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ARRESTING OFFICERS AND TREATING PHYSICIANS: WHEN MAY A WITNESS TESTIFY TO WHAT OTHERS TOLD HIM FOR THE PURPOSE OF EXPLAINING HIS CONDUCT?

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Every trial lawyer eventually becomes intimately familiar with the steps of an elaborate *pas de deux* that is danced at almost every trial. The steps go like this:

1. One party, known as the proponent, asks a witness to testify about some information that the witness received from someone else.
2. The opposing party naturally objects that this is inadmissible hearsay.
3. The proponent, who implicitly admits that the evidence would not be admissible under any other exception to the hearsay rule, replies: "It's not being offered for its truth, but merely so that the jury can understand *why* this witness believed what he did, and took the actions that he did, on the basis of what he was told beforehand." In other words, the statement is being offered merely to show what the textbooks sometimes call its "effect on the hearer." By making this response, the proponent is tacitly conceding that the opposing counsel will be entitled to a limiting instruction if he has the good sense to request one.

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4. The objecting party then responds that the evidence, if offered solely for that limited purpose, is not worth the trouble it would cause, because its probative value would be substantially outweighed by its risk of unfair prejudice. This requires the objecting party to persuade the court that (a) the question of *why* this witness did what he did, and how that decision was affected by what others *told* him, is not that central to the case, and (b) the danger is great that the jury would disregard the necessary limiting instruction.
5. The proponent then predictably disagrees, arguing that the probative value is fairly high and that there is nothing unusual about the case to justify a departure from the law's ordinary presumption that jurors can usually be trusted to follow the instructions of the court. He also points out, correctly, that the admission of the evidence carries literally no risk of unfair prejudice to anyone if the jury can be counted upon to follow a court order that the evidence "may not be considered for its truth."

How should the judge rule? It depends on the circumstances of each case. It all comes down to whether the conduct and motives of the witness are important for the jury to decide, and the likelihood that the jury can be safely trusted to follow an instruction to use the evidence only for that purpose and not as proof of the truth of what the witness was told.¹

This intricate facet of hearsay doctrine has caused a great deal of confusion in the courts. As we shall see, it has accounted for several of the most poorly reasoned evidence rulings that have ever come out of the appellate courts of Virginia, all involving this precise question of whether to admit a statement allegedly offered to explain why the

¹ Purely as a matter of semantics, there are two different ways to describe what happens when a trial judge excludes a statement (or when an appeals court reverses a judgment) because the court fears that the jury is likely to disregard a limiting instruction that the statement may not be considered for its truth. A purist would insist that the evidence, by definition, *cannot* be hearsay if the proponent tells the judge, and the judge tells the jury, that it is not offered for its truth; the exclusion of such evidence must be based on a balancing of its probative value against its potential for unfair prejudice. *United States v. Evans*, 216 F.3d 80, 87 (D.C. Cir. 2000); CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE §§ 8.12, 8.18 (3d ed. 2003). The Supreme Court of Virginia, however, claims that a statement is *hearsay*, and excluded by the *hearsay* rule, even if the trial judge says it is not admitted for its truth, as long as it carries an unacceptable risk of being misused by the jurors for its truth, or where it appears that the offering party's real motive for offering the evidence was his hope that the jury would do so. *See sources cited infra* notes 9, 46, and 50. For the sake of simplicity, this article will adopt the somewhat unconventional terminology employed by the Supreme Court of Virginia.

witness took certain actions on the basis of what he had been told by others. These cases include some of the clearest imaginable situations where the admission or the exclusion of such evidence was obviously the right course. Indeed, the cases discussed in this article furnish textbook examples that could have been used to teach future generations of lawyers about this area of hearsay law and doctrine, except for one little problem. The courts of Virginia got them all dead wrong.

I. ARRESTING POLICE OFFICERS

Courts generally have wide discretion in deciding whether to let a witness testify “I did what I did because of what someone else told me.” But the admission of such testimony is always *most* suspect when it comes from a law enforcement officer in a criminal case. One of the leading reference works on American evidence law, *McCormick on Evidence*, specifically cautions that the “one area where abuse may be a particular problem involves statements by arresting or investigating officers regarding the reason for their presence at the scene of a crime.”² Statements by the police relating “complaints and reports of others containing inadmissible hearsay . . . are sometimes *erroneously* admitted under the argument that the officers are entitled to give the information upon which they acted,”³ but that is usually an abuse of discretion, since “the need for this evidence is slight, and the likelihood of misuse great.”⁴ Since the police officer is not a party to the case, his conduct and motives and the reliability of his sources are irrelevant to anything the jury has to decide, except for the rare case when the defendant chooses to make an issue out of them.⁵ Such matters are often relevant to the judge ruling on a pretrial suppression motion, but not to the jury at trial. The jury’s only assignment is to decide whether the accused is guilty on the basis of the evidence admitted at trial, not whether the police had probable cause

² 2 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 249 (5th ed. 1999).

³ *Id.* (emphasis added).

⁴ *Id.* Instead of giving the details of the complaints received from others, the testifying officer should merely explain that he arrived at the scene or took certain actions “upon information received,” or words to that effect, which “should be sufficient” to protect the prosecution from any unfair prejudice or jury confusion. *Id. Accord* United States v. Lopez, 340 F.3d 169, 176-77 (3d Cir. 2003).

⁵ Such matters usually become relevant only if the accused chooses to make them relevant by advancing the suggestion that he was the victim of “overly aggressive or unjustified enforcement efforts.” MUELLER & KIRKPATRICK, *supra* note 1, § 8.18. But even then, the “cure” of allowing the officers to explain their conduct is “often worse than the disease” if it discloses to the jury “the opinions of outsiders that defendants engaged in criminal acts,” so it is often wise for the court to exclude such evidence as unfairly prejudicial “if the defense does not raise or exploit the issue in some way.” *Id.* For an excellent discussion of this issue, see *United States v. Silva*, 380 F.3d 1018, 1019-20 (7th Cir. 2004), and *United States v. Evans*, 216 F.3d 80, 85-90 (D.C. Cir. 2000).

for his arrest. Moreover, as the Sixth Amendment Confrontation Clause confirms, the risk of unfair prejudice is greatest when the opposing party is the accused on trial for his liberty or life.

This point has been emphasized many times by the United States Courts of Appeals, which have held time and time again that it is error for police officers to relate the details of incriminating complaints they received about the accused for the supposed purpose of explaining how and why they suspected, located, or arrested him.⁶ The highest courts of many other states have done the same.⁷ As one federal appeals court has observed, “[a]llowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the sixth amendment and the hearsay rule.”⁸ Such evidence has the greatest imaginable potential for unfair prejudice and little or no probative value, since the jury ordinarily has no reason to learn anything about when or why the accused was suspected or charged.

