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Lenz v. Commonwealth 544 S.E.2d 299 (Va. 2001) Remington v. Commonwealth 551 S.E.2d 620 (Va. 2001)

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I. Facts

On January 16, 2000, Michael Lenz ("Lenz"), Jeffrey Remington ("Remington"), Brent Parker ("Parker"), and three other inmates attended a meeting in Building J-5 at the Augusta Correctional Center. Earl Jones ("Jones"), a correctional officer, was assigned to Building J-5 that evening. After closing the door and securing the room, Jones noticed a commotion. Jones radioed other correctional officers and requested help. As Jones walked toward the room where the inmates were holding their meeting, three of the inmates ran out of the room. One of the inmates said, "They're stabbing him."[1]

When Jones went to the door, he saw Remington and Lenz stabbing Parker. Jones ordered Lenz and Remington to stop stabbing Parker, but they did not. Jones, who was unarmed, again used his radio to request help. After several correctional officers arrived at the meeting room, the officers entered the room and told Lenz and Remington "to drop" their knives. One of the officers testified that he saw Remington stab Parker "[a]bout four or five times."[2] Another officer testified that he saw Remington stab Parker "eight to ten times" around the stomach and chest.[3] Lenz and Remington surrendered their knives, and they were handcuffed and escorted from the area. Parker was transported by ambulance to the Augusta Medical Center, where he died.[4]

Lenz was tried and convicted by a jury on an indictment charging him with the capital murder of Parker under Virginia Code Section 18.2-31(3).[5] The jury fixed Lenz's punishment at death, and the court sentenced him in accord with the jury's verdict. Remington's motion to transfer his capital murder trial from Augusta County to the City of Buena Vista was granted. A jury found Remington guilty of the capital murder of Parker under Virginia Code Section 18.2-31(3)

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1. Lenz v. Commonwealth, 544 S.E.2d 299, 301 (Va. 2001).
2. Remington v. Commonwealth, 551 S.E.2d 620, 624-25 (Va. 2001).
3. *Id.* at 625.
4. *Lenz*, 544 S.E.2d at 302.
5. *Id.* at 301; *see also* VA. CODE ANN. § 18.2-31(3) (Michie Supp. 2001) (defining capital murder as "[t]he willful, deliberate, and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof").

and fixed Remington's punishment at death. The circuit court sentenced Remington in accord with this verdict.[6]

A. Issues Raised in Lenz

During the penalty phase of his trial, Lenz testified that he had planned to murder Parker that day.[7] A psychologist employed at the Augusta Correctional Center testified that, in his opinion, Lenz had murdered Parker based "solely on a religious conviction."[8] Lenz's mother testified about Lenz's childhood.[9] The Chief of Operations at the Virginia Department of Corrections and the Assistant Warden of Operations at the Red Onion State Prison both testified about "prison life" and the security conditions that Lenz would encounter at a Virginia maximum security correctional facility if he were sentenced to life imprisonment.[10]

On appeal, Lenz argued that the circuit court abused its discretion in denying his request for the appointment of an expert at the Commonwealth's expense on the subject of "prison life."[11] Lenz also argued that the circuit court erred in denying his pretrial motion "to poll individual jurors as to which statutory aggravating factors and elements of vileness were found."[12]

The Commonwealth filed and was granted a pretrial motion in limine requesting that the circuit court prohibit Lenz from introducing evidence about Parker's criminal record.[13] Although the circuit court ruled in favor of the Commonwealth's motion, during the penalty phase Lenz tried to elicit information regarding Parker's criminal record.[14] The circuit court sustained the Commonwealth's objection to this, and Lenz argued on appeal that the circuit court erred in sustaining this objection.[15] Finally, Lenz argued that when reviewing the trial record and records from other cases to ensure that passion or prejudice did not influence the jury and the sentence of death was not excessive or disproportionate, the court should have compared his case to those dealing with murders in which the defendant and the victim were inmates at a correctional facility.[16]

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6. *Remington*, 551 S.E.2d at 624.
7. *Lenz*, 544 S.E.2d at 303.
8. *Id.* at 302-03.
9. *Id.* at 303.
10. *Id.*
11. *Id.* at 304.
12. *Id.* at 305.
13. *Id.* at 307.
14. *Id.*
15. *Id.*
16. *Id.* at 310.

