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# Predicate Felonies in the Context of Capital Cases

Heather L. Necklaus\*

## I. Introduction

Included within the statutory definition of first degree murder is “murder . . . in the commission of, or attempt to commit . . . robbery.”<sup>2</sup> Yet, on September 17, 1999, the Supreme Court of Virginia held that “[a]n instruction on first degree murder was *not* warranted because the video tape clearly established that [the victim] was shot in the chest *during the commission of armed robbery* at the convenience store.”<sup>3</sup> That, of course, is precisely first degree murder. One might think, or at least hope, that such careless language is an anomaly among the Supreme Court of Virginia decisions. Sadly, it reflects a continuing trend by the Supreme Court of Virginia toward analytical looseness in capital cases. In the context of capital cases based upon predicate felonies, it is frequent.

In the beginning there were traditional felonies. Then there was capital murder. After robbery and rape became predicate felonies under the Virginia capital murder statute,<sup>4</sup> the definition of those traditional felonies began to change. A similar phenomenon may be occurring with forcible sodomy and object sexual penetration, statutory felonies that are predicates for capital murder. More specifically, the Virginia courts have expanded the definitions of robbery and rape in the context of capital cases. This article will show how the definition of robbery remained the same in the non-capital context but expanded in the capital context, thus creating two different standards.<sup>5</sup> Secondly, this article will demonstrate how the expan-

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2. VA. CODE ANN. § 18.2-32 (Michie 1999).

3. *Orbe v. Commonwealth*, 519 S.E.2d 808, 813 (Va. 1999) (emphasis added). See *Briley v. Bass*, 584 F. Supp. 807, 839 (E.D. Va. 1984) (holding that “the defendant found guilty of first degree murder is the defendant who killed during the course of a robbery, but did not kill with willfulness, deliberation, and premeditation”).

4. See VA. CODE ANN. § 18.2-31(4) & (5) (Michie 1999).

5. See discussion *infra* Part II.

sion of rape began in the capital context and then carried over to rape in the non-capital context.<sup>6</sup> Finally, this article will discuss how the expansion of rape in the capital context probably has been extended to cases involving forcible sodomy and object sexual penetration and has established a dangerous trend for capital cases predicated upon those felonies.<sup>7</sup>

## II. Robbery

### A. Robbery and Larceny Defined

In Virginia, the crime of robbery is not defined by statute; instead, the elements of robbery are taken from the common law. Common law defines robbery as "the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation."<sup>8</sup> To establish a robbery, each of these elements must be proved beyond a reasonable doubt.<sup>9</sup> In *Branch v. Commonwealth*,<sup>10</sup> the Supreme Court of Virginia identified the principal elements of a robbery as (1) the taking, (2) the intent to steal, and (3) the use of violence or intimidation.<sup>11</sup> These three principal elements are further defined by their "temporal correlation" to one another.<sup>12</sup> To constitute robbery at common law, the taking must coincide with the intent to steal, the intent to steal must have been formed before or during the violence, and the violence must occur before or during the taking.<sup>13</sup>

Like robbery, larceny is a common law crime in Virginia. It is defined as "the wrongful or fraudulent taking of personal goods of some intrinsic value, belonging to another, without his assent, and with the intention to deprive the owner thereof permanently."<sup>14</sup> There are two *actus* elements within common law larceny: (1) the caption, or taking of property, and (2) the asportation, or the carrying away, of the property.<sup>15</sup> The caption, or taking, "must be the securing dominion or absolute control of the property. The absolute dominion must exist at some time, though it be only momentary."<sup>16</sup> To satisfy the asportation element of larceny, only the movement

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6. See discussion *infra* Part III A.

7. See discussion *infra* Part III B, C.

8. *Pierce v. Commonwealth*, 138 S.E.2d 28, 31 (Va. 1964) (citing *Mason v. Commonwealth*, 105 S.E.2d 149, 150 (Va. 1958)).

9. *Maxwell v. Commonwealth*, 183 S.E. 452, 454 (Va. 1936).

10. 300 S.E.2d 758 (Va. 1983).

11. *Branch v. Commonwealth*, 300 S.E.2d 758, 759 (Va. 1983).

12. *Id.*

13. *Id.*

14. *Jones v. Commonwealth*, 349 S.E.2d 414, 418 (Va. Ct. App. 1986) (citing *Dunlavey v. Commonwealth*, 35 S.E.2d 763, 764 (Va. 1945)).

15. *Bryant v. Commonwealth*, 445 S.E.2d 667, 670 (Va. 1994).

16. *Green v. Commonwealth*, 112 S.E. 562, 563 (Va. 1922). In *Green v. Common-*

of property from the location in which it was placed by the owner is required.<sup>17</sup> For example, in *Welch v. Commonwealth*,<sup>18</sup> larceny was complete when the shoplifter removed televisions from the shelf and put them in a shopping cart which he abandoned in the outside lawn and garden area of the store.<sup>19</sup> In *Bryant v. Commonwealth*,<sup>20</sup> larceny was complete when the shoplifter took merchandise from the shelves and removed the packaging and alarm sensors from the merchandise while still inside the store.<sup>21</sup>

### *B. Robbery Expands in the Context of Capital Cases*

Both robbery and larceny involve the taking of property with the intent to steal. Like larceny, "[t]he predicate element of robbery is the actual taking by caption and asportation of the personal property of the victim."<sup>22</sup> The critical difference between robbery and larceny is that robbery involves violence or intimidation while larceny does not. It is the violence or intimidation element that implies danger to the life of the victim and makes robbery a proper predicate for both capital and first degree felony murder. The substance of the taking elements of larceny, and therefore robbery, should not depend upon the crime charged, be it larceny, robbery, first degree murder, or capital murder. However, the Virginia courts have expanded the definition of robbery in the context of capital cases by tinkering with the taking elements. The expansion of robbery by the Virginia courts has transformed larceny into robbery in capital cases and has given the Commonwealth yet another path to take in securing a sentence of death.

