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Winston v. Commonwealth 604 S.E.2d 21 (Va. 2004)

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I. Facts

In June 2003 a jury found Leon Jermain Winston guilty of three counts of capital murder, two counts of attempted robbery and statutory burglary, one count of maliciously discharging a firearm, and five counts of using a firearm while committing a felony.[1] All of the charges resulted from the murders of Anthony and Rhonda Robinson on April 19, 2002.[2] Witnesses and crime scene evidence presented at trial revealed that Winston and Kevin Brown broke into the Robinsons' house and shot and killed them both while the Robinsons' eight and five-year-old daughters were in the house.[3] In a separate sentencing phase, the jury found both the vileness and future dangerousness aggravators and imposed three death sentences.[4] On appeal to the Supreme Court of Virginia, Winston alleged numerous trial errors.[5]

II. Holding

The Supreme Court of Virginia found no error and affirmed Winston's three death sentences.[6] Specifically, the court determined that the trial court did not err when it denied Winston's request for an expert under *Ake v. Oklahoma*,[7] permitted testimony regarding the fact that one of the victims was pregnant at

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1. Winston v. Commonwealth, 604 S.E.2d 21, 28 (Va. 2004); *see* VA. CODE ANN. § 18.2-31 (Michie 2004) (defining capital murder). The three capital murder convictions were for "the capital murder of Anthony Robinson in the commission of robbery or attempted robbery . . . capital murder of Rhonda Robinson in the commission of robbery or attempted robbery . . . [and] capital murder of Rhonda Robinson during the same transaction in which another person was willfully, deliberately, and with premeditation killed." *Winston*, 604 S.E.2d at 28.

2. *Winston*, 604 S.E.2d at 26–28.

3. *Id.* at 26–27.

4. *Id.* at 28; *see* VA. CODE ANN. § 19.2-264.2 (Michie 2004) (listing the aggravating factors a jury must find in order to impose death).

5. *Winston*, 604 S.E.2d at 29; *see* VA. CODE ANN. § 17.1-313 (Michie 2004) (requiring automatic review of any death sentence by the Supreme Court of Virginia). Of the seventy-two assignments of error, the court immediately dismissed fifteen because Winston did not brief them. *Winston*, 604 S.E.2d at 29. Further, the court dismissed nine of Winston's assignments because the court found "no reason to modify our previously expressed views on these questions." *Id.* at 29–30. Various issues that involved the appointment of experts, the seating of jurors, admitted evidence, jury instructions, the sentencing phase, and the postsentencing phase will not be addressed in this case note. *See generally id.* at 26–55 (finding no error in the trial court's judgment).

6. *Winston*, 604 S.E.2d at 54–55.

7. 470 U.S. 68 (1985).

the time she was murdered, and allowed a police officer and other witness to testify regarding Winston's attempt to elude the police at the time of a prior, relatively minor offense.[8] Further, the court rejected Winston's argument that the absence of mental retardation is an element of a capital offense that the Commonwealth must affirmatively prove beyond a reasonable doubt to a jury.[9]

III. Analysis

A. Expert Funding Under Ake

First, Winston argued that the trial court erred when it appointed Winston a mental health expert pursuant to Virginia Code section 19.2-264.3:1, rather than under the federal due process rule of *Ake*.[10] Winston had requested the mental health expert pursuant to *Ake*, as opposed to section 19.2-264.3:1, and argued that he had an independent constitutional right to such a mental health expert.[11] The court presumed that Winston made the request to avoid the notice and discovery requirements of section 19.2-264.3:1.[12] *Ake* requires the state to provide a mental health expert to the indigent defendant when the defendant's sanity at the time of the offense is "likely to be a significant factor in his defense" or the State plans to proffer psychiatric testimony in support of future dangerousness during sentencing.[13] The Supreme Court of Virginia determined that the trial court fulfilled the *Ake* requirements when it furnished Winston with a mental health expert pursuant to section 19.2-264.3:1.[14] The court noted that Winston never demonstrated that his sanity at the time of the offense would be

8. *Winston*, 604 S.E.2d at 33–34, 38–40, 51–52; *see* Ake v. Oklahoma, 470 U.S. 68, 83–84 (1985) (holding that due process requires the state to provide a defendant with the means to at least one competent mental health expert when the defendant's sanity at the time of the offense is at issue or the prosecution plans to introduce psychiatric testimony regarding future dangerousness).