Once upon a time, that was the law here in Virginia too. Only half a century ago, in *Sturgis v. Commonwealth*,⁹ the Supreme Court of Virginia reversed a conviction because the arresting officer testified that he was patrolling a certain highway on the night in question after he had “received some information” that the defendant was hauling illegal whiskey in that area, just before he found and arrested that same suspect and charged him with that same offense. The Supreme Court correctly reasoned that this testimony was “[c]learly” inadmissible and “pure hearsay” because “[i]t conveyed to the jury the information that these officers had been told by other persons that the defendant was or

⁶ *E.g.*, United States v. Solomon, 399 F.3d 1231, 1237 (10th Cir. 2005); United States v. Silva, 380 F.3d 1018, 1019-20 (7th Cir. 2004); United States v. Williams, 358 F.3d 956 (D.C. Cir. 2004); United States v. Lopez, 340 F.3d 169, 175-77 (3d Cir. 2003); Ryan v. Miller, 303 F.3d 231, 252-53 (2d Cir. 2002); United States v. Meserve, 271 F.3d 314, 319-20, 330 (1st Cir. 2001); United States v. Becker, 230 F.3d 1224, 1228-29 (10th Cir. 2000); United States v. Evans, 216 F.3d 80, 85-90 (D.C. Cir. 2000); United States v. Cass, 127 F.3d 1218, 1222-24 (10th Cir. 1997); United States v. Blake, 107 F.3d 651, 653 (8th Cir. 1997); United States v. Sallins, 993 F.2d 344, 346 (3d Cir. 1993); United States v. Brown, 767 F.2d 1078, 1083-84 (4th Cir. 1985); United States v. Hernandez, 750 F.2d 1256, 1256-59 (5th Cir. 1985).

⁷ *E.g.*, State v. Broadway, 753 So. 2d 801, 808-10 (La. 1999); Conley v. State, 620 So. 2d 180, 182-83 (Fla. 1993); Craig v. State, 630 N.E.2d 207 (Ind. 1994); State v. Doughty, 359 N.W.2d 439 (Iowa 1984); Gordon v. Commonwealth, 916 S.W.2d 176 (Ky. 1995); Commonwealth v. Rosario, 721 N.E.2d 903 (Mass. 1999); State v. Williams, 525 N.W.2d 538, 544-45 (Minn. 1994); State v. Braxter, 568 A.2d 311 (R.I. 1990); accord Shook v. State, 172 S.W.3d 36, 39-40 (Tex. Crim. App. 2005).

⁸ United States v. Silva, 380 F.3d 1018, 1020 (7th Cir. 2004).

⁹ *Sturgis v. Commonwealth*, 197 Va. 264, 88 S.E.2d 919 (1955).

had been engaged in the very illegal act for which he was then being tried.”¹⁰

Just a few years later, however, the wisdom of that case began to unravel in a pair of terribly reasoned cases. Ironically, both of them involved the fatal shootings of police officers, as if the court was unwittingly destined to prove that tragic cases make very bad law.

In *Fuller v. Commonwealth*,¹¹ the defendant was charged with capital murder for shooting and killing one of two police officers who had been placing him under arrest for an unrelated charge. Over a hearsay objection, the other officer testified that, at the time of the murder, they had been placing Fuller under arrest because earlier that day they had met a man who was bleeding profusely from a wound on his head, and who told the police that he had been assaulted by Fuller at an address where they might also find a dead woman.¹² This testimony about the details of the other assault charge was obviously hearsay, terribly prejudicial, and irrelevant. Incredibly, however, the Supreme Court of Virginia held that this evidence was properly admitted “not for the purpose of showing the guilt or innocence of the defendant; but for the purpose of showing the reason for the police officers’ action in arresting him.”¹³ That reasoning was exceptionally dubious, because the jury at Fuller’s capital murder trial only needed to be told, at most, that Fuller was resisting some sort of an arrest when he shot the arresting officer; the jury had no need to know *why* he was being arrested, much less that it was for an unrelated crime of violence.¹⁴ But as bad as this holding was, at least its logic was originally limited to the unusual situation in which a defendant is charged with crimes he committed *while* resisting

¹⁰ *Id.* at 267, 88 S.E.2d at 921.

¹¹ 201 Va. 724, 113 S.E.2d 667 (1960).

¹² *Id.* at 725, 113 S.E.2d at 668.

¹³ *Id.* at 729, 113 S.E.2d at 670.

¹⁴ Under Virginia law, a defendant charged with crimes of violence against an arresting officer may try to reduce the grade of the offense by proving that he was being arrested illegally, but the burden of raising that issue and proving the illegality of the arrest is on the defendant, not the prosecution, *Clinton v. Commonwealth*, 161 Va. 1084, 1089, 172 S.E. 272, 274 (1934), and the defendant in *Fuller* did not even testify, much less offer any evidence that he was resisting an illegal arrest or that he was threatened with any conduct that would justify the use of deadly force. *See Banner v. Commonwealth*, 204 Va. 640, 647, 133 S.E.2d 305, 310 (1963) (“An illegal arrest of itself would not give the defendant the right to shoot or take the officer’s life”). So there is no way the prosecution should have been allowed to prove the legality of the arrest in that case to rebut a defense that had never been raised. In any event, that charitable explanation of the holding in *Fuller* would be especially tenuous today, since “the overall trend in a majority of states has been toward abrogation of the common law right to use reasonable force to resist an unlawful arrest.” *Commonwealth v. Hill*, 264 Va. 541, 548 n.2, 570 S.E.2d 805, 809 n.2 (2002) (noting without deciding whether Virginia should join that trend).

arrest, and the prosecution wants merely to prove why he was being arrested at the time of his crimes against the arresting officer.

In the first two decades after *Fuller* was decided, its scope was drawn slightly into question by a pair of cases in which police officers were permitted to testify as to what they had done immediately after receiving generalized radio reports of suspicious activity then in progress. One officer testified to receiving a report about a “burglary in progress,”¹⁵ and the other explained that he had “gone to investigate noises heard in that building.”¹⁶ In both cases, the court cited *Fuller* as if to suggest that perhaps the hearsay rule would never be implicated by allowing a police officer to explain what led him to the place where he found the defendant or to place the defendant under arrest. That reliance was unfortunate and entirely unnecessary. A far more solid foundation for those two rulings would have been simply to note that those cases, unlike *Fuller*, involved police testifying how they immediately responded to reports that did not describe or name the accused or even directly implicate him in any criminal activity, and that those reports were in any event almost certainly admissible, even for their truth, as “present sense impressions” of crimes then in progress.¹⁷ Neither case therefore represented any significant expansion of the holding in *Fuller*.

But any possible limits on that once arguably narrow case were unwittingly obliterated by the disastrous decision of the Supreme Court of Virginia in *Weeks v. Commonwealth*.¹⁸

The defendant in *Weeks* was one of two men in a car that was stopped by a state trooper for speeding, moments before one of them apparently shot and killed the trooper during that routine traffic stop. Some time later, Weeks was detained by the police for several hours of questioning before he was arrested and charged with the murder. At trial, the police officer who had questioned Weeks about the murder was permitted to disclose that he eventually decided to arrest Weeks after hearing that *another* officer had allegedly been told by the vehicle’s other occupant (who was also the defendant’s uncle) “that Lonnie Weeks did, in fact, shoot the trooper.” Of course, this testimony by a police officer as to what some *other* officer allegedly heard from a witness was “double

¹⁵ *Upchurch v. Commonwealth*, 220 Va. 408, 409, 258 S.E.2d 506, 507 (1979).

