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# Orbe v. Commonwealth

## 519 S.E.2d 808 (Va. 1999)

### *I. Facts*

Dennis Mitchell Orbe ("Orbe") robbed a convenience store in York County on January 24, 1998, at approximately 3:38 a.m. One of the store's security cameras recorded Orbe approach the check-out counter and point a revolver at the clerk's chest. The clerk, Richard Sterling Burnett ("Burnett"), opened the cash register drawer and Orbe shot him once in the chest. As Burnett clutched his chest and struggled to remain standing, Orbe walked around the counter, pulled some money from the open cash register drawer, and left. A customer discovered Burnett's body a short time later and called the police. An investigator with the York County sheriff's office collected evidence including the video tape from the security camera, from which he printed images of Orbe. Several people contacted the sheriff's office and identified the perpetrator as Orbe; a warrant was soon obtained for his arrest. However, Orbe was not captured until a week later, after a high-speed chase in Richmond. Police seized a partially loaded .357 magnum revolver from Orbe; the Division of Forensic Science tested this gun and determined it was the weapon that fired the bullet that killed Burnett.<sup>1</sup>

A jury found Orbe guilty of capital murder, use or display of a firearm while committing murder, robbery, and use or display of a firearm while committing robbery, and recommended a sentence of death. The Commonwealth persuaded the jury of Orbe's future dangerousness with evidence of his prior criminal conduct, some of which was adjudicated at the time of the sentencing. The Commonwealth pointed to three separate incidents: an attempted abduction on January 21, 1998, and the shooting of a person who attempted to stop the abduction; the armed robbery of two elderly men of their wallets and car, also on January 21; and the threatening and robbery of three women whom he left locked in a closet for over four hours on January 30, the day before he was captured by police for Burnett's murder. Orbe subsequently pleaded guilty to most of these offenses. Lay mitigation witnesses testified to Orbe's troubled childhood, abuse of alcohol, a change in his behavior shortly before the criminal incidents on January 21, 1998, and his good behavior in jail. A clinical psychologist, Dr. Thomas A. Pasquale, testified that Orbe had exhibited suicidal tendencies,

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1. Orbe v. Commonwealth, 519 S.E.2d 808, 809-11 (Va. 1999).

was depressed over his perceived failure as a father, drank heavily, and had an impulse control dysfunction. Dr. Pasquale suggested that Orbe's actions were motivated by a desire to visit his father whom he had recently relocated after being abandoned by him at an early age. Regarding Orbe's future dangerousness, Dr. Pasquale testified that Orbe would not be a threat in prison if he avoided alcohol and abuse at the hands of other prisoners, but would be very dangerous if he escaped. The trial judge followed the recommendation of the jury and sentenced Orbe to death. The Supreme Court of Virginia consolidated Orbe's appeal to the Virginia Court of Appeals of his noncapital convictions with the automatic appeal of his capital conviction.<sup>2</sup>

## II. Holding

The Supreme Court of Virginia considered and denied the following claims raised by Orbe on direct appeal: (1) the trial court wrongly refused to instruct the jury on lesser included offenses; (2) unadjudicated criminal acts should not be used to show future dangerousness; (3) certain photographs should not have been introduced into evidence because they proved certain facts to which Orbe had already stipulated; and (4) the trial court improperly refused to allow Orbe to mail questionnaires to prospective jurors.<sup>3</sup> The court refused to consider several claims that Orbe defaulted. First, Orbe defaulted his claim of denial of individual voir dire because he only raised the claim in his brief and did not include it in an assignment of error as required by Rule 5:17(c) of the Virginia Supreme Court Rules.<sup>4</sup> Additionally, the court refused to consider seven of Orbe's seventeen assignments of error because he did not argue them on brief as required under *Quesinberry v. Commonwealth*.<sup>5</sup> Finally, the court held that Orbe failed to preserve an objection to the verdict form, and therefore could not raise the issue on appeal.<sup>6</sup> Orbe had intended to claim, using *Atkins v. Commonwealth*,<sup>7</sup> that the verdict form given to the jury was inconsistent with the penalty phase jury instructions.<sup>8</sup>

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2. *Id.* at 809-12.

3. *Id.* at 810.

4. *Id.* at 815. See VA. SUP. CT. R. 5:17(c).