9. *Winston*, 604 S.E.2d at 50–51; *see* Ring v. Arizona, 536 U.S. 584, 602 (2002) (noting that any fact that increases the defendant's authorized punishment must be proven to a jury beyond a reasonable doubt).

10. *Winston*, 604 S.E.2d at 33.

11. *Id.*; *see* VA. CODE ANN. § 19.2-264.3:1 (Michie 2004) (requiring trial courts to supply capital defendants with a mental health expert upon a showing of financial need); *Ake*, 470 U.S. at 83–84 (holding that under certain circumstances due process requires the state to provide a defendant with the means to at least one competent mental health expert). *See generally* Mark J. Goldsmith, *Ask and the Commonwealth Shall Receive: The Imbalance of Virginia's Mental-Health Expert Statute*, 17 CAP. DEF. J. 293 (2005) (discussing possible constitutional challenges to Virginia Code section 19.2-264.3:1).

12. *Winston*, 604 S.E.2d at 33; *see* VA. CODE ANN. § 19.2-264.3:1(D) (requiring the defense to give the prosecution "the report and the results of any other evaluation of the defendant's mental condition conducted relative to the sentencing proceeding and copies of psychiatric, psychological, medical or other records obtained during the course of such evaluation" once the defense announces that it will introduce psychiatric or psychological evidence during sentencing).

13. *Ake*, 470 U.S. at 82–83.

14. *Winston*, 604 S.E.2d at 34.

a factor and that the prosecution had not planned to introduce psychiatric testimony regarding Winston's future dangerousness; thus, Winston did not trigger *Ake*'s requirements.[15] The court also added that Winston presented no psychiatric testimony at trial, and therefore, the notice provisions of section 19.2-264.3:1(D) were not at issue.[16]

B. Admission of Evidence of Victim's Pregnancy

Next, Winston argued "that any mention of Rhonda's pregnancy at trial was irrelevant and, assuming that Rhonda's pregnancy ha[d] any relevance, its probative value was outweighed by its prejudicial effect on the jury."[17] The trial court granted Winston's motion to prohibit the prosecution from mentioning the victim's pregnancy during voir dire.[18] The trial court, however, "reserv[ed] ruling on the admissibility of that fact at trial."[19] Subsequently, the trial court permitted the prosecution to introduce evidence of the victim's pregnancy if one of the Commonwealth's witnesses, Nathan Rorls, included it in his description of what Winston had told him about the murder.[20] Rorls did not mention the pregnancy on direct examination.[21] However, when the Commonwealth tried to rehabilitate Rorls after the defense attempted to impeach him, Rorls testified that Winston told him the victim was pregnant at the time of the murder.[22] The Commonwealth then recalled the medical examiner who confirmed the victim's pregnancy.[23] Despite the defendant's objection, the court admitted the medical examiner's testimony because evidence of the victim's pregnancy was "already in."[24] The Commonwealth also mentioned the victim's pregnancy during its closing statement in order to re-enforce Rorls's credibility.[25]

For "evidence to be relevant, it must have a 'logical tendency, however slight, to prove a fact at issue in the case.' "[26] The Supreme Court of Virginia noted that although the pregnancy evidence may not have been relevant prior to

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15. *Id.*; *see also* Husske v. Commonwealth, 476 S.E.2d 920, 925 (Va. 1996) (finding that *Ake*'s holding extends to any expert when the defendant can show that such assistance is " 'likely to be a significant factor in his defense' " (quoting *Ake*, 470 U.S. at 82–83)).

16. *Winston*, 604 S.E.2d at 34.

17. *Id.* at 39.

18. *Id.* at 38.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Winston*, 604 S.E.2d at 38–39.

23. *Id.* at 39.

24. *Id.* The re-examination of the medical examiner only consisted of the Commonwealth asking whether the victim was pregnant and the examiner answering "yes." *Id.*

25. *Id.*

26. *Id.* (quoting Clay v. Commonwealth, 546 S.E.2d 728, 730 (Va. 2001)).