#### *1. Larceny Becomes Robbery in Capital Cases*

On the night of January 18, 1958, Joseph Grimes was sitting in his radio-television business. There were no lights on in the store. Around midnight, Grimes noticed that a car kept driving past the store, and he

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*wealth*, the victim's purse was moved away from her during an assault. There was no evidence that the defendant ever had the purse within his control. When the purse was recovered, its contents were undisturbed. The court found no caption and reversed the defendant's robbery conviction. *Id.* at 563.

17. *Welch v. Commonwealth*, 425 S.E.2d 101, 104 (Va. Ct. App. 1992). See also *Durham v. Commonwealth*, 198 S.E.2d 603 (Va. 1973). In *Durham v. Commonwealth*, the Supreme Court of Virginia found movement of furniture sufficient to support the asportation element of robbery. Even though there was no evidence that any property had been removed from the house, the court affirmed Durham's first degree murder conviction, which was predicated upon the robbery. *Id.* at 605-07.

18. 425 S.E.2d 101 (Va. Ct. App. 1992).

19. *Welch v. Commonwealth*, 425 S.E.2d 101, 106 (Va. Ct. App. 1992).

20. 445 S.E.2d 667 (Va. 1994).

21. *Bryant v. Commonwealth*, 445 S.E.2d 667, 670 (Va. 1994).

22. *Beard v. Commonwealth*, 451 S.E.2d 698, 700 (Va. Ct. App. 1994).

became suspicious. Grimes notified the police and positioned himself behind a display in the store. Shortly thereafter, William Paul Mason threw a cement object through the plate glass window, entered the store, and took a television set from the display area. As Mason handed the television through the hole in the window to his companion, Grimes appeared from behind the display and struck him with a board. Mason then threw a radio at Grimes and fired four shots from a pistol in Grimes's general direction.<sup>23</sup> Mason was convicted of robbery.<sup>24</sup> On appeal, the court explained that "if the violence or intimidation preceded or was concomitant with the taking, the offense of robbery is established; if the taking was accomplished before the violence toward or intimidation of Grimes, then it was not robbery."<sup>25</sup> Thus, "[n]o violence, no excitation of fear, resorted to merely for the purpose of retaining a possession already acquired, or to effect escape, will, in point of time, supply the element of force or intimidation, an essential [element] of [robbery]."<sup>26</sup> Applying that standard to the facts of the case, the court found that, because the caption and asportation preceded the violence, the evidence was insufficient to sustain Mason's robbery conviction.<sup>27</sup>

In the capital context, the standard for robbery changes and larceny becomes robbery. On September 24, 1989, George A. Quesinberry and Eric Hinkle broke into a warehouse. Quesinberry had with him a pistol. In one office, Quesinberry found and took two walkie talkies. As the two men were looking for money in another office within the warehouse, the owner interrupted them. Once the owner realized that the men had a gun, he ran. Quesinberry followed and shot him twice in the back. Afterwards, Quesinberry returned to the office and took a box of money and a roll of stamps before leaving the premises.<sup>28</sup> Quesinberry was convicted of capital murder based on the robbery predicate,<sup>29</sup> and his sentence was fixed at death.<sup>30</sup> On appeal to the Supreme Court of Virginia, Quesinberry claimed that the robbery predicate for capital murder was not established because the taking of property from the warehouse was complete *before* Haynes was

23. *Mason v. Commonwealth*, 105 S.E.2d 149, 150 (Va. 1958).

24. *Id.*

25. *Id.* at 151.

26. *Id.*

27. *Id.* at 151-52. Mason could have been convicted of both larceny and assault, rather than robbery. The difference is not the conduct; it is the sequence of events, or the temporal connection. The purpose of the "temporal correlation" rule is to keep every larceny and assault or battery from becoming robbery.

28. *Quesinberry v. Commonwealth*, 402 S.E.2d 218, 221 (Va. 1991).

29. Section 18.2-31(4) of the Virginia Code classifies as capital those killings that are "[t]he willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery." VA. CODE ANN. § 18.2-31(4) (Michie 1999).

30. *Quesinberry*, 402 S.E.2d at 220.

shot.<sup>31</sup> Because the court found that “the robbery and killing of the victim were interdependent objects of a common criminal design,” the court rejected *Quesinberry*’s claim.<sup>32</sup> What the Supreme Court of Virginia meant by “interdependent objects of a common criminal design” is not clear. To the extent the capital murder conviction is based upon the taking of the money and stamps, *Quesinberry v. Commonwealth* is probably correct; to the extent it was based on the taking of the walkie-talkies, the decision transformed larceny into robbery.