5. *Orbe*, 519 S.E.2d at 812 n.8 (citing *Quesinberry v. Commonwealth*, 402 S.E.2d 218, 222 (Va. 1991)).

6. *Orbe*, 519 S.E.2d, at 816 n.13. See VA. SUP. CT. R. 5:17(c).

7. 510 S.E.2d 445 (Va. 1999).

8. *Orbe*, 519 S.E.2d at 816 n.13. See *Atkins v. Commonwealth*, 510 S.E.2d 445, 457 (Va. 1999) (setting aside death sentence where jury form was "incomplete . . . and did not comport with a correct statement of the law").

### III. Analysis and Application in Virginia

#### A. Instructions on Lesser Included Offenses

Orbe requested the trial judge to instruct the jury on first degree murder, and on the grading of homicides, because it was not clear that he acted with malice.<sup>9</sup> The court concluded that the evidence of the murder in the commission of the robbery was clear enough to warrant exclusion of instructions on lesser included offenses: "It is well-established in Virginia that jury instructions are proper only if supported by the evidence, and that more than a scintilla of evidence is necessary to support a lesser-included offense instruction requested by the defendant."<sup>10</sup> The court held that because the video tape so clearly showed the murder was committed in the course of a robbery and because Orbe failed to offer any evidence that he did not act with malice or premeditation, there was no reason to give an instruction on lesser included offenses.<sup>11</sup>

The court's own language belies its holding. It stated that "an instruction of first degree murder was not warranted because the video tape clearly established that Burnett was shot in the chest during the commission of armed robbery at the convenience store."<sup>12</sup> Compare this assertion to the first degree murder provision embodied in section 18.2-32 of the Virginia Code: "Murder, other than capital murder . . . in the commission of . . . robbery . . . is murder of the first degree."<sup>13</sup> The difference between capital murder and first degree is that first degree lacks premeditation, willfulness, and deliberation.<sup>14</sup> This determination of the premeditation requirements for capital murder must be made by jurors and their opportunity to consider it should not be precluded by the judge's choice of instructions. The Su-

9. *Id.* at 812-813.

10. *Id.* at 813. (quoting *Commonwealth v. Donkor*, 507 S.E.2d 75, 76 (Va. 1998)) (internal quotation marks omitted).

11. Orbe offered two instructions. The first included elements of both first and second degree murder, as well as voluntary manslaughter. Apparently, the defense contended that the shooting was accidental based on the firing mechanism of the gun, a double-action revolver, and this instruction would have provided the jurors with options if they agreed with this theory. The second instruction asserted that if there was a reasonable doubt as to the grade of the homicide, the grade should be determined in Orbe's favor. *Id.* at 812 & 813 n.9.

12. *Id.* at 813.

13. VA. CODE ANN. § 18.2-32 (Michie 1995).

14. See *Briley v. Bass*, 584 F. Supp. 807, 839 (E.D. Va. 1984) ("[C]apital murder is an appropriate finding only while both an ongoing robbery with a deadly weapon and a premeditated murder are present simultaneously, only where the defendant while engaged in the robbery with the use of a deadly weapon has killed willfully, with premeditation, and with deliberation.").

preme Court of Virginia's holding at best obfuscates the distinction between capital and first degree murder, and at worst, simply wipes from the Code the offense of first degree murder in the commission of a robbery.

Furthermore, the court determined that Orbe failed to offer a "scintilla of evidence that [he] acted without premeditation or malice so as to justify an instruction on second degree murder or voluntary manslaughter."<sup>15</sup> To the contrary, the court noticed that Orbe offered evidence based on the firing mechanism of the gun that the shooting may have been accidental: "[D]efendant posited that the testimony elicited from Scott Glass, the forensic expert, during cross-examination supported the defendant's contention that the shooting of Burnett was 'accidental.'"<sup>16</sup> Though this evidence may not have been extremely persuasive, it is more than a scintilla. Properly instructed, the jury could easily have found first degree murder rather than capital murder.