¹⁶ *Foster v. Commonwealth*, 209 Va. 297, 303, 163 S.E.2d 565, 569 (1968).

¹⁷ Hearsay statements are admissible in Virginia when there is “substantial contemporaneity” between the statement and the event being described. BOYD-GRAVES CONFERENCE, A GUIDE TO EVIDENCE IN VIRGINIA 96 (2004).

¹⁸ 248 Va. 460, 477, 450 S.E.2d 379, 390 (1994). All of the facts about the *Weeks* case set forth here are of course taken from that opinion.

hearsay and thus doubly suspect.”¹⁹ Nevertheless, the Supreme Court of Virginia affirmed the admission of this hearsay within hearsay on the absurd grounds that it was merely offered to “explain” something the jury had absolutely no need to know: namely, why the officer decided to arrest the defendant and charge him with the very crime for which he was on trial. Quoting but utterly failing to comprehend the language from its earlier holding in *Fuller*, the court stated that “[t]he hearsay rule does not operate to exclude evidence of a statement offered for the mere purpose of explaining the conduct of the person to whom it was made; this is especially true when the evidence is not offered for the purpose of establishing guilt or innocence of the accused ‘but for the purpose of showing *the reason for the police officers’ action in arresting him.*”²⁰

The court’s careless extension of its holding in *Fuller* was so preposterous that it takes your breath away. When the *Fuller* court approved the admission of hearsay to explain “the reason for the *police officers’* action in arresting him,” remember, that court was talking about the *victims* in that case—the officers who were trying to arrest the accused at the time he shot at them and murdered one of them—not the other police officers who arrested him hours later and charged him with that murder! If the court had understood and truly followed the logic of its earlier holding in *Fuller*, all it would have approved in *Weeks* would have been the admission of evidence as to why the slain police officer had stopped the accused for speeding just moments *before* the murder, not why a *different* officer decided several hours later, based on inadmissible third-hand information, to charge him with the very same crime for which he was on trial. That testimony, even apart from its obvious unreliability, should have been excluded on the grounds of its sheer irrelevance. There is no need for a jury to learn anything about whether the defendant was ever arrested *on the charge for which he is now being tried*, much less when or by whom or *why*.²¹ On the contrary, even in

¹⁹ *Serv. Steel Erectors Co. v. Int’l Union of Operating Eng’s*, 219 Va. 227, 236, 247 S.E.2d 370, 376 (1978). In saying that double hearsay is “doubly suspect,” of course, the court did not mean that it is always inherently less trustworthy than ordinary hearsay, because it is not. James Joseph Duane, *The Four Greatest Myths About Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1530 & n.25 (1995). But it is doubly suspect in the sense that there is need for special caution in admitting such evidence, and the proponent must overcome a more daunting burden of demonstrating that the court can safely dispense with the need for both witnesses whose out-of-court declarations are being offered.

²⁰ *Weeks*, 248 Va. at 477, 450 S.E.2d at 390 (emphasis added). The court said it was quoting its opinion in *Upchurch v. Commonwealth*, 220 Va. 408, 258 S.E.2d 506 (1979), but the passage it quoted from *Upchurch* was actually a quotation from *Fuller*.

²¹ In *Weeks*, the Supreme Court reasoned that the incriminating statement by the defendant’s passenger “was offered to explain [the police officer’s] action in arresting

cases where it is impossible to keep the jury from learning or inferring such facts, the admission of such evidence must be treated with extraordinary delicacy and restraint, since the United States Constitution commands that a jury must not be “permitted to draw inferences of guilt from the fact of arrest and indictment.”²² The fact that the Supreme Court of Virginia could not immediately perceive this great difference is nothing short of astounding.

In fact, although the court did not realize this point, its decision in *Weeks* was plainly controlled by *Sturgis*, which had correctly recognized that it is improper to tell the jury that the police “had been told by other persons that the defendant was or had been engaged in the very illegal act for which he was then being tried.”²³ Yet that is exactly what the testifying officer did in *Weeks* with the later blessing of the Supreme Court. Although the court probably did not even realize that it was doing so, its decision in *Weeks* unmistakably overruled *Sturgis*, and represented a complete reversal of the law of Virginia. It also distorted *Fuller* utterly beyond recognition, by expanding the logic of that holding from cases involving crimes committed against arresting officers (a very small subset of all prosecutions) to all cases in which the accused was arrested some time after his crime—in other words, *all* prosecutions.

For the reasons outlined above, *Weeks* is perhaps the most poorly reasoned judicial opinion I have ever seen on any aspect of hearsay law; I will note only in passing (because it is not our central concern here) that the decision is also unquestionably wrong under the Confrontation Clause of the United States Constitution, which plainly forbids any court from doing what the trial judge did in that case.²⁴

defendant at 7:52 a.m. after considering defendant not in custody 12 minutes earlier, and not to prove that defendant had in fact shot the trooper.” 248 Va. at 477, 450 S.E.2d at 390. This completely overlooks the obvious fact that the precise time when the accused was placed under arrest was irrelevant to the jury. The jurors never even should have been told such things, much less given an explanation for them.

²² *Taylor v. Kentucky*, 436 U.S. 478, 487 (1978) (explaining the reasons for the need to give criminal jurors an instruction on the presumption of innocence). Many readers with the supposed “benefit” of extensive criminal trial experience will certainly think I do not know what I am talking about because they have seen countless police officers testify at trial about their decision to place the accused under arrest. I am well aware of that common practice, which is entirely because of the unfortunate prevalence of incompetent defense lawyers who have not read *Taylor v. Kentucky* and do not understand that they should be objecting to such prejudicial and irrelevant information, perhaps because they too have seen it happen so often. And so the tragic cycle continues.

²³ *Sturgis v. Commonwealth*, 197 Va. 264, 267, 88 S.E.2d 919, 921 (1955).

²⁴ In a case like *Weeks* where two potential suspects were present at a crime, an extrajudicial statement made by one of them to the police and implicating the other is so inherently suspect and devastating that it cannot be admitted at their joint trial, not even if it is admitted with a “limiting instruction” that the jury may not consider it for its truth against the one who did not make the statement, because of the intolerable risk that the jury will be unable to heed such an instruction. *Bruton v. United States*, 391 U.S. 123

Predictably, the horrendous decision in *Weeks* has led the lower Virginia courts to sustain some of the most egregious examples one could imagine of inadmissible hearsay smuggled into the record under the ridiculous pretense of telling the jury why the police did what they did. For example, in *Fisher v. Commonwealth*,²⁵ the accused was a felon charged with illegal possession of a shotgun that was found in the trunk of a car he was driving. The arresting officer testified that he stopped the car, among other reasons, because he saw that the defendant (1) had no inspection or rejection sticker on his car, (2) made an illegal turn, and (3) pulled into a private apartment complex where the officer knew the defendant did not live. The officer testified that he decided to have the car towed in accordance with county policy because it had no inspection or rejection sticker, that he then found a bottle of pills in the car during a routine inventory search that tested positive for cocaine, and that he therefore obtained a search warrant for the search of the trunk that turned up the gun.²⁶ That should have been the end of the matter. That was far more than adequate explanation for the stop, and the search. No jury on earth confronted with that explanation would have ever suspected the police of anything suspicious or improper, and the defendant did not suggest otherwise at trial.²⁷

But the prosecutor did not stop there, because he feared the jury might not convict on the gun possession charge when there was no admissible testimony by anyone who had ever seen the defendant touch the gun (much less use it in a menacing manner), or who could say who had put the gun in the trunk, or how long the gun had been there. So, with the consent of the trial judge and the later blessing of the court of

(1968). That is true even in a case, such as *Weeks*, where the extrajudicial statement is admitted alongside an alleged confession by the defendant himself. *Cruz v. New York*, 481 U.S. 186 (1987). Logically, that conclusion is not altered merely because the accused is on trial by himself, at least not in a case like *Weeks* where the evidence was neither relevant nor admissible for any proper purpose to rebut some defense raised by the accused at trial. *Tennessee v. Street*, 471 U.S. 409, 417 (1985) (Brennan, J., concurring). These points were all plainly settled long before *Weeks* was decided.

