Capital Defense Journal

Volume 17 | Issue 2 Article 20

Spring 3-1-2005

Riner v. Commonwealth 601 S.E.2d 555 (Va. 2004)

Riner v. Commonwealth
601 S.E.2d 555 (Va. 2004)

I. Facts

A jury convicted Charles Douglas Riner of arson, petit larceny, and the first-degree murder of Karen Denise Riner ("Denise").[1] The jury based its conviction on circumstantial evidence arising from the fire that killed Denise and from Riner's activities before and after the fire.[2] In particular, the prosecution presented evidence regarding disagreements between Riner and Denise over Riner's disciplining Denise's son from a previous marriage and over the couple's financial difficulties.[3] The Court of Appeals of Virginia affirmed Riner's conviction and sentence.[4] Riner brought six assignments of error on appeal to the Supreme Court of Virginia.[5]

II. Holding

The Supreme Court of Virginia denied Riner's assignments of error and affirmed the judgment of the court of appeals.[6] In particular, the court held that Riner waived his motion to change venue and his objection to the admission of double hearsay testimony.[7] Further, the court affirmed the trial court's determination that the juror misconduct did not warrant a mistrial.[8]

---

1. Riner v. Commonwealth, 601 S.E.2d 555, 558 (Va. 2004); *see* VA. CODE ANN. § 18.2-32 (Michie 2004) (defining first-degree murder); VA. CODE ANN. § 18.2-77 (Michie 2004) (stating the punishment for burning down a dwelling house); VA. CODE ANN. § 18.2-96 (Michie 2004) (defining petit larceny). The victim, Denise, was Riner's wife. *Riner*, 601 S.E.2d at 558.

2. *Riner*, 601 S.E.2d at 558–61.

3. *Id.* at 560.

4. Riner v. Commonwealth, 579 S.E.2d 671, 676 (Va. Ct. App. 2003). On appeal, Riner contended that the trial court erred in denying his change of venue motion, denying his motion for a mistrial based on juror Gibson's misconduct, allowing a private prosecutor to assist the prosecution, and admitting an entry from a pawn shop journal. *Id.*

5. *Riner*, 601 S.E.2d at 558. The six issues were: (1) the trial court's denial of Riner's change of venue motion; (2) the trial court's refusal to grant a mistrial based on juror misconduct; (3) the prosecution's use of a private prosecutor; (4) the prosecution's use of double hearsay testimony; (5) the prosecution's use of entries in a pawn shop diary; and (6) the sufficiency of the evidence in the arson conviction. *Id.*

6. *Id.*

7. *Id.* at 562–63, 571.

8. *Id.* at 563.

III. Analysis

A. Change of Venue Motion

Prior to trial, Riner moved to change venue because of prejudicial media coverage in Wise County.[9] The trial judge denied the motion but took the claim under advisement.[10] The judge indicated that he would reconsider the motion if it appeared that Riner could not receive a fair trial in Wise County.[11] Riner did not object when the trial court denied the motion, after the conclusion of voir dire, or prior to the time when the jury was empaneled.[12] The Commonwealth made a motion to change venue conditioned on whether the trial court would permit Riner to introduce polygraph evidence to rebut the inference that Riner fled the country in order to avoid prosecution for his wife's murder.[13] The Commonwealth argued that the admission of the polygraph evidence would establish that the judge thought the jury was tainted because some of the jurors knew about Riner's flight to Panama after Denise's murder.[14] Riner joined the Commonwealth's unsuccessful conditional motion to change venue.[15] Riner did not, however, mention his previous change of venue motion when joining the Commonwealth's motion.[16]

On appeal, Riner asserted that: (1) the trial judge applied an improper legal standard in ruling on Riner's change of venue motion; (2) the trial judge erred in denying his change of venue motion; and (3) the trial judge erred in denying the Commonwealth's change of venue motion.[17] First, Riner argued that the trial judge should have evaluated his change of venue motion by assessing the ease of jury selection rather than the ultimate result of the selection process.[18] The court of appeals held that Riner defaulted the claim because he did not object when the trial court applied the allegedly improper legal standard.[19] The Supreme Court

---

9. *Id.* at 561; *see* VA. CODE ANN. § 19.2-251 (Michie 2004) (stating that the trial court may order a change of venue for good cause). Riner submitted 157 affidavits from Wise County residents stating that a fair trial was impossible in Wise County. Brief for Appellant at 10, Riner v. Commonwealth, 601 S.E.2d 555 (Va. 2004) (No. 031299) (on file with author).

