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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 780749

JOHN LLOYD STEWART
Appellant

v.

COMMONWEALTH OF VIRGINIA
Appellees

JOINT APPENDIX

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VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF STAFFORD

May 16, 1977

The Grand Jury, upon its oath, charges that

On or about February 18, 1977, in the County of Stafford, John Lloyd Stewart did take, steal and carry away property, namely: a 1969 Ford LTD Station Wagon, having a value of one hundred dollars or more and belonging to Everlee B. Stewart in violation of Virginia Code Section 18.12-95.

Witnesses:

Everlee B. Stewart

Catherine Madtes

V I R G I N I A :

IN THE CIRCUIT COURT OF STAFFORD COUNTY

Everlee B. Stewart,
Complainant

vs.

John L. Stewart,
Defendant

DECREE OF DIVORCE
FROM BED AND BOARD

THIS CAUSE, which has been regularly matured, docketed and set for hearing, came on this day to be heard upon the Bill of Complaint; upon proof of legal service of process upon the defendant; upon the depositions of witnesses on behalf of the complainant, taken in accordance with law and legally filed; and was argued by counsel.

Upon Consideration whereof, it appearing to the Court from the evidence, independently of any admissions of the parties in the pleadings or otherwise, that the parties are members of the white race and more than eighteen years of age; that they were lawfully married on October 8, 1962 in Ridgeland, South Carolina; that no children were born of the marriage; that the parties last cohabited in Stafford County, Virginia within which county the defendant resides; that that complainant is domiciled in an is and has been an actual bona fide resident of the Commonwealth of Virginia for at least six months preceeding the institution of this suit; that the complainant's allegation of the defendant's cruelty toward her has been fully proven by the evidence; and that the complainant is entitled to the relief prayed for;

The Court doth ADJUDGE, ORDER and DECREE that the complainant, Everlee B. Stewart, be, and she is hereby, granted a divorce from bed and board from the defendant, John L. Stewart, on the ground of the defendant's cruelty toward her, with leave to later petition the Court to merge the same into a

divorce from the bonds of matrimony; it is further ordered that the defendant do pay to the complainant for her support and maintenance the sum of $ 350.00 per month, until the further order of the Court; it is further ordered that the defendant pay to the complainant, for her attorney's fees and

Court costs, the sum of $ 300.00, the same to be recorded by the Clerk of Court as a judgment; and it is further DECREED that the parties be perpetually protected in their persons and property.

Docketed in Book 0 Page 395

ENTERED this 6 day of June, 1977.

JUDGE

I ask for this:

Robert B. Easterling, Of Counsel
Fox & Notarianni
P.O. Box 306
Stafford, Virginia 22554

Chancery No. -593

A COPY, TESTE:
S. L. Alexander
Clerk
By: Barbara G. Decatur, D.C.

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JULY 12, 1977

NOTE: Court convenes at 10:00 a.m. After the swearing of the court reporter, the hearing is begun as follows:

THE COURT: What about the Stewart case, Mr. Chichester?

MR. CHICHESTER: We are ready to go.

THE COURT: John Lloyd Stewart come forward.

Are you ready to proceed, Mr. Goggin?

MR. GOGGIN: Yes, sir.

THE COURT: All right, Mr. Stewart, have a seat at counsel table.

You gentlemen wish to make opening statements?

MR. CHICHESTER: We have none, Your Honor.

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MR. GOGGIN: We have none. I would move for the exclusion of witnesses.

THE COURT: Call your witnesses.

MR. CHICHESTER: Mr. Bumgardner is an expert witness on the value of cars and I asked him to be here at eleven o'clock.

THE COURT: Is that when the case was set?

MR. CHICHESTER: No, sir, but --

THE COURT: All right, come forward.

MR. CHICHESTER: Catherine Mattis, Celia Ann Fry, and Tim Jenkins, Mrs. Stewart.

THE COURT: Are these all your witnesses?

MR. CHICHESTER: Yes, sir.

THE COURT: Call your witnesses, Mr. Goggin.

MR. GOGGIN: Mr. Stewart will be the only witness, Your Honor.

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THE CLERK: You all raise your right hands, please.

NOTE: The witnesses are now being sworn by the Clerk of Court.

THE COURT: You all go with the Sheriff, please.

MR. CHICHESTER: Mrs. Stewart will be the first witness.

THE COURT: You come and take the witness stand, please, Mrs. Stewart.

NOTE: The witnesses now depart from the Courtroom, in the company of the Sheriff, and the matter continues as follows:

MR. GOGGIN: If Your Honor please, if Mr. Chichester would stipulate that Mrs. Stewart at the time of this offense was married to Mr. Stewart, I would have a motion at this point.

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THE COURT: Is there any question as to whether she was married to Mr. Stewart?

MR. CHICHESTER: At this particular time she was married at the date of the offense. Now she is not. It would seem -- I am not sure. I would have to find out whether or not she had an interlocutory decree on February 18th, which is the date of the offense.

THE COURT: Well, you can ask her about that, Mr. Chichester.

MR. CHICHESTER: Shall I proceed?

THE COURT: Yes, sir.

EVERLEE B. STEWART, a witness, being called for examination by the Commonwealth, first being duly sworn, testified as follows:

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DIRECT EXAMINATION

BY MR. CHICHESTER:

Q Tell the Court your name.

A Everlee B. Stewart.

Q Where do you live?

A Box 58, Stafford, Virginia.

Q How long have you lived there?

A About two years.

Q And, were you living there on February 18, 1977?

A No, I was not.

Q On February 18th were you married at that time?

A Yes.

Q To whom were you married?

A I was married to John L. Stewart.

Q Is he in the Courtroom today?

A Yes, sir, he is.

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Q Will you point him out to the Court.