### *B. Future Dangerousness Based on Unadjudicated Criminal Acts*

Orbe challenged the finding of future dangerousness with three arguments. First, he pointed to his lack of a prior history of violent offenses, but the court found that the three criminal episodes in the two weeks surrounding the murder were sufficient to show future dangerousness.<sup>17</sup> Second, Orbe claimed that the trial court used the wrong standard—sufficient "probable cause" rather than "probability" that he would be "guilty of future dangerousness"—in overruling the defense's motion to strike the Commonwealth's evidence at sentencing.<sup>18</sup> The court responded that the trial judge corrected himself after stating "probable cause" and gave the proper standard, "probability," under section 19.2-264.4(C) of the Virginia Code.<sup>19</sup> The court also pointed out that the jury instructions were correct as to the standard.<sup>20</sup> Finally, Orbe challenged the use of unadjudicated criminal acts to show future dangerousness.<sup>21</sup> The court held that most of the claimed unadjudicated acts were actually adjudicated because Orbe pleaded guilty to them before the sentencing phase, and that the ones to which he had not pleaded were admissible under Virginia precedent.<sup>22</sup>

The precedent in Virginia for allowing unadjudicated criminal acts to be considered in sentencing of capital defendants is well established. The

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15. *Orbe*, 519 S.E.2d at 813.

16. *Id.* at 813 n.10.

17. *Id.* at 813-14.

18. *Id.*

19. *Id.* at 813-14. See VA. CODE ANN. § 19.2-264.2 (Michie 1995).

20. *Orbe*, 519 S.E.2d at 814.

21. *Id.* at 813-14.

22. *Id.* at 814 (quoting *Spencer v. Commonwealth*, 384 S.E.2d 785 (Va. 1990)).

court in *Orbe* stated the standard thus: "[E]vidence of each unadjudicated criminal act admitted to show a defendant's future dangerousness is not subject to the reasonable doubt standard. Rather, the finding of future dangerousness must be supported by proof beyond a reasonable doubt."<sup>23</sup> It is unclear how incidents about which there may be reasonable doubt can, in the cumulative, prove future dangerousness beyond a reasonable doubt. Even more difficult for defense counsel is that once future dangerousness is found by a jury, that decision is essentially final. The Virginia Supreme Court has never overturned such a finding. Although in *Orbe's* case enough of his criminal acts were adjudicated that strenuously contesting the unadjudicated acts might not have been successful, it is critical for defense counsel to be prepared to attack the Commonwealth's evidence whenever unadjudicated criminal acts comprise any part of the future dangerousness showing. Built in to the reasonable doubt standard for future dangerousness is the presumed safeguard that defense counsel has an opportunity to cast doubt on each of the parts of the future dangerousness showing, thereby casting doubt on the *whole* showing. Thus defense counsel must take full advantage of this opportunity by searching for (via motions for discovery or through outside investigation) facts that may discredit the witnesses for the Commonwealth, engaging in extensive cross-examination, and presenting contrary witnesses. Also, despite the unfavorable holdings of the Supreme Court of Virginia, defense counsel should continue to object to the introduction of unadjudicated conduct in anticipation of a federal constitutional limitation on the use of such evidence.<sup>24</sup>

### C. Admission of Photographic Evidence

*Orbe* argued that since he had already stipulated to the facts that photographs of the victim would show, they should not have been introduced because they served only to arouse the jury's sympathy for the victim rather than help determine *Orbe's* guilt.<sup>25</sup> The photographic evidence included pictures of the crime scene (including the open register drawer and Burnett's body on the floor), the gunshot wound and the body's condition at the autopsy, as well as personal photographs (one of the victim with some friends and another of him at church).<sup>26</sup> The court held that the

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23. *Id.* at 814 (citing *Walker v. Commonwealth*, 515 S.E.2d 565, 572 (Va. 1999)).

24. Such was the fortunate case in *Simmons v. South Carolina*, 512 U.S. 154 (1994) (holding that where future dangerousness is at issue, jury must be instructed that "life in prison" means "life without parole"). Those defendants whose counsel had proffered a *Simmons* instruction in the face of contrary precedent, and whose cases were still in direct appeals, obtained the advantage of *Simmons*.

25. *Orbe*, 519 S.E.2d at 814-15.

