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Schmitt v. Commonwealth 547 S.E.2d 186 (Va. 200[1])

Schmitt v. Commonwealth
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I. Facts

On February 17, 1999, Earl Shelton Dunning ("Dunning") was shot and killed while working as a security guard at the Bon Air branch of NationsBank ("the bank") on Buford Road in Chesterfield County. Around 1:00 p.m. on that day, John Yancey Schmitt ("Schmitt") entered the bank wearing dark sunglasses and a bulky jacket. One of the tellers, Sara Parker-Orr ("Parker-Orr") noticed Schmitt when he entered and thought it odd that he was wearing sunglasses on a cloudy day. After Schmitt entered the bank, Dunning went inside and stood at the end of the teller line in which customers were waiting. Schmitt was in line behind several customers. Parker-Orr testified that Schmitt left his place in line and walked over to where Dunning was standing. Seconds later, Parker-Orr heard two gunshots and someone screaming, "Get down, get down." Dunning had been shot in the chest. Schmitt then approached Parker-Orr, as well as the other tellers, and demanded all of their money. Schmitt threatened to kill everybody if he was not given all of the money.[1]

The bank's security camera recorded Schmitt standing at a teller window holding a bag and pointing a gun. While the robbery was recorded on the bank's security camera, the shooting of Dunning was not. Parker-Orr and the three other tellers did not see Schmitt shoot the security guard. However, they did identify Schmitt as the man who robbed the bank that day.[2]

After the murder and the robbery, Schmitt registered at a Williamsburg hotel the same day under the name "R. Napier." He paid cash for a three day stay. The desk clerk identified Schmitt and said that after checking in, Schmitt changed his hair color. Schmitt was identified by Captain Karl S. Leonard of the Chesterfield County Police Department using the bank camera's security photographs. On February 19, 1999, the police discovered that Schmitt was staying in Williamsburg. The James City County Tactical Team surrounded Schmitt's hotel room, and a crisis negotiator, Lieutenant Diane M. Clarcq of the James City County Police Department, attempted to persuade Schmitt to surrender. Schmitt surrendered the next morning and was taken into police custody. The hotel room was searched and along with a handgun and several new items of clothing, the police found $27,091 in cash, most of which was still wrapped in "bank

1. Schmitt v. Commonwealth, 547 S.E.2d 186, 192 (Va. 200[1]).
2. *Id.* at 192.

bands" identifying the money as coming from the Bon Air branch of NationsBank.[3]

Schmitt was indicted for murder during the commission of a robbery, armed entry of a bank with the intent to commit larceny, two counts of robbery, and three counts of use of a firearm.[4] In the guilt phase of the trial, the jury convicted Schmitt of all of the offenses charged. In the penalty phase of the trial, the jury fixed his punishment for capital murder at death based on a finding of future dangerousness, and fixed the sentence for the other offenses at imprisonment for 118 years.[5] The Supreme Court of Virginia consolidated Schmitt's automatic appeal of the death sentence with all of Schmitt's other claims on appeal.[6]

II. Holding

The Supreme Court of Virginia affirmed each of Schmitt's convictions, and after reviewing Schmitt's death sentence, declined to commute the sentence of death.[7] The court found that the jury was properly selected, the evidence was sufficient to show premeditation to support the capital murder charge, that statements appellant made to a hostage negotiator were not statements against Schmitt's penal interest, that the jury was properly instructed, and that Schmitt was properly sentenced.[8] There were other issues which the court did not rule upon because Schmitt waived his right to appeal or defaulted those issues.[9]

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3. *Id.*

4. *Id.*; *see also* VA. CODE ANN. §§ 18.2-31(4) (Michie Supp. 2001) (stating that "the willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery" shall constitute a capital murder); VA. CODE ANN. § 18.2-93 (Michie 2000) (stating that any person armed with a deadly weapon, who enters a bank with the intent to commit larceny shall be guilty of a Class 2 felony); VA. CODE ANN. § 18.2-58 (Michie 2000) (any person committing robbery with a firearm or other deadly weapon shall be guilty of a felony and sentenced for a term of life or not less than five years); VA. CODE ANN. § 18.2-53.1 (Michie 2000) (making it unlawful for anyone to use a firearm during the commission or attempted commission of a robbery).

