Chapter VII
Attempt, Conspiracy, and Solicitation

Chapter Overview:

Statutes on inchoate crimes provide that individuals may be held criminally responsible for the intent to commit a crime, even if the crime is not actually committed. Inchoate crimes require that an individual have the intent to commit the criminal act and that they take some step to achieve the goal. Attempt, conspiracy, and solicitation are all inchoate crimes.

Attempt includes complete, incomplete, and impossible attempts. Complete attempts occur when the perpetrator takes every necessary step in the commission of a crime and yet is unable to commit it. An incomplete attempt occurs when the perpetrator takes some steps towards committing the crime but is stopped by some intervening force outside of their control before they are able to complete the attempt. An impossible attempt occurs when a perpetrator takes steps towards committing a crime, only to realize that there is something in the way making it impossible for the crime to be completed. This would include something like trying to commit murder when the target is already dead.

There are three tests that are used in trying to determine whether a person truly carried out an attempt. In the first, the perpetrator must have the physical proximity necessary to have completed the crime, with the emphasis being on what steps remain to be taken. In the second it is considered whether any ordinary person witnessing the acts of the perpetrator would undoubtedly conclude that the perpetrator was intending to commit the crime in question. Finally, under the standard of the Model Penal Code it must be examined whether the perpetrator has taken significant steps that clearly indicate intent to commit the crime.

Conspiracy is an agreement between parties to commit a crime. Most jurisdictions now also require for conspiracy that some overt act be committed to further the criminal conspiracy. Any act, however small, can satisfy this requirement so long as the act is done with the intention of furthering the commission of the crime. Conspiracy is considered a separate and distinct crime and a perpetrator who carries out and is charged for the crime they conspired to commit can still also be charged with conspiracy.

Solicitation occurs when a perpetrator encourages another person to commit a crime. This includes but is not limited to commands or requests that the person commit the crime, an offer of money to the person for committing the crime, or counseling or advising the person to commit the crime. Examples of solicitation include things like hiring someone to commit a murder or offering someone money for prostitution. In this chapter of the supplement you will find Virginia statutes regarding inchoate crimes as well as Virginia case law exemplifying the application of those statutes.

I. Attempt:

Section Introduction: An attempt to commit a crime can be prosecuted as a crime itself in some cases. After reviewing the following Virginia statutes, consider the case that follows in which the defendant is charged with attempting to commit a crime that he did not successfully commit.

Virginia Code § 18.2-25. Attempts to commit capital offenses; how punished.
If any person attempts to commit an offense which is punishable with death, he shall be guilty of a Class 2 felony.

Virginia Code § 18.2-26. Attempts to commit noncapital felonies; how punished.
Every person who attempts to commit an offense which is a noncapital felony shall be punished as follows:
(1) If the felony attempted is punishable by a maximum punishment of life imprisonment or a term of years in excess of twenty years, an attempt thereat shall be punishable as a Class 4 felony.
(2) If the felony attempted is punishable by a maximum punishment of twenty years' imprisonment, an attempt thereat shall be punishable as a Class 5 felony.
(3) If the felony attempted is punishable by a maximum punishment of less than twenty years' imprisonment, an attempt thereat shall be punishable as a Class 6 felony.

Virginia Code § 18.2-27. Attempts to commit misdemeanors; how punished.
Every person who attempts to commit an offense which is a misdemeanor shall be punishable by the same punishment prescribed for the offense the commission of which was the object of the attempt.

Virginia Code § 18.2-28. Maximum punishment for attempts.
Any provision in this article notwithstanding, in no event shall the punishment for an attempt to commit an offense exceed the maximum punishment had the offense been committed.

Barrett v. Commonwealth, 210 Va. 153, 169 S.E.2d 449 (1969)

Procedural History: Defendant, Billy Joe Barrett, was indicted for the rape of his twelve-year-old daughter, Daisy. On his trial to a jury, the court struck out the evidence on the charge of rape, the jury found him guilty of attempt to rape and fixed his punishment at five years in the penitentiary, Code s 18.1-16. He was sentenced accordingly.

Issue(s): Was the evidence presented by the Commonwealth sufficient to prove the defendant guilty of attempted rape?

Facts: The Barrett family was composed of the defendant, his wife Eva, to whom he had been married for nearly thirteen years, and three children - Daisy, twelve years old, Virginia, eight, and Larry, six. They lived in Burkes Garden in Tazewell County. Defendant was employed by the County School Board to drive the school bus, and he worked on a farm between times. He and his wife Eva were custodians of the Burkes Garden school building and she cleaned the building. They lived a short distance from the school in a two-story house. The defendant and his

wife slept in a room downstairs; Larry, the son, in a connecting room, and the two girls in a room upstairs.

On Saturday night, April 13, 1968, there was a dance in the school building and all the Barrett family attended. During the evening the defendant ‘got drunk,’ as his wife described it, and an officer required him to leave. The family went with him and when they reached home Mrs. Barrett sent the three children to bed. It was then about eleven o'clock.