²⁵ 42 Va. App. 395, 592 S.E.2d 377 (Va. Ct. App. 2004).

²⁶ *Id.* at 399-400, 592 S.E.2d at 378-79.

²⁷ I say this with complete confidence even though I have not seen the entire trial record in that case, because if the defense had been foolish enough to make an issue out of the traffic stop in front of the jury, the court of appeals surely would have made a point of emphasizing that fact in attempting to justify its ruling. Through personal contact with Fisher's lawyer, I confirmed the unsurprising fact that he did not argue in the presence of the jury that the police lacked lawful authority to stop the vehicle, and even stipulated before trial that he would not do so. Even if that were not the case it would be beside the point, however, since not one word of the *Fisher* opinion suggests that the court's ruling was based on anything done or said by the defense at trial, so that opinion can surely be cited as binding precedent in any case where the accused makes no suggestion of any suspicious or improper misconduct by the police.

appeals, the arresting officer was *also* allowed to testify that one of his *other* reasons for stopping the car was that it had matched both the plates and the description of a car that had been the subject of a broadcast one week earlier, advising the police to “be on the lookout” for an older model Cadillac driven by a black male who had reportedly been involved in an “altercation”²⁸ and “who carried a shotgun in the trunk of his car,”²⁹ and who “had brandished a shotgun and put it in the trunk of his car the week before the stop.”³⁰

The potential of this evidence for unfair prejudice was off the charts. It was the *only* evidence in the entire trial that anyone had ever seen the accused actually touching the gun, much less brandishing it in a menacing manner.³¹ Incredibly, however, the prosecution had the audacity to tell the court with a straight face that its only reason for offering this evidence was “so the jury understands this was a legitimate and reasonable stop by the police in this case.”³² The testimony was admitted by the trial judge, and unanimously approved by the court of

²⁸ *Fisher*, 42 Va. App. at 399, 592 S.E.2d at 378.

²⁹ *Id.*

³⁰ *Id.* at 405, 592 S.E.2d at 381. The officer’s testimony was as follows:

Approximately one week before on my police radio while in my police car, I listened to a broadcast from another police officer, which stated that a large black Cadillac, 80s model driven by a tall black male bearing Virginia tags YGE3435 had been involved in a brandishing of a firearm on South Langley Street, which is approximately, a block and a half from where I saw him; and it was said on the broadcast that he keeps a shotgun in the trunk.

Appendix at 116, *Fisher* (Nos. 3309-02-4, 0553-03-4). Curiously, by the way, even though the police obtained a search warrant before opening the defendant’s locked trunk, *Fisher*, 42 Va. App. at 399-400, 592 S.E.2d at 378-79, the court of appeals was obviously unwilling to uphold the search on that basis, since it went out of its way to sustain the search as an “inventory search.” *Id.* at 401-05, 592 S.E.2d at 379-81. The court evidently recognized that the police broadcast was not even trustworthy enough to establish probable cause for the issuance of a warrant, yet it was willing to entrust that same evidence to the jury deciding the guilt or innocence of the accused.

³¹ Logically, a conviction would not require proof that the defendant had ever “brandished” the shotgun in a threatening way, and it was possible that a jury might have inferred his knowing possession of the gun from the other circumstantial evidence in that case, including evidence that he nervously slammed the trunk door shut. *Id.* at 400, 592 S.E.2d at 379. But the prosecutor knew well enough that a cautious jury might be reluctant to convict in the absence of more direct proof tying the shotgun to the owner of the vehicle, thus ruling out the possibility that the gun had been left or planted in the car by someone else, and in the absence of any evidence that his use of the gun posed a threat to anyone. *Cf.* *United States v. Barker*, 1 F.3d 957, 959 (9th Cir. 1993) (noting the risk of jury nullification in felon-in-possession prosecutions, particularly in a nation where mere possession of a firearm is ordinarily legal). Both of those weaknesses in the government’s case were fixed by the admission of this inadmissible hearsay tying the gun to the owner of the car, and suggesting that the gun had been in the trunk for at least a week and that he had “brandished” it in connection with some “altercation.”

³² Appendix at 114, *Commonwealth v. Fisher*, 42 Va. App. 395, 592 S.E.2d 377 (Va. Ct. App. 2004) (Nos. 3309-02-4, 0553-03-4).

appeals, on the theory that its potential for unfair prejudice was outweighed by its supposed probative value in explaining for the jury “what this police officer did upon receiving that information.”³³ This ruling was indefensible for three independent reasons, any one of which should have been a decisive reason for reversal.

First, as the Supreme Court of Virginia once cogently declared in the completely indistinguishable case of *Sturgis v. Commonwealth*,³⁴ testimony by an arresting officer is clearly inadmissible and “pure hearsay” if “[i]t conveyed to the jury the information that these officers had been told by other persons that the defendant was or had been engaged in the very illegal act for which he was then being tried.”³⁵ That is exactly what the witness did in *Fisher*. Exactly two weeks after *Fisher* was decided, by the way, a federal appeals court held in a case with an uncannily similar set of facts that the admission of such testimony was plain error. In *United States v. Williams*,³⁶ another prosecution for possession of a firearm by a convicted felon, the court correctly held that it was plain error to allow the arresting officer to testify that others had told him that they had earlier seen the accused holding a gun, especially since the prosecution easily could have disclosed that the officers had information leading them to question the accused without revealing that it involved a report that he had been *armed*. Could anything possibly be more obvious?

Second, even if we concede that Virginia law after *Weeks* now apparently allows the police, at least as a general rule, to narrate inadmissible hearsay in order to explain their decision to arrest the accused, it boggles the mind to suppose that such testimony might be properly admitted even in a case like *Fisher*, where the officer had already testified without contradiction that he had seen with his own eyes plenty of lawful reasons to stop the accused and search his car, and the “one last reason” the prosecution wanted to sneak into the record was an otherwise inadmissible third-hand report that the defendant was guilty of the very charge for which he was on trial.³⁷ If that is proper

³³ *Fisher*, 42 Va. App. at 406, 592 S.E.2d at 382. By way of clarification, it should be noted that the two charges against Mr. Fisher (possessing a firearm while possessing cocaine, and possessing a firearm while a convicted felon) were tried separately before two different judges, both of whom were named in the reported opinion by the court of appeals. One of them, the Honorable Paul F. Sheridan, was *not* the one who admitted this hearsay evidence. On the contrary, Judge Sheridan sensibly sustained the defendant’s hearsay objection to that evidence, surely for the same obvious reasons detailed in this article.