On January 22, 1993, Russell Tross and four friends entered a grocery store in Harrisonburg, Virginia, to steal beer. Tross carried a gun in his pocket. Two of Tross’s companions took beer from the store and walked out without paying. As Tross attempted to leave the store with a forty-ounce bottle of beer in his pocket, Steven Daniel, the store manager, stepped in front of the exit doors to block Tross’s way. Tross raised his gun and shot Daniel in the face.<sup>33</sup> Tross, who was sixteen years old at the time of the shooting, was convicted of capital murder under the robbery predicate of the capital murder statute and sentenced to life imprisonment.<sup>34</sup> Tross claimed that because he took the beer before he came into contact with the manager, the taking was complete before the shooting; therefore, there was no robbery.<sup>35</sup> The Virginia Court of Appeals upheld Tross’s capital murder conviction and found that the “asportation of the beer continued until he shot the store manager in the face and took beer from the manager’s dominion and control.”<sup>36</sup>

The takings in *Quesinberry* (at least of the walkie-talkies) and *Tross v. Commonwealth* were identical to that in *Mason v. Commonwealth*. In all three cases, the caption and asportation preceded the violence. In *Mason*, a non-capital case, the court reversed the defendant’s robbery conviction because the temporal connection between the taking and the violence had not been established.<sup>37</sup> In *Quesinberry* and *Tross*, both capital cases, the courts found the evidence sufficient to support a capital murder conviction based upon the robbery predicate.<sup>38</sup> Yet, in both cases there was no temporal connection between the taking and the violence. How do takings that look like larceny become sufficient to support a capital murder conviction? The holdings in *Welch* and *Bryant* establish that larceny is complete when

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31. *Id.* at 224.

32. *Id.*

33. *Tross v. Commonwealth*, 464 S.E.2d 523, 525-26 (Va. Ct. App. 1995).

34. *Id.* at 525.

35. *Id.* at 534.

36. *Id.*

37. *Mason*, 105 S.E.2d at 152.

38. *Quesinberry*, 402 S.E.2d at 224; *Tross*, 464 S.E.2d at 534.

a shoplifter removes an item from the display shelf.<sup>39</sup> Under that standard, the takings in *Quesinberry* and *Tross* clearly preceded the violence and could therefore not constitute robbery or support capital murder convictions based upon the robbery predicate. The holdings in *Quesinberry* and *Tross* make clear that the Virginia courts are applying a different standard in the context of capital murder. These holdings reveal that, when capital murder is charged, larceny is not complete until the thief kills the proprietor to retain the goods. Thus, in the capital context, larceny becomes robbery. *Mason* involved a larceny plus assault/battery; if the proprietor had been killed, the crime would have become a larceny plus criminal homicide, probably second degree murder. *Quesinberry* and *Tross* transform the same case into capital murder.

## 2. *Afterthought Robbery Sufficient for Capital Murder But Not First Degree Murder?*

On April 2, 1992, Michael V. Shepperson killed Victor White and took his watch, necklace, wallet, car, rifle, and fifty dollars.<sup>40</sup> Shepperson was charged with first degree murder,<sup>41</sup> robbery, and use of a firearm in the commission of a murder.<sup>42</sup> During its deliberations, the jury submitted the following question to the court: "If Michael Shepperson did not kill Victor White with the intention of robbery can Michael Shepperson be found guilty of robbery after the murder?"<sup>43</sup> The court responded that "[i]n order to find the defendant guilty you must find that the violence or intimidation precede or be concomitant with the taking. It is immaterial that the victim is dead when the theft occurs."<sup>44</sup> The jury returned with guilty verdicts on all charges.<sup>45</sup> On appeal, Shepperson challenged the court's answer to the jury's question, arguing that it was both incorrect as a matter of law and not responsive to the question asked.<sup>46</sup> The Virginia Court of Appeals found

39. *Welch*, 425 S.E.2d at 104 (holding that "[t]he crime of larceny is complete when a defendant with the requisite intent to permanently deprive takes possession of property without the consent of the owner and moves that property from the exact location it occupied prior to the defendant's conduct"); *Bryant*, 445 S.E.2d 667, 670 (holding that "any movement of the items, irrespective of how slight, is sufficient evidence of asportation").

40. *Shepperson v. Commonwealth*, 454 S.E.2d 5, 6 (Va. Ct. App. 1995).

41. First degree murder is defined by statute as "[m]urder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary or abduction . . ." VA. CODE ANN. § 18.2-32 (Michie 1999).

42. *Shepperson*, 454 S.E.2d at 6.

43. *Id.* at 7.

44. *Id.*

45. *Id.*

46. *Id.* at 8.

that while the answer supplied to the jury was technically correct, it was not responsive to the question because the jury's question concerned the timing of the intent to rob, not the timing of the violence or theft.<sup>47</sup> The court concluded that "[i]f Shepperson killed White only for a purpose unrelated to theft, and as an *afterthought* decided to steal his property, the theft was larceny;"<sup>48</sup> since the trial court failed to give this information to the jury, the court reversed Shepperson's robbery and first degree murder convictions.<sup>49</sup>

To support a capital murder conviction based upon the robbery predicate, the Commonwealth must prove (1) that the defendant committed a willful, deliberate, and premeditated murder; and (2) that the murder was committed "in the commission of a robbery."<sup>50</sup> First degree murder is distinguishable from capital murder in that "the defendant found guilty of first degree murder is the defendant who killed during the course of a robbery, but did not kill with willfulness, deliberation, and premeditation."<sup>51</sup> Capital murder is limited to those situations in which "both an ongoing robbery . . . and a premeditated murder are present *simultaneously*, only where the defendant while engaged in the robbery . . . has killed willfully, with premeditation, and with deliberation."<sup>52</sup> The difference between capital murder and first degree murder is the defendant's mental state; the elements of the underlying robbery should be the same. After reading *Shepperson*, logic would dictate that if an *afterthought* larceny is insufficient to support a first degree murder conviction, it would also be insufficient to support a capital murder conviction based upon the robbery predicate. The Virginia courts have held otherwise.<sup>53</sup>

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47. *Id.*

48. *Id.* (emphasis added).