5. *Schmitt*, 547 S.E.2d at 191.

6. *Id.* at 192.

7. *Id.* at 204.

8. *Id.* at 196-202.

9. *Id.* at 194. Several of Schmitt's claims were summarily dismissed by the court and are not discussed in detail in this note.

First, Schmitt claimed that the trial court failed to strike juror, James J. Goodin, for cause based on his statements concerning the death penalty. *Id.* Schmitt failed to ask the trial court to strike the juror and therefore waived his right to object. *Id.*

Second, Schmitt contended that the trial court erred in excluding prospective jurors, Linda Miles and Leo Gibbs. *Id.* Both of these prospective jurors expressed objections to the death penalty. Schmitt claims that the failure of the court to exclude is an example of a "pattern of seating pro-death penalty jurors." *Id.* Again, because Schmitt failed to make these objections in the trial court, he waived his right to appeal on these issues. *Id.*; *see also* VA. SUP. CT. R. 5:25 (2001) (stating that an "[e]rror will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice").

III. Analysis / Application in Virginia

A. Jury Selection

Schmitt argued that the trial court abused its discretion because it failed to strike jurors who favored the death penalty, it excluded jurors who opposed the death penalty, and it failed to strike a juror that had once been a bank teller.[10] The court stated that "[a] prospective juror should be excluded for cause based on the juror's views about the death penalty if those views would substantially impair or prevent the performance of the juror's duties in accordance with his oath and the court's instructions."[11] The court further stated that the trial court is in the best position to determine whether a juror can perform his duties in accordance with the court's instructions.[12] A trial court's decision regarding the selection or exclusion of jurors will be upheld unless the trial court abused its discretion.[13] The two jurors who were seated on the jury who were in favor of the death penalty both said during voir dire that they would be able to listen to the evidence presented with an open mind and follow the instructions of the judge.[14] The bank teller testified that she could follow the law as instructed by

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Third, Schmitt argued that the capital murder charge should be struck on the grounds that the charge encouraged the jury to impose harsher sentences on the non-capital offenses. *Schmitt*, 547 S.E.2d at 194. Due to Schmitt's failure to raise this issue at the trial court, the issue was waived for appeal. *Id.*; *see also* VA. SUP. CT. R. 5:25 (2001).

Fourth, Schmitt filed a pre-trial motion to bar admission, during the penalty phase of the trial, of evidence of his previous unadjudicated conduct. *Schmitt*, 547 S.E.2d at 194. The trial court decided to reserve ruling on the motion. *Id.* During the penalty phase of the trial, Schmitt did not object to testimony about his unadjudicated conduct. *Id.* Schmitt's failure to object during the penalty phase waived this objection on appeal. *Id.*; *see also* VA. SUP. CT. R. 5:25 (2001).

Fifth, Schmitt argued that the trial court erred in allowing the jury to consider the issue of future dangerousness because this aggravator is unconstitutionally vague and violates the Sixth, Eighth, and Fourteenth Amendments. *Schmitt*, 547 S.E.2d at 194. Schmitt relied on his motion presented at the trial court regarding this issue, but references to arguments made in the motion were insufficient and amounted to procedural default on this issue. *Id.*; *see* Burns v. Commonwealth, 541 S.E.2d 872, 881 (Va. 2001) (The court ruled that Burns's reliance on the memorandum that he presented to the circuit court on the issue of the constitutionality of the Virginia capital murder statute was insufficient and that he had therefore procedurally defaulted the issue).

Lastly, Schmitt, at the conclusion of his brief, set forth an argument "relating to all assignments of error" that the alleged errors violated his constitutional rights. *Schmitt*, 547 S.E.2d at 194. However, because Schmitt failed to specify in what manner his rights were violated with respect to each assignment of error, the argument was waived. *Id.*

10. *Schmitt*, 547 S.E.2d at 195.