Shortly after the family arrived home, defendant sent his wife back to the school to lock the building after the dance. She returned to the house a few minutes after midnight and as she got out of her automobile she heard Daisy ‘hollering pretty loud.’ Mrs. Barrett ran to the house. No lights were on, but the television set in the living room was operating, its volume turned down ‘real low.’

Mrs. Barrett turned a light on and found Daisy in her parents' bed ‘sort of covered up and my husband was up over her.’ Defendant was ‘pretty near naked’ with his ‘britches' down around his legs. He never wore underwear. Daisy's gown was ‘pulled up, sort of’ above her waist.

Defendant raised up when his wife entered the room and, she testified, he ‘told me it wasn't what I thought it was. He thought that was Larry that he had got in the bed with and he was going to play with him some.’ Defendant and Larry frequently scuffled and wrestled, ‘pretending like they were scrapping.’

Defendant's nose was bleeding and Daisy had a fleck of blood, but no apparent wound, in her ear. When Mrs. Barrett turned on the light she saw that Barrett, her husband, did not have an erection.

Daisy gave this version of what occurred after the family returned home from the dance:

She and her sister went upstairs to their bedroom but Larry stayed in the living room to watch television. After her mother left the house to go to the school, Daisy called downstairs and asked her father's permission to come down to watch television, but he ‘told me, no, to stay upstairs and go on to sleep.’ She then ‘slipped’ downstairs and got into her parents' bed to watch television through the door opening into the living room. When her father reduced the volume of the television set she was unable to hear so ‘I covered up and went to sleep.’ She did not know how long she slept.

She awoke when her father came into the bedroom and, she said, ‘he thought I was my little brother and he got me by the arms and he said, ‘I got you, you little rascal you.’ Then her father hit her on the leg and told her to get back upstairs. She started screaming, she said, because she was afraid he might ‘whip’ her for being in his bed.’

She testified that when her mother came in her father was getting in the bed and as he grabbed her his ‘britches' fell down but she could not see his body.

After the incident Mrs. Barrett, who was mad at her husband 'because he was drunk,' took Daisy to the home of a neighbor and called the police. When police officers arrived, Mrs. Barrett made a complaint and defendant was arrested. Daisy made no statement to the officers. She appeared dazed and to have been crying, and she had a bruise on her left cheek. Later that night Daisy was examined by a physician but no evidence of his findings was introduced.

Mrs. Barrett was asked whether she had told her husband after he was put in jail that she was considering a divorce. She answered, 'Yes, before I found out that he hadn't done that. I told him * * * I wasn't going to live with him. I wanted my divorce.' Later he wrote her a letter, she said, asking her to assure Daisy she would not be punished regardless of what she said, and then to ask her to tell the truth. She did so and then Daisy told her she had made this story up.

When Mrs. Barrett was being questioned by the Commonwealth's attorney she stated to the court: 'Your Honor, I don't want to say anything else against my husband because since I have swore out this warrant, I found out these things wasn't so.' She was directed to answer the questions.

Afterwards the Commonwealth's attorney asked Daisy whether on the night of the incident she told her mother the truth about what happened. She replied that she 'made up a lie,' but after her mother talked to her she decided to tell the truth. She was asked where she had heard about the things she put in the lie and she replied that 'I have a girl friend in school and she talks about stuff like that to me.'

Holding: *Reversed and remanded.*

Opinion: BUCHANAN, Justice.

An attempt to commit a crime is composed to two elements: (1) the intent to commit it; and (2) a direct, ineffectual act done toward its commission. The act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. Ingram v. Commonwealth, 192 Va. 794, 802, 66 S.E.2d 846, 851; Preddy v. Commonwealth, 184 Va. 765, 775-776, 36 S.E.2d 549, 553; Mullins v. Commonwealth, 174 Va. 477, 478-479, 5 S.E.2d 491, 492.

Intent is the purpose formed in a person's mind and may be, and frequently is, shown by circumstances. It is a state of mind which may be proved by a person's conduct or by his statements. Johnson v. Commonwealth, 209 Va. 291, 295, 163 S.E.2d 570, 574; Howard v. Commonwealth, 207 Va. 222, 228, 148 S.E.2d 800, 804.

The inferences to be drawn from proved facts are within the province of the jury or of the court trying the case without a jury, so long as the inferences are reasonable and justified. But the inference of guilt must meet the test stated in Webb v. Commonwealth, 204 Va. 24, 34, 129 S.E.2d 22, 29: 'All necessary circumstances proved must be consistent with guilt and inconsistent with innocence. It is not sufficient that the evidence create a suspicion of guilt, however strong, or even a probability of guilt, but must exclude every reasonable hypothesis save that of guilt.' See also Garner v. Commonwealth, 186 Va. 600, 613, 43 S.E.2d 911, 917.