B. *Issues Raised in* Remington

During the penalty phase of Remington's trial, the Commonwealth introduced Remington's prior convictions.[17] A mitigation expert testified that Remington "had a very troubled upbringing," that his biological father was "an alcoholic [and] a very violent man," and that Remington was sexually molested as a child.[18] Remington testified that he had been raped when he was an inmate at another correctional facility.[19] He also testified that several inmates at the Augusta Correctional Facility had threatened to rape him and that he "believed that Parker was involved in those threats of rape."[20] He testified that when he informed Lenz that Parker had "threatened [his] life," Lenz told him to "arm himself with a knife."[21] Remington stated that he took the knife to the meeting for his protection.[22]

On appeal, Remington asserted that the circuit court erred in not granting his various pretrial discovery motions pertaining to potential witnesses and informants.[23] He also asserted error in the circuit court's removal of two prospective jurors from the venire, claiming that their removal violated their constitutional right to religious freedom.[24] Remington also argued that the trial court should have accepted his proposed jury instruction, which would have instructed the jury on the grades of murder, including second-degree murder and malicious wounding.[25]

Remington further claimed that he should have been granted a new sentencing hearing because the post-sentence report did not contain a victim impact statement.[26] Like Lenz, Remington also argued that after conducting the statutorily required proportionality review, the court should have found that the death sentence was "excessive or disproportionate to the penalty imposed in similar cases."[27] Finally, Remington argued that because he was in the hospital during the jury's deliberations at the sentencing stage, his right to be present during trial

17. *Remington*, 551 S.E.2d at 625.
18. *Id.* at 626.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 628.
24. *Id.*
25. *Id.* at 631.
26. *Id.* at 632-33.
27. *Id.* at 637-38.

was violated.[28] The Supreme Court of Virginia rejected all of Remington's claims of error.[29]

II. Holdings

The Supreme Court of Virginia affirmed the judgments of both circuit courts, finding no reversible error in the records and "perceiving no reason to commute the death sentence."[30]

III. Analysis / Application in Virginia

A. Common Issues

1. Victim Character Evidence

Both Lenz and Remington contended that the circuit courts erred in not allowing them to present the jury with evidence of Parker's criminal record.[31] Each relied on Virginia Code Section 19.2-264.4(B) and prior court decisions, including *Lockett v. Ohio*,[32] in arguing that he was entitled to present to the jury all the facts when the jury was making a decision regarding his sentence.[33] In both cases, the Supreme Court of Virginia found that the defendant's assertions were without merit.[34]

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28. *Id.* at 636.

29. *Id.* at 626-37.

30. *Lenz*, 544 S.E.2d at 311.

31. *Id.* at 307; *Remington*, 551 S.E.2d at 634.

32. 438 U.S. 586 (1978).

33. *Lenz*, 544 S.E.2d at 307; *Remington*, 551 S.E.2d at 634; *see also* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding that the sentencer should be able to consider, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death, as long as the court deems such evidence as being relevant to the defendant's character, prior record, or circumstances of his offense); VA. CODE ANN. § 19.2-264.4(B) (Michie 2000). Section 19.2-264.4(B) states:

> In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence. Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) the defendant has no significant history of prior criminal activity, (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, (v) the age of the defendant at the time of the commission of the capital offense, or (vi) mental retardation of the defendant.

Id.

34. *Lenz*, 544 S.E.2d at 307; *Remington*, 551 S.E.2d at 634-35.

The court in *Lenz* held that Parker's criminal history was not relevant to any issue in the proceeding.[35] The court found that "[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."[36] The court dismissed Lenz's contention under *Lockett*, stating that Lenz had no constitutional right to present evidence of Parker's criminal history.[37] The court pointed out that Parker's history was neither relevant, nor had any bearing on, the circumstances of Lenz's offense, because Lenz admitted during the penalty phase of the trial that he did not like Parker and that he had intended to kill Parker because Parker did not respect his religious beliefs.[38] The court in *Remington* relied on *Lenz* to reach the same conclusion, holding that "generally, a defendant does not have a constitutional right to present evidence of a victim's criminal history."[39]