11. *Id.* at 195 (citing Barnabei v. Commonwealth, 477 S.E.2d 270, 277 (Va. 1996) (holding that the trial court was correct in refusing to sit two prospective jurors who were opposed to the death penalty because the court believed it would substantially impair their performance as jurors)).

12. *Id.* at 195.

13. *Id.* at 195 (citing Lovitt v. Commonwealth, 537 S.E.2d 866, 875 (Va. 2000) (holding that the trial court did not err in allowing juror to sit, who was opposed to the death penalty but stated that she could do her duty, stating that the trial court was entitled to deference)).

14. *Id.* at 195.

the court, so the trial court seated her as well.[15] The Supreme Court of Virginia held that the trial court acted properly when it allowed these three jurors to sit.[16] The juror who was opposed to the death penalty stated that she would be unable, no matter what the circumstances, to vote for the death penalty.[17] The Supreme Court of Virginia held that the trial court properly excluded her.[18]

Schmitt argued that the trial court erred in limiting his questioning of prospective jurors during voir dire regarding their views on the death penalty.[19] The trial court refused to allow prospective jurors to respond to hypothetical questions posed by the defense.[20] Under *Witherspoon v Illinois*[21] and *Morgan v Illinois*,[22] a juror should be dismissed for cause if the juror would automatically vote against the death penalty or if the juror would automatically vote for the death penalty if the defendant were to be found guilty of capital murder.[23] Restrictions on the use of hypotheticals prevents counsel from conducting a *Witherspoon* and *Morgan* inquiry. Hypotheticals are essential because jurors supposedly do not know much about this particular case. The only way to determine whether a juror could consider life or death is to pose hypotheticals. It is not enough to just ask the question: "Would you ever impose the death penalty?" While it is true that the questions to a prospective juror must be posed with reference to the juror's ability to consider the evidence and the court's instructions, hypotheticals are still necessary to determine whether the juror can truly consider both life and death. By not allowing the hypothetical questions, limits are placed on the defense in determining where potential jurors stand on the issue of the death penalty.

Schmitt further argued that the trial court improperly asked leading questions of prospective jurors during voir dire in order to rehabilitate them.[24] When the judge asks leading questions the defense counsel must object the moment the question is asked.[25] Schmitt did not object to the leading questions specifically

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15. *Id.* at 196.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. 391 U.S. 510 (1968).
22. 504 U.S. 719 (1992).
23. Witherspoon v. Illinois, 391 U.S. 510 (1968) (holding that a juror could not be dismissed for cause for general objections to the death penalty); Morgan v. Illinois, 504 U.S. 719 (1992) (holding that a judge must ask, if requested by counsel, whether a potential juror would automatically vote for the death penalty if the defendant was found guilty of capital murder).
24. *Schmitt*, 547 S.E.2d at 196-97.
25. *Id.*

but rather made a general objection at the end of the voir dire.[26] The appellate court therefore considered the objections waived because they were untimely.[27]

B. Declarations Against Penal Interest

Schmitt argued that the trial court erred in refusing to permit the crisis negotiator, Lieutenant Clarcq, to testify about statements that Schmitt made regarding the robbery and the shooting.[28] The statements included Schmitt's admission that he committed the robbery and his claim that he did not intend to kill Dunning, but rather, shot him during a struggle.[29] The court disagreed with Schmitt that the statements were admissible as a declaration against his penal interest.[30] Declarations against penal interest are an exception to the hearsay rule which allows out-of-court statements that tend to incriminate a declarant to be received in evidence upon a showing that the declaration is reliable and that the declarant is presently unavailable.[31] When the declarant has made a statement that is contrary to his self-interest, this "element of self-interest" functions as a "reasonably safe substitute for the oath and cross-examination as a guarantee of truth."[32] The court believed that the statements that Schmitt wanted admitted constituted a self serving denial of criminal intent.[33] For this reason, the court ruled that the statements were not declarations against penal interest.[34]

C. Sentencing Issues

1. Evidence of Victim's Character

The Commonwealth was allowed to present testimony from the victim's friends at the sentencing phase of the trial.[35] Several bank employees testified about his kindness and generosity toward his fellow employees.[36] The Commonwealth presented testimony that he was the father of three children and was soon