10. *Riner*, 601 S.E.2d at 561.

11. *Id.*

12. *Id.* at 561–62.

13. *Id.* at 561.

14. *Id.*

15. *Id.*

16. *Riner*, 601 S.E.2d at 561.

17. *Id.* at 562.

18. *Id.*; *see* Thomas v. Commonwealth, 559 S.E.2d 652, 661 (Va. 2002) ("While this Court has included statements regarding the impartiality of the jury actually seated when discussing the relative ease of seating the jury, it is the ease of seating the jury that is the relevant factor, not the ultimate result of that process.").

19. *Riner*, 601 S.E.2d at 562; *see* VA. SUP. CT. R. 5A:18 ("No ruling of the trial court . . . will

of Virginia held that, in accordance with Virginia Supreme Court Rule 5:17, Riner defaulted his claim regarding the improper legal standard because his assignment of error should have challenged the court of appeal's finding of procedural default instead of the trial court's ruling.[20]

The court also held that Riner waived his appeal of the trial court's denial of his change of venue motion.[21] The court cited *Green v. Commonwealth*,[22] which held that once a trial court takes a change of venue motion under advisement prior to voir dire, the defense must renew the motion before the jury is empaneled.[23] The court concluded that Riner procedurally defaulted his claim by not renewing his motion before the jury was empaneled.[24]

Finally, the court determined that Riner did not waive his right to appeal the trial court's denial of the Commonwealth's conditional change of venue motion.[25] The court presumed that a defendant will receive a fair hearing in the jurisdiction where the offense took place.[26] In order to rebut that presumption, the party making the motion must show a widespread prejudice amongst the citizenry of the jurisdiction and a reasonable certainty that the prejudice would prevent a fair trial.[27] The court held that the trial court did not abuse its discretion by denying the motion because the potential prejudice did not rebut the presumption of a fair trial.[28]

---

be considered as a basis for reversal unless the objection was stated together with the grounds therefor at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice.").

20. *Riner*, 601 S.E.2d at 562; *see* VA. SUP. CT. R. 5:17(c) ("Where appeal is taken from a judgment of the Court of Appeals, only assignments of error relating to questions presented in, or to actions taken by, the Court of Appeals may be included in the petition for appeal to this Court."). The court also denied Riner's argument that the "ends of justice" required the court to hear the claim because the decision in *Thomas* postdated Riner's trial. *Riner*, 601 S.E.2d at 562; *see* Brief for Appellant at 31, *Riner* (No. 031299) (arguing that the timing of the *Thomas* decision required the court to hear the issue on the merits); VA. SUP. CT. R. 5A:18 (stating that a court may hear otherwise procedurally defaulted claims in order "to attain the ends of justice").

21. *Riner*, 601 S.E.2d at 562.

22. 580 S.E.2d 834 (Va. 2003).

23. *Riner*, 601 S.E.2d at 562–63 (citing Green v. Commonwealth, 580 S.E.2d 834, 842 (Va. 2003)). *See generally* Jessie A. Seiden, Case Note, 16 CAP. DEF. J. 273 (2003) (analyzing Green v. Commonwealth, 580 S.E.2d 834 (Va. 2003)).

24. *Riner*, 601 S.E.2d at 563.

25. *Id.*

26. *Id.* (citing Mueller v. Commonwealth, 422 S.E.2d 380, 388 (Va. 1992)).