Remington also contended that he was entitled to a new sentencing hearing because the circuit court admitted a post-sentence report that did not contain a victim impact statement.[40] Remington raised this contention under Virginia Code Section 19.2-264.5, which states that when a defendant's punishment has been fixed at death, the court must direct a post-sentence report to be made.[41] The statute requires that "such reports shall in all cases contain a Victim Impact Statement."[42] The court rejected this argument, stating that "the Crime Victim and Witness Rights Act, of which Code Section 19.2-264.5 is a part, was enacted to 'preserve the right of victims of crimes to have the impact of those crimes upon their lives considered as part of the sentencing process, if that is their wish.'"[43] The court stated that the statutorily required victim impact statement in the post-sentence report did not confer any rights upon a capital murder defendant.[44] The court also found that Remington "was not prejudiced by the omission of a victim-impact statement in the post-sentence report," and, therefore, a new sentencing hearing was not warranted.[45]

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35. *Lenz*, 544 S.E.2d at 307.
36. *Id.*
37. *Id.*
38. *Id.* at 308.
39. *Remington*, 551 S.E.2d at 635.
40. *Id.* at 632-33.
41. *Id.*; *see also* VA. CODE ANN. § 19.2-264.5 (Michie 2000).
42. *Remington*, 551 S.E.2d at 633; *see also* § 19.2-264.5.
43. *Remington*, 551 S.E.2d at 633 (quoting Beck v. Commonwealth, 484 S.E.2d 898, 905 (Va. 1997)).
44. *Id.*
45. *Id.*

The court's decision to exclude Lenz's evidence regarding Parker's criminal record is surprising in light of its recent decision in *Schmitt v Commonwealth*.[46] Although the Supreme Court of Virginia found that under Virginia Code Section 19.2-264.4 evidence pertaining to the victim's character is not relevant in establishing vileness or future dangerousness,[47] the Commonwealth is allowed to include non-statutory victim impact evidence.[48] In *Schmitt*, the Commonwealth was allowed to present testimony from the victim's friends and co-workers about the victim's "kindness" and "generosity," as well as evidence showing that he had received several commendations during his twenty years of service in the United States Army and that he had three children.[49] This is in stark contrast to the court's decision in *Lenz*. The court's disparity in admitting victim impact evidence suggests that it is basing its determination on the actual nature of the evidence, rather than on the relevance or probative value of such evidence in the jury's consideration of the death sentence. In coming to its decision in *Schmitt*, the court relied on the United States Supreme Court's decision in *Payne v Tennessee*,[50] in which the Court articulated that "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant."[51] For the sake of consistency, the court should either completely allow or disallow proffered evidence of the victim's character, regardless of whether the evidence portrays the victim as a "good guy" or a "bad guy."

2. *Proportionality Review*

Pursuant to Virginia Code Section 17.1-313(E), the Virginia Supreme Court said it "examined records in all capital murder cases previously reviewed by [that] court when, as here, the death penalty was imposed based upon . . . the capital murder of an inmate while the defendant was confined in a state or local correctional facility."[52] The court conducted this review to ensure that the death sentence in Lenz's case was proportionate to the penalty imposed in similar

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46. Schmitt v. Commonwealth, 547 S.E.2d 186 (Va. 200[1]) (rejecting defendant's assignments of error and affirming Schmitt's sentence of death).

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

48. *See, e.g., Schmitt*, 547 S.E.2d at 193. *But see* VA. CODE ANN. § 19.2-299.1 (Michie 2000) (providing the scope and content of victim impact testimony at a capital sentencing).

49. *Id.*

50. 501 U.S. at 808 (1991).

51. Payne v. Tennessee, 501 U.S. 808, 825 (1991) (holding that the Eighth Amendment does not bar presentation of victim impact evidence to a capital sentencing jury).