³⁴ 197 Va. 264, 88 S.E.2d 919 (1955).

³⁵ *Id.* at 267, 88 S.E.2d at 921.

³⁶ 358 F.3d 956, 963-64 (D.C. Cir. 2004).

³⁷ If the prosecutor and the testifying officer had honestly desired to use this evidence solely for the alleged purpose of explaining the conduct of the police that night, (1) they could have limited themselves to the traffic violations without mentioning the

under Virginia law, then we might as well come clean and admit that Virginia hearsay law imposes absolutely no limits on what police officers can tell the jury, as long as the prosecutor will naturally and gleefully accept a pathetic limiting instruction that even the rankest hearsay rumors are being admitted not for their truth but “merely” to explain why some expert in the police department thought they were reliable enough to act on!

Finally, even if one were to agree with the Virginia Court of Appeals that such testimony was properly admitted but not for its truth, it is folly to suggest that the jury in *Fisher* would have understood what was happening when the trial judge told them merely that “whether or not this incident was reported or is true or not is *not the issue*; it’s only being offered to you for your consideration to show what this police officer did upon receiving that information; not whether or not it was true one week earlier.”³⁸ This instruction appeared only to tell the jury that it was neither crucial nor important whether the “be on the lookout” warning was true or false, which no jury would understand or believe. That is a far cry from what would have been a minimally adequate limiting instruction under the facts of a case like *Fisher*, where the accused was entitled to insist, at a minimum, that the jury be told something like this:

Ladies and gentleman of the jury, you have heard that the arresting officer stopped the defendant’s car because he said he had heard from the police dispatcher that someone else said they saw the accused brandishing a shotgun and placing it in the trunk of this car.

broadcast at all, or (2) they could have revealed only that the police had other “information” leading them to question the defendant without describing that information, or (3) they could have revealed that the report involved alleged possession of contraband without disclosing that it was a gun, or (4) they could have mentioned a report about a gun without disclosing that it also involved a *shotgun* that was allegedly carried around regularly by the vehicle’s owner, who had supposedly brandished it in connection with some altercation. *Dayenu!* Incredibly, none of those options were satisfactory to the prosecutor, who still had the brazen audacity to claim that he wanted only to show the jury that the police had lawful grounds to stop and question Mr. Fisher. It is painfully obvious that the prosecutor’s true motive was the hope that the jury would disregard the judge’s limiting instructions and rely on this hearsay as proof of the defendant’s guilt.

To add to the hypocrisy, by the way, the prosecution was able to prevail on the other issue raised by Fisher on his appeal—the legality of the search that led to the discovery of the shotgun in the trunk—only by persuading the court of appeals that it was found during a routine inventory that was not a “pretext concealing an investigatory motive.” *Fisher*, 42 Va. App. at 401, 592 S.E.2d at 380 (citation omitted). In other words, the Commonwealth was able to prevail on this appeal only by simultaneously committing itself to the positions that (1) the jurors *needed* to learn about the broadcast involving a shotgun in the trunk to understand why the police stopped this car, but (2) the later decision of those same officers to look inside the trunk had nothing to do with that report of a shotgun in that trunk! It is a pity that some lawyers will say anything to win. It is tragic that courts will sometimes let them get away with it.

³⁸ *Fisher*, 42 Va. App. at 406, 592 S.E.2d at 382 (emphasis added).

That multiple hearsay was admitted for only one purpose: to assist you in deciding, if it matters to you, why the police decided to stop the defendant's car. But you are neither required nor expected to decide whether the police had lawful grounds for that stop, which has no bearing on whether you should acquit or convict the defendant. That weapon turned up after the police obtained a search warrant from a judge, who determined there was probable cause to make that search. The law does not allow you to reconsider that question, and the defendant has not asked you to do so.

This double hearsay has not been admitted for any other purpose, and you may *not* give it any weight when deciding any other issue in this case, including whether the defendant ever touched or possessed the weapon that was found in the trunk of the car, or whether he placed it there or knew that it was there. Indeed, because there has been absolutely no admissible evidence that this hearsay report was true, and because the defendant is presumed to be innocent of all misconduct in the absence of admissible evidence to the contrary, I am ordering you to proceed on the assumption, no matter how unlikely it may sound in hindsight, that the report was, in fact, *false*.

As bizarre as this instruction admittedly sounds, it is merely a detailed explication of what the trial judge was supposedly telling the jury in *Fisher*, although there is no chance that any juror would understand all this after hearing a cryptic, baffling, and unpersuasive assertion by the judge that the truth of the out-of-court statement "was not the issue" and that it was not admitted to assist them in deciding "whether it was true." I am not claiming, by the way, that an instruction like the one above would be adequate to protect the rights of the accused in a case like *Fisher*, because it would not. This instruction asks the impossible by seemingly ordering the jurors to make believe that, by the most remarkable coincidence they have ever heard of, some unidentified caller *falsely* claimed that a man was seen putting a shotgun in the trunk of his car, one week before that same man was found with a shotgun in the trunk of that car. But that absurdity is not of my making: I am merely spelling out plainly and exactly what the trial judge was pretending to communicate to the jury in *Fisher*. The absurdity of expecting a jury to follow an instruction like this is the reason why dozens of state and federal courts from around the country have been virtually unanimous in holding that a police officer cannot be allowed to justify an arrest by telling the jury about hearsay reports that the accused committed the same crime for which he is now on trial.³⁹

There have been outrageous cases from other jurisdictions where police officers were allowed to relate inadmissible hearsay only because a bungling defense lawyer made the execrable mistake on cross-

³⁹ See cases cited *supra* notes 6-8.

examination of asking why they arrested the defendant the way they did. For example, in one Ohio case where the defendant was charged only with drug possession, the testifying officer revealed that a team of seven officers was assembled to make the arrest because “there were other allegations that he was beating the children at the residence.”⁴⁰ In a Connecticut case, an officer explained that he arrested the defendant with his gun drawn because the police had received information from “other police departments that [the defendant] has carried weapons on his person, that he has also said he wouldn't be taken again, and that he'll shoot it out with the police if he had to.”⁴¹ Another police officer suspected the accused of criminal activity after calling headquarters to run his name through “a criminal history check” which revealed that “he [had] past convictions for burglaries as well as larcenies.”⁴² In all three cases, the admission of this clearly inadmissible hearsay was affirmed only because the error was invited by a foolish question on cross-examination by defense counsel. If those same cases had been tried here in Virginia after *Weeks* and *Fisher*, there would have been no need to wait until cross to make such devastating disclosures; they could have been volunteered on direct examination with a limiting instruction that the officer was merely exercising his supposed “right” under Virginia law to explain why and how he placed the defendant under arrest.