A (witness indicating)

Q Had you --

MR. COGGIN: (interjecting) If Your Honor please, I am going to interpose an objection to Mrs. Stewart testifying any further on behalf of the defendant.

MR. CHICHESTER: If I could ask one or two more questions, Your Honor, not about the offense itself, but rather about the --

THE COURT: (interjecting) You can ask her questions relating to the marital relationship.

BY MR. CHICHESTER: (continuing)

Q Are you presently married to Mr. Stewart?

A No, I am not.

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Q When did you get your final decree of divorce?

A October of '76.

Q What date?

A June of '77.

Q Did you have any sort of interlocutory decree of divorce from your husband on February 18, 1977?

A I don't think so. I had filed suit for divorce, but that's all.

MR. CHICHESTER: That's all the questions I have with respect to her marital status.

THE COURT: You want to ask her anything about the marital status?

MR. GOGGIN: Yes, sir.

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CROSS EXAMINATION

BY MR. GOGGIN:

Q Mrs. Stewart, what were your grounds for divorce?

A Mental cruelty and constructive desertion.

Q Do you know what ground the divorce was granted on?

A I assume they were granted on that.

Q But you don't know?

A I don't really know.

MR. GOGGIN: If Your Honor please, Mr. Stewart is in possession of the decree that was entered by this Court on June the 6th.

THE COURT: Show it to Mr. Chichester.

NOTE: Mr. Goggin now hands to Mr. Chichester a paperwriting.

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MR. CHICHESTER: No objection.

NOTE: Mr. Goggin now hands to the Court a paperwriting.

THE COURT: All right, do you have anything further you want to ask this lady?

MR. GOGGIN: No, sir, not at this point.

THE COURT: You have a motion?

MR. GOGGIN: Yes, sir.

THE COURT: What is your motion?

MR. GOGGIN: Well, if Your Honor please, we object to Mrs. Stewart testifying against Mr. Stewart --

THE COURT: (interjecting) On what grounds?

MR. GOGGIN: The grounds of 19.2-271.

THE COURT: All right, Mr. Chichester, what is your position on that?

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MR. CHICHESTER: Our position is the statute, I think, contemplates allowing her to testify if the crime is against her, as this crime is. Number two, a bed and board decree allows her freedom or desolves the marriage for all purposes except remarriage, which would allow her to testify, and our third position is her testimony would only regard ownership of the vehicle, not the -- well, I take that back. Those are our two positions that she is allowed to testify in crimes against her, as this one is, and secondly, they are presently divorced for all purposes except for remarriage.

THE COURT: Let me see 19.2-271.

MR. GOGGIN: If Your Honor please, our position is that on a bed and board decree the parties are technically married until a year from the time the grounds were established, and in this case I suppose constructive desertion,

COPY

which make them technically married until October of this year. In addition we would submit that 19.2 is couched in terms of crimes against the person. The charge here today is grand larceny, which in the code is distinguished as from the person, and otherwise, insofar as punishment is concerned, and I would submit to the Court 19.2-271 has no application to this case; that under the code Mrs. Stewart is prohibited from testifying against Mr. Stewart unless he consents to it.

THE COURT: The objection is overruled. I will permit her to testify.

MR. GOGGIN: We'll note an exception.

THE COURT: Exception is noted.

All right, Mr. Chichester.

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DIRECT EXAMINATION (continued)

BY MR. CHICHESTER:

Q Now, on February 18, 1977, where were you located or where were you staying?

A I was in the National Orthopedic Hospital in Arlington, Virginia.

Q On that date did you own an automobile?

A Yes, I do.

Q Would you describe the automobile to the Court.

A I have a '69 LTD Ford station wagon. It's gold in color.

Q What is the license number or what was the license number?

A The license number is GHZ-448.

Q GH what?

A GHZ.

Q 448?

COPY

A 448.

Q Can you further describe the automobile?

A Well, my son had put a bunch of stickers on it like "Go Navy", and I have a kind of big rusted out spot on the left-hand panel on the back side.

Q You say it's a station wagon?

A Yes, it is.

Q And what color was it?

A It's like a goldish brown, tan.

Q Were there any other colors on it?

A Yes, it's got like a wood work veneer on the sides.

Q On both sides?

A Yes.

Q When had you purchased this car?

A I bought the car, I think, in December of '74.

Q All right, can you tell the Court how much you paid for it at that time.

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A I bought it from Logan Ford Company in Springfield and I paid eight,ninety-five for it.

Q Were you and your husband living together at the time that you purchased it?

A No, we were not.

Q Who made the payments on the car?

A I did.

Q Did he ever make any payments on it?

A No, he did not.

Q Now. would you point out your husband to the Court.

A (witness indicating)

Q Now, do you have any evidence of ownership of the car? Do you have your bill of sale?

A I have the bill of sale and I have my registration.

Q All right, tell the Court what this document is.

A That's a bill of sale from Logan

COPY

Ford Company and where I had to make a second lien on it where she assumed it, because I didn't have the money to pay down on it.

Q What is this document?

A That is my registration.

Q For what particular car?

A Ford station wagon, '69.

Q For the one you just described?

A That's it.

Q Is this bill of sale for the one you just described?

A Right.

MR. CHICHESTER: I tender the bill of sale as Commonwealth's Exhibit One and the registration card as Exhibit Two.

THE COURT: The bill of sale is received as Commonwealth's Exhibit One and the registration card is received as Commonwealth's Exhibit Two.

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NOTE: The above referred to bill of sale is now being marked and filed by the Court as Commonwealth's Exhibit One and the registration is now being marked and filed by the Court as Commonwealth's Exhibit Two.

BY MR. CHICHESTER: (continuing)

Q What condition was the car in on February 18, 1977?

