and the timing of her scream that the scream evinced pain and hurt because of appellant's bite."[233] The Commonwealth is not required to prove that the victim suffered "any observable wounds, cuts, or breaking of the skin" to sustain a felony violation of a protective order conviction.[234]

P. *Wiretap Act*

In *Pick v. Commonwealth*, the Court of Appeals of Virginia upheld a denial of a motion to suppress statements and video sent by the appellant to an undercover officer posing as a minor.[235] The appellant argued that the contents of the conversations between he and the undercover officer were obtained in violation of Code of Virginia section 19.2-62, Virginia's law on wiretapping, because the only people who could consent to the recording of the conversa-

229. 73 Va. App. 393, 404–05, 860 S.E.2d 408, 414 (2021).

230. *Id.* at 400–02, 860 S.E.2d at 412–13; VA. CODE ANN. § 18.2-386.1(A) (2021).

231. 72 Va. App. 513, 520, 523, 850 S.E.2d at 376, 380–81 (2020); VA. CODE ANN. § 16.1-253.2(C) (2020).

232. *McGowan*, 72 Va. App. at 521, 850 S.E.2d at 380.

233. *Id.*

234. *Id.* at 521–22, 850 S.E.2d at 380–81 (quoting English v. Commonwealth, 58 Va. App. 711, 719, 715 S.E.2d 391, 395 (2011)).

235. 72 Va. App. 651, 655, 664–65, 852 S.E.2d 479, 481, 485 (2021).

tion were the appellant and the minor persona the officer had adopted. [236] The court disagreed, holding that the definition of "person" in the wiretap act does not include a fictitious persona but did include the undercover officer; thus, he was a party and could consent to the recording of the conversation.[237]

Q. *Wounding by Mob*

In *Barnett v. Commonwealth*, the Court of Appeals of Virginia upheld the appellant's conviction for wounding by mob, in violation of Code of Virginia section 18.2-41, deeming the evidence sufficient to establish that the appellant was "part of a mob."[238] The court held that although the Commonwealth needed to prove that the appellant "was a member of a mob when the wounding actually occurred," it did not need to prove that the appellant "actively encouraged, aided, or countenanced the act."[239]

The court held that a reasonable fact finder could have determined that the appellant and his cousins assembled in a restaurant parking lot for the purpose of fighting another individual.[240] Although one of the individuals gathered shot the appellant, the appellant remained in the parking lot until the shooter shot the intended victim.[241] The court rejected the appellant's argument that he was no longer a part of the mob once he was shot "because his intention had changed from assaulting [the intended victim] to leaving the scene and getting treatment for his injuries."[242]

III. LEGISLATION

A. *Competency*

The General Assembly amended Code of Virginia sections 19.2-169.1 and 19.2-169.2 concerning competency evaluations of defendants accused of misdemeanors.[243] Where an accused in a misde-

236. *Id.* at 662–63, 852 S.E.2d at 484–85; VA. CODE ANN. § 19.2-62 (2015).
237. *Pick*, 72 Va. App. at 663–65, 852 S.E.2d at 485–85.
238. 73 Va. App. 111, 114, 855 S.E.2d 874, 875 (2021).
239. *Id.* at 118–19, 855 S.E.2d at 877–78 (citation omitted).
240. *Id.* at 119, 855 S.E.2d at 878.
241. *Id.* at 119–20, 855 S.E.2d at 878.
242. *Id.*
243. 2022 Va. Acts ch. 508 (codified as amended at VA. CODE ANN. §§ 19.2-169.1, -169.2 (Cum. Supp. 2022)).

meanor proceeding has been declared incompetent, the competency report may recommend that the court direct the local community services board or behavioral health authority to evaluate the accused and determine whether to temporarily detain the accused.[244] Where the accused is determined incompetent and is temporarily detained, the court may dismiss the charges against the accused and permit the local community services board to seek detention of the accused, unless the attorney for the Commonwealth objects.[245] This bill sunsets on July 1, 2023.[246]

B. *Covering Security Cameras at Correctional Facility*

It is now a Class 1 misdemeanor for anyone "who intentionally covers, removes, damages, renders inoperable, or otherwise obscures a security camera without the permission of the" jail or prison.[247] If the person intends to prevent a security camera from recording, that person is guilty of a Class 6 felony.[248]

C. *Credit for Time Served*

Inmates now get credit for time served when they have been incarcerated pretrial on "separate, dismissed, or nolle prosequi charges that are from the same act as the violation for which the person is convicted and sentenced to a term of confinement."[249]

D. *Facial Recognition*

The General Assembly amended Code of Virginia section 15.2-1723.2 to authorize local law-enforcement agencies, campus police departments, and the Department of State Police to use facial recognition technology for certain authorized uses that meet particular criteria, all defined in the statute.[250]

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244. *Id.*
245. *Id.*
246. *Id.*
247. 2022 Va. Acts ch. 673 (codified at VA. CODE ANN. § 18.2-473.2 (Cum. Supp. 2022)).
248. *Id.*
249. 2022 Va. Acts ch. 399 (codified as amended at VA. CODE ANN. § 53.1-187 (Cum. Supp. 2022)).
250. 2022 Va. Acts ch. 737 (codified as amended at VA. CODE ANN. § 15.2-1723.2 (Cum. Supp. 2022)).