26. *Id.* at 815.

trial court did not abuse its discretion in admitting the photographs because they accurately depicted the crime scene and were more probative than prejudicial.<sup>27</sup> It also stated that precedent clearly established that stipulation to certain facts would not preempt the use of photographs.<sup>28</sup>

In its analysis, the court neglected to consider fully the proper uses of the photographs. Nowhere did the court indicate whether the photographs were introduced at the guilt or penalty phase of the trial; rather, it simply lumped them together and found that they were admissible to show "motive, intent, method, malice, premeditation and the atrociousness of [the defendant's] crimes."<sup>29</sup> The first five elements of this list are relevant to the guilt phase, while the last, atrociousness, apparently refers to vileness and depravity of mind and is applicable only to the sentencing phase. Further, the court did not discuss how (or even cite a case supporting the proposition that) the two photographs of the victim before the crime depicted the crime scene, showed the motive and intent of the defendant, or addressed the factual question of whether Orbe killed Burnett. These two photographs more properly should have been considered victim impact evidence, which also is relevant only for purposes of sentencing under *Payne v. Tennessee*.<sup>30</sup>

#### *D. Juror Questionnaires and Individual Voir Dire*

The court held that the manner in which the voir dire is conducted is within the discretion of the trial court and that the trial court could refuse to allow Orbe to mail questionnaires to prospective jurors. The decision not to allow the mailing of the questionnaires was justified, the court reasoned, because they might have impeded the trial judge's opportunity to evaluate each member of the venire.<sup>31</sup>

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27. *Id.*

28. *Id.* (citing *Mackall v. Commonwealth*, 372 S.E.2d 759 (Va. 1988)).

29. *Id.* (quoting *Chichester v. Commonwealth*, 448 S.E.2d 638, 648 (Va. 1994)) (alteration in original) (internal quotation marks omitted).

30. 501 U.S. 808 (1991). The right of victims to present to the courts the effects of the crime on them is codified in section 19.2-11.01 of the Virginia Code. VA. CODE. § 19.2-11.01 (Michie 1999). The photographs of the victim were probably gathered from the family in accordance with this provision, but should not have been introduced to the jury at the guilt phase. The procedures for gathering this evidence are outlined in sections 19.264.4 and 19.264.5 of the Virginia Code. See VA. CODE. §§ 19.2-264.4, 19.2-264.5 (Michie 1999). A similar statement of the right of victims to inform the court of the impact of the crime was ratified and added to the Virginia Constitution in 1996. VA. CONST. art. I, § 8-A. For a recent discussion of the admissibility of victim impact evidence, under both statutory and case law, see *Beck v. Commonwealth*, 484 S.E.2d 898 (Va. 1997).

31. *Orbe*, 519 S.E.2d at 815-16 (citing *Whitley v. Commonwealth*, 286 S.E.2d 162 (Va. 1982)).

*E. Proportionality Review*  
*Mandated by Section 17.1-313(C) of the Virginia Code*

The court claimed to have compiled and reviewed the records of not only all death sentence cases it had considered, but also all capital cases "in which the trial court or jury imposed a life sentence and defendant petitioned this court for appeal."<sup>32</sup> It specifically focused on and discussed cases where an employee was killed during a robbery and future dangerousness was the predicate and found that there were enough of these cases to support Orbe's sentence.<sup>33</sup> However, the court reminds us that the purpose of its review "is to reach a reasoned judgment regarding what cases justify the imposition of the death penalty" and that it "cannot insure complete symmetry among all death penalty cases."<sup>34</sup> The *Orbe* court admitted that it reviews only those cases that were "reviewed by this court," which excludes a large number of life-sentenced capital cases. While *Orbe* may be in line with other cases in which death was imposed, the court has no way of knowing whether the sentence was disproportionate when compared to similar cases in which a life rather than death sentence was imposed since the pool of those cases reviewed by the Supreme Court of Virginia is very small. The court sees few life capital cases because those defendants who receive a life sentence on a capital charge appeal to the Virginia Court of Appeals, and few of these will appeal to or be granted review by the Supreme Court of Virginia. Moreover, section 17.1-313(C)(2) requires that the supreme court consider "both the crime and the defendant."<sup>35</sup> None of the review in *Orbe* considers the specific defendant, Orbe, in relation to other death- or life-sentenced defendants. In other words, we can only be assured that Orbe's sentence is no more disproportionate than that imposed on any other death-sentenced defendant.

Robert H. Robinson, Jr.

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32. *Id.* at 816. It is unknown which cases these were since the court failed to cite or discuss any cases where the defendant appealed a life sentence after a capital conviction.

33. *Id.* at 816-17.

34. *Id.* at 817.

35. VA. CODE ANN. § 17.1-313(C)(2) (Michie 1999).