49. *Id.* at 8-9.

50. VA. CODE ANN. § 18.2-31(4) (Michie 1999).

51. *Briley v. Bass*, 584 F. Supp. 807, 839 (E.D. Va. 1984). The court's definition of first degree murder in *Briley* is clearly correct. *But see Orbe v. Commonwealth*, 519 S.E.2d 808, 813 (Va. 1999) (holding that "[a]n instruction on first degree murder was *not* warranted because the video tape clearly established that [the victim] was shot in the chest *during the commission of armed robbery* at the convenience store") (emphasis added). In *Orbe v. Commonwealth*, the Supreme Court of Virginia misread the first degree murder statute; an instruction on first degree murder was not only warranted, it was required by the language of the statute. *See* VA. CODE ANN. § 18.2-32 (Michie 1999).

52. *Briley*, 584 F. Supp. at 839 (emphasis added). References to the former statutory requirement which limited capital murder to robbery committed with the use of a deadly weapon have been deleted.

53. *See George v. Commonwealth*, 411 S.E.2d 12 (Va. 1991) (sustaining robbery capital murder conviction upon evidence that the defendant took the victim's motorcycle and helmet, hid them away from the body, and marked their location on a map); *Williams v. Commonwealth*, 360 S.E.2d 361 (Va. 1987) (finding evidence that the defendant took three dollars from the victim's wallet after the killing adequate to support a capital murder conviction based on the robbery predicate offense).



In *Haskell v. Commonwealth*,<sup>54</sup> the Supreme Court of Virginia established the parameters of capital murder supported by the robbery predicate.<sup>55</sup> For the killing to be considered "in the commission of a robbery," the killing must be so closely related in time, place, and causal connection to the felony as to make them part of the "same criminal enterprise."<sup>56</sup> However, in *George v. Commonwealth*,<sup>57</sup> the court expanded the rule to include "a killing which takes place before, during, or after the robbery;"<sup>58</sup> in doing so, the court explicitly endorsed afterthought robbery in the capital context despite its rejection of afterthought robbery in the first degree murder context. The same might be said of the post-homicide taking of the stamps and money in *Quesinberry*. The Virginia courts are thus making it easier for the Commonwealth to indict and convict for capital murder than for first degree murder when the predicate felony is robbery.

### III. Sex Offenses

#### A. Rape

##### 1. Rape Defined

Rape is defined by the Virginia Code as "sexual intercourse . . . against the complaining witness's will, by force, threat or intimidation."<sup>59</sup> Early rape cases required the Commonwealth to prove sexual intercourse by evidence "that there ha[d] been an actual penetration to some extent of the male sexual organ into the female sexual organ."<sup>60</sup> In *McCall v. Commonwealth*,<sup>61</sup> the only proof of penetration presented by the Commonwealth was injury to the girl's genital organs;<sup>62</sup> the Supreme Court of Virginia determined there was no proof that the injury was caused by the defendant's penetration and required that the "proof must go beyond the mere showing of injury to the genital organs of the female and an opportunity on the part of the accused to have committed the offense."<sup>63</sup> Likewise, in *Strawderman v. Commonwealth*,<sup>64</sup> testimony by a physician that the injury to the genital area was caused by a male penis was held by the court to be insufficient to

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54. 243 S.E.2d 477 (Va. 1978).

55. *Haskell v. Commonwealth*, 243 S.E.2d 477, 483 (Va. 1978).

56. *Id.*

57. 411 S.E.2d 12 (Va. 1991).

58. *George v. Commonwealth*, 411 S.E.2d 12, 20 (Va. 1991) (emphasis added).

59. VA. CODE ANN. § 18.2-61(A) (Michie 1999).

60. *McCall v. Commonwealth*, 65 S.E.2d 540, 542 (Va. 1951). See also *Strawderman v. Commonwealth*, 108 S.E.2d 376, 379 (Va. 1959).

61. 65 S.E.2d 540 (Va. 1951).

62. *Id.* at 542. The victim's family physician testified that he could not determine the cause of the injury. *Id.*

63. *Id.*

64. 108 S.E.2d 376 (Va. 1959).

establish sexual intercourse.<sup>65</sup> The court explained that the doctor's testimony overlooked the possibility that the injuries could have been caused by other means.<sup>66</sup>

## 2. *The Scope of Rape Expands in Tuggle v. Commonwealth*

While early rape cases like *McCall* and *Strawderman* established a high standard for proof of penetration, that standard has been lowered by the Virginia courts through expansion of the evidence that courts accept to prove penetration. In large part, the Supreme Court of Virginia's decision in *Tuggle v. Commonwealth*<sup>67</sup> was the impetus for the change. Tuggle was convicted of capital murder under the rape predicate<sup>68</sup> of the capital murder statute.<sup>69</sup> On appeal, Tuggle claimed that the Commonwealth failed to prove capital murder based on the rape predicate because (1) the evidence did not establish that he penetrated the victim's vagina with his penis and (2) the evidence did not establish that sexual intercourse was forced upon the victim against her will.<sup>70</sup> Evidence introduced by the Commonwealth included testimony by the medical examiner that "something" penetrated the victim's vagina; "[t]ests established that semen was found in the victim's rectum, indicating penetration and ejaculation there, but sperm was not found in her vagina."<sup>71</sup> In challenging the proof of the rape, Tuggle relied upon *McCall* and *Strawderman*.<sup>72</sup> The court found *McCall* and *Strawderman* distinguishable from the facts before them because there was no indication in either of those cases that the defendant had exposed his penis.<sup>73</sup> In *Tuggle*, on the other hand, the court found the presence of semen in the victim's rectum sufficient to establish penile exposure.<sup>74</sup> By holding the combination of vaginal injury and penile exposure sufficient to establish penetration, the court allowed the Commonwealth to prove vaginal rape with evidence of anal sodomy. The strict proof requirements of *McCall* and *Strawderman* were discarded.