27. *Id.* (citing Stockton v. Commonwealth, 314 S.E.2d 371, 380 (Va. 1984)).

28. *Id.* The Supreme Court of Virginia did not consider Riner's reasons for joining the motion because Riner did not reassert his reasons for requesting a change of venue when joining the Commonwealth's motion. *Id.*

B. Juror Misconduct

At trial, Riner moved for a mistrial on several occasions based on the misconduct of juror Gibson.[29] Gibson engaged in the following misconduct: (1) he went to the Commonwealth Attorney's office to ask about a piece of evidence; (2) he tried to pass a note through the judge to the Commonwealth Attorney about another piece of evidence; (3) he talked to fellow jurors during the presentation of evidence; (4) he made inflammatory comments about the evidence; (5) he made sexual comments to a juror; (6) during the trial he had been in contact with his wife, who informed Gibson about a newspaper article involving Riner; and (7) he discussed the newspaper article with jurors.[30] The court dismissed Gibson during the trial and instructed the jury to disregard Gibson's actions but overruled Riner's various motions for a mistrial.[31]

On appeal, Riner argued that the third-party contact and other misconduct resulted in prejudice and violated his right to a fair trial.[32] The court noted that under *Remmer v. United States*[33] a presumption of prejudice arises when the defendant proves extraneous third-party contact with a member of the jury and that the contact involved an issue before the jury.[34] The court determined that Riner satisfied the *Remmer* requirements for a presumption of prejudice, but that in accordance with *Lenz v. Warden*,[35] the Commonwealth rebutted that presumption by showing that the contact was harmless.[36] The court concluded that the Commonwealth rebutted the presumption of prejudice because the trial court dismissed Gibson prior to jury deliberations, only one juror remembered Gibson's comments about the newspaper article, the jurors generally ignored Gibson's actions and did not allow his actions to influence them, and the trial court instructed the jury to disregard any comments Gibson made.[37] Particularly, the court emphasized Gibson's absence during jury deliberations.[38]

---

29. *Id.* at 563–65.

30. *Riner*, 601 S.E.2d at 563–65.

31. *Id.*

32. *Id.* at 565.

33. 347 U.S. 227 (1954).

34. *Riner*, 601 S.E.2d at 565 (citing Remmer v. United States, 347 U.S. 227, 229 (1954)).

35. 593 S.E.2d 292 (Va. 2004).

36. *Riner*, 601 S.E.2d at 565–66; *see* Lenz v. Warden, 593 S.E.2d 292, 298 (Va. 2004) (stating that once a defendant shows third-party contact involving matters pending before the jury, a presumption of prejudice arises and the Government must prove that the prejudice was harmless). *See generally*, Terrence T. Egland, *Prejudiced by the Presence of God: Keeping Religious Material Out of Death Penalty Deliberations*, 16 CAP. DEF. J. 337, 342–46 (2004) (discussing Virginia's treatment of instances of juror misconduct involving the viewing of extraneous material).

37. *Riner*, 601 S.E.2d at 566–67.

38. *Id.* at 566.

Regarding Gibson's other non-third-party conduct, the court stated that Riner must "establish that juror misconduct 'probably resulted in prejudice.' "[39] The court noted that courts primarily find juror misconduct prejudicial when the conduct occurs outside the jury room and causes the jury to consider evidence not introduced at trial.[40] The court determined that Riner failed to show that Gibson's conduct "probably resulted in prejudice" because Gibson did not participate in jury deliberations, the jurors maintained an open mind about the evidence and did not allow Gibson to influence their decision, and the trial court gave a curative instruction.[41] Thus, the court held that the trial court did not abuse its discretion in denying Riner's motions for a mistrial.[42] Further, the court did not consider some of juror Gibson's actions because Riner did not move for a mistrial immediately after learning about them and thus defaulted those aspects of his juror misconduct claim.[43]

C. Admission of Hearsay

Riner also claimed that the trial court erred in admitting the statement of a witness who testified that Denise told her that Riner had threatened to kill Denise.[44] The court first examined whether the United States Supreme Court's decision in *Crawford v. Washington*[45] should affect its treatment of the alleged double hearsay statement.[46] The court noted that *Crawford* distinguished between testimonial and non-testimonial statements in determining whether the admission of a statement by an unavailable witness violates the Confrontation Clause.[47] The

39. *Id.* at 567 (quoting Robertson v. Metro. Washington Airport Auth., 452 S.E.2d 845, 847 (Va. 1995)).