A Well, I had just put two hundred dollars worth of work on it at the time and it was in real good condition, because I was having to drive from here to Manassas to work.

Q All right, now, you testified, I believe, you were in the Orthopedic Hospital on February 18, 1977.

A Yes, that's right.

Q Who had your car, if anyone?

COPY

A I had drove myself to the hospital and I called my daughter to come and get my car and bring it back home and get it off the lot.

Q Who is your daughter?

A Kathy Mattice.

Q Where does she live?

A She lives in Stafford.

Q What county does she live in?

A Stafford.

Q Do you know whether or not she came and got the car?

A Yes, she did, because I had the keys.

Q Did she come and get your car?

A Yes.

Q Did anyone else have your permission to take your car?

A No.

Q Did your husband have permission to take your car?

COPY

A I didn't even know where he was.

Q Did he have permission to take your car?

A No, he did not.

Q Did there come a time after February 18, 1977, that you got out of the hospital?

A Yes.

Q When was that?

A I got out on that Friday.

Q All right, and did there come a time after February 18, 1977, that you saw your car again?

A Yes. I had some friends to drive me to Woodbridge to help have a prescription filled, and while we were there, we saw him in the car.

Q What date was that?

A That was on the 21st of February.

Q Who did you see in the car?

A I saw my husband in the car.

Q This man over here? (indicating)

direct - E. Stewart

COPY

A That's right.

Q Was anyone else in the car?

A No, it was not.

Q How do you know it was your car?

A I know my car and I know my husband, because he was only like the next aisle over from us.

Q What do you mean?

A Like you park at the curb, he come down like this. (witness indicating)

Q Was the car moving?

A It was moving.

Q What time of day was it?

A About 12:30.

Q Was it light?

A Yes, it was in the day time.

Q Did he have permission to have your car on that day?

A No, he did not.

COPY

Q Now, after February 21st, did you ever see your husband with the car?

A I saw him that following Friday. I believe it was on the 25th, on a Friday night, about 7:30.

Q All right, tell us the circumstances under which you saw him on February 25th.

A This friend of mine and his wife, we were driving back towards Stafford from Woodbridge, and he was going in a northerly direction. We were sitting like this way and he was going this way. (witness indicating)

Q Was anybody in the car with him?

A No, he was alone.

Q What did you do as a result of seeing him then, if anything?

A We stopped at the Fire Station and called the Prince William Police.

Q Did he have permission to have your car on that day?

COPY

A No, he did not.

Q When did you obtain a warrant for him?

A Let's see. Probably the 23rd or the 24th.

Q Of what month?

A Of February.

Q Of what year?

A '77.

MR. CHICHESTER: All right, that's all I have of this witness.

THE COURT: Mr. Goggin.

CROSS EXAMINATION

BY MR. GOGGIN:

Q Mrs. Stewart, when did you buy this car?

COPY

A When did I buy it?

Q Yes.

A It was in December of '74, I believe.

Q December of '74?

A I think so.

Q Were you married to Mr. Stewart at that time?

A Yes, I was.

Q Now, how did you pay for this car?

A How did I pay for it?

Q Um-hum.

A I am a nurse and I make good money.

Q Did Mr. Stewart help you pay for it?

A I wasn't living with him when I got the car.

Q You didn't answer my question. Did he help you pay for the car?

A No, he did not.

COPY

Q Do you remember the preliminary hearing when you testified?

A Yes.

Q Do you remember telling me at that time that he did?

A I had borrowed money on it for him, yes.

Q Do you remember telling me that he did help you pay?

A On the money that I borrowed on the car, yes. I distinctly remember that.

Q So he did help you pay?

A Yes, when I borrowed four hundred dollars on it.

Q Now, during the time that you owned the car, did he contribute to the repairs of the car in any way?

A (witness shaking head)

Q Didn't he, in fact, buy tires for the car?

COPY

A They are charged to me.

Q They are charged to you?

A They are charged to me.

Q How are they charged?

A At Woolco.

Q Is that a joint account?

A No, it is not.

Q What is the status of that bill?

A I don't know what you mean.

Q Has it been paid?

A No, it hasn't. I am paying eighteen dollars a month on it.

Q Did he go and buy the tires for it?

A I was with him.

Q But he was with you when the tires were bought?

A Yes.

Q Did there come a time that you got the car back?

COPY

A When I got the car back?

Q Um-hum.

A Yes.

Q You have the car now?

A Yes.

Q Did Mr. Stewart give you the car back?

A He told me where it was parked at.

Q Now, you all have been involved in a divorce, have you not, over the past several months?

A Since October.

Q And it's been a rather stormy divorce, has it not?

MR. CHICHESTER: Well, I object to that, Your Honor.

THE COURT: The objection is overruled.

Q Has it been a rather difficult divorce?

A Not really. I haven't seen him.

Q Well, didn't, in fact, at one point on

COPY

or about February, didn't you try to go and see Mr. Stewart at White Haven Motor Lodge?

A Yes, I did.

Q Did you find him there?

A No, I did not.

Q Did you find his car there?

A Yes, his car was there.

Q What did you do to his car?

A I didn't do nothing to his car.

Q You, in fact, tore his car up, did you not?

MR. CHICHESTER: I object, Your Honor, because I don't think it's relevant to this charge.

THE COURT: Objection is overruled.

Q Now, were you aware that his car was completely disabled?

A Not until I saw it, no. No, I did not because I knocked on the door and told the lady that I was there, his landlady.

COPY

Q Now, you said that insofar as these tires were concerned that you went together to buy the tires. Did Mr. Stewart at some point buy a carburetor for your car?

A Not that I know of.

Q You don't recall that?

A (witness shaking head)

Q How about did he fix the power steering on it?

