Chapter V

Mens Rea, Concurrence, Causation

Chapter Overview:

In conjunction with *actus reus*, a crime requires a criminal intent, or *mens rea*. This stems from the belief that a person should only be criminally punished for a crime if they can be held morally blameworthy for the act. If someone commits an act accidentally, without intent, it is believed that they are not morally blameworthy and so should not be criminally accountable. This is intended to uphold the concepts of individual responsibility, deterrence, and a punishment fitting of the crime. This element is essential to a crime and so prosecutors are required to prove *mens rea* beyond a reasonable doubt.

Intent is divided into four categories, which reflect their varying degrees of severity. The most serious form of intent is purposeful intent, which means that the individual acted deliberately for the purpose of committing the crime. The next level of intent requires that an individual act knowingly. This means the perpetrator is aware of the fact that an act is criminal but commits it anyway. The third level is reckless intent, by which an individual is aware of the risky and dangerous nature of their behavior and continues to act knowing that there is a high probability of harm. The lowest level of intent is negligence. Negligence involves participation in risky and dangerous behavior similar to that of recklessness, but in this case the perpetrator is unaware of the great potential for harm and so is considered less blameworthy.

Some criminal acts do not require *mens rea*. These are called strict liability offenses, and they only require that a criminal act be committed. An example of this would be statutory rape laws, by which an individual can be held accountable for sexual misconduct with a minor even if they were not aware of the age of the victim, or believed the age to be different than it was. One may also be punished for mistaking the age of a minor in the case of the sale of alcohol or tobacco.

When *mens rea* is required, as in the great majority of crimes, it is also necessary to show a concurrent between the criminal intent and the criminal act. This means that the intent must exist at the same time as the act. For example, if someone intends to commit murder, and even may attempt to commit murder, but later finds out that the individual they have tried to kill was already dead, he or she cannot be convicted of murder because the intent did not occur concurrent to the murder of the victim. Finally, criminal law also requires that causation be proved beyond a reasonable doubt. It must be shown that the acts committed by the perpetrator were the factual or proximate cause of the harm to the victim. If there are other factors outside the control of the perpetrator that may have contributed to the resulting harm, it must be determined if it was those other factors or the action of the perpetrator which was the factual or legal cause of harm. In this chapter of the supplement you will read Virginia cases which exemplify the various levels of criminal intent, as well as the necessity for concurrence and causality.

I. Mens Rea:

Section Introduction: *Mens rea* is the necessary element of intent in the commission of a crime. There are four different levels of *mens rea*, which imply different degrees of criminal culpability. These are known as purposely, knowingly, recklessly, and negligently, and they will each be addressed separately.

Purposely: This is the most serious form of criminal intent. It implies that a defendant acted with the express purpose of the commission of a crime. The following case examines the question of what is required for a perpetrator to act purposely.

Luck v. Commonwealth, 32 Va.App. 827, 531 S.E.2d 41 (2000).

Procedural History: Defendant was convicted in the Circuit Court, Chesterfield County, John F. Daffron Jr., J., of two counts of malicious bodily injury of a police officer. Defendant appealed.

Issue(s): Did the evidence support a finding that the defendant acted intentionally and with malice?

Facts: Officer Gregory A. Johnson observed the defendant weaving his pickup truck through traffic on Jefferson Davis Highway during the early morning hours of October 29, 1995 while throwing items out of it. Officer Johnson activated his flashing lights, but the defendant refused to pull over and accelerated to 80 miles per hour. That began a chase through Chesterfield County into Colonial Heights that lasted for sixteen miles, involved four to five police vehicles, and only ended when the defendant wrecked after ramming into the side of a pursuing police vehicle. The defendant drove at 85-90 miles per hour in the southbound lanes weaving between them like a race driver, and crossing into the oncoming, northbound lanes to pass cars. The defendant never stopped for red traffic lights even when entering a 25 miles per hour zone. Whenever the police pulled alongside, he would turn into the police vehicle forcing it to back off to avoid collision.

Eventually State Trooper Thomas, with Trooper Garrett riding with him, attempted to establish a rolling roadblock to slow the defendant down. Each time the troopers tried to pass, the defendant steered into their lane and forced them into oncoming traffic. Finally, Trooper Thomas got in front of the defendant by ducking to the inside and accelerating to 130 miles per hour. He began the rolling roadblock by slowing to the defendant's speed of 80 miles per hour. At that point, the defendant accelerated, rammed the police vehicle, and maneuvered back in front.

The troopers again tried to pass, but when they came alongside, the defendant steered into their car with sufficient force to shatter the windshield and lock the vehicles together. The two cars crossed nearly all four lanes before Trooper Thomas “hit the brakes and locked it down, and the vehicles separated....” Even as the defendant lost control of his car and started to roll over, he was still trying to push the police car off the road. The troopers went off the road to the left, but Trooper Thomas was able to bring his vehicle to a controlled stop. The defendant kept going until he crashed.

Both troopers were treated in the hospital for injuries received in the collisions. Trooper Thomas was out of work for a day or two, continued to be stiff for four to five days, and took prescribed medication for lower back pain. He suffered a low back strain from being hit several times by the defendant's vehicle. Trooper Garrett had similar injuries and suffered from "mild back discomfort on flexion and extension" with "tenderness to palpation in the lumbar musculature."

Holding: *Affirmed.*

Opinion: BUMGARDNER, Judge.

To sustain the convictions of malicious wounding of the two state troopers, the Commonwealth had to prove the defendant maliciously caused "bodily injury to another person ... with intent to maim, disfigure, disable or kill, and knowing or having reason to know that such other person is a law enforcement officer ... engaged in the performance of his public duties." Code § 18.2-51.1. The defendant contends the injuries were not sufficient to constitute bodily injury because the troopers suffered no broken bones or bruises. He argues that the injuries must be observable or determinable by objective means. The defendant also contends the evidence failed to establish he had an intent to "maim, disfigure, disable or kill" the troopers and failed to prove he acted maliciously.

" 'Bodily injury comprehends, it would seem, *any bodily hurt* whatsoever.' " *Bryant v. Commonwealth*, 189 Va. 310, 316, 53 S.E.2d 54, 57 (1949) (citation omitted). *See Campbell v. Commonwealth*, 12 Va.App. 476, 483, 405 S.E.2d 1, 4 (1991) (*en banc*) (breaking of the skin not required). While the statute does not define bodily injury, courts have been reluctant to give juries a definition because the phrase has an "everyday, ordinary meaning." *Stein v. Commonwealth*, 12 Va.App. 65, 69, 402 S