II. TREATING PHYSICIANS

If one were pressed to identify a situation where a witness *should* generally be allowed to testify to what someone else told him, not for its truth but for the purpose of explaining why he later did the things he did, it would probably be impossible to imagine a better case than a medical malpractice defendant attempting to explain that he made the decision that constituted his alleged malpractice only after seeking and relying upon the factual reports and advice of doctors with other pertinent medical specialties.

Unlike the arresting officer in a criminal case, a malpractice defendant is a party to the case, and the reasonableness of his conclusions and conduct is the central issue in the litigation, so any evidence bearing on that matter naturally has the highest degree of probative value. Besides, apart from the special case of police officers, leading evidence texts agree that when a witness wishes to testify to what he was told in order to explain his subsequent decisions and conduct, “unless the need for the evidence for the proper purpose is substantially outweighed by the danger of improper use, the appropriate

⁴⁰ State v. Brack, No. 2000CA00216, 2001 WL 92089, at *4 (Ohio Ct. App. 2001).

⁴¹ State v. Brokaw, 438 A.2d 815, 816 n.2 (1980).

⁴² State v. Wragg, 764 A.2d 216, 219 (Conn. App. Ct. 2001).

result is to admit the evidence with a limiting instruction.”⁴³ All this is obviously consistent with the law’s presumption that a jury ordinarily “follows an explicit cautionary instruction given by the trial court,”⁴⁴ because if a jury can be trusted to follow a clear instruction that an otherwise relevant statement may not be considered for its truth, there is literally no risk of unfair prejudice to anyone. And let’s not forget that, even in the context of testimony by officers explaining the irrelevant reasons for their decision to arrest the accused, the Supreme Court of Virginia has said that “[t]he hearsay rule does *not* operate to exclude evidence of a statement, request, or message offered for the mere purpose of explaining or throwing light on the conduct of the person to whom it was made.”⁴⁵

So this should be a no-brainer, right? Surely that logic must follow with incomparably greater force when a malpractice defendant, seeking to explain why he made the decision that constituted his alleged malpractice, wishes to testify to facts and opinions that he *first* solicited and relied upon from doctors with other medical specialties. Right?

Wrong. In a pair of astounding cases decided in the past two years, the Supreme Court of Virginia has apparently eliminated any possibility that a medical malpractice defendant will be allowed to explain that he made his treatment decisions only after consulting with other doctors who had seen the same patient, even if the testimony is offered merely to prove the extent of his efforts to obtain appropriate consultation with relevant specialists.

In *Wright v. Kaye*,⁴⁶ the defendant, Dr. Kaye, was accused of malpractice during the surgical excision of a urachal cyst. The plaintiff charged that Dr. Kaye was negligent in using a stapling device to close the affected area and in failing to perform a cystoscopy to visually inspect the dome of the bladder. In his defense, Dr. Kaye testified that he did not complete the surgery until after he sought an intraoperative consulting opinion from a urologist who came into the operating room and then “informed him he was far enough from the bladder to safely use the Endo-stapler and that no cystoscopy was needed prior to closing the

⁴³ STRONG ET AL., *supra* note 2, § 249. Accord MUELLER & KIRKPATRICK, *supra* note 1, § 8.18.

In an astonishing variety of cases, it is important to prove what a person actually knew or understood, what information was provided to her (warning or notice), or what pressures she felt from the urgings or blandishments of others. In such settings, evidence of oral out-of-court statements that she heard, or written statements that she read or had a chance to read, is routinely admitted.

Id.

⁴⁴ *Riner v. Commonwealth*, 268 Va. 296, 317, 601 S.E.2d 555, 567 (2004).

⁴⁵ *Fuller v. Commonwealth*, 201 Va. 724, 729, 113 S.E.2d 667, 670 (1960).

⁴⁶ 267 Va. 510, 593 S.E.2d 307 (2004).

surgery.”⁴⁷ Dr. Kaye testified that he arranged this intraoperative consultation because he wanted the opinion of a urologist to assure “that the anatomy was properly identified.”⁴⁸ The plaintiff’s hearsay objection was overruled, according to the trial judge, because the testimony was admissible not “for the truth of what indeed the [urologist] said, . . . but simply to show why Dr. Kaye did what he did in this particular matter.”⁴⁹

In another case decided the same year, *Chandler v. Graffeo*,⁵⁰ an emergency room patient complained of chest pains to Dr. Graffeo, who diagnosed the patient “as suffering from a non-dissecting lower thoracoabdominal aortic aneurysm.”⁵¹ When the patient’s pain subsided, he was released with instructions to see another doctor the next day, but died a few days later. After Dr. Graffeo was sued for his alleged “negligence in discharging [the patient] from the hospital,”⁵² he testified that he did not release the patient until after he first consulted with a specialist in nephrology, described the patient’s current condition, and confirmed with the specialist that “it was safe to discharge [the patient] from the hospital.”⁵³ Dr. Graffeo testified that he sought and obtained this consulting opinion from Dr. Keith Zaitoun because he was a specialist in nephrology, and because Zaitoun had done a work-up on the patient during a five-day hospital stay a week earlier and therefore “knew the patient better.”⁵⁴ Again, the plaintiff’s hearsay objection was overruled by the trial judge.

These two cases followed a remarkably similar pattern. In both cases, the plaintiff objected on hearsay grounds to the defendant’s testimony about the consulting opinion he obtained from a specialist. In both cases, the defendant argued that his testimony was not offered for its truth but to explain why he later made the decisions for which he was on trial, and the trial judge correctly overruled the objection. And in both cases, despite the law that evidentiary rulings are supposed to be reviewed only for abuse of discretion, the Supreme Court of Virginia

⁴⁷ *Id.* at 529, 593 S.E.2d at 317.

⁴⁸ Deposition of Dr. Kaye at 11-12 and 16-19, *Wright*, 267 Va. 510, 593 S.E.2d 307 (No. 030658).

⁴⁹ *Wright*, 267 Va. at 529, 593 S.E.2d at 318.

⁵⁰ 268 Va. 673, 604 S.E.2d 1 (2004).

⁵¹ *Id.* at 677, 604 S.E.2d at 2. The diagnosis was at least partially correct, because the patient died several days later from a ruptured thoracoabdominal aortic aneurysm. *Id.* at 676, 604 S.E.2d at 2.

⁵² *Id.* at 681, 604 S.E.2d at 5.

⁵³ *Id.* at 682, 604 S.E.2d at 5.

⁵⁴ Trial transcript at 840, *Chandler*, 268 Va. 673, 604 S.E.2d 1 (No. 030665). Dr. Graffeo further stated that this was “a patient who [Dr. Zaitoun] had completed his work-up on,” *id.* at 838, and that Dr. Zaitoun “had the knowledge of [the patient’s] five-day hospitalization at Maryview.” *Id.* at 840.

reversed and concluded that the testimony should have been excluded as hearsay.

In both *Wright* and *Chandler*, the court made the mistake of placing almost exclusive reliance on a line of earlier cases in which it had held that a nonparty expert medical witness should not be allowed to testify that he has spoken with others who agreed with his opinion.⁵⁵ Those cases made good sense; when a *nonparty* expert witness says that others agree with him, such testimony has absolutely no relevance unless it is taken as evidence of the truth of what the others said, which makes it classic hearsay. The same would also be true if a malpractice defendant testified to conversations he had with other doctors *after* the date of his alleged negligence.