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26. *Id.* at 197.
27. *Id.*
28. *Id.* at 198.
29. *Id.*
30. *Id.*
31. *See* Ellison v. Commonwealth 247 S.E.2d 685, 688 (Va. 1978) (holding that, while a declaration against penal interest is an exception to the hearsay rule, the declaration is only admissible upon a showing that the declaration is reliable).
32. Newberry v. Commonwealth, 61 S.E.2d 318, 326 (Va. 1950) (stating that admissions that are contrary to self interest, even those generally considered hearsay, are admissible so long as the evidence is important to the ends of justice and the element of self-interest affords a reasonably safe substitute for the oath and cross examination as a guarantee of truth).
33. *Schmitt*, 547 S.E.2d at 198.
34. *Id.*
35. *Id.* at 193.
36. *Id.*

to be married.[37] The admission of this testimony about the victim should be compared to the denial of testimony about the victim in *Lenz v Commonwealth*[38] and *Remington v Commonwealth*.[39] In *Lenz*, the court refused to allow evidence of the victim's prior record showing that the victim was a murderer.[40] The court stated, "[t]he victim's prior convictions had no relevance to the issue whether the defendant's acts were vile, inhuman, or showed depravity of mind, and the victim's criminal record was not relevant to the issue whether the defendant would constitute a serious continuing threat to society."[41] In *Remington*, the court relied on the *Lenz* decision in determining that "generally, a defendant does not have a constitutional right to present evidence of a victim's criminal history."[42] It is difficult to determine what, if any, relevance statements about the victim's history or character have on the determination of a sentence. The evidence about the degree of harm or loss caused by the crime is not relevant to the determination about vileness and/or future dangerousness that the jury is required to make when determining whether to give life or death.[43] The court has now permitted the Commonwealth to introduce evidence that portrays the victim in a positive light, but has disallowed defendant's attempts to introduce evidence that portrays the victim in a negative light. If the court allows the introduction of victim evidence at all, then it should not matter whether the evidence is good or bad.

2. *Conditions of Incarceration*

Schmitt contended that the trial court erred in refusing to allow evidence concerning prison life to rebut the Commonwealth's arguments on future dangerousness.[44] Schmitt claimed that in capital murder sentencing, such evidence is relevant to the issue of whether a defendant will pose a future threat to society.[45] *Simmons v South Carolina*[46] held that in a case in which future dangerousness is at issue and the only alternative to a sentence of death under applicable

37. *Id.*

38. 544 S.E.2d 299 (Va. 2001).

39. *See also* Remington v. Commonwealth, 551 S.E.2d 620 (Va. 2001) (holding that a defendant has no constitutional right to present evidence of a victim's criminal history); Lenz v. Commonwealth, 544 S.E.2d 299 (Va. 2001) (holding that the victim's prior criminal record had no relevance in determining whether the defendant's acts were vile or showed a likelihood of future dangerousness); Mythri A. Jayaraman, Case Note, 14 CAP. DEF. J. 151 (2001) (analyzing Remington v. Commonwealth and Lenz v. Commonwealth).

40. *Lenz*, 544 S.E.2d at 307.

41. *Id.*

42. *Remington*, 551 S.E.2d at 635.

43. *See* Matthew L. Engle, *Due Process Limitations on Victim Impact Evidence*, 13 CAP. DEF. J. 55, 63 (2000).

44. *Schmitt*, 547 S.E.2d at 199.