We hold that the evidence in this case does not meet these requirements.

The offense charged is revolting, unnatural and contrary to the instincts of a normal father. For the thirteen years of their marriage this defendant and his wife had experienced a normal sex life. His explanation of his purpose was not incredible, but had some support in his custom of playing with his small son.

The conditions described by Mrs. Barrett when she turned on the light were not necessarily incriminating. His physical condition in fact gave some indication that rape of his child was not defendant's purpose. There was no evidence that he had pulled up his daughter's gown, nor was there testimony that Larry was still in the living room at the time of the incident. The evidence was that the defendant had refused Daisy's request to be allowed to come back downstairs and had told her to go on to sleep. There was no evidence that he knew that she had disobeyed and that she, not Larry, was in his bed.

The judgment below is reversed and the case is remanded for a new trial if the Commonwealth be so advised.

Critical Thinking Question(s): Do you think the prosecution will re-try this case? Why or why not? Should there be an exception to allowing retraction of statements when it involves parents of allegedly "abused" children? Had the evidence been as the 'victim" and mother originally described it to police, were the elements of attempt complete? In other words, without the retraction of statements, was there sufficient evidence to prove attempted rape?

II. Conspiracy:

Section Introduction: When multiple parties enter into an agreement and take steps toward the commission of a crime they can be held accountable for the crime of conspiracy. Conspiracy to commit a crime is charged separately from the commission of the crime itself, which mean that someone may be charged with conspiracy to commit a crime they did not actually commit. It also means that if an individual does commit the crime they conspire to commit, they can be charged with both the crime and the conspiracy. The following Virginia case examines the crime of conspiracy in a case where the ultimate crime was not committed.

Virginia Code § 18.2-22. Conspiracy to commit felony.
(a) If any person shall conspire, confederate or combine with another, either within or without this Commonwealth, to commit a felony within this Commonwealth, or if he shall so conspire, confederate or combine with another within this Commonwealth to commit a felony either within or without this Commonwealth, he shall be guilty of a felony which shall be punishable as follows:

(1) Every person who so conspires to commit an offense which is punishable by death shall be guilty of a Class 3 felony;
(2) Every person who so conspires to commit an offense which is a noncapital felony shall be guilty of a Class 5 felony; and

(3) Every person who so conspires to commit an offense the maximum punishment for which is confinement in a state correctional facility for a period of less than five years shall be confined in a state correctional facility for a period of one year, or, in the discretion of the jury or the court trying the case without a jury, may be confined in jail not exceeding twelve months and fined not exceeding $500, either or both.

(b) However, in no event shall the punishment for a conspiracy to commit an offense exceed the maximum punishment for the commission of the offense itself.

(c) Jurisdiction for the trial of any person accused of a conspiracy under this section shall be in the county or city wherein any part of such conspiracy is planned or in the county or city wherein any act is done toward the consummation of such plan or conspiracy.

(d) The penalty provisions of this section shall not apply to any person who conspires to commit any offense defined in Chapter 34 of Title 54.1 or of Article 1 (§ 18.2-247 et seq.), Chapter 7 of this title. The penalty for any such violation shall be as provided in § 18.2-256.

Virginia Code § 18.2-23.1. Completed substantive offense bars conviction for conspiracy. Notwithstanding any other provision of this article or of § 18.2-256, in any case where a defendant has been tried and convicted of an act he has also conspired to commit, such defendant shall be subject to conviction only for the completed substantive offense and not thereafter be convicted for the underlying conspiracy.

***Hodge v. Commonwealth*, 7 Va.App. 351, 374 S.E.2d 76 (1988).**

Procedural History: Clinton Pete Hodge and his son, Bobby Dean Hodge, a/k/a Robby Dean Hodge, were jointly tried and convicted by a jury of conspiracy "to sell, give, or distribute cocaine" in violation of Code §§ 18.2-248 and 18.2-256. They were each sentenced to forty years in the state penitentiary with twenty years suspended and fined $25,000.

Issue(s): Was the Commonwealth's evidence sufficient to establish that a conspiracy existed?

Facts: Evidence presented at the trial established that an informant, identified only as Wendy, gave Virginia State Police Officer Michael E. Horst a telephone number and told Horst that he could arrange a drug transaction with Clinton Pete Hodge. Identifying himself as Jerry, Horst contacted Hodge by telephone at his North Carolina residence and recorded the entire conversation. During the conversation, Hodge asked Horst if he would be interested in "two or three squares" and assured Horst that it was straight from the deep south and would "knock out at seventy." Horst said that he would be interested in buying a couple of ounces and that if the people he worked with liked it, he would arrange future purchases. Although Hodge stated that he wanted to complete the transaction in North Carolina where he had "scales and everything," Horst and Hodge ultimately agreed that they would arrange a transaction the following week in Virginia. Horst asked Hodge if he had a telephone answering machine on which he could leave a message. Hodge replied that his son did, but stated that he could not give Horst his son's number. Hodge told Horst that he would give Wendy another telephone number where Horst could contact him.