But that is a far cry from what happened in *Wright* and *Chandler*, where the *defendant* in a medical malpractice case testified about the opinions he requested and obtained from specialists who had actually seen the same patient, as a way of demonstrating the extent of his care in obtaining appropriate consultations *during* his treatment of the plaintiff, which is typically a central issue in malpractice litigation.⁵⁶ If the evidence is offered for that limited purpose with an appropriate limiting instruction, its relevance does not depend on whether it is true or false, and so no hearsay danger is presented, as the trial judges correctly realized in both of those cases. When the witness on the stand is a *nonparty* medical expert, by contrast, obviously no similar claim can be made that the evidence is “offered for the mere purpose of explaining or throwing light on the *conduct* of the person to whom it was made,”⁵⁷ since the lawsuit does not involve *his* conduct at all.

This is why the Supreme Court was mistaken to conclude in *Chandler* that there could be “no other reason for introducing Dr. Zaitoun’s opinion than to bolster Dr. Graffeo’s testimony to prove that he had complied with the appropriate standard of care.”⁵⁸ On the contrary, the obvious “other reason” was to show, not that this patient’s condition permitted his safe discharge from the hospital (his later death pretty

⁵⁵ See *CSX Transp. v. Casale*, 247 Va. 180, 182-83, 441 S.E.2d 212, 214 (1994); *Todd v. Williams*, 242 Va. 178, 181, 409 S.E.2d 450, 452 (1991); *McMunn v. Tatum*, 237 Va. 558, 566, 379 S.E.2d 908, 912 (1989).

⁵⁶ *Bracey v. Sullivan*, 899 So. 2d 210, 215 (Miss. Ct. App. 2005) (affirming summary judgment for malpractice defendant based on affidavits from expert witnesses to establish, among other things, “that the appropriate consultations were made throughout [the patient’s] treatment at the hospital”).

⁵⁷ *Fuller v. Commonwealth*, 201 Va. 724, 729, 113 S.E.2d 667, 670 (1960) (emphasis added).

⁵⁸ *Chandler*, 268 Va. at 682, 604 S.E.2d at 5. Even if Dr. Graffeo had intended to offer Dr. Zaitoun’s opinion on the relevant standard of care, however, it is not clear why that should have made a difference under Virginia law. See *infra* note 64 and accompanying text.

much proved otherwise), but that the defendant *reasonably believed* it did at the time, based on his consultation with a specialist who knew the patient better. Virginia law allows a medical malpractice defendant to testify to the “factual issues in the case, including what actions he took and *his reasons* for taking those actions,” and such “factual testimony,” even if it includes the doctor’s understanding of what “many surgeons do,” is “materially different from standard of care testimony.”⁵⁹

In attempting to explain why it could not trust a jury to obey the standard limiting instruction in a case like *Wright*, the Supreme Court reasoned: “While [the urologist’s] statements would be some evidence of Dr. Kaye’s state of mind (why he proceeded in Wright’s procedure as he did), that would be true, to some degree, of almost *any* hearsay statement offered by its proponent.”⁶⁰ In other words, the court reasoned, if we let doctors testify to what others told them in the operating room on the grounds that it is only offered to explain their subsequent conduct, that “exception” to the hearsay rule would quickly swallow the rule, since almost every bit of hearsay could be admitted on that rationale. This is perfect nonsense. Most inadmissible hearsay could never be logically offered on such a theory, either because it was heard by the witness after the event in question, or else because it was heard by a nonparty witness whose conduct is therefore not relevant at the trial. That would most obviously include, come to think of it, *all* of the inadmissible hearsay collected by police officers in criminal cases! Perhaps it should be no surprise that this obvious point was missed by the same court that has evidently perceived no logical limits on the ability of a police officer to do what Dr. Kaye was trying to do.

These two holdings are unfortunate and deeply troubling, and seem to reflect a grave naivety about the nature of medical malpractice litigation. Doctors routinely make life-and-death decisions based in large part on reports that they receive from specialists, lab technicians, nurses, radiologists, and a host of others, as well as the expertise they have acquired over a lifetime of conversations and conferences with

⁵⁹ *Smith v. Irving*, 268 Va. 496, 502, 604 S.E.2d 62, 65 (2004) (emphasis added). Believe it or not, this case was decided the same day the court decided *Chandler*, and also on the same day that the court reiterated, in the course of affirming the conviction and death sentence of a criminal defendant, that “[t]he hearsay rule does not operate to exclude evidence of a statement offered for the mere purpose of explaining the conduct of the person to whom it was made.” *Winston v. Commonwealth*, 268 Va. 564, 591-92, 604 S.E.2d 21, 36 (2004) (quoting *Weeks* and ruling that a police officer could testify to incriminating statements made to him by a crime victim solely for the purpose of explaining why the officer took certain photos of the accused). Needless to say, the three opinions were written by three different justices—it could not have been otherwise—but, incredibly, all three cases were unanimous on the points for which I have cited them. It appears that the members of the court may be too busy to read these things very closely.

⁶⁰ *Wright v. Kaye*, 267 Va. 510, 530, 593 S.E.2d 307, 318 (2004) (emphasis added).

other doctors going all the way back to their classes in medical school.⁶¹ All of these sources of guidance are classic hearsay if admitted for their truth, but they are routinely admitted in malpractice litigation, often without objection, even if only to permit the jury to decide whether the defendant made every reasonable effort to gather all pertinent sources of data and insight, and whether he made the right choices in light of the information and knowledge available to him. If the reasoning of *Wright* and *Chandler* is to be taken seriously and carried to its logical conclusion, there is no principled reason why all of these extrajudicial sources of insight would not also be inadmissible hearsay, a result which would have a profound impact on malpractice litigation as we know it.⁶²

In both *Wright* and *Chandler*, the court bristled at its mistaken perception that the defendants had attempted to quote some other specialist on nothing but the appropriate “standard of care.”⁶³ Even if that had been true, however, it is not clear why that should have made any difference. The same year it decided both of those cases, the Supreme Court of Virginia held that a medical malpractice plaintiff’s expert witness could testify as to the appropriate “standard of care applicable to basic gynecological surgical procedures in Virginia,” even though that expert had never practiced medicine in Virginia and had evidently never even observed such procedures in Virginia.⁶⁴ So far as the record revealed, the expert had gained his knowledge of the customary Virginia standard of care entirely “through *discussions* with physicians in Virginia, and while attending *seminars and meetings* in Virginia concerning laparoscopic surgery.”⁶⁵ One wonders whether the court paused long enough to realize that as long as a doctor has never actually *witnessed* those procedures being conducted in Virginia, everything he has learned through discussions, seminars and meetings

⁶¹ “[A] physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, *reports and opinions from nurses, technicians and other doctors*, hospital records, and X-rays.” FED. R. EVID. 703 advisory committee’s note (emphasis added).

⁶² Under Virginia law, “statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by testimony or by stipulation shall not be excluded as hearsay,” Virginia Code § 8.01-401.1, but that hearsay exception obviously does not apply to the vast wealth of insight a medical doctor collects through decades of oral conversations and conferences with colleagues.