A He loaned me his car to go get a used hose to put on it.

Q Ever since you bought this car you all have lived together on and off as man and wife, have you not?

A Yes.

MR. GOGGIN: That's all I have of this witness.

MR. CHICHESTER: I have one other question, if I might ask it.

COPY

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. CHICHESTER:

Q Did you take this car anywhere to be appraised?

A Yes, I have.

Q To whom did you take it?

A I taken it to a Mr. B. C. Bumgardner.

Q When did you take it there?

A I took it last week.

Q Compare the condition of the car on February 18, 1977, and the condition when you took it to Mr. Bumgardner.

A (no reply)

Q Was it in the same condition or different condition and if it was different, tell us how it was different.

COPY

A The tires and the wheels had been taken off the back. They weren't the tires or wheels that went on it. It was like the car uses a fifteen inch wheel. There were fourteen inch wheels put back on it that didn't even fit, and it had been, I don't know, hot wired, whatever you call it, hot wired, and all the wires were burnt up in it.

Q When did you discover it to be in this condition?

A In that condition?

Q Yes.

A I had it towed home, towed to a friend's house.

Q When?

A In April.

Q Was that after you got it from the defendant?

A That's right.

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Q Was it that way on February 18th when it was discovered missing?

A No.

Q Were those things all right then?

A That is correct.

Q When you took it to Mr. Bumgardner, were those things repaired?

A I had them repaired.

Q All right, now, was there any difference in the condition of the car on February 18th, 1977, and the condition when you took it to Mr. Bumgardner, was there any difference at all in the condition on those two dates?

A On the 18th before it was taken?

Q Yes.

A No.

MR. CHICHESTER: All right, I have no other questions.

COPY

THE COURT: All right, you can step down.

WITNESS STOOD ASIDE.

MR. CHICHESTER: Call Kathrine Mattice.

KATHERINE MATTICE, a witness, being called for examination by the Commonwealth, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CHICHESTER:

Q Tell the Court your name.

A Katherine Mattice.

Q Please speak up so we can hear you. Where do you live?

COPY

A Box 58, Staffordboro.

Q What county is that in?

A Stafford.

Q How long have you lived there?

A About a year and a half.

Q Were you living there on February 18, 1977?

A Yes, I was.

Q With whom do you live?

A My husband.

Q Are you related in any way to Everlee Stewart, the lady who just testified?

A She's my mother.

Q All right, are you related in any way to the defendant, John Stewart?

A He is my stepfather.

Q All right, again drawing your attention to February 18, 1977, I ask you what, if anything, unusual occurred on that date or the date before that with respect to these charges?

COPY

A February 17th my mother called me up from National Orthopedic Hospital.

Q As a result of that call, what did you do?

A I went and got her car.

Q All right, describe that car to the Court.

A 1969 LTD, tan in color, and it had "Go Navy" stickers on it, and --

Q (interjecting) Did it have any other colors on it other than tan?

A It had the wood grain panelling on the side.

Q Do you recall any other distinguishing features of the car?

A The only thing is that on the vent window on the driver's side there was a place on it where he had always turned his cigars to knock the ashes off.

Q Did there come a time that you took possession of this automobile of your mother's?

COPY

A I got it on the 17th.

Q Of what --

A (interjecting) Of February.

Q What year?

A '77.

Q What did you do with it?

A I went and picked my husband up from work and we drove home that night.

Q To what place did you drive?

A Staffordboro.

Q What county is that in?

A Stafford.

Q Did you have your mother's permission?

A Yes, I did.

Q Okay, now, where did you park it?

A In front of the house.

Q Okay, what, if anything, unusual occurred with respect to the car?

A Well, on the 18th when we came home

COPY

that night, where we had parked the car in front of the house, and the next morning on the 19th my husband told me that the car --

Q (interjecting) As a result of what your husband told you, what did you do?

A I got up and went and looked out the window and the car was gone. So I got my coat on and I went outside to see if it had rolled or whatever, and the car was nowheres around.

Q Had you given anybody permission to take the car?

A No, I didn't.

Q Go ahead.

A So I immediately went over to a friend's house and called my mom at the hospital and told her that the car was gone; that I had believed it had been stolen. So she told me then to call the police.

Q Did you call the police?

A Yes, I did.

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Q And what condition was the car in when you left it there in front of your home in Stafford?

A It was in good condition.

Q Where was it parked?

A In front of the house.

Q Is this John Stewart over here to my right? (indicating)

A Yes, it is.

Q Is that your stepfather?

A (witness nodding head)

Q Did you see him there that night at all?

A No, I did not.

MR. CHICHESTER: All right, I think that's all I have of this witness.

COPY

CROSS EXAMINATION

BY MR. GOGGIN:

Q Mrs. Mattice, you said something in your testimony about where he did the cigars.

A Um-hum.

Q What did you mean by that?

A It's like a smudge or burn mark on the window, on the vent window of the car

Q Who do you mean by "he"?

A (witness indicating)

Q John Stewart?

A John.

Q Where he used to drive the car?

A Yes.

Q Did he drive it often?

A Well, he did at one time and then he got his own car.

Q The car was treated as a joint car between your mother and Mr. Stewart, was it not? They both used it jointly while they were married?

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A Not really.

Q Well, you just said he did use it.

A Well, he used it, but it was not used as a joint car. When she wanted something done or something, she would ask him and give him permission at that time.

Q But he did use the car?

A (witness nodding head)

MR. GOGGIN: That's all I have.

THE COURT: All right, you can step down.

WITNESS STOOD ASIDE.

MR. CHICHESTER: Call Gelia Ann Frye.

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CELIA ANN FRYE, a witness, being called for examination by the Commonwealth, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CHICHESTER:

Q Tell the Court your name.

A Celia Ann Frye.