45. *Id.*

46. 512 U.S. 154 (1994).

law is life without parole, due process requires that the jury be told that "life means life."[47] In Virginia, those convicted of capital murder are ineligible for parole. Therefore, when determining whether the defendant will pose a continuous threat to society, the society referred to must be prison society because the defendant will never again be a member of any other society.[48] For this reason evidence of prison life becomes highly relevant. The Supreme Court of Virginia has held that prison life testimony is not admissible as mitigation evidence, however, it should be used to rebut future dangerousness.[49] In *Gardner v Florida*,[50] the United States Supreme Court ruled that capital defendants have a constitutional right to present evidence which rebuts the proposition that the defendant poses a future danger to society.[51] In the case at hand, the court concluded that because the Commonwealth had not presented evidence concerning prison security, the evidence proffered by Schmitt was not admissible to rebut particular evidence concerning prison security or prison conditions offered by the Commonwealth.[52] However, the court was mistaken. The Commonwealth did make reference to prison life during closing argument.[53] The prosecutor mentioned prison life in his closing argument when he talked about the "wonderful life" Schmitt would have were he sentenced to life imprisonment.[54] Because the Commonwealth made reference to prison life and because the defendant has a constitutional right to rebut the Commonwealth's argument of future dangerousness, the court should have allowed prison life evidence to be introduced.

3. Vileness

Schmitt next argued that the trial court erred in allowing the Commonwealth to present evidence regarding vileness and in allowing the jury to consider this factor.[55] Schmitt claimed that although the jury did not use the vileness

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47. Simmons v. South Carolina, 512 U.S. 154 (1994); *see generally* Kathryn Roe Eldridge, Case Note, 14 CAP. DEF. J. 89 (2001) (analyzing Shafer v. South Carolina, 121 S. Ct. 1263 (2001) (holding by the Supreme Court of the United States that the *Simmons* instruction that life means life does apply when future dangerousness is at issue)).

48. VA. CODE ANN. § 19.2-264.4(A) (Michie 2000) (stating that any person sentenced to life imprisonment is ineligible for parole).

49. *See generally* Burns v. Commonwealth, 541 S.E.2d 872 (Va. 2001) (allowing for limited rebuttal on the relevance of prison life evidence to future dangerousness).

50. 430 U.S. 349 (1977).

51. Gardner v. Florida, 430 U.S. 349 (1977).

52. *Schmitt*, 547 S.E.2d at 199.

53. *Id.*

54. *Id.* at 200.

55. *Id.* at 201; *see also* Peterson v. Commonwealth, 302 S.E.2d 520 (Va. 1983) (holding that the jury fixed punishment at death based upon a finding of future dangerousness rather than vileness because killing with a single gun shot wound from which the victim dies instantly does not constitute vileness).

factor in its determination to impose the death penalty, the arguments concerning vileness were prejudicial to the jury's consideration of future dangerousness.[56] The court ruled that the jury's rejection of the vileness claim is proof that they understood the court's instruction to consider the two aggravating factors separately.[57]

4. *Future Dangerousness*

Schmitt further claimed that there was insufficient evidence to support the jury's finding of future dangerousness.[58] Future dangerousness refers to the probability that the defendant would commit criminal acts of violence that would constitute a "continuing serious threat to society."[59] The court has held that the "facts and circumstances surrounding a capital murder may be sufficient, standing alone, to support a finding of future dangerousness."[60] In this case, Schmitt murdered Dunning, a security guard, to facilitate a robbery.[61] The Supreme Court of Virginia ruled that the jury was entitled to find that this violent act was sufficient to show "future dangerousness."[62] By ruling that the violent act itself was enough to meet the requirements for future dangerousness, the court effectively ruled that every capital murder meets the future dangerousness requirement because a violent act is implicit in a capital murder.

5. *Mitigating Factors*

Schmitt also asserted that the trial court erred in refusing to instruct the jury on mitigating factors.[63] Schmitt claimed that he was under the influence of controlled substances, that he had shown remorse for his actions, and that a term of life imprisonment would be served without parole.[64] The court ruled that Schmitt was not entitled to a jury instruction that emphasized any particular

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56. *Schmitt*, 547 S.E.2d at 201.

57. *Id.*

58. *Id.*

59. *See* VA. CODE ANN. § 19.2-264.2 (Michie 2000) (stating that "a sentence of death shall not be imposed unless a jury finds a threat of future dangerousness or vileness and recommends that the death penalty be imposed").

60. *Schmitt*, 547 S.E.2d at 201; *see* Lovitt v. Commonwealth, 537 S.E.2d 866, 878 (Va. 2000) (holding that the facts and circumstances surrounding a capital murder may be sufficient standing alone to support a finding of future dangerousness).