Rorls's testimony, the evidence became relevant when the defendant questioned Rorls's credibility.[27] The victim's pregnancy tended to confirm Rorls's testimony that he received all his information from Winston and thereby rebutted the defense's assertion that Rorls received his information from others.[28]

The court then considered whether the evidence's probative value outweighed its prejudicial value.[29] The defense argued that the evidence of the victim's pregnancy was inflammatory and outweighed its probative value.[30] The court noted that "evidence of pregnancy is not inadmissible *per se*; its prejudicial effect must be weighed against its probative value."[31] The court determined that the evidence's probative value was high due to the importance of Rorls's credibility, while its prejudicial impact was diminished because the Commonwealth did not sensationalize the evidence and only introduced it to rehabilitate a key witness.[32] Thus, the court concluded that the trial court did not err in admitting the evidence concerning the victim's pregnancy.[33]

C. Mental Retardation as an Element of the Crime or Aggravating Circumstance

Further, Winston asserted that *Atkins v. Virginia*[34] and sections 19.2-264.3:1.1 and 19.2-264.3:1.2 turned the absence of mental retardation into an element of capital murder that the Commonwealth must prove beyond a reasonable doubt.[35] Winston also alleged that sections 19.2-264.3:1.1 and 19.2-264.3:1.2 were promulgated after Winston committed the murders and that the statutes could not "be applied retroactively under the ex post facto, due process, and equal protection clauses of the U.S. and Virginia Constitutions" because they added a new element to the offense of capital murder.[36] The court agreed with the Supreme Court of Louisiana in *State v. Williams*,[37] which determined that

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27. *Id.*

28. *Winston*, 604 S.E.2d at 39.

29. *Id.* at 39–40.

30. *Id.* at 38.

31. *Id.* at 40.

32. *Id.*

33. *Id.*

34. 536 U.S. 304 (2002).

35. *Winston*, 604 S.E.2d at 50–51; *see* VA. CODE ANN. § 19.2-264.3:1.1 (Michie 2004) (establishing procedures for determining whether a capital defendant is mentally retarded); VA. CODE ANN. § 19.2-264.3:1.2 (Michie 2004) (establishing procedures for a capital defendant to obtain expert assistance to assess possible mental retardation); *Ring*, 536 U.S. at 609 (holding that due process requires that a jury determine aggravating factors that render a defendant eligible for the death penalty); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment prohibits the execution of mentally retarded persons).

36. *Winston*, 604 S.E.2d at 50.

37. 831 So. 2d 835 (La. 2002).

" '*Atkins* explicitly addressed mental retardation as an exemption from capital punishment' " and not as an aggravator or an element of capital murder.[38] Accordingly, the court rejected each of Winston's claims and concluded that *Atkins* did not create a new aggravator or element of capital murder; rather, *Atkins* only created "an affirmative defense to the imposition of the death penalty."[39]

D. Admission of Record for Eluding Police Officer

Winston also alleged that the trial court erred when it permitted testimony about the details of Winston's arrest for eluding a police officer.[40] During the sentencing phase, both a police officer involved in the pursuit and Winston's passenger during the chase testified about the dangerous police chase that ended when Winston was arrested with a gun in his lap just after telling his passenger that "he had to go take care of some business."[41] Winston argued that the testimony was inflammatory and cumulative because the jury already knew about the charge from the sentencing order.[42] The court noted that it had " 'repeatedly approved the use of testimonial evidence relating to a defendant's commission of other crimes of which he has been convicted.' "[43] The evidence was relevant to future dangerousness because it tended to show that Winston had "a general disregard for human life" and "a history of violent or dangerous behavior."[44] Without discussing the prejudicial nature of the evidence, the court concluded that the trial court did not err in admitting either witness's testimony.[45]

IV. Application to Virginia Practice

A. Ake *Issues*

Subsection D of section 19.2-264.3:1 requires the defense to disclose almost all court-appointed mental-health expert findings to the prosecution and to submit to a mental-health evaluation, if the defense intends to introduce psychiatric testimony at trial.[46] The court in *Winston* rejected the defendant's argument

38. *Winston*, 604 S.E.2d at 50–51 (quoting State v. Williams, 831 So. 2d 835, 860 n.35 (La. 2002)).

39. *Id.* at 50.

40. *Id.* at 51.

41. *Id.*

42. *Id.*

43. *Id.* (quoting Watkins v. Commonwealth, 331 S.E.2d 422, 436 (Va. 1985)).

44. *Winston*, 604 S.E.2d at 51.

45. *Id.* at 52.