Two days later, after receiving a telephone number from Wendy, Horst dialed the number, identified as the son's telephone number, and recorded the conversation. After Horst identified

himself as Jerry, the son said: “Let me see here. Maybe you can talk to him. He can kinda decide where we want to meet up there, wherever.” Horst replied, “Well you all have got the stuff. I have got to go along with however you want to do it.” The son responded, “Well let him talk to you and he can kinda tell you about when we can get up there.” Hodge then came to the telephone and agreed to meet Horst at 2 p.m. the following Monday at Spotsylvania Mall, near Fredericksburg, Virginia. They agreed on a price of $4,600 for two ounces.

On the day of the transaction, Horst and other police personnel in unmarked cars awaited the arrival of Hodge and his son at the Spotsylvania Mall. Horst was wearing a hidden microphone and was cautioned not to leave the parking lot. Shortly before 2 p.m., the son accompanied by Hodge, drove into the mall parking lot. Horst and Hodge got out of their vehicles to talk. Horst showed Hodge the money and asked if he could “see the stuff.” Hodge replied that he didn't bring it with him and stated that he would rather that Horst follow them “just a short distance.” Horst, however, said that he wanted to conclude the transaction in the parking lot as previously agreed. After some discussion between Horst and Hodge concerning whether they should finish the transaction elsewhere, the son joined them and stated: “This is too wide open for me. Have a place to go where it's private and you can look and see and do whatever you want to do ... it's just down the road here. You can stay in your car. It ain't no big deal. You don't even have to get out. I'll bring it to you. If you want to get out, you can get out.” Horst again refused to follow the Hodges stating, “I'm not going to go nowhere ... [t]he deal was for here ... and it ain't here so I'll see you later.”

Thereafter, Hodge and his son went back to their vehicle and drove out of the parking lot. The police followed them a short distance before pulling them over and frisking them. The police obtained the son's consent to search the vehicle and asked them both to have a seat on the sidewalk next to the vehicle. During the search of the vehicle, Horst noticed that the son had a towel draped over his knees and that his hands were moving underneath the towel. After searching the vehicle and discovering no contraband, Hodge and his son were placed under arrest and searched. The son had a key to a Fredericksburg motel room in his hand and six hundred and sixteen dollars in his sock.

The police obtained a search warrant for the motor inn room, which was registered in the son's name, and executed the warrant that day. They found a plastic bag of cocaine under the corner of a rug and .25 caliber semi-automatic pistol underneath the pillow. They also discovered two clothing bags containing men's clothing and toiletries. One bag contained the son's credit and business cards. The other bag contained Hodge's eyeglasses.

Holding: *Affirmed.*

Opinion: BENTON, Judge.

The Hodges initially contend that because the Commonwealth failed to prove beyond a reasonable doubt an agreement essential to support a conspiracy and, in addition, failed to prove an overt act to commit the offense, the evidence is insufficient to convict them of conspiracy. We disagree. “Conspiracy is defined as ‘an agreement between two or more persons by some concerted action to commit an offense.’ ” *Cartwright v. Commonwealth*, 223 Va. 368, 372, 288

S.E.2d 491, 493 (1982) (quoting *Falden v. Commonwealth*, 167 Va. 542, 544, 189 S.E. 326, 327 (1937)); *see also Amato v. Commonwealth*, 3 Va.App. 544, 551, 352 S.E.2d 4, 8 (1987). The agreement is the essence of the offense; it is not necessary that the crime be fully consummated. *Amato*, 3 Va.App. at 553, 352 S.E.2d at 9. Moreover, "[a] conspiracy may be proved by circumstantial evidence." *Wright v. Commonwealth*, 224 Va. 502, 505, 297 S.E.2d 711, 713 (1982). "Indeed, from the very nature of the offense, [a conspiracy] often may be established only by indirect and circumstantial evidence." *Floyd v. Commonwealth*, 219 Va. 575, 580, 249 S.E.2d 171, 174 (1978).

In the present case, there was sufficient evidence to support the jury's finding that an agreement existed between Hodge and his son to sell cocaine. During the first telephone conversation between Horst and Hodge, Horst indicated that he wanted to "buy a couple ounces." Hodge stated to Horst: "I guess you want something you can put a cut on, don't you? ... If this is sixty-five or seventy percent ... you can go a pretty good cut." Hodge assured Horst that he would supply him with a seventy percent pure product and wanted to conclude the transaction in North Carolina where he had "scales and everything." From these references, a jury reasonably could infer that the transaction involved illegal drugs.