61. *Schmitt*, 547 S.E.2d at 192.

62. *Id.* at 201 (stating that "the jury was entitled to find that this violent, premeditated action was strong evidence that Schmitt is a dangerous person who would commit future criminal acts of violence").

63. *Id.* at 202.

64. *Id.*

mitigating factors and the trial court was therefore correct in not allowing this jury instruction.[65]

D. Proportionality Review

Virginia Code Section 17.1-313(C) requires the Supreme Court of Virginia to review death sentences to determine whether they are: (1) "imposed under the influence of passion, prejudice, or any other arbitrary factor"; and (2) "excessive or disproportionate to the penalty imposed in similar cases."[66] Schmitt argued that the sentence was based on passion, prejudice and arbitrariness because: (1) the Commonwealth was improperly allowed to argue that Schmitt's crime satisfied the aggravating factor of vileness; (2) evidence and testimony was allowed that inflamed the passions of the jury; and (3) the prosecutor engaged in raising the juror's passions by making improper remarks encouraging them to vote for the death penalty.[67]

The court found no merit in Schmitt's claims.[68] According to the court, the introduction of the vileness aggravating factor clearly did not affect the death sentence ruling because the jury rejected the use of vileness as an aggravating factor in its determination to impose the death penalty.[69] The court found that the testimony was properly admitted as evidence and the jury was entitled to view all the available evidence in making its sentence determination.[70] As for the prosecution's comments, the court found no reason to believe that any of the comments influenced the jury's verdict.[71]

When determining whether the sentence was disproportionate or excessive, the court must look at how other sentencing bodies in the jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant.[72] The court focused on other capital murder cases in which the death penalty was obtained under the predicate of future dangerousness.[73] The court found, with some exceptions, that the death sentence has generally been imposed where there is a finding of future dangerousness and the underlying crime was robbery.[74]

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65. *Id.* (citing Burns v. Commonwealth 541 S.E.2d 872, 895 (Va. 2001) (holding that defendant convicted of capital murder is not entitled to a jury instruction that emphasizes a particular mitigating factor)).

66. VA. CODE ANN. § 17.1-313(C) (Michie 2000).

67. *Schmitt*, 547 S.E.2d at 202, 203.

68. *Id.* at 203.

69. *Id.*

70. *Id.*

71. *Id.*

72. *See also* VA. CODE ANN. § 17.1-313(C) (Michie 1999) (mandating that a reviewing court reviews the death sentence imposed to determine whether it (1) has been "imposed under the influence of passion, prejudice, or any other arbitrary factor"; or (2) "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant").

73. *Schmitt*, 547 S.E.2d at 203.

74. *Id.* However, there are also cases where a life sentence has been given upon a finding of

E. Appellate Issues Waived

1. Jury Issues

The appellant in this case had multiple issues to appeal. Unfortunately many of the issues were waived for failure to object at the proper time.[75] Schmitt failed to make a timely objection to the seating of the jury. There are several objections that must be made when objecting to the seating of a jury.[76] First, defense counsel must object when the challenge for cause is overruled.[77] The defense counsel must object to the seating of the jury.[78] Counsel cannot be forced to use a peremptory strike to strike a juror who should have been excluded for cause.[79] If it is necessary to use a peremptory strike to strike a juror who was not excluded on a challenge for cause, defense counsel must still object to the seating of the jury, but can agree to the seating of the jury subject to prior objections.[80]

2. Trial Judge's Questions at Voir Dire

Schmitt argued that the trial court improperly asked leading questions of prospective jurors during voir dire.[81] The judge's voir dire was done to "rehabilitate" and make the jurors appear to be qualified.[82] The judge, as claimed by Schmitt, acted "inappropriately" by asking prospective jurors whether they could fairly consider both sentencing alternatives, thereby "hindering [Schmitt's] opportunity to get a valid response."[83] The issue was waived on appeal because an objection based on the judge asking leading questions must be made when the question was asked and Schmitt failed to do this.[84]

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future dangerousness when the underlying crime was robbery. *See* e.g., McLean v. Commonwealth, 516 S.E.2d 717 (Va. Ct. App. 1999); Mundy v. Commonwealth, 390 S.E.2d 525 (Va. Ct. App. 1990); Rea v. Commonwealth, 421 S.E.2d 464 (Va. Ct. App. 1992).