Q Where do you live?

A Crystal Lake Park, Box 51.

Q How long have you lived there?

A Almost two years.

Q Were you living there on February 18, 1977?

A Yes, sir, I was.

Q Do you know Everlee Stewart?

A Yes, sir.

Q How long have you known her?

A Well, actually for about a year, but I used to go to school with her daughter.

COPY

Q On February 18, 1977, did you know what kind of automobile she drove?

A Yes, sir.

Q What kind of car was it?

A It was a '69 LTD, station wagon.

Q Can you give us an additional description of the automobile?

A It's a goldish tan, and it's got the wood grain along the side, and on the left side by the back wheel it's got a rust spot, and on the back end of it near the bumper it's got "Go Navy" and "Sailors have more fun."

Q Now, directing your attention to February 21, 1977, I ask you whether or not you saw that particular automobile?

A I saw it in Prince William Plaza Shopping Center.

Q How many times prior to February 21, '77, had you seen this car that belonged to Mrs. Stewart?

A I'd say about six, maybe seven times,

COPY

because she would come to my trailer to visit me and my husband.

Q Now, you say you saw it on February 21st, '77?

A Yes, sir.

Q Tell the Court the circumstances under which you saw it on that day.

A Well, Mrs. Stewart hadn't been long getting out the hospital. I think it was Saturday or Sunday, and she had no way of going so somebody brought her by my trailer early the 21st. My husband and I took her to her place of work to pick up her paycheck, and then took her to the Drug Fair in Prince William Shopping Center to pick up the medication, and we were waiting for my husband to come out, and we seen the car.

Q Was it Mrs. Stewart's car?

A Yes, sir, it was.

Q How do you know it was the same car?

A Because I recognized it.

Q What made you recognize it?

A See, it come by. We were sitting in the car and it came back and I noticed it.

Q What distinguished it?

A Well, really I noticed the front part, but when it got by, the back end, I really was sure.

Q What about the back end?

A The rust spot and I saw the stickers on it.

Q Do you know who was driving the car?

A Yes, sir, Mr. Stewart.

Q If Mr. Stewart was in the Courtroom today, would you recognize him?

A Yes, sir.

Q Is he in the Courtroom today?

A Yes, sir.

Q Would you point him out.

A He is sitting over there. (witness indicating)

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MR. CHICHESTER: I'd like the record to so reflect the witness's identification of the defendant.

THE COURT: The record will so reflect.

Q Was anybody in the car with Mr. Stewart?

A No, sir, he was by himself.

Q What time of day was it?

A I believe it was around 12:00, maybe 12:30. I can't exactly say for sure.

~~MR. CHICHESTER: All right, I think that's all I have.~~

~~THE COURT: Mr. Goggin.~~

CROSS EXAMINATION

BY MR. GOGGIN:

Q Mrs. Frye, did you know Mr. Stewart?

A I have seen him before.

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cross - Frye

Q When did you see him before?

A Him and his wife used to live down the street from me where I used to live in Alexandria when I was going to school.

Q How long ago was that?

A Several years ago.

MR. GOGGIN: No further questions.

THE COURT: All right, you can step down.

WITNESS STOOD ASIDE.

MR. CHICHESTER: Tim Jenkins.

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TIM JENKINS, a witness, being called for examination by the Commonwealth, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CHICHESTER:

Q Tell the Court your name.

A Tim Jenkins.

Q Where do you live?

A Staffordboro.

Q And how long have you lived there?

A Just about two years now, something like that.

Q Were you living there on February 18, 1977?

A Yes, sir, I was.

Q Did you know Mrs. Everlee Stewart?

A Yes, I do.

Q How long have you known her?

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direct - Jenkins

A Ever since we moved in there.

Q With whom do you live there at Stafford boro?

A With whom?

Q With whom.

A My wife and my daughter.

Q Now, I draw your attention again to February 18th or thereafter and I ask you to tell the Court what you saw with respect to these charges.

A Okay, on the morning of the 19th I was on my way to work and I drove by Katherine Mattice's trailer, and she stopped me. She was out there. This was about --

Q (interjecting) what county is that in?

A This is in Stafford County and this was about 5:30 or something like that. I don't remember just what time it was and she stopped me and said --

MR. GOGGIN: Objection.

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direct - Jenkins

Q Don't tell us what she said. What did you do or what were you looking for as a result of your conversation with her?

A Like I say, I was on my way to work and they informed me that --

Q (interjecting) Don't tell what they informed you. Just tell us what you did as a result of what they told you.

A I told her to go over to my trailer and talk to my wife and call the police or whatever.

Q What were you looking for as a result of your conversation with Mrs. Mattice?

A I don't really understand what you mean by "looking for."

Q Go ahead and tell us what you saw then with respect to this case.

A Okay, I went on ahead to work then and then on the 21st, Washington's birthday, myself and my wife were out driving around, and I believe that was the

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day Mrs. Stewart was with us, and we were in Woodbridge, and we saw Mr. Stewart in the station wagon, and this was at the Prince William Shopping Center, and he was driving the station wagon. It's a gold-tanish color, '69 Ford LTD, station wagon, a chrome luggage rack on top. It's a Navy sticker on the back of it. Let's see, the 25th, I think it was a Friday.

Q Do you know the license number of the car?

A It's GHZ-448.

Q How do you know it's the license number?

A I have lived right next door to that car for almost two years.

Q Are you sure it's Mrs. Stewart's car?

A Yes, I am.

Q If you saw Mr. Stewart, the man who was driving the car, would you recognize him?

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A Yes.

Q If he were in the Courtroom today, would you recognize him?

A Yes, I would.

Q Point him out to the Court.

A Sitting right over there. (witness indicating)

MR. CHICHESTER: Again I'd like the record to reflect this witness's identification of the defendant.