The evidence further establishes that the son agreed with his father to participate in the sale to Horst. "When one accedes to the conspiracy he sanctions what may have been previously done or said by the other in furtherance of the common object." *Amato*, 3 Va.App. at 553, 352 S.E.2d at 9. Although Hodge's initial reluctance to supply Horst with his son's telephone number might indicate that the son was not aware of the nature of the transaction at its inception, the son's subsequent actions support the conclusion that even if he was not initially involved in the transaction, he later became a full participant in the drug transaction. Furthermore, when Horst talked to the son on the telephone the son stated that Horst should talk to Hodge to decide "where *we* want to meet up there." (emphasis added). When the Hodges and Horst met at the mall parking lot to conclude the transaction, the son, expressing concern about being in the open, agreed with Hodge that they should go elsewhere to conclude the transaction. After the arrest, the son was holding a key to a motel room which contained cocaine, a gun and the Hodges' personal belongings. When viewed in the light most favorable to the Commonwealth and granted all reasonable inferences, *Higginbotham v. Commonwealth*, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975), this evidence is sufficient to establish beyond a reasonable doubt an agreement necessary to support a conspiracy.

The Hodges also contend that the Commonwealth failed to prove an overt act, and that without such proof the conviction cannot stand. Relying solely upon *Crump v. Commonwealth*, 84 Va. 927, 941-42, 6 S.E. 620, 628 (1888), the Commonwealth argues that proof of an overt act in furtherance of the conspiracy is not necessary for conviction. Although the Court in *Crump* stated that no overt act is necessary to constitute the offense of conspiracy to injure persons in their business, the Court cited and relied upon evidence of significant overt acts in furtherance of the conspiracy in concluding that a conspiracy existed. *Id.* at 946, 6 S.E. at 629-30; *see also Ramsey v. Commonwealth*, 2 Va.App. 265, 270-71, 343 S.E.2d 465, 469 (1986) (reciting several overt acts in furtherance of the conspiracy but asserting that "[a] conspiracy is committed when the agreement to commit the offense is complete regardless whether any overt act in furtherance of the substantive offense is initiated.").

We need not decide in this case, however, whether under Virginia law the absence of proof of an overt act to effect the object of the conspiracy is fatal to a prosecution for conspiracy to sell and distribute cocaine. The facts of this case provide numerous instances of overt acts. For example, the evidence conclusively establishes that Hodge and his son travelled from North Carolina to Virginia to meet Horst. They also negotiated with Horst to consummate the transaction in the parking lot. It is of no moment that these acts are neither criminal nor unlawful. The evidence need only establish that the acts effect the object of the conspiracy. *See* Henry v. Commonwealth, 2 Va.App. 194, 199, 342 S.E.2d 655, 658 (1986); *see also* United States v. Medina, 761 F.2d 12, 15 (1st Cir.1985); *United States v. Caudle*, 758 F.2d 994, 997-98 (4th Cir.1985); *United States v. Slocum*, 695 F.2d 650, 654 (2d Cir.1982), *cert. denied*, 460 U.S. 1015, 103 S.Ct. 1260, 75 L.Ed.2d 487 (1983); *People v. Bongarzone*, 116 A.D.2d 164, 169, 500 N.Y.S.2d 532, 536 (1986), *aff'd*, 69 N.Y.2d 892, 515 N.Y.S.2d 227, 507 N.E.2d 1083 (1987); *State v. Gessler*, 142 Ariz. 379, 383, 690 P.2d 98, 102 (Ariz.App.1984); *State v. Stewart*, 452 So.2d 186, 193 (La.App.), *writ denied*, 456 So.2d 1014 (1984). Thus, even if overt acts to effect the object of the conspiracy must be proved, they were sufficiently established by the evidence in this case.

The Hodges next assert that the trial judge erred by admitting into evidence the cocaine seized from the motel room. They argue that the Commonwealth must prove actual or constructive possession before the cocaine may be offered in evidence. Citing *Clodfelter v. Commonwealth*, 218 Va. 619, 238 S.E.2d 820 (1977), they contend that mere occupancy of the room in which the cocaine was found did not prove either awareness of the presence and character of the cocaine or intentional and conscious possession. In *Clodfelter*, however, the Supreme Court stated that "[w]hile ... *occupancy of the room where the drugs were found* did not create a presumption that [the accused] either knowingly or intentionally possessed the drug, ... it *was a circumstance which could be considered by the court, along with the other evidence, in determining ... guilt or innocence.*" 218 Va. at 623, 238 S.E.2d at 822 (emphasis added). Thus, contrary to the Hodges' assertion, *Clodfelter* does not support the assertion that the cocaine was inadmissible in this case.