46. *See* VA. CODE ANN. § 19.2-264.3:1(D) (Michie 2004) (providing that the defense shall give the prosecution all mental health evaluations if the defendant announces its intention to proffer psychiatric or psychological testimony at sentencing).

that *Ake* creates a right to expert assistance independent of the right under Virginia Code section 19.2-264.3:1.[47] Thus, a defendant may not use *Ake* to evade the notice requirements attached to the appointment of a section 19.2-264.3:1 expert. However, the Supreme Court of Virginia in *Husske v. Commonwealth*[48] recognized that *Ake* applies to any type of expert if the defendant shows that the expert " 'is likely to be a significant factor in his defense.' "[49] Virginia Code section 19.2-264.3:1 only applies to capital defendants seeking mental health experts.[50] Thus, there is still an independent right under *Ake* and *Husske* to funding for non-mental health experts.[51]

B. Mental Retardation as an Element of Capital Murder or an Aggravating Circumstance

Winston clarified that the Supreme Court of Virginia does not consider the absence of mental retardation to be an element of capital murder or an additional aggravating factor.[52] Rather, mental retardation is an affirmative defense to the imposition of the death penalty.[53] The Supreme Court of Virginia's holding is not unique; other jurisdictions have determined that the absence of mental retardation is not an element of capital murder or an aggravating factor that the State must prove beyond a reasonable doubt.[54] Although some state courts have accepted the proposition that defendants are entitled to a jury determination of mental retardation, the proposition that the State must bear the burden of proof has not fared as well.[55] Thus, capital defendants in Virginia must prove that they

47. *Winston*, 604 S.E.2d at 33–34.

48. 476 S.E.2d 920 (Va. 1996).

49. *Husske*, 476 S.E.2d at 925 (quoting *Ake*, 470 U.S. at 83).

50. *See* VA. CODE ANN. § 19.2-264.3:1 (giving capital defendants access to a mental health expert upon a showing of financial need).

51. *See Husske*, 476 S.E.2d at 925 (finding that the state must provide defendants with an expert upon a showing that the expert is likely to be a significant factor in the defense and that the expert's absence will prejudice the defendant).

52. *Winston*, 604 S.E.2d at 50–51.

53. *Id.* at 50.

54. *See In re* Johnson, 334 F.3d 403, 404–05 (5th Cir. 2003) (finding that *Atkins* did not turn the absence of mental retardation into an element of a capital crime such that the State must prove it beyond a reasonable doubt to a jury); Walton v. Johnson, 269 F. Supp. 2d 692, 698 n.3 (W.D. Va. 2003) (finding that the absence of mental retardation is not an element of capital murder because it does not increase the maximum possible penalty for the crime); Head v. Hill, 587 S.E.2d 613, 619–20 (Ga. 2003) (same); *Williams*, 831 So. 2d at 860 n.35 (same); *Ex Parte* Briseno, 135 S.W.3d 1, 10 (Tex. Crim. App. 2004) (same).

55. *See, e.g.*, Murphy v. State, 54 P.3d 556, 568 (Okla. Crim. App. 2002) (finding that the jury shall determine whether the defendant has proven mental retardation by a preponderance of the evidence).

are mentally retarded by a preponderance of the evidence, and the jury will make that determination only if the guilt phase was tried before a jury.[56]

Yet the court's explanation for rejecting Winston's claims involving mental retardation was not completely satisfying. To support its conclusion that the absence of mental retardation is not an element of a capital offense and at least implicitly to support its conclusion that absence of mental retardation is not an aggravating factor, the court observed that "an accused can be found guilty of a capital offense and not receive the death penalty."[57] However, the court misunderstood the defendant's argument: the issue was whether the absence of mental retardation was a necessary predicate for a death sentence, not whether the jury was required to impose death after finding that the defendant did not have mental retardation. In concluding that a jury must find beyond a reasonable doubt the existence of aggravating circumstances necessary to sentence a defendant to death, the Court in *Ring v. Arizona*[58] noted that " '[a]ll the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury.' "[59] Like the elements of capital murder or aggravating circumstances, the judge or jury must find that the defendant is not mentally retarded in order to impose the death penalty.[60] The court failed to address this part of the defendant's argument.