E. *Financial Exploitation*

The General Assembly created new Code of Virginia section 18.2-178.2, which criminalizes financial exploitation by someone who is an agent under a power of attorney.[251] The new section provides that if an act or activity that violates this section also violates another provision of law, prosecution under this section shall not bar further prosecution under any other provision.[252]

F. *Juvenile Delinquency Disposition*

The General Assembly eliminated the authority of the Department of Juvenile Justice to create "boot camp[s]" for juvenile delinquents.[253]

G. *Policing*

The General Assembly prohibited arrest or summons quotas for various law enforcement agencies.[254]

H. *Schools*

School principals are now required to report to law enforcement certain enumerated acts that may constitute a misdemeanor offense and report to the parents of any minor student who is the specific object of such act that the incident has been reported to law enforcement.[255] The amendments provide an exception to the requirement to report any written threats against school personnel while on a school bus, on school property, or at a school-sponsored activity if such incident is committed by a student who has a disability.[256]

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251. 2022 Va. Acts chs. 397 & 654 (codified at VA. CODE ANN. § 18.2-178.2 (Cum. Supp. 2022)).

252. 2022 Va. Acts ch. 397 & 654.

253. 2022 Va. Acts ch. 414 (codified as amended at VA. CODE ANN. §§ 16.1-228, -278.8 (Cum. Supp. 2022)).

254. 2022 Va. Acts ch. 209 (codified at VA. CODE ANN. §§ 2.2-5516, 15.2-1609.11, 15.2-1710.1, 52-11.6 (Cum. Supp. 2022)).

255. 2022 Va. Acts ch. 794 (codified as amended at VA. CODE ANN. § 22.1-279.3:1 (Cum. Supp. 2022)).

256. VA. CODE ANN. § 22.1-279.3:1 (Cum. Supp. 2022).

I. *Sentencing*

The General Assembly created new Code of Virginia section 19.2-306.2, which requires the preparation of a sentencing revocation report in revocation proceedings.[257] This report shall indicate the nature of the violation and include the discretionary probation violation guidelines.[258] The revocation court is required to make the report part of the record of the proceedings.[259]

The General Assembly enacted new Code of Virginia section 17.1-805.1, which directs the Virginia Sentencing Commission to adopt new sentencing guidelines that may increase the midpoint of a recommended sentencing range based on the defendant's record for violent felony convictions.[260] This bill will become effective July 1, 2023.[261]

J. *Sexual Abuse of Animals*

The General Assembly created new Code of Virginia section 18.2-361.01, which outlaws the sexual abuse of animals.[262] The statute also provides that any person convicted under this new section is prohibited from possessing, owning, or exercising control over any animal.[263]

K. *Sexual Offenses*

The General Assembly amended Code of Virginia section 18.2-67.10 to include "the chest of a child under the age of 15" within the definition of "intimate parts."[264]

257. 2022 Va. Acts ch. 569 (codified at VA. CODE ANN. § 19.2-306.2 (Cum. Supp. 2022)).
258. VA. CODE ANN. § 19.2-306.2(A) (Cum. Supp. 2022).
259. *Id.* § 19.2-306.2(B) (Cum. Supp. 2022).
260. 2022 Va. Acts ch. 783 (codified at VA. CODE ANN. § 17.1-805.1 (Cum. Supp. 2022)).
261. *Id.*
262. 2022 Va. Acts ch. 594 (codified at VA. CODE ANN. § 18.2-361.01 (Cum. Supp. 2022)).
263. *Id.*
264. 2022 Va. Acts ch. 645 (codified as amended at VA. CODE ANN. § 18.2-67.10 (Cum. Supp. 2022)).

L. *Stalking*

The General Assembly amended and reenacted Code of Virginia section 18.2-60.3 allowing a person to be prosecuted for a stalking charge in the jurisdiction where the person resided at the time of such stalking.[265] The new language also provides that evidence of any conduct that occurred outside the Commonwealth may be admissible, if relevant, in any prosecution for stalking.[266]

M. *Testimony*

The General Assembly added new Code of Virginia section 19.2-188.4, which permits the sexual assault nurse examiner or forensic examiner who conducted an examination to testify via two-way video in certain proceedings.[267]

N. *Venue*

The General Assembly amended Code of Virginia sections 18.2-60, -60.1, -83, -152.7:1, and -430 to clarify venue for prosecutions for making threats to people and to public officials.[268] Venue is now proper only in the city, county, or town "in which the communication was made or received."[269]

O. *Warrants*

The General Assembly amended Code of Virginia section 19.2-56(B) to provide that, after obtaining a search warrant for a "place of abode," if the owner is not present, the search warrant and affidavit must be provided to at least one adult occupant of the place to be searched.[270]

265. 2022 Va. Acts ch. 276 (codified as amended at VA. CODE ANN. § 18.2-60.3 (Cum. Supp. 2022)).

266. *Id.*

267. 2022 Va. Acts ch. 253 (codified at VA. CODE ANN. § 19.2-188.4 (Cum. Supp. 2022)).

268. 2022 Va. Acts ch. 336 (codified as amended at VA. CODE ANN. §§ 18.2-60, -60.1, -83, -152.7:1, -430 (Cum. Supp. 2022)).

269. *Id.*

270. 2022 Va. Acts ch. 403 (codified as amended at VA. CODE ANN. § 19.2-56 (Cum. Supp. 2022)).

P. *Weapons*

The General Assembly amended Code of Virginia section 18.2-311 by removing criminal liability for any person who sells a switch blade knife.[271]

271. 2022 Va. Acts ch. 27 (codified as amended at VA. CODE ANN. § 18.2-311 (Cum. Supp. 2022)).