The Commonwealth correctly asserts that evidence that the Hodges constructively possessed cocaine was probative of the object of the conspiracy. Indeed, as a defense to the indictment, the Hodges had contended that the evidence of conspiracy to sell or distribute cocaine was deficient because none of the statements made specific references to cocaine. "Evidence which bears upon and is pertinent to matters in issue, and which tends to prove the offense, is relevant and should be admitted." *Coe v. Commonwealth*, 231 Va. 83, 87, 340 S.E.2d 820, 823 (1986). Proof of constructive possession of cocaine, when combined with the other available evidence, establishes "facts or circumstances connected with the principal transaction, from which an inference can be reasonably drawn as to the truth of [another] disputed fact." *Karnes v. Commonwealth*, 125 Va. 758, 764, 99 S.E. 562, 564 (1919).

Although proof that cocaine is found on premises owned or occupied by an accused is insufficient, standing alone, to prove constructive possession, *see* Code § 18.2-250, such evidence is probative of possession and is a circumstance which may be considered along with other evidence. *Powers v. Commonwealth*, 227 Va. 474, 476, 316 S.E.2d 739, 740 (1984); *Clodfelter*, 218 Va. at 623, 238 S.E.2d at 822; *Behrens v. Commonwealth*, 3 Va.App. 131, 135, 348 S.E.2d 430, 432 (1986). In order to prove that the Hodges, and not some previous occupants

of the motel room, constructively possessed the cocaine, the Commonwealth was required to "point to evidence of acts, statements, or conduct of the accused or other facts or circumstances which tend to show that [they were] aware of both the presence and character of the substance and that it was subject to [their] dominion and control." *Drew v. Commonwealth*, 230 Va. 471, 473, 338 S.E.2d 844, 845 (1986).

The evidence established that Hodge agreed to sell Horst "two ... squares" that would "knock out at seventy." Horst testified that in his experience as a narcotics officer illicit drug dealers use various euphemisms to identify drugs and do not "refer to cocaine as cocaine." Horst also testified that Hodge's statements referred to two ounces of 70 percent pure cocaine. The evidence further established that Horst said to Hodge in the parking lot: "I got this tube here and you can sprinkle a little shit in there. I see it fizz. You get the money. You give me the dope and we get the hell out of here." To which, Hodge responded, "Well, why don't you just do that, Robby. What do you think?" The jury could reasonably have inferred from this evidence that the transaction related to cocaine.

Additional, abundant evidence supports that inference. Hodge and his son arrived at the agreed location empty-handed and attempted to convince Horst to consummate the transaction in a place other than the mall parking lot. The son told Horst that they wanted to conclude the transaction somewhere "private," a place "just down the road." He further stated that Horst could remain in his car and "[y]ou don't even have to get out. I'll bring it to you." In the son's motel room the agreed upon quantity of cocaine was later discovered. In addition to the two ounces of cocaine, police discovered the personal belongings of both men in the motel room, a circumstance which suggests that the room had been occupied by both and subject to their control. *See* *Ritter v. Commonwealth*, 210 Va. 732, 741, 173 S.E.2d 799, 805-06 (1970) (possession need not be exclusive).

Based on this evidence, the jury reasonably could have inferred that the private place referred to was the motel room and that the substance they intended to sell was the very cocaine seized from the motel. Such reasonable inferences, drawn from this evidence, were wholly within the province of the jury, and when coupled with the other evidence in this record, were sufficient beyond a reasonable doubt to sustain the convictions of conspiracy to sell or distribute cocaine. *See* *Webb v. Commonwealth*, 204 Va. 24, 34, 129 S.E.2d 22, 29 (1963).

AFFIRMED.

Critical Thinking Question(s): What is the purpose of the crime of conspiracy? Why should someone held to be a party to a conspiracy when no actual crime has been committed? When does a person's "discussions/conversations" cross the line from "mere preparation" to the level of conspiracy? In a case of solicitation for murder where the "other" party does not actually agree to murder the target, is can there be a charge of conspiracy? If one party is not convicted on the conspiracy charge at a trial, is the case of the "co-conspirator" automatically dropped?

III. Solicitation:

Section Introduction: Solicitation occurs when an individual makes a request for or encourages another in the commission of a crime. As in conspiracy and attempt, the ultimate crime need not be carried out for the initial crime of solicitation to be committed. Examine the following Virginia statute and case regarding the issue of solicitation.

Virginia Code § 18.2-29. Criminal solicitation; penalty.
Any person who commands, entreats, or otherwise attempts to persuade another person to commit a felony other than murder, shall be guilty of a Class 6 felony. Any person age eighteen or older who commands, entreats, or otherwise attempts to persuade another person under age eighteen to commit a felony other than murder, shall be guilty of a Class 5 felony. Any person who commands, entreats, or otherwise attempts to persuade another person to commit a murder is guilty of a felony punishable by confinement in a state correctional facility for a term not less than five years or more than forty years.

***Brooker v. Commonwealth*, 41 Va.App. 609, 587 S.E.2d 732 (2003).**

Procedural History: James Gangga Brooker, appellant, was convicted of two counts of attempting to take indecent liberties with a child in violation of Code §§ 18.2-26 and 18.2-370. He was also convicted of three counts of the use of a communications system for soliciting a minor in a sex crime in violation of Code § 18.2-374.3(B)(i).