52. *Lenz*, 544 S.E.2d at 310; *see also* VA. CODE ANN. § 17.1-313(C)(2) (Michie 1999) (requiring the court to determine whether the sentence of death in a particular case is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant").

cases.[53] The court stated that the records included capital murder cases in which the death penalty was imposed, as well as cases in which a life sentence was imposed and the defendant petitioned the court for an appeal.[54] Lenz argued that the most significant circumstance surrounding the offense was the fact that both he and the victim were prisoners confined in a state correctional facility at the time the murder was committed.[55] Lenz pointed out that there was no underlying felony in his case, and thus, that had the same offense been committed outside the prison, "it could only have been charged as first degree murder."[56] Lenz argued that, therefore, the similar cases against which his case was compared should have been murders where the defendant and the victim were inmates at a correctional facility.[57]

In rejecting Lenz's argument, the court reiterated its position in *Johnson v Commonwealth*,[58] in which it held that in conducting its proportionality review, the court must determine whether other sentencing bodies in the Commonwealth generally imposed the death penalty for comparable or similar crimes, considering both the crime and the defendant.[59] The court held that in Lenz's case "the fact that the defendant was an inmate, who killed another inmate, [was] only one factor to consider in determining whether other juries generally impose the sentence of death for similar crimes."[60] The court held that Virginia Code Section 17.1-313(C)(2) does not require that the court confine its review to identical crimes.[61]

In making its proportionality determination in *Lenz*, the court stated that it examined cases in which the death penalty was imposed for the capital murder of an inmate while the defendant was confined in a state or local correctional facility, including *Payne v Commonwealth*.[62] It is interesting to note that prior to *Lenz* and *Remington*, Payne was the only inmate-on-inmate homicide to result in a death penalty since Virginia Code Section 18.2-31(3) was enacted. Payne's death sentence was later commuted to life in prison by the Governor.[63] The

53. *Lenz*, 544 S.E.2d at 310-11.

54. *Lenz*, 544 S.E.2d at 310. In this case, the Supreme Court of Virginia did not include capital murder life sentence cases not reviewed by itself. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. 529 S.E.2d 769 (Va. 2000).

59. *Lenz*, 544 S.E.2d at 310; *see also* Johnson v. Commonwealth, 529 S.E.2d 769, 786 (Va. 2000) (holding that defendant's age was only one factor to consider in determining whether other juries generally imposed the sentence of death for similar crimes).

60. *Lenz*, 544 S.E.2d at 310.

61. *Id.*

62. *Id.*; *see also* Payne v. Commonwealth, 357 S.E.2d 500 (Va. 1987).

63. *Lenz*, 544 S.E.2d at 311.

court stated that the Governor's decision to commute Payne's death sentence did not necessarily render Lenz's sentence excessive, because the court "do[es] not consider the actions of the executive branch when making [its] statutory determination of proportionality."[64]

Remington argued that the circuit court erred in not applying mandatory proportionality principles to impose a life sentence.[65] Like Lenz, Remington pointed out that there were no other Virginia cases with similar facts involving an inmate victim that had resulted in the death penalty.[66] The court found that Remington's claim was meritless, holding that "the circuit court was not required to conduct a proportionality analysis."[67] Although the court noted that Virginia Code Section 19.2-264.5 allows a circuit court to set aside a death sentence upon good cause shown, it found that the circuit court had established that the evidence justified the jury's decision and that the imposition of the death penalty in this case was proportionate.[68]

Another interesting point to consider is the under-representation of cases in which the defendant received a life sentence for a capital murder. Life sentence cases may not be appealed and often the opinions are unpublished. Thus, these cases are not included in the comparison the court is required to make. Those life cases that are appealed and published often do not include the aggravators. These factors necessarily distort the cases reviewed by the Supreme Court of Virginia toward the death sentence, making the required proportionality review meaningless and undermining the purpose of Virginia Code Section 17.1-313.[69]

B. Issues in Lenz

1. Conditions of Confinement (Prison Life)

Lenz, relying on *Ake v. Oklahoma*[70] and *Husske v. Commonwealth*,[71] asserted through a pretrial motion that he should receive a court-appointed expert witness on the subject of prison operations and classifications.[72] Lenz asserted that this

64. *Id.*

65. *Remington*, 551 S.E.2d at 634.

66. *Id.*

67. *Id.*

68. *Remington*, 551 S.E.2d at 634; *see* VA. CODE ANN. § 19.2-264.5 (Michie 2000).