40. *Id.* (citing Caterpillar Tractor Co. v. Hulvey, 353 S.E.2d 747, 751 (Va. 1987)).

41. *Id.* at 567–68.

42. *Id.* at 567.

43. *Riner*, 601 S.E.2d at 567 n.9 (citing VA. SUP. CT. R. 5:25).

44. *Id.* at 569. On appeal, Riner's primary argument was that although the statement from Denise to the witness may evidence Denise's fear of Riner, Denise's fear of Riner was not relevant to the case. Brief for Appellant at 19, *Riner* (No. 031299). A victim's fear of the defendant is only relevant if the defense is that the victim died as a result of suicide, accident, or self-defense. *Id.* at 20; *see* Evans-Smith v. Commonwealth, 361 S.E.2d 436, 442 (Va. Ct. App. 1987) ("A victim's state of mind would be relevant in cases where the defense contends that the death was the result of suicide, accident or self-defense."). Riner argued that the accident exception does not apply when the defendant claims that his actions did not cause the death of the victim. Brief for Appellant at 21, *Riner* (No. 031299); *see* State v. Post, 901 S.W.2d 231, 236 (Mo. App. 1995) (stating that the accident exemption only applies when the defendant acknowledges that he killed the defendant but claims that his actions were accidental).

45. 124 S. Ct. 1354 (2004).

46. *Riner*, 601 S.E.2d at 569 (citing Crawford v. Washington, 124 S. Ct. 1354 (2004)).

47. *Id.* at 570 (citing *Crawford*, 124 S. Ct. at 1374); *see* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."). In *Crawford*, The United States Supreme Court stated that the Confrontation Clause is

court stated that *Crawford* identifies testimonial statements as those made with the reasonable belief that someone may later use them in court.[48] Under *Crawford*, a court may only admit testimonial statements if the witness is unavailable and if the defendant had a prior opportunity to cross-examine the witness.[49] However, the Supreme Court of Virginia found no reason to believe that Denise made the statement thinking that it would be used in court.[50] Thus, the court concluded that Denise's statements were not testimonial statements and *Crawford* did not apply.[51]

At trial, Riner objected to the testimony because the communication between Denise and the witness did not fit under any recognized hearsay exception.[52] The trial court overruled Riner's objection to the testimony because the threat from Riner to Denise was relevant in showing Riner's relationship with Denise and was admissible under a hearsay exception because it showed Riner's state of mind.[53] Riner argued that the trial court erred by not determining whether each level of hearsay—Riner's communication to Denise and Denise's communication to the witness—fit under a recognized exception to the hearsay rule.[54] The court agreed that each level of testimony must fit under a recognized hearsay exception in order for a court to admit double hearsay testimony.[55] The court found, however, that the trial court never ruled on the admissibility of the statement made by Denise to the witness and that Riner never pointed this omission out to the trial court after the judge indicated that he had focused only of the first level of hearsay—Riner's statements to Denise.[56] The court stated that Riner's situation was analogous to the situation in *Green* when the defendant did not renew his pretrial change of venue motion before the court empaneled the jury.[57] The court held that Riner waived his right to challenge the trial court's error by not pointing out the mistake when it was made.[58] The court concluded that Riner needed to renew his motion when the trial court failed to rule on the

---

particularly concerned with out-of-court declarations that are testimonial. *Crawford*, 124 S. Ct. at 1364.

48. *Riner*, 601 S.E.2d at 570 (citing *Crawford*, 124 S. Ct. at 1364).