Issue(s): Can a conviction for solicitation be sustained when the defendants collude with a police agent without whose actions the crime cannot be carried out?

Facts: Detective Rick Meadows posed as a twelve-year-old girl named "Kim" while conducting computer on-line investigations. Meadows, as "Kim," had three separate text message conversations with appellant via an instant message internet chat room called "Romance Virginia." On October 30, 2001, in his first "chat" with appellant, Meadows wrote that "Kim" was twelve years old and lived in Virginia. Appellant replied that he was twenty-four years old, and he asked if "Kim" had ever kissed "an older guy." Appellant also sent Meadows two photographs of himself in which his genitals were exposed. Appellant wrote, "Don't you want to see and feel the real thing?" Meadows replied, "Yes" and asked, "What would you do with me?" Appellant wrote, "Anything you want me to do. Do you want to cumm [sic] in my mouth?" and he referred to licking "Kim" "you know where" and "everywhere on [her] body." He asked if "Kim" wished she lived closer to him and if she would "come over." Appellant also gave "Kim" his home telephone number.

On October 31, 2001, appellant and Meadows had another on-line conversation. Appellant told "Kim" not to tell her parents about their communication. He also asked if "Kim" wanted to see him and if she wanted him to remove his pants. Appellant removed his pants and transmitted by means of a web camera live pictures of himself, exposing his penis and holding his erect penis. Detective Meadows testified that appellant's web camera allowed Meadows to "see what [appellant] was doing" at that time. Detective Meadows produced snapshots of his computer screen which were introduced into evidence. The images clearly showed appellant's penis.

Appellant wrote that he wished "Kim" was there with him and that he would "make love to" her if she was there. He further stated he would "be gentle" with her and "teach" her. Appellant and "Kim" discussed meeting each other, and appellant said he would "pick [her] up" somewhere, although he was "not too familiar with Richmond."

On November 26, 2001, appellant and Meadows, as "Kim," had a third on-line exchange. Appellant asked if "Kim" wanted him to remove his clothes, and he activated his web camera. Appellant removed his pants and exposed his penis to the camera. He then asked if "Kim" wanted to see him masturbate. Appellant masturbated to ejaculation in front of the web camera. Snapshots of Detective Meadows' computer screen taken during this exchange showing appellant's penis were admitted into evidence. "Kim" asked appellant if he thought she was too young for him, and he replied, "No, but we have to be very careful." He also asked, "Are you going to lose your virginity to me?"

Holding: *Affirmed.*

Opinion: OVERTON, Judge.

Appellant admits that he made the communications with "Kim" over the internet. However, he contends that the evidence was insufficient to prove he used a communication device to solicit a minor in violation of Code § 18.2-374.3(B). He argues that the evidence failed to show he intended the minor to act upon the content of the on-line conversations.

"On appeal, 'we review the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom.' " *Archer v. Commonwealth*, 26 Va.App. 1, 11, 492 S.E.2d 826, 831 (1997) (citation omitted).

Code § 18.2-374.3(B) provides:

> It shall be unlawful for any person over the age of eighteen to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting any person he knows or has reason to believe is a minor for (i) any activity in violation of §§ 18.2-355, 18.2-358, 18.2-361 or § 18.2-370, (ii) any activity in violation of § 18.2-374.1, or (iii) a violation of § 18.2-374.1:1.

"Criminal solicitation involves the attempt of the accused to incite another to commit a criminal offense. 'It is immaterial whether the solicitation has any effect and whether the crime solicited is in fact committed.... The gist of [the] offense is incitement.' " *Branche v. Commonwealth*, 25 Va.App. 480, 490, 489 S.E.2d 692, 697 (1997) (citation omitted). "[T]he act of solicitation may be completed before any attempt is made to commit the solicited crime." *Ford v. Commonwealth*, 10 Va.App. 224, 226, 391 S.E.2d 603, 604 (1990).

The specific intent to commit [a crime] may be inferred from the conduct of the accused if such intent flows naturally from the conduct proven. Where the conduct of the accused under the circumstances involved points with reasonable certainty to a specific intent to commit [the

crime], the intent element is established. *Wilson v. Commonwealth*, 249 Va. 95, 101, 452 S.E.2d 669, 674 (1995) (citations omitted).

Appellant's actions and statements to "Kim" were not simply "words alone." *See Bloom v. Commonwealth*, 34 Va.App. 364, 373, 542 S.E.2d 18, 22, *aff'd*, 262 Va. 814, 554 S.E.2d 84 (2001). In the October 30, 2001 conversation, appellant discussed kissing "Kim," whom he believed was twelve years old, and he sent her photographs of himself in which his genitals were exposed. He inquired if she wanted to "see and feel the real thing," and he discussed "Kim" "cumm[ing][sic] in his mouth." In addition, appellant expressed a desire to lick "Kim" "everywhere on [her] body," and he asked if she would "come over."