69. *See* Gregory v. Commonwealth, No. 1671-99-2, 2001 WL 242227, at *1 (Va. Ct. App. March 13, 2001) (unpublished capital murder opinion in which defendant was given a life sentence). *See generally* Kelly E.P. Bennett, *Proportionality Review: The Historical Application and Deficiencies*, 12 CAP. DEF. J. 103, 106 (1999).

70. 470 U.S. 68 (1985).

71. 476 S.E.2d 920 (1996).

72. *Lenz*, 544 S.E.2d at 304; *see also* Ake v. Oklahoma, 470 U.S. 68 (1985); Husske v. Com-

expert witness should be retained at the Commonwealth's expense.[73] Lenz argued that "the due process and equal protection clauses of the Fourteenth Amendment of the federal constitution required the circuit court to appoint, at the Commonwealth's expense, an expert to assist him."[74]

The court rejected this argument, stating that the court in *Ake* stipulated that "[t]he indigent defendant who seeks the appointment of an expert must show a particularized need."[75] The court held that the circuit court did not abuse its discretion in denying Lenz's request for a "prison life" expert and that this denial did not result in a "fundamentally unfair trial."[76] Applying the principles set forth in *Ake*, the court noted that Lenz had not demonstrated that "prison life" was likely to be a significant factor in his defense, thus necessitating a "prison life" expert.[77] Therefore, the court found that Lenz suffered no prejudice as a result of the circuit court's denial of his request.[78]

Lenz also argued that the circuit court's purported denial of his pretrial motion "to poll individual jurors as to which statutory aggravating factors and elements of vileness were found" was error.[79] Lenz contended that the circuit court denied his motion in an order dated July 25, 2000.[80] However, the Supreme Court of Virginia stated that it did not find any circuit court order in the record disposing of this motion.[81] The court concluded that the circuit court did not rule on Lenz's motion and that therefore the defendant had waived his claim in this regard.[82] In order to preserve an issue for appeal, the defendant must request a ruling from the circuit court, which Lenz failed to do.[83]

2. Apprendi *Issue*

Lenz moved the circuit court to allow an instruction which stated that the jury could only give him the death penalty "based upon the vileness predicate if the jury unanimously agreed that the Commonwealth's evidence proves torture or depravity of mind or an aggravated battery to the victim beyond the minimum

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monwealth, 476 S.E.2d 920 (1996).

73. *Id.*
74. *Id.*
75. *Id.* at 305 (citing *Ake*, 470 U.S. at 83).
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 305-06.
81. *Id.* at 306.
82. *Id.*
83. *Id.*

necessary to accomplish an act of murder."[84] The proposed instruction would have also stipulated that the jury's "decision must be unanimous as to at least one of the above to find that [the defendant's] conduct was outrageously or wantonly vile, horrible or inhuman."[85] While the circuit court refused Lenz's proposed jury instruction, it is important to note that the Supreme Court of Virginia did not actually affirm this decision.[86] Instead, the court did not reach this issue because the jury fixed Lenz's punishment at death based on both future dangerousness and vileness.[87]

In *Apprendi v New Jersey*,[88] the United States Supreme Court held that "[o]ther 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."[89] *Apprendi*, read in conjunction with earlier cases from the United States Supreme Court, appears to require the Virginia courts to provide jury instructions that require the jury to find each statutory aggravator and each vileness subelement beyond a reasonable doubt and unanimously. This will provide the jury with "clear and objective standards . . . [and] will enhance the reliability of the death sentence."[90]

C. *Issues in* Remington

1. Pretrial Discovery Motions

Remington filed a pretrial motion asking the circuit court to order the Commonwealth to comply with various discovery requests.[91] Remington asserted that the circuit court's denial of this motion violated his federal and state constitutional rights.[92] The court upheld the circuit court's decisions, finding no merit in Remington's claims.[93]

Remington requested the Commonwealth to provide a list of all expert witnesses it intended to call at trial, as well as each expert's qualifications, a description of the expert's contemplated testimony, and the expert's report.[94]

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84. *Id.* at 308.
85. *Id.* (alterations in original).
86. *Id.*
87. *Id.*
88. 530 U.S. 466 (2000).
89. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).
90. *See* M. Kate Calvert, *Obtaining Unanimity and a Standard of Proof on the Vileness Sub-Elements with* Apprendi v. New Jersey, 13 CAP. DEF. J. 1, 35 (2000).
91. *Remington*, 551 S.E.2d at 627.
92. *Id.* at 628.
93. *Id.*
94. *Id.* at 627.