⁶³ *Wright*, 267 Va. at 530, 593 S.E.2d at 318; *Chandler*, 268 Va. at 682, 604 S.E.2d at 5.

⁶⁴ *Christian v. Surgical Specialists of Richmond, Ltd.*, 268 Va. 60, 66, 596 S.E.2d 522, 525 (2004).

⁶⁵ *Id.* (emphasis added).

about “how we do it here” is technically hearsay. It is impossible to guess how the court will eventually reconcile this inconsistency.⁶⁶

Those who share my deep concern over these two cases might take some consolation in the knowledge that the court’s dubious holdings could be attributable to its confusion over the facts of those cases. In *Wright*, for example, the court mistakenly stated that the allegedly inadmissible hearsay proffered by the defendant involved “an intraoperative consultation he undertook *by telephone*” with a urologist,⁶⁷ when in fact that specialist was summoned into the operating room and observed the site of the incision before recommending the proper course to close the affected area.⁶⁸ Likewise, the court’s opinion in *Chandler* is written as if the court had no idea that the specialist called by the defendant for a consultative opinion had actually seen the same patient one week earlier and knew the patient better than the defendant did.⁶⁹ It

⁶⁶ The court’s opinion in *Christian* contains no indication that the defendant explicitly objected on hearsay grounds to the testimony of this expert, and perhaps the court did not see itself as deciding that precise question. But the question presented in that case was whether the proposed expert had demonstrated “sufficient knowledge of the Virginia standard of care at issue in this case to qualify as an expert witness,” *id.* at 66, 596 S.E.2d at 525, which is arguably not so different from an explicit hearsay objection. Surely the court could not make a principled reconciliation of *Christian* with *Wright* and *Chandler* on the grounds that *Christian* involved a plaintiff’s witness, or that it involved a nonparty expert witness. The court will inevitably need to hold either that (1) “the expert testimony in *Christian* was inadmissible hearsay but we did not decide that question because that was not the issue presented on appeal,” or (2) “hearsay testimony about the appropriate standard of care in a medical malpractice case is not admissible, not even from the defendant, if he wants to tell us what he heard from one specialist; it is admissible, however, even from a nonparty expert who has never practiced medicine in Virginia, if he has heard about it from a *lot* of doctors (just don’t ask us how many hearsay reports are enough to do the trick).” The later opinion in *Chandler* contains no hint as to which way the justices will eventually try to get around this inconsistency when someone inevitably calls them on it.

⁶⁷ *Wright v. Kaye*, 267 Va. 510, 517, 593 S.E.2d 307, 310 (2004) (emphasis added).

⁶⁸ I knew this had to be a mistake; no surgeon in any operating room would ever call a urologist on the telephone and ask “if I try to describe where I have made the incision, would you tell me if I am too close to the bladder?” I checked the record on appeal and confirmed this unsurprising fact for myself. The allegedly inadmissible testimony consisted of what the urologist saw “while he was there,” and his response when he was asked for his recommendation “given what you see here.” Deposition of Dr. Kaye at 16-19, *Wright*, 267 Va. 510, 593 S.E.2d 307 (No. 030658). There is nothing in the record about any telephone conversation. It is a good bet that this mistake was made by an inexperienced law clerk who did not understand the operative note which stated that the urologist “was called for intraoperative consultation.” Young folks these days spend so much time on cell phones that they do not even remember the days when “calling” a person sometimes meant to *summon* him.

⁶⁹ The court’s opinion curiously describes Dr. Zaitoun as “a non-testifying expert.” *Chandler v. Graffeo*, 268 Va. 673, 682, 604 S.E.2d 1, 5 (2004). That is technically accurate, in the narrow sense that all doctors are medical experts, but that is not how a lawyer or a court would normally describe a nonparty treating physician who had actually seen and

appears probable that the court mistakenly thought both cases involved second opinions obtained over the phone from specialists who never saw the patient, which arguably might reduce their precedential significance a great deal—although it must be conceded that nothing in either opinion clearly confirms whether these mistakes about the facts played any role in the court’s rulings, or whether the court would have reached a different result if it had known that these cases involved alleged hearsay statements by doctors who were consulted after they had actually seen the patient. Only time will tell whether the court will limit those rulings to cases where the defendant obtained a second opinion from someone who never saw the patient, even though (perhaps unbeknownst to the court) *neither* of those cases actually involved such a situation. This sad chapter in Virginia legal history vividly confirms the wisdom of the rule that evidentiary rulings are supposed to be reviewed only for abuse of discretion by the trial judge, who usually understands the facts and background of the case better than a busy appeals court ever could.

III. CONCLUSION

We summarize by considering a fundamental and frequently recurring question of evidence law, as well as its incredible answer here in Virginia.

Q. Is it proper for a witness to testify to what others told him out of court, where that otherwise inadmissible testimony is offered solely for the purpose of explaining or throwing light on the conduct of the witness?

A. It all depends on who the witness is. If the witness is not even a party but is a police officer in a criminal case trying to explain why he arrested and charged the defendant with the same crime the jury is trying to resolve, the answer is evidently always *yes*—even though such unfairly prejudicial details are irrelevant to the jury, which has no need to learn whether (much less why) the accused was ever placed under arrest, and even though the United States Constitution forbids the jury from attaching *any* weight to the fact of his arrest in deciding his guilt or innocence. Moreover, this is true even if the testifying police officer is merely narrating *multiple* hearsay about what he heard from another

cared for the patient. Moreover, in narrating the supposedly relevant facts in that case, the court stated that the defendant “was permitted to testify that *he had described Fields’ condition and symptoms to Dr. Zaitoun* and that Dr. Zaitoun had agreed that it was safe to discharge Fields from the hospital,” and that the defendant had tried without success to get the patient an appointment to see Dr. Zaitoun. *Id.* (emphasis added). Nowhere in its opinion does the court mention the critical fact that the patient had *already* seen Dr. Zaitoun during an earlier five-day stay at another hospital before the conversation between the two doctors, and that he was discharged by the defendant with instructions to see Dr. Zaitoun *again*. See *supra* note 54.

police agent who allegedly heard it from an alleged witness to the crime.⁷⁰

On the other hand, if the witness is the defendant in a medical malpractice action trying to explain precisely why he took the actions that constituted his alleged malpractice, and why he reasonably believed that those decisions were correct in light of the information available to him, the answer is evidently always *no*—even though that information goes directly to the ultimate issue in the litigation and therefore has a very high level of probative value, and even if the witness is attempting to show the extent of his care in seeking out the opinions of appropriate specialists who also treated the patient and saw the patient with their own eyes.⁷¹

Both lines of cases are about as wrong as one could imagine. But to think that they came from the same court is simply mind-boggling. It is hard enough to believe that they were written by judges from the same *planet*.

⁷⁰ This is exactly what happened in both *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379 (1994), and *Fisher v. Commonwealth*, 42 Va. App. 395, 592 S.E.2d 377 (Va. Ct. App. 2004).

⁷¹ This is exactly what happened in both *Wright v. Kaye*, 267 Va. 510, 593 S.E.2d 307 (2004), and *Chandler v. Graffeo*, 268 Va. 673, 604 S.E.2d 1 (2004).