In the October 31, 2001 communication, appellant transmitted to "Kim" images of his erect penis using a web camera allowing the recipient to view live images of him. During this communication, appellant wrote that he would have sexual intercourse with the minor if she was present, stating that he would be "gentle" with her. Furthermore, appellant discussed meeting "Kim" and offered to pick her up "somewhere." "Kim" responded, "I'm not far," and appellant wrote back, "I know. That's good, but I'm not too familiar with Richmond."

During the November 26, 2001 conversation, appellant asked if "Kim" would lose her virginity to him. He activated his web camera, removed his pants, and masturbated to ejaculation.

From the content of the three conversations and from the evidence of the images appellant transmitted to the minor, the trial judge could infer that appellant intended to solicit a minor to commit illegal sexual acts in violation of the statute and via a communications device. Accordingly, the evidence was sufficient to prove beyond a reasonable doubt that, on three separate occasions, appellant violated Code § 18.2-374.3(B).

The fact that appellant and "Kim" were located in different cities while they exchanged communications is of no consequence. "[T]the separate crime of solicitation may be completed before an attempt is made to commit the solicited crime." *Pedersen v. City of Richmond*, 219 Va. 1061, 1067-68, 254 S.E.2d 95, 99 (1979). Appellant's "principal objective was to persuade" the minor to engage in criminal sexual acts. *See id.* at 1068, 254 S.E.2d at 100. Proof of any overt act toward committing the crimes, such as meeting the minor at a specified location, was not required.

In addition, appellant's argument that his actions constituted a single continuing offense is without merit. Evidence of separate, discrete conduct by appellant supported each of the three offenses. *See, e.g., Slater v. Commonwealth*, 15 Va.App. 593, 596, 425 S.E.2d 816, 817-18 (1993); *Johnson v. Commonwealth*, 13 Va.App. 515, 518, 412 S.E.2d 731, 732 (1992). The offenses occurred on three different dates, involved three distinct and separate communications, and, in each conversation appellant incited the minor to commit a crime. Therefore, the evidence proved that appellant violated the statute on three separate occasions.

Appellant contends the evidence was insufficient to prove that he attempted to expose himself to a minor in violation of Code § 18.2-370 because the parties were located in separate cities at the

time of the incidents. He also contends that he could not have committed these offenses because he exposed his genitals by means of the internet and not in a public location.

Code § 18.2-370 provides, in part, that a person who knowingly and intentionally "[e]xpose[s] his ... sexual or genital parts to any child" under the age of fourteen years shall be guilty of a Class 5 felony.

Expose has been defined as 'to put on show or display,' 'to lay open to view,' 'to display,' 'to offer to the public view.' *Siquina v. Commonwealth*, 28 Va.App. 694, 698, 508 S.E.2d 350, 352 (1998) (citations omitted). "Exposure of [a] person becomes indecent when it occurs at such time and place where [a] reasonable person knows or should know his act will be open to observation of others." *Id.* (citing *Black's Law Dictionary* 768 (6th ed.1990)). " [A]n indecent exposure must be either in the actual presence and sight of others, or in such a place or under such circumstances that the exhibition is liable to be seen by others." *Holley v. Commonwealth*, 38 Va.App. 158, 164, 562 S.E.2d 351, 354 (2002) (citation omitted).

The evidence showed that appellant twice transmitted to someone, whom he believed was a minor, live images of his genital parts by means of a computer and a web camera so that the minor could see appellant's genital parts at the time of the exposure. In addition, on both occasions, prior to exposing his penis, appellant asked via instant messaging whether the minor wanted him to remove his pants or clothing. In both instances, Meadows indicated that "Kim" wanted appellant to remove his pants. From appellant's words and conduct, the trial judge could infer that appellant knowingly and intentionally exposed his genitals to a person whom he believed to be a minor.

Furthermore, the trial judge admitted evidence showing Meadows' computer screen at the time appellant sent the transmissions to "Kim." Several of the pictures received on October 31 and November 26, 2001 clearly show appellant's genitals. From this evidence, the trial judge could conclude that appellant knew that the exposure of his genitals in front of his activated web camera was "liable to be seen" by the minor at the time of the exhibition because "Kim" was engaged in an instant message internet conversation with appellant at the time of the displays. Accordingly, the evidence was sufficient to prove beyond a reasonable doubt that appellant violated Code §§ 18.2-26 and 18.2-370.

For the reasons stated, we affirm the convictions.

Critical Thinking Question(s): How is it possible to for a person to be charged with "solicitation of a minor" when the person s/he solicits is not, in fact, a minor? Is the above described charge not a legal act between "consenting" adults? Do you have nay problem with the fact that the officer involved as "Kim" is an agent of the state and there are no "real" complaining witness? Are the elements for a conspiracy charge present in this case?