75. *Schmitt*, 547 S.E.2d at 195.

76. *Id.*

77. *See* Beavers v. Commonwealth, 427 S.E.2d 411, 418-19 (Va. 1993) (holding that when a juror is struck for cause an objection must be made immediately or the issue is waived).

78. Spencer v. Commonwealth, 384 S.E.2d 785 (Va. 1989) (holding that if a party objects to rulings made during voir dire of a prospective juror but subsequently fails to object to the seating of that juror, the party has waived the voir dire objections).

79. *See* Murray v. Commonwealth, No. 0874-00-4, 2001 WL 345780, at *1 (Va. Ct. App. Apr. 10, 2001) (holding that if the judge errs in denying defense challenge for cause, the error survives defense counsel's use of a peremptory to strike the juror).

80. *Id.* (finding that defendant did not waive objection to seating of juror by agreeing to seat juror because defendant did so while preserving the prior objection).

81. *Schmitt*, 547 S.E.2d at 196-97.

82. *Id.*

83. *Id.*

84. *Id.*

3. *Jury Instructions*

Schmitt argued that the trial court erred in not allowing his jury instruction. He noted that the Commonwealth's failure to produce the two bank customers that were behind Schmitt in line allowed the jury to presume that the testimony of those witnesses was unfavorable to the Commonwealth.[85] The Supreme Court of Virginia ruled that the trial court's refusal of the instruction was the correct ruling because the Commonwealth's burden of proof does not include "the duty to produce all witnesses possibly having some knowledge of a case."[86] Schmitt also objected to the use of the instruction that it is "permissible to infer that every person intends the natural and probable consequences of his or her acts."[87] Schmitt argued that this diminished the presumption of innocence.[88] The Supreme Court of Virginia ruled that this instruction did not establish an improper presumption but rather stated a permissive inference.[89] Objections to jury instructions must be made when the jury instructions are issued.[90]

4. *Commonwealth's Closing Argument*

Schmitt objected to the following comments made by the prosecutor during his closing argument: "(1) Schmitt's use of a stolen gun when the Commonwealth earlier had stipulated that the gun was not stolen; (2) Schmitt's prior 'shotgun assault' on his girlfriend; and 3) the 'wonderful life' in prison Schmitt would have were he sentenced to life imprisonment."[91] Schmitt claimed that his fair trial and due process rights were violated.[92] The Supreme Court of Virginia disagreed.[93] Schmitt objected when the Commonwealth made the comment about Schmitt's use of the stolen gun and the trial court promptly gave explicit curative instructions.[94] The Supreme Court of Virginia ruled that without evidence to the contrary, the court will presume that the jury followed the instructions that were given.[95]

As to the comments about the "shotgun assault" and the "wonderful life," Schmitt failed to make a request for a curative instruction or mistrial at the time

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85. *Id.* at 198.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 199 (stating that the instruction did not establish an improper presumption but rather stated a permissive inference) (*citing* Kelly v. Commonwealth 382 S.E.2d 270, 278 (Va. Ct. App. 1989)).

90. VA. SUP. CT. R. 5:25 (2001) (stating that an "[e]rror will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice").

91. *Schmitt*, 547 S.E.2d at 200.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

the remarks were made so the objections were waived.[96] A defendant must object to comments made during the closing argument immediately following the objectionable comment.[97] While the issues in this case were rejected by the court, the issues that were waived or procedurally defaulted may have had merit. Unfortunately, those issues were never dealt with because Schmitt failed to raise objections at the right time.[98]

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96. *Id.*

97. *Id.* at 200-01.

98. *See generally* Matthew K. Mahoney, *Bridging the Procedural Default Chasm*, 12 CAP. DEF. J. 305 (2000).