THE COURT: The record will reflect the witness's identification.

Q Did you ever see the car after February 21st?

A Yes, I did. On the 25th, the Friday following Washington's birthday, my wife and myself were again in Woodbridge and we saw the station wagon pulling out of Featherstone Shopping Center heading north on 1.

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Q Do you know who was driving?

A Yes, sir, I do. It was Mr. Stewart again.

Q This man over here? (indicating)

A Yes, sir.

Q Did you see the car after that?

A I saw it myself one other time and that was on Highway 1. He was going north. This was between the Marine Corps Base at Quantico and Stafford.

Q All right, who was driving the car then?

A Mr. Stewart again.

Q Do you know when that was?

A It was within a week to ten days after the 25th. I don't know the date.

Q How many times in all did you see Mr. Stewart in the car after February 18th?

A To my knowledge, three. Those are the three.

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MR. CHICHESTER: All right, that's all I have of this witness.

THE COURT: Mr. Goggin.

MR. GOGGIN: No questions.

THE COURT: All right, you can step down.

WITNESS STOOD ASIDE.

MR. CHICHESTER: Call Mr. Bumgardner.

THE SHERIFF: He hasn't shown up yet.

MR. CHICHESTER: If Your Honor please, I asked him to be here at eleven o'clock to testify. I didn't summon him. I talked to him yesterday and this morning. He said he would be here at eleven o'clock

THE COURT: You say you have not subpoenaed him?

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THE SHERIFF: Your Honor, he is here.

MR. BUMGARDNER: I got caught in a little traffic, Your Honor.

THE COURT: That's all right, sir.

B. C. BUMGARDNER, a witness, being called for examination by the Commonwealth, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CHICHESTER:

Q Tell the Court your name.

A B. C. Bumgardner.

Q What is your occupation?

A Automobile dealer.

Q And, would you explain exactly what you do as an automobile dealer.

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A I am a wholesaler. I wholesale used cars.

Q How long have you been in this business?

A About thirty years.

Q Thirty years?

A (witness nodding head)

Q Do you buy and sell used cars?

A Yes.

Q Do you buy and sell used American automobiles, specifically Fords?

A Yes.

Q Are you familiar with the wholesale and retail values of American automobiles at this particular time and in February of 1977?

A Yes.

MR. CHICHESTER: I ask Your Honor that he be qualified as an expert.

THE COURT: He is received as an expert witness in the field of used car values.

direct - Bumgardner

Q Did there come a time that Mrs. Everlee Stewart brought to you a 1969 Ford LTD, station wagon, gold or tan in color?

A Yes, one day last week I believe she stopped by.

Q And did you have occasion to look at the automobile and inspect it?

A Yes.

Q Did there come a time that you appraised it?

A Yes.

Q Did you come to any sort of conclusion as to the value of the automobile?

A Yes, I wrote it here, Your Honor.

Q Just tell us what you, in your opinion, is the value of that automobile.

A I put the value down at six-fifty with two hundred and fifty dollars reconditioning on it so it looked like about four hundred dollars actual cash value.

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Q Is that your opinion as to the value of the automobile?

A That would be hard dollars.

Q What do you mean by "hard dollars?"

A Well, there is no retail value on anything that is between the consumer. This is market value. The price of a stock or price of a bond.

Q What is the market value of this automobile?

A In my opinion it's four hundred dollars.

MR. CHICHESTER: I have no other questions.

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CROSS EXAMINATION

BY MR. GOGGIN:

Q Mr. Bungardner, would you describe this car that you looked at.

A It was a '69 Ford LTD Squire, right front fender had some damage on it. It had two tires on it. It was tan and the front seat had some tears on it, as I remember the car.

Q Did you notice anything else unusual about it?

A Not that much.

Q Did you see any rust spots on it?

A Rust?

Q (nodding head)

A Oh, I am sure there was for that year.

Q You don't recall noticing any of those?

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cross - Bumgardner

A I think it was some back on the right quarter. You have to remember one thing, that I probably look at forty or fifty cars a day. That particular time, you know, you look at something--

MR. GOGGIN: That's all.

THE COURT: Do you have any further questions, Mr. Goggin?

MR. GOGGIN: No, sir.

THE COURT: All right, you can step down.

MR. CHICHESTER: Thank you, Mr. Bumgardner.

THE COURT: You want Mr. Bumgardner excused?

MR. CHICHESTER: Yes, sir.

THE COURT: Any objection, Mr. Goggin?

MR. GOGGIN: No, sir.

THE COURT: Thank you, Mr. Bumgardner. You are free to go.

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WITNESS STOOD ASIDE.

MR. CHICHESTER: We rest, Your Honor.

THE COURT: Mr. Goggin.

MR. GOGGIN: If Your Honor please, I would move to strike at this point. The charge here is grand larceny, which is the taking of the property of another. The value in this case is a hundred dollars or more with intent to deprive the owner permanently of it. The Court, I think, has seen the situation we have here. It's a husband/wife. Mrs. Stewart admitted that Mr. Stewart did contribute toward the payment of the car. The car was bought during the marriage and in addition he did some -- well, she didn't have any recollection, but he did in some ways use the car as his, as a joint car during the marriage,

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and contributed to the repair of the car. Now, in addition Mr. Chichester has put on evidence that the, from Mr. Bumgardner, that the car was worth four hundred dollars last week, and he put on evidence, I think, that the car was bought in 1974 for eight hundred dollars, but he has put on no evidence of the value of the car in February of this year when it was supposedly taken.

Your Honor, under the common law, I believe I am accurate when I say this, that a husband and wife are presumed to be one person. It's questionable in my mind as to whether one can commit a larceny against the other, particularly of personal property which was purchased during the marriage by funds contributed by both parties. I don't think titling here or who the car is titled in would necessarily be a key factor.