Remington also requested access to any evidence the Commonwealth planned to offer at any sentencing proceeding, including:

> (a) the names and addresses of all witnesses, a summary of their expected testimony and with respect to expert witnesses, a copy of their professional qualifications, resume or curriculum vitae; (b) any evidence of unadjudicated acts of misconduct for future dangerousness, and the alleged dates and witnesses to such acts; (c) a copy of any statement by a non-witness declarant to be offered into evidence; and (d) an opportunity to inspect, test, and copy any physical evidence.[95]

The court held that this discovery request was improper because Remington did not have a "general right to discovery of witness statements, reports, or other memoranda possessed by the Commonwealth."[96]

Remington also moved the circuit court to compel discovery of "[a]ll memoranda, documents, and reports to, from, or between law enforcement officers connected with the subject matter of this case," as well as any material that could be exculpatory or be used to impeach a witness.[97] Remington requested discovery pertaining to any "occasion on which any potential witness ha[d] testified . . . in relation to any of the defendants, the investigation, or the facts of this case."[98] The Supreme Court of Virginia held that the circuit court's denial of this motion did not violate any of Remington's constitutional rights because the circuit court had already entered an order requiring the Commonwealth "to provide . . . all exculpatory evidence to impeach witnesses."[99] The court also found that Remington's rights were not abridged because the Commonwealth provided him complete access to its investigation file and allowed him to examine its entire file.[100]

Finally, Remington requested discovery of the identity of any informant, "regardless of whether said informant [would] be called as a witness at trial."[101] Remington contended that the circuit court's denial of this request "violated his federal right to 'the disclosure of an informer's identity, or of the contents of his communication [that] is relevant and helpful to the defense of the accused, or is essential to a fair determination of a cause.'"[102] The Supreme Court of Virginia

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95. *Id.*

96. *Id.* at 628 (quoting Clagett v. Commonwealth, 472 S.E.2d 263, 269 (Va. 1996) (holding that a trial court may properly deny a defendant's discovery request where the requested documents are represented as containing no exculpatory material)).

97. *Id.* at 627.

98. *Id.*

99. *Id.* at 628.

100. *Id.*

101. *Id.* at 627.

102. *Id.* at 628.

rejected this argument because Remington failed to show how this information would have assisted his defense, and because no informant testified at trial.[103]

2. *Voir Dire*

The circuit court removed two members of the jury panel, Sharon Martin ("Martin") and Barbara Pentecost ("Pentecost"), from the venire.[104] During voir dire, the court asked Martin whether she had "any religious, philosophical, or moral beliefs which would prevent or substantially impair [her] ability to convict a person of a crime which potentially carried a death penalty."[105] Martin testified that she did not believe in the death penalty and that she did not think she could ever impose a death penalty.[106] During Pentecost's voir dire, the court went over various jury instructions, including the presumption of innocence and the requirement that the Commonwealth must prove each element of the offense beyond a reasonable doubt in order to find a defendant guilty.[107] The court then asked Pentecost if she had "any type of moral or philosophical beliefs that would prevent [her] from following that instruction."[108] Pentecost responded that "[i]f it has anything to do with . . . lethal injection . . . I do not believe in that."[109] When asked if she would consider the death penalty, she testified that "[she did not] think [she] could live with [her]self if [she] had anything to do with putting someone to death."[110] Remington contended that excluding these two prospective jurors violated their First and Fourteenth Amendment rights relating to religious freedom.[111]

The Supreme Court of Virginia upheld the circuit court's decision, holding that "the circuit court's decision to remove a juror for cause will not be reversed on appeal unless that decision constitutes manifest error."[112] The court found that it "must give deference to the circuit court's determination whether to exclude a prospective juror because that court was able to see and hear the prospective juror respond to questions posed."[113] The court also held that "the