In *Tuggle*, the Supreme Court of Virginia expanded rape in the capital context; in *Elam v. Commonwealth*<sup>75</sup> the court extended the expansion to rape cases. Elam was convicted of rape; on appeal, he claimed that the

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65. *Strawderman v. Commonwealth*, 108 S.E.2d 376, 379-80 (Va. 1959).

66. *Id.* at 380.

67. 323 S.E.2d 539 (Va. 1984).

68. See VA. CODE ANN. § 18.2-31(5) (Michie 1999).

69. *Tuggle v. Commonwealth*, 323 S.E.2d 539, 543 (Va. 1984).

70. *Id.* at 549.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 550.

75. 326 S.E.2d 685 (Va. 1985).

Commonwealth failed to prove penetration.<sup>76</sup> In support of his claim that penetration never occurred, Elam relied upon an excerpt from the victim's testimony which read as follows:

Q. All right, after he jerked off your clothes, what did he do?

A. Well, he didn't rape me; I don't think he raped me; but it seemed like they thought he did.

Q. Did he try to put his penis into your sexual organ?

A. Yes.

Q. But you don't know whether he got it in or not?

A. No, I don't, but it liked to scared me to death.<sup>77</sup>

The court dismissed the victim's testimony that penetration never occurred by explaining that the meaning of rape to the lay person differs from that assigned to it by the law.<sup>78</sup> Although the victim's testimony standing alone was insufficient to establish rape, the court found that, taken together, circumstantial evidence consisting of vaginal injury and semen found on a blanket was sufficient to establish penetration.<sup>79</sup> Although there was no semen found in or around the victim's vagina, the court found the presence of semen on a blanket sufficient to establish proof of penile exposure.<sup>80</sup> After *Elam*, the standard of proof for rape set in the capital context by *Tuggle*—vaginal injury plus penile exposure—was extended to rape cases.<sup>81</sup>

## B. Forcible Sodomy

### 1. Forcible Sodomy Defined

The Virginia Code defines forcible sodomy as "cunnilingus, fellatio, anallingus, or anal intercourse . . . accomplished against the will of the complaining witness."<sup>82</sup> Labeling the offense as "forcible" sodomy "is slightly misleading because actual force is not required . . . it is the willing-

76. *Elam v. Commonwealth*, 326 S.E.2d 685, 686 (Va. 1985).

77. *Id.*

78. *Id.* Citing *Tuggle*, the court reaffirmed the legal principles defining rape as follows:

Penetration by a penis of a vagina is an essential element of the crime of rape; proof of penetration, however slight the entry may be, is sufficient; evidence of ejaculation is not required; and no hypothesis that penetration was accomplished by some object other than the penis is sufficient to reverse a conviction unless it reasonably flows from the evidence itself rather than the imagination of counsel.

*Id.* at 686-87 (citing *Tuggle*, 323 S.E.2d 539).

79. *Id.* at 687.

80. *Id.*

81. See *Morrison v. Commonwealth*, 391 S.E.2d 612, 613 (Va. Ct. App. 1990) (holding that absence of victim testimony indicating that penetration occurred was not dispositive in light of medical examination which found vaginal injury and circumstantial evidence of penile exposure). *But see Moore v. Commonwealth*, 491 S.E.2d 739, 742 (Va. 1997) (finding no evidence of penetration because, when victim testified that defendant put his penis on her vagina, it was clear from the evidence that she was referring to the external area of her body).

82. VA. CODE ANN. § 18.2-67.1(A) (Michie 1999).

ness of the victim which is crucial.<sup>83</sup> As in rape, actual penetration is required.<sup>84</sup> In *Ryan v. Commonwealth*,<sup>85</sup> the Supreme Court of Virginia, relying upon testimony by the victim that the defendant had licked her vagina,<sup>86</sup> found circumstantial evidence sufficient to prove penetration by the defendant's mouth.<sup>87</sup> The assault spanned a period of approximately forty-five minutes, during which time the defendant "rubbed his penis around [victim's] vaginal area, fondled her breasts and took his tongue and . . . started down around the vagina with his tongue, licking her vagina."<sup>88</sup> *Ryan* states that a conviction of sodomy by cunnilingus requires penetration, but, as in rape cases, the penetration need only be slight and can be proved by circumstantial evidence.<sup>89</sup>

## 2. Technical Redefinition of Penetration Expands Forcible Sodomy

*Ryan* made it clear that a sodomy conviction required proof of penetration. Later cases further defined what portions of the female anatomy must be penetrated to support a conviction of sodomy by cunnilingus. In *Love v. Commonwealth*,<sup>90</sup> the Virginia Court of Appeals addressed the anatomy issue and concluded that penetration of the labia majora, the outer lips of the vagina, was enough to support a conviction of sodomy by cunnilingus; penetration into the opening of the vagina was not required.<sup>91</sup> In *Horton & Newby v. Commonwealth*,<sup>92</sup> the Supreme Court of Virginia addressed the anatomy issue in even greater detail.<sup>93</sup> Because section 18.2-67.1 of the Virginia Code does not define cunnilingus, the court relied upon the traditional meaning of the word as encompassing "stimulation of the vulva or clitoris with the lips or tongue."<sup>94</sup> The court then examined the female

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83. ROGER D. GROOT, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA 429 (4th ed. 1998).