49. *Id.* (citing *Crawford*, 124 S. Ct. at 1374).

50. *Id.*

51. *Id.*

52. *Id.* at 571.

53. *Id.*; *see* Johnson v. Commonwealth, 347 S.E.2d 163, 165 (Va. Ct. App. 1986) ("Out of court statements offered to show the state of mind of the declarant are admissible in Virginia when relevant and material.").

54. *Riner*, 601 S.E.2d at 571 (citing West v. Commonwealth, 407 S.E.2d 22, 24 (Va. Ct. App. 1991)).

55. *Id.* (citing *West*, 407 S.E.2d at 24).

56. *Id.*

57. *Id.* (citing *Green*, 580 S.E.2d at 842).

58. *Id.*

second level of Riner's double hearsay claim in order to give "the trial court the opportunity to rule intelligently on the issue."[59]

Justice Koontz, joined by Justices Hassel and Keenan, dissented from the majority's ruling on the hearsay issue.[60] The dissent concluded that Riner had not procedurally defaulted the double hearsay claim because Riner's objection at trial was sufficient.[61] Virginia Supreme Court Rule 5:25 requires a party to object " 'with reasonable certainty' in order to enable the trial judge to rule on the objection intelligently and, thus, to avoid unnecessary reversal on appeal."[62] Although the dissent admitted that Riner could have made his objection clearer, Justice Koontz thought that his objection satisfied the "with reasonable certainty" requirement of Rule 5:25.[63] The dissent concluded that Riner's objection adequately called the issue to the court's attention and did not prevent the trial court from ruling on the claim intelligently.[64]

IV. Application to Virginia Practice

A. Default on Change of Venue Motion

The Supreme Court of Virginia held that Riner waived his change of venue motion despite Riner's pretrial motion, the court's taking the motion under advisement, and Riner's joining in the Commonwealth's conditional change of venue motion.[65] The court relied on *Green* and stated that defendants waive their pretrial change of venue motions unless they renew their motions immediately before the court empanels the jury.[66] Also, a defendant must make that objection with some particularity.[67] Although Riner joined in the Commonwealth's condi-

---

59. *Id.*; *see* VA. SUP. CT. R. 5:25 ("Error will not be sustained to any ruling of the trial court . . . unless the objection was stated with reasonable certainty at the time of the ruling."); Johnson v. Raviotta, 563 S.E.2d 727, 731 (Va. 2002) ("The purpose of Rule 5:25 is to ensure that the trial court has an opportunity to rule intelligently on a party's objections and avoid unnecessary mistrials or reversals.").

60. *Riner*, 601 S.E.2d at 575 (Koontz, J., dissenting).

61. *Id.*

62. *Id.* (quoting VA. SUP. CT. R. 5:25).

63. *Id.*

64. *Id.* at 575–76. The dissent went on to rule on the merits of the double hearsay claim and determined that the trial court should not have admitted the hearsay because the communication between Denise and the witness did not fit under a recognized exception to the hearsay rule. *Id.* at 579. Further, the dissent concluded that the admission of the double hearsay evidence required reversal and a new trial because the trial court's error was not harmless. *Id.* at 580.

65. *Id.* at 562–63.

66. *Riner*, 601 S.E.2d at 562–63; *see Green*, 580 S.E.2d at 842 (stating that the defendant had to renew the claim before the court empaneled the jury in order to preserve a change of venue motion).

67. *See* Spencer v. Commonwealth, 384 S.E.2d 785, 793 (Va. 1989) (stating that when a defendant renews a pretrial objection prior to the seating of a juror, he must object "with sufficient

tional motion for a change of venue, the court concluded that he did not preserve his own prior objections because he did not specifically renew them.[68] Thus, *Riner* underscores that defendants must restate their pretrial change of venue motions before a court seats the jury and must specifically state why the jury selection process shows that the motion should have been granted.