THE COURT: Have you researched that question?

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1 MR. GOGGIN: Well, yes, sir. I mean
2 I think that is --
3 THE COURT: (interjecting) Did you
4 find any authority on the subject of whether a
5 husband can commit larceny from his wife?
6 MR. GOGGIN: I can find nothing
7 which suggested that it could. In fact, you get
8 this general statement that a husband and wife
9 under common law are presumed to be one person,
10 and then you get a bunch of commentary on the
11 married woman's acts, which applied, I suppose,
12 to the ownership of various property. I know,
13 of course, that a woman can own property in her
14 own right, real estate, and I suppose personal,
15 however, I think there is or there should be --
16 THE COURT: (interjecting) You
17 suppose. Do you mean that you have reservations
18 as to whether a woman can own property in her
19 own right?
20
21

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MR. GOGGIN: Yes, sir, if it's purchased during the marriage, I do have some reservations there. I mean, I understand exactly what the Court is saying, but the things purchased during the marriage with joint funds, I would think that some kind of presumption can arise that it's joint property to which either party is entitled, regardless of how the thing is titled. I mean, a lot of individuals title a car, title one car in the wife and one car in the husband. I don't think it necessarily means that it's their sole and separate property. The cars are shared and they are used together. I think that is the situation we have here.

She's talking about cigar burns on the vent done by Mr. Stewart. It's just a serious question in my mind as to whether any crime has been committed here by Mr. Stewart. I think the evidence has shown that the car was

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taken. He was seen in recent possession of the car. She eventually got the car back or he gave it to her, and --

THE COURT: (interjecting) When was that?

MR. GOGGIN: That was in April, I believe. I believe that's what the testimony was, it was in April when she got the car back, and I suppose that the Court can find -- I don't think the Court can find any crime existed here but petty larceny, because of the value, unless the Court presumes it was worth eight hundred dollars in '74, and four hundred in July; that it was worth something in between, and I think you have to have something a little more definite as to when the property was actually taken, but if the Court finds -- I just don't feel that a larceny has been committed. It was a husband and wife. It was a divorce situation, a domestic squabble,

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and I think this is an extreme measure for the Commonwealth to take, and for anyone to take arising out of a domestic situation.

The man certainly didn't commit a crime punishable for anything really, and I move to strike the charge at this point entirely or at least strike it down to no more than petty larceny at this point based on what I see.

MR. CHICHESTER: If Your Honor please, I certainly think a woman can own property. In terms of the statute she can own property that can be stolen. I don't think the law is such that a man can steal property from his wife and not be chargeable for it, especially in a situation where they are separated.

Now, the evidence in this case is they were separated when the car was purchased; that she paid for it; that it's titled in her name; that she didn't give him permission to

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have it; and, of course, he was seen in recent possession of that particular vehicle, raising a presumption, so I think the charge has been made out.

Now, with respect to the value, the evidence was that she purchased the car in '73 for eight hundred ninety-five dollars; that recently it was appraised at four hundred dollars by Mr. Bumgardner; and the evidence is that on February 18th the car was in the same condition as when Mr. Bumgardner looked at it.

Now, that's the only evidence before the Court at this point and should be taken in a light most favorable to the Commonwealth. So I ask that the motion be overruled.

THE COURT: The motion is denied.

MR. GOGGIN: Call Mr. Stewart.

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JOHN LLOYD STEWART, the defendant, first being duly sworn, testified in his own behalf as follows:

DIRECT EXAMINATION

BY MR. GOGGIN:

Q State your name, please.

A John Stewart.

Q Where do you live, Mr. Stewart?

A 16013 Caroline, Woodbridge.

Q Are you married to Mrs. Stewart?

A I was.

Q You were?

A I am.

Q You were?

A (defendant nodding head)

Q Mr. Stewart, are you familiar with the car that is the subject of this proceeding today?

A Yes, sir.

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Q Did you take that car on February of this year?

A Yes, sir.

Q And why did you take it?

A I went up to see her at the hospital on a Wednesday. When I come back up town, I left her at the hospital and the following Monday she swore out a warrant for me, assault and battery, and I was in Caroline. Prince William Police picked me up at my home. While I was in the Prince William Jail, she came over to my house, went inside, talking to the woman, and went back outside and broke into my car. She took a screwdriver, opened the hood, broke the distributor cap, pulled out the spark plugs. At that time my car was completely disabled for almost a week, plus while in here, she told me her son took her to Woodbridge --

MR. CHICHESTER: (interjecting) I object to any hearsay, Your Honor.

THE COURT: Objection is sustained.

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Q Mr. Stewart, how long did you have the car?

A I drove it about three or four days and parked it until I got mine running.

Q Where did you park it?

A Up in Alexandria. I tried to get in touch with her and could never get in touch with her.

Q Did there come a time when you gave the car back to her?

A I called her son-in-law and told him where the car was.

Q When did you do that?

A In April.

Q How long has the divorce proceedings between you two been going on?

A Since January.

Q Since January?

A I think it was January. Yeah, January when she filed the first time.

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Q Did you contest the divorce in any way?

A No, sir.

MR. GOGGIN: Answer Mr. Chichester's questions.

CROSS EXAMINATION

BY MR. CHICHESTER:

Q You took the car on February 18th, 1977, is that right?

A I am not sure of the day I took it.

Q You didn't have Mrs. Stewart's permission to take it, did you?

A No, sir.

Q The car belongs to her, does it not?

cross - defendant

A Yes, sir.

Q And your excuse was to get even with her, is that right?

A No, sir, I just took it to have transportation until I got mine fixed.

Q You gave it back after the warrant had been issued for your arrest?