84. See *Hudson v. Commonwealth*, 127 S.E. 89 (Va. 1925) (holding that penetration is an essential element of sodomy); *Ashby v. Commonwealth*, 158 S.E.2d 657, 658 (Va. 1968) (holding evidence that a boy placed his mouth on a man's genitals insufficient to establish the essential element of penetration).

85. 247 S.E.2d 698 (Va. 1978).

86. *Ryan v. Commonwealth*, 247 S.E.2d 698, 700 (Va. 1978).

87. *Id.* at 702.

88. *Id.* at 700-01.

89. *Id.* at 702.

90. 441 S.E.2d 709 (Va. Ct. App. 1994).

91. *Love v. Commonwealth*, 441 S.E.2d 709, 712 (Va. Ct. App. 1994).

92. 499 S.E.2d 258 (Va. 1998).

93. *Horton & Newby v. Commonwealth*, 499 S.E.2d 258, 261-62 (Va. 1998).

94. *Id.* at 261 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 554 (3d ed. 1993) (internal quotation marks omitted)); see also BLACK'S LAW DICTIONARY 380 (6th ed. 1990) (defining cunnilingus as "[a]n act of sex committed with the mouth and the female sexual organ").

anatomy to determine which portions of the female genitalia must be penetrated to constitute cunnilingus. The court concluded that “[s]ince cunnilingus involves stimulation of the vulva or clitoris and the vulva encompasses the outermost part of the female genitalia, we conclude that penetration of any portion of the vulva is sufficient to prove sodomy by cunnilingus.”<sup>95</sup> In *Love*, the Virginia Court of Appeals recognized that other jurisdictions had held that “insertion of the defendant’s tongue into the victim’s vagina need not be shown to prove cunnilingus.”<sup>96</sup> In *Horton & Newby*, the Supreme Court of Virginia explicitly adopted that standard.<sup>97</sup> The court applied its technical redefinition of penetration to the facts of the cases before it and affirmed the convictions of both Horton, who licked his victim’s vagina, and Newby, who “drooled” on his victim’s vagina.<sup>98</sup> Thus, the court accepted external conduct as an inference of internal penetration. One has to stretch the imagination to visualize an instance in which the proof requirements for penetration set by the Supreme Court of Virginia in *Horton & Newby* would not be satisfied.

On March 30, 1992, the body of seventeen-year-old Timothy Jason Hall was found near an abandoned construction building.<sup>99</sup> Walter Mickens, Jr. was convicted of Hall’s murder based on the attempted forcible sodomy predicate<sup>100</sup> of the capital murder statute.<sup>101</sup> Hall’s nude body was discovered lying face down on a mattress with his legs spread approximately twelve inches apart; in addition white lubricant was found around his anus.<sup>102</sup> African-American pubic hairs taken from Hall’s buttocks matched the sample taken from Mickens, an African-American.<sup>103</sup> There were also bloody “transfer” stains found on Hall’s thighs and DNA extracted from semen found on the mattress was consistent with Mickens’s DNA.<sup>104</sup> The court concluded that, taken together, the circumstantial evidence established proof of attempted forcible sodomy.<sup>105</sup>

Because the Commonwealth in *Mickens* relied on the *attempted* forcible sodomy predicate, evidence of penetration was not required. *Mickens*, of

95. *Horton & Newby*, 499 S.E.2d at 261-62.

96. *Love*, 441 S.E.2d at 712.

97. *Horton & Newby*, 499 S.E.2d at 262.

98. *Id.*

99. *Mickens v. Commonwealth*, 442 S.E.2d 678, 681 (Va. 1994).

100. See VA. CODE ANN. § 18.2-31(5) (Michie 1999).

101. *Mickens*, 442 S.E.2d at 681.

102. *Id.* at 688.

103. *Id.* Human tissue was attached to the pubic hairs found on Hall. The attached tissue suggested that the hairs were forcibly removed. The court found this “consistent with Mickens’ having rubbed his genitals against Hall’s buttocks.” *Id.*

104. *Id.* Transfer stains “occur when an object comes into contact with blood and then contacts another surface, thereby leaving a stain on the other surface.” *Id.* at 681 n.1.

105. *Id.* at 688.

course, involved sodomy by anal intercourse rather than by cunnilingus. After the redefinition of penetration in the context of forcible sodomy by cunnilingus in *Horton & Newby*,<sup>106</sup> the circumstantial evidence tending to show proof of penetration in *Mickens* would likely now fall within the parameters of forcible sodomy. Even if that is not the case, the rape cases would produce the same result. In *Tuggle and Elam*, vaginal injury plus penile exposure satisfied the penetration element of rape.<sup>107</sup> It is clear from the current trend that the expansion of penetration in the rape context is easily transferrable to the forcible sodomy context. The pubic hairs, human tissue, and bloody transfer stains in *Mickens* are equivalent to the vaginal injury in *Tuggle and Elam*, and penile exposure is proven by the presence of semen on the mattress. The Commonwealth's decision to charge capital murder based upon the attempted forcible sodomy predicate rather than the forcible sodomy predicate could be explained by the fact that the Virginia courts' expansion of penetration had not been explicitly adopted in the context of forcible sodomy by anal intercourse. Reading *Tuggle, Elam*, and *Love* together, two general principles emerge: in the context of sex crimes, the level of penetration required by the courts is (1) slender, and (2) proven by the vaginal injury plus penile exposure, or its equivalent. Adding *Horton & Newby* to these general principles indicates that, although not yet explicitly adopted, the court's expansion of penetration in the context of forcible sodomy by cunnilingus has probably expanded into the context of forcible sodomy by anal intercourse. In any event, the foundation has been laid for the court's expansion of penetration in the context of forcible sodomy. If the trend established by capital cases predicated upon robbery and rape continues, then it is only a matter of time before the bar is further lowered in capital cases predicated upon forcible sodomy.