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103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 628-29.
107. *Id.* at 629.
108. *Id.*
109. *Id.*
110. *Id.* at 630.
111. *Id.* at 628.
112. *Id.* at 630; *see also* Green v. Commonwealth, 546 S.E.2d 446, 451 (Va. 2001) (stating that "the circuit court's refusal to strike a juror for cause will not be disturbed on appeal unless that decision constitutes manifest error").
113. *Remington*, 551 S.E.2d at 630; *see also Green*, 546 S.E.2d at 451 (holding that the court "must consider the voir dire as a whole, and not the juror's isolated statements").

circuit court is in a superior position to determine whether a prospective juror . . . would be impaired or prevented from performing the duties of a juror."[114]

The Supreme Court of Virginia found that the removal of Martin and Pentecost from the venire did not violate Remington's constitutional rights because their removal was not based on their religious beliefs.[115] The court found that the circuit court properly excluded them from the jury panel because they stated that they would not vote to impose a sentence of death.[116] The court held that the circuit court did not err in removing them "because their responses demonstrated that their personal objections to the death penalty would have substantially impaired or prevented them from performing their duties as jurors."[117]

3. *The Commonwealth's Evidence*

Remington argued that the circuit court erred in denying his motion to "strike the Commonwealth's evidence on the basis that the evidence did not establish that he had inflicted the fatal wounds upon Parker."[118] Remington relied on Virginia's "triggerman rule," which excludes principals in the second degree from eligibility for capital murder. The Supreme Court of Virginia, relying on *Strickler v. Commonwealth*,[119] held that "when two or more persons took a direct part in inflicting fatal injuries, each participant in the murder was an immediate perpetrator for purposes of the capital murder statutes."[120] The court found that "the evidence established beyond a reasonable doubt that Remington and Lenz jointly participated in the fatal stabbing of Parker."[121] The court also noted that the medical examiner found that Parker had sixty-eight separate stab wounds, "all of which contributed to his death," and that thus, the circuit court did not err when it denied Remington's motion to strike the Commonwealth's evidence.[122]

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114. *Remington*, 551 S.E.2d at 630; *see also* Schmitt v. Commonwealth, 547 S.E.2d 186, 195 (Va. 200[1]) (stating 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").

115. *Remington*, 551 S.E.2d at 630.

116. *Id.*

117. *Id.*

118. *Id.*

119. 404 S.E.2d 227 (Va. 1991).

120. *Remington*, 551 S.E.2d at 630; *see* Strickler v. Commonwealth, 404 S.E.2d 227, 234-35 (Va. 1991) (stating that an instruction which allows that a defendant may be found "guilty of capital murder if the evidence establishes that the defendant jointly participated in the fatal beating, if it is established beyond a reasonable doubt that the defendant was an active and immediate participant in the act or acts that caused the victim's death" is an appropriate instruction).

121. *Remington*, 551 S.E.2d at 631.

122. *Id.* at 630.

Remington also argued that his capital murder conviction must be set aside because "the evidence of premeditation was insufficient as a matter of law."[123] The Supreme Court of Virginia disagreed, stating that the "'question whether a defendant is guilty of a premeditated killing of the victim is usually a jury question.'"[124] The court found that premeditation required only that a specific intent to kill must exist some time before the killing but that this intent need not exist for any specified length of time.[125] The court held that there was sufficient evidence in this case for the jury to find premeditation.[126] The court held that "the jury was entitled to find that [Remington] had a specific intent to kill [Parker], based upon [Remington's] acts of stabbing the victim at least eight to ten times in the stomach and chest."[127]

4. Proffered Jury Instructions

Remington asserted that "even if the circuit court did not err in denying his motion to strike" the Commonwealth's evidence, that court erred in refusing to give his proffered jury instructions, because "there [was] certainly sufficient evidence upon which a reasonable jury could [have found that he was] merely a principal in the second degree."[128] Remington proffered an instruction that would have instructed the jury to find him guilty of being a principal in the second degree unless he inflicted the fatal blows that caused Parker's death.[129] The Supreme Court of Virginia found that this instruction was not warranted because there was no evidence showing that a sole perpetrator had accomplished the killing.[130] The court found that the "evidence established beyond a reasonable doubt that Remington and Lenz jointly participated in Parker's death."[131]