A I was picked up that following Saturday in Stafford County. I didn't have a chance to get in touch with her.

Q But the car was given back after the warrant was obtained for your arrest?

A Right.

Q You had no intention of giving it back until the warrant had been obtained?

A Yes, sir, I did.

Q Did you get in touch with anybody?

A Yes, sir. After I left the trailer park, I tried to get in touch with her and I couldn't get in touch with her.

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Q You had the car over two months before you gave it back.

A I was in jail here for a month and I went to Arlington and stayed three or four days.

Q You knew where she lived.

A No, sir.

Q You didn't know where Mrs. Mattice lived?

A Yes, sir, but I was ordered by the Arlington judge to stay out of Stafford County to keep from getting in any more trouble.

Q Couldn't you get in touch with her by telephone?

A She don't have a telephone.

Q Couldn't you send her a letter?

A (no reply)

MR. CHICHESTER: I don't have any further questions.

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THE COURT: Step down.

DEFENDANT STOOD ASIDE.

MR. GOGGIN: We rest.

THE COURT: You rest?

MR. GOGGIN: Yes, sir.

MR. CHICHESTER: We have no rebuttal witnesses, Your Honor.

THE COURT: All right, gentlemen, I want you to research and file memorandum on the legal question of whether a husband can commit larceny of the property of his wife. How long do you want to prepare your memorandum, Mr. Chichester?

MR. CHICHESTER: I would think ten days would be sufficient, Your Honor.

THE COURT: How long do you need, Mr. Goggin?

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MR. GOGGIN: Two weeks. Should I answer his memorandum or should we --

THE COURT: (interjecting) I think you can file them simultaneously.

MR. GOGGIN: Two weeks will be fine.

THE COURT: All right, I will give you each until August 8th to file those and if either of you wants to reply to the memorandum of the other, I will give you time to do that, and this case is continued pending receipt of those memoranda.

Is there anything further, gentlemen?

MR. CHICHESTER: We have nothing else.

THE COURT: All right, Sheriff, adjourn Court.

HEARING CONCLUDED at 11:23 a.m.

MARCH 20, 1978.

NOTE: Court convenes at 10:00 a.m. This case is called to be heard at 10:50 a.m. After the swearing of the Court Reporter, the hearing is begun as follows:

THE COURT: Mr. Chichester, which case do you want to take next?

MR. CHICHESTER: Commonwealth v. Stewart, Your Honor. This case comes back to the Court on sentencing.

THE COURT: All right. Mr. Goggin, are you ready?

MR. GOGGIN: Yes, sir.

THE COURT: Do you gentlemen care to be heard on this?

MR. CHICHESTER: I have nothing to say on this case, Your Honor.

THE COURT: Do you, Mr. Goggin?

MR. GOGGIN: If the Court please, the Court has -- we're at the point, I suppose, we

were here last September when you had received and read memorandum which we had submitted, and I would simply like to reiterate two points that were obtained in my memorandum; that is, the offense committed by a husband against a wife, and what our position is is very simply that that offense, due to the common law unit of husband and wife, isn't possible in this state. Secondly, Mrs. Stewart was allowed to testify against the defendant in the proceeding, the trial of this case, and we would also say that's in violation of the Virginia Code, and that this is an offense which we would characterize as a crime against the property rather than a crime against the person, which we feel is prohibited by that statute.

They were the two major points. We would ask the Court to consider those points in rendering any verdict.

THE COURT: Stand up, Mr. Stewart. Mr. Stewart, on August 29, 1977, the Court,

having considered memorandum filed by your attorney and by the Commonwealth's Attorney, found you guilty of grand larceny. It later developed that there was no record which showed that that hearing, at which your guilt was determined and you were sentenced, had been reported by a court reporter, and, therefore, that judgment was set aside. It is now the judgment of the Court in that same case that you are guilty of grand larceny as charged in the indictment. You are sentenced to served twelve months in jail. Ten months of the sentence is suspended on condition that you be of good behavior for a period of two years. So ordered.

MR. GOGGIN: If the Court please, the Court had seen fit to set bond in the amount of one thousand dollars. We would ask that that be continued.

COMMONWEALTH OF VIRGINIA

vs.

JOHN LLOYD STEWART

This day came the Attorney for the Commonwealth, and John Lloyd Stewart, who stands indicted for a felony, to-wit: Grand Larceny, appeared according to the condition of his recognizance, and came also Rodney G. Goggin, his attorney.

Whereupon, the Court, on August 29, 1978, having found the defendant guilty of grand larceny as charged in the indictment, it is the judgment of this Court that the defendant is guilty of grand larceny as charged in the indictment and the defendant is hereby sentenced to confinement in jail for a term of twelve months, of which term the Court doth suspend the execution of ten months upon the conditions that he keep the peace and be of good behavior for two years, and the bond of the defendant is continued pending appeal.

Date of Entry-
March. 20, 1978

A COPY, TESTE:
S. L. Alexander
Clerk
By: Barbara G. Decatur, D.C.

ASSIGNMENTS OF ERROR

1. The Court erred in overruling the Defendant's objection to his wife's testimony against him in a criminal proceeding pursuant to Section 19.2-271.2, Code of Virginia of 1950, as ammended.

2. The Court erred in refusing to grant the Defendant's Motion to Strike the Commonwealth's evidence made at the conclusion of the presentation of the Commonwealth's case.

3. The Court erred in refusing to grant the Defendant's Motion to Dismiss made at the conclusion of all of the evidence.

4. The evidence as presented by the Commonwealth was insufficent to constitute a finding of guilty by the Court.

5. The finding of guilty by the Court was contrary to the weight of the evidence.

6. The finding of guilty by the Court was contrary to the law and the evidence.