### C. Object Sexual Penetration

#### 1. Object Sexual Penetration Defined

The Virginia Code defines object sexual penetration ("OSP") as the inanimate or animate object sexual penetration of the labia majora or anus with any object or animal by force, threat, or intimidation.<sup>108</sup> Initially, the OSP statute only included inanimate object penetration; animate object penetration was added in 1993.<sup>109</sup> Thus, the OSP statute has itself expanded. In *Bell v. Commonwealth*,<sup>110</sup> the Virginia Court of Appeals addressed the question of what objects fell within the meaning of "animate" under the

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106. *Horton & Newby* was decided in 1998, four years after *Mickens*.

107. See *supra* notes 66-80 and accompanying text.

108. VA. CODE ANN. § 18.2-67.2(A) (Michie 1999).

109. 1993 Va. Acts, ch. 549.

110. 468 S.E.2d 114 (Va. Ct. App. 1996).

OSP statute.<sup>111</sup> The defendant in *Bell* challenged his conviction of animate OSP on the basis that his finger did not fall within the definition of an "animate" object.<sup>112</sup> Recognizing the ambiguity of the statute, the court looked to the definition of "animate" and the plain meaning of the statute for clarification.<sup>113</sup> Finding that "animate" means "possessing life; living," the court concluded that a finger fell within that definition.<sup>114</sup> Furthermore, the court explained that the Commonwealth was not required to label the object used for penetration as animate or inanimate because the statute covered "any object."<sup>115</sup> *Bell* represents the beginning of a trend of broad interpretation by the Virginia Court of Appeals of OSP proof requirements.

## 2. Technical Redefinition of Penetration Extended to Object Sexual Penetration

In *Jett v. Commonwealth*,<sup>116</sup> the Virginia Court of Appeals addressed the penetration requirements of OSP. The court concluded that, as in rape and forcible sodomy, penetration in the context of OSP "need only be slight."<sup>117</sup> The court's qualification of the penetration requirements of OSP seems unwarranted since section 18.2-67.2 of the Virginia Code clearly states that penetration in the OSP context involves the penetration of "the *labia majora* or anus . . . with any object."<sup>118</sup> In *Jett*, the victim's testimony did not establish penetration, but the court found circumstantial evidence of victim's vaginal pain and swollen clitoris sufficient to establish penetration.<sup>119</sup> In holding the victim's vaginal pain and swollen clitoris to be sufficient evidence of OSP, the court appears to permit proof of injury alone to serve as evidence of penetration. It is not clear that there is an equivalent to the penile exposure evidence required in rape cases. In *Jett*, evidence

111. See also *Payne v. Commonwealth*, 509 S.E.2d 293 (Va. 1999). Because Payne inserted his finger into the victim's vagina, he was convicted of capital murder based upon the OSP predicate. *Id.* at 298-99.

112. *Bell v. Commonwealth*, 468 S.E.2d 114, 116 (Va. Ct. App. 1996). The defendant contended that "animate" only referred to acts done by or with an animal. The court noted that section 18.2-67.2 specifically addressed acts committed by or with an animal separately; thus, animate was not limited to penetration by or with an animal. *Id.* at 117.

113. *Id.*

114. *Id.* (quoting THE AMERICAN HERITAGE DICTIONARY 111 (2d College ed. 1982) (internal quotation marks omitted)).

115. *Id.* (emphasis added).

116. 501 S.E.2d 457 (Va. Ct. App. 1998).

117. *Jett v. Commonwealth*, 501 S.E.2d 457, 459 (Va. Ct. App. 1998) (quoting *Horton & Newby v. Commonwealth*, 449 S.E.2d 258, 261 (Va. 1998) (internal quotation marks omitted)).

118. VA. CODE ANN. § 18.2-67.2(A) (Michie 1999) (emphasis added).

119. *Jett*, 501 S.E.2d at 459.

indicated the use of both a doll and a hairbrush, but the victim's testimony referred to these objects "on the outside of [her] pookie."<sup>120</sup>

### 3. Attempted Object Sexual Penetration in the First Degree Murder Context

In *Marshall v. Commonwealth*,<sup>121</sup> the defendant was charged with the murder of his infant son and convicted of first degree felony murder based upon the attempted OSP predicate.<sup>122</sup> The doctor who performed the autopsy testified that the infant died from "severe blunt force trauma to the abdomen."<sup>123</sup> The doctor also found abrasions around the infant's anus and testified that the injuries on the anal ring were unrelated to the abdominal injuries but "could have been caused by a human finger."<sup>124</sup> On cross-examination, the doctor admitted that "a rough towel in conjunction with a finger" pushed up or against the anus could have caused the abrasions.<sup>125</sup> There was no specific evidence of penetration.<sup>126</sup> Marshall's convictions were affirmed.<sup>127</sup>