B. Juror Misconduct

The court determined that juror Gibson's conduct did not prejudice Riner because of the trial court's curative instruction, Gibson's absence during deliberations, and the other jurors' attitudes toward Gibson.[69] Had Gibson deliberated with the jury, the court may have granted the mistrial.[70] The court in *Gray v. Commonwealth*[71] rejected a motion for a mistrial when an alternate juror concealed during voir dire that he was a law enforcement officer because the juror "was merely an alternate and, therefore, did not participate in the jury's deliberations or decision."[72] Thus, an important factor for defendants arguing that juror misconduct warrants a mistrial is whether that juror deliberated with the jury. Further, defendants should move for a mistrial immediately after learning of each specific instance of juror misconduct. Otherwise, they risk waiving their right to challenge that conduct on appeal.[73]

C. Defaulted Objection to Double Hearsay

The court in *Spencer v. Commonwealth*[74] stated that the standard for determining whether a defendant preserved an objection for appeal is whether the defendant stated the claim with "sufficient specificity," and Supreme Court of Virginia Rule 5:25 requires a defendant to object "with reasonable certainty."[75] In this case, Riner argued that the witness's statement constituted double hearsay and that the communication between Denise and the witness did not fall under any

---

specificity").

68. *Riner*, 601 S.E.2d at 563.

69. *Id.* at 566–67.

70. *See id.* at 566 (finding that Gibson's absence from jury deliberations was "a significant fact distinguishing the present case from many other cases involving juror misconduct").

71. 356 S.E.2d 157 (Va. 1987).

72. Gray v. Commonwealth, 356 S.E.2d 157, 171 (Va. 1987).

73. *See* Reid v. Baumgardner, 232 S.E.2d 778, 781 (Va. 1977) (stating that the defendant's motion for a mistrial was not timely because the "objection should have been made when the objectionable words were spoken").

74. 384 S.E.2d 785 (Va. 1989).

75. *Riner*, 601 S.E.2d at 571–72 (citing VA. SUP. CT. R. 5:25); *see Spencer*, 384 S.E.2d at 793 (requiring a defendant to state an objection "with sufficient specificity" when renewing an objection originally made during voir dire).

recognized hearsay exception.[76] Yet because Riner did not apprise the trial court of its failure to rule on the claim properly, the Supreme Court of Virginia concluded that Riner did not give the trial court the opportunity to rule intelligently on the issue.[77]

The dissent noted that the majority's ruling "would place every criminal defendant in the position of having to request full and express rulings from the trial court on every objection in order to avoid the waiver applied in this case, a practice that is wholly impractical."[78] A careful defendant should take the dissent's advice. The holding not only requires that defendants object with sufficient specificity but also that defendants carefully evaluate a court's ruling for errors and bring any such errors or omissions to the judge's attention.[79] Although such persistence might seem to verge on arguing with the judge after an adverse ruling, *Riner* seems to require that defense counsel take that risk whenever the judge's initial ruling does not squarely and clearly address each ground of an objection or motion.

V. Conclusion

The court held that Riner procedurally defaulted on the change of venue and double hearsay issues.[80] Regarding pretrial change of venue motions, defendants must renew their objections prior to the seating of the jury in order to preserve their claims.[81] When objecting to a ruling made during trial, defendants must make specific objections and request "full and express rulings from the trial court" in order to preserve that issue.[82] Finally, the court denied Riner's claim that the trial court erred in not granting a mistrial due to juror misconduct primarily because the court had dismissed the juror prior to jury deliberations.[83]

Justin B. Shane

---

76. *Riner*, 601 S.E.2d at 571.

77. *Id.* at 571.

78. *Id.* at 577 (Koontz, J., dissenting).

79. *See id.* at 571 ("[B]y failing to bring to the trial court's attention the fact that it had ruled only on the admissibility of the primary hearsay in the statement, Riner did not afford the trial court the opportunity to rule intelligently on the issue now before us.").

80. *Id.* at 562, 571.

81. *Id.* at 562.

82. *Riner*, 601 S.E.2d at 577 (Koontz, J., dissenting).

83. *Id.* at 565–68.