Remington also proffered an instruction that would have required the jury to find that he was an active and immediate participant in order to convict him of capital murder.[132] Another proposed instruction directed that if the jury believed that Parker had already been fatally wounded by Lenz before Remington entered into the attack, or if it had a reasonable doubt thereof, it must find Remington not guilty of capital murder.[133] The court found that the circuit court

123. *Id.* at 632.
124. *Id.* (quoting Weeks v. Commonwealth, 450 S.E.2d 379, 390 (Va. 1994)).
125. *Id.*; *see also* Smith v. Commonwealth, 261 S.E.2d 550, 553 (Va. 1980).
126. *Remington*, 551 S.E.2d at 632.
127. *Id.*
128. *Id.* at 630-31.
129. *Id.* at 631.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*

properly rejected these instructions "because the substance of th[ese] instructions was included in other instructions given by the court."[134]

The Supreme Court of Virginia also held that the circuit court properly refused Remington's proposed jury instructions on the lesser-included offenses to capital murder.[135] Remington proposed instructions that informed the jury on the different grades of homicide, including second-degree murder and malicious wounding. The court held that an instruction on second-degree murder, as a lesser-included offense of capital murder, must be supported by the evidence, and that such evidence "'must amount to more than a scintilla.'"[136] The Supreme Court of Virginia held that these instructions were not appropriate, because the evidence showed that Remington and Lenz jointly participated in Parker's murder.[137]

5. Right to be Present at Trial

After counsel concluded their closing arguments in the penalty phase, the jury decided to return the following morning to commence deliberations.[138] That same morning, Remington, who was wearing an electronic restraining belt, was accidentally shocked and was therefore taken to the hospital for observation.[139] When Remington's defense counsel was asked whether they had any objections to proceeding with the jury deliberations, Remington's lead counsel said, "I think we should go ahead."[140] During a later hearing, the circuit court stated that the jury went directly to the jury room and that there was "no way" for the jurors to know that Remington was not present.[141]

Remington argued that the circuit court erred in denying his motion to set aside the verdict and grant a new sentencing hearing.[142] Remington made this claim under the Due Process Clause of the Fourteenth Amendment and Virginia Code Section 19.2-259, which provides that "[a] person tried for felony shall be personally present during the trial."[143] The court relied on *Palmer v. Commonwealth*[144] to define the statutory phrase "during the trial" to mean "every stage of the trial from his arraignment to his sentence, when anything is to be done which can affect his interest."[145] The court also stated that the Sixth and

134. *Id.*
135. *Id.*
136. *Id.* at 632 (quoting Justus v. Commonwealth, 283 S.E.2d 905, 911 (Va. 1981)).
137. *Remington*, 551 S.E.2d at 630-32.
138. *Id.* at 635.
139. *Id.*
140. *Id.*
141. *Id.* at 635-36.
142. *Id.* at 635.
143. *Remington*, 551 S.E.2d at 635-36; *see* VA. CODE ANN. § 19.2-259 (Michie 2000).
144. 130 S.E. 398 (Va. 1925).
145. *Remington*, 551 S.E.2d at 636; *see* Palmer v. Commonwealth, 130 S.E. 398, 402 (Va. 1925).

Fourteenth Amendments to the federal constitution "confer upon a defendant the right to be present at trial."[146]

The court held that Remington waived any error relating to his absence during the jury's deliberations because his counsel agreed to permit the jury to begin its deliberations in his absence.[147] The court also held that Virginia Code Section 19.2-259 "does not require a defendant's presence in the courtroom while a jury is deliberating in another room."[148] It pointed out that "for security reasons, a defendant in custody would have been placed in a holding cell during the jury's deliberations."[149] The court found that Remington had the right to be present "'at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.'"[150] The court held that the circuit court committed no error:

> [N]either the federal constitution nor the common law of [the] Commonwealth conferred upon [Remington], who would have otherwise been confined in a holding cell, a right to be present in a courtroom while the jury [was] in a different room deliberating, and nothing . . . occurred in the courtroom which would have affected [Remington's] interests.[151]

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146. *Remington*, 551 S.E.2d at 637.
147. *Id.* at 636.
148. *Id.*
149. *Id.*
150. *Id.* at 637 (quoting Kentucky v. Stincer, 482 U.S. 730, 745 (1987)).
151. *Id.*