If Marshall had been charged with completed OSP rather than attempted OSP the Commonwealth could have charged either first degree felony murder or capital murder.<sup>128</sup> Would the *Jett* rule, which reduces proof of penetration to injury alone, now be sufficient to support a charge of first degree felony murder or capital murder predicated upon OSP? In *Jett*, the *Tuggle* and *Elam* redefinition of penetration—vaginal injury plus penile exposure (identification of the offending object?)—is put into the OSP context. In holding that "evidence of the victim's pain and swollen clitoris established the element of penetration,"<sup>129</sup> the court in *Jett* apparently reduced the proof of penetration to mere injury. At a minimum, proof of injury plus proof of an available object appears sufficient. The expansion of penetration in *Jett* may go beyond both *Tuggle* and *Elam*. If the proof of penetration is the injury alone, there is no equivalent to penile exposure. In the OSP context, it does not matter in which orifice the injury appears and there is some question as to whether the object used even has to be identi-

120. *Id.* The victim testified that the defendant showed her how to rub a hairbrush or Barbie doll "on the outside of [her] pookie." *Id.* (internal quotation marks omitted).

121. 496 S.E.2d 120 (Va. Ct. App. 1998).

122. *Marshall v. Commonwealth*, 496 S.E.2d 120, 122 (Va. Ct. App. 1998).

123. *Id.* (internal quotation marks omitted).

124. *Id.* The anal injuries were found to be of the same age as the abdominal injuries. *Id.* at 123.

125. *Id.* at 122. At the time, the first degree felony murder statute only included inanimate OSP; animate OSP was added in 1998, see 1998 Va. Acts, ch. 281, but Marshall failed to preserve that issue for review.

126. *Marshall*, 496 S.E.2d at 122-23.

127. *Id.* at 125.

128. Attempted OSP is not currently included within the capital murder statute.

129. *Jett*, 501 S.E.2d at 459.



fied by the Commonwealth. If there is no duty to identify the object used to carry out the OSP and the *Jett* penetration standard continues to be followed by the Virginia courts, there may be no remaining distinction between attempted and completed OSP.

#### D. *The Future of Attempted Sex Crimes*

The proof of penetration has been reduced such that there is little, if any, distinction remaining between attempted and completed sex crimes, especially in the OSP context. After *Tuggle, Elam, Horton & Newby*, and *Jett*, the conclusion is both obvious and shocking: injury alone may be sufficient to prove penetration in all sex crimes. This is extraordinarily dangerous because it abolishes the distinction between attempted and completed sex crimes across the board. Erasing the distinctions between attempted and completed sex crimes has serious consequences for those charged with these crimes.<sup>130</sup> It also, in effect, expands the capital murder statute by including what is properly attempted OSP under section 18.2-31(5) as completed OSP.

#### V. *Conclusion*

In the beginning there was robbery. Then there was capital murder based upon the robbery predicate. The concept of robbery expanded in the context of capital cases, but the expansion did not carry over to plain robbery cases or first degree murder/robbery cases. Thus, we end up with two different standards: one for plain robbery and first degree murder/robbery and another for capital murder predicated upon robbery. In the capital context, larceny becomes robbery and an afterthought larceny is sufficient to support a capital murder conviction. Thus, the standard employed in the capital murder/robbery context is more expansive than that employed in the robbery or first degree/robbery context.

The expansion of traditional felonies in the context of sex offenses took a different turn than the expansion in the robbery context. In the context of sex offenses, *Tuggle v. Commonwealth*, a capital murder case based upon

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130. Section 18.2-26 of the Virginia Code lays out the penalty structure for attempts to commit noncapital felonies. Under 18.2-26, if the maximum penalty available for the felony attempted is life imprisonment or more than twenty years, the attempt is punishable as a Class 4 felony; if the maximum penalty for the felony is twenty years, the attempt is punishable as a Class 5 felony; and if the maximum penalty for the felony is less than twenty years, the attempt is punishable as a Class 6 felony. VA. CODE ANN. § 18.2-26 (Michie 1999). Section 18.2-67.5 of the Virginia Code establishes the penalty for attempted rape, forcible sodomy, and inanimate or animate object sexual penetration; these attempts are punishable as Class 4 felonies. VA. CODE ANN. § 18.2-67.5 (Michie 1999). Under this penalty structure, attempted OSP is a Class 4 felony which carries a penalty of two to ten years. *Id.* If the distinction between attempted OSP and completed OSP has been lost, the penalty is five years to life. VA. CODE ANN. § 18.2-67.2 (Michie 1999).

the rape predicate, expanded rape. The expansion was followed in *Elam v. Commonwealth*, a pure rape case. *Tuggle* also precipitated the expansion of forcible sodomy and OSP. In *Tuggle*, rape was redefined in the context of capital murder and the expansion then carried over to forcible sodomy and OSP. The difference is that expansion of robbery within the capital context did not extend to plain robbery. Thus, we are operating under two different standards in the robbery and capital murder/robbery context but are not operating under two different standards in the rape and capital murder/rape context. Instead, both rape in the non-capital context and rape in the capital murder context have been expanded.

Rape, forcible sodomy, and OSP each require proof of penetration. The requirement of penetration remains, but what evidence is necessary to prove penetration changes. The technical redefinition of what suffices as penetration in *Horton & Newby v. Commonwealth* significantly lowers and possibly eliminates the requirement of penetration, at least in the context of forcible sodomy by cunnilingus. The expansion has not been explicitly adopted in the capital context based on the forcible sodomy predicate; however, in *Jett*, it did carry over to the OSP context. This establishes a dangerous trend and could have a serious impact on capital cases based on rape, sodomy, and OSP.