C. Evidentiary Issues

In permitting the Commonwealth to introduce the police officer's and witness's accounts of Winston's elusion of police officers, the court noted that " '[i]n determining his proclivity for violence, the jury may obtain from the mere record of previous convictions an inaccurate or incomplete impression of the defendant's temperament and disposition.' "[61] This holding was consistent with *Stamper v. Commonwealth*,[62] in which the Supreme Court of Virginia upheld admission of a witness's testimony whom the defendant had shot in an unrelated crime because the evidence demonstrated that the defendant had "such a propensity to

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56. *See* VA. CODE ANN. § 19.2-264.3:1.1(C) (Michie 2004) ("The defendant shall bear the burden of proving that he is mentally retarded by a preponderance of the evidence.").

57. *Winston*, 604 S.E.2d at 50.

58. 536 U.S. 584 (2002).

59. *Ring*, 536 U.S. at 602 (quoting Apprendi v. New Jersey, 530 U.S. 466, 499 (2000) (Scalia, J., concurring)); *see Apprendi*, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

60. *See Atkins*, 536 U.S. at 321 (holding that the Eighth Amendment prohibits the execution of the mentally retarded).

61. *Winston*, 604 S.E.2d at 51–52 (quoting Stamper v. Commonwealth, 257 S.E.2d 808, 819 (Va. 1979)).

62. 257 S.E.2d 808 (Va. 1979).

violence as to make him a menace to society."[63] The defendant's gunshot had impaired the witness's ability to walk and speak.[64] The court, however, admitted it because the testimony and the record of the past crime distinguished Stamper from other defendants who had committed similar crimes.[65] Thus, defense counsel should be aware that courts will admit extremely inflammatory evidence of the defendant's past acts in order to prove future dangerousness.

Additionally, the Supreme Court of Virginia determined that evidence of the victim's pregnancy was relevant because it contributed to Rorls's credibility.[66] Although it did not rule on the issue, the court indicated that the evidence may not have been relevant had the defense not questioned Rorls's credibility on cross-examination.[67] Further, the court determined that the inflammatory nature of a murder victim's pregnancy does not make evidence concerning it per se inadmissible; rather, courts must evaluate such evidence for its prejudicial and probative value.[68] In balancing prejudicial and probative value, the court emphasized that the Commonwealth introduced the evidence out of necessity to protect the credibility of its star witness and did not present the evidence in an inflammatory matter.[69] Courts in other jurisdictions have also focused on the manner in which the prosecution used evidence of the victim's pregnancy to assess whether its admission required reversal.[70] The defense must fight to keep such inflammatory evidence out at trial because a reviewing court is unlikely to overturn its admission unless the prosecution unduly exploits it, or it is clearly not material to the State's case.

V. Conclusion

The Supreme Court of Virginia denied Winston's claims and affirmed the trial court's holding.[71] Specifically, the court determined that capital defendants

63. *Stamper*, 257 S.E.2d at 819.

64. *Id.*

65. *Id.*

66. *Winston*, 604 S.E.2d at 39.

67. *Id.*

68. *Id.* at 39–40.

69. *Id.* at 40.

70. *See* People v. Lewis, 651 N.E.2d 72, 83–85 (Ill. 1995) (noting that the manner in which the State raised evidence of the victim's pregnancy is relevant to determining whether the evidence's probative value outweighed its prejudicial effect); State v. Moore, 585 A.2d 864, 887 (N.J. 1991) ("The liberty of the repeated references to defendant's 'pregnant wife,' without corresponding establishment of relevance to defendant's state of mind with respect to either victim or to any defense, tended in effect to outweigh probative value with undue prejudice."); People v. Martinez, 734 P.2d 650, 652 (Colo. Ct. App. 1986) (finding that although evidence of the victim's pregnancy was irrelevant, the prosecution's two brief references to the evidence did not prejudice the defendant).

71. *Winston*, 604 S.E.2d at 54–55.

seeking a mental health expert have no independent right to an expert under *Ake* and that Virginia Code section 19.2-264.3:1 satisfies *Ake*.[72] Further, the court concluded that the trial court did not err by admitting testimony regarding the victim's pregnancy at the time of the murder or the defendant's attempt to evade the police.[73] Finally, the court rejected the defendant's claim that *Atkins* and Virginia Code sections 19.2-264.3:1.1 and 19.2-264.3:1.2 turned the absence of mental retardation into an element of capital murder or an aggravating factor and noted that mental retardation is only an affirmative defense to capital punishment.[74]

Justin B. Shane

72. *Id.* at 33–34.
73. *Id.* at 38–40, 51–52.
74. *Id.* at 50–51.

CASE NOTES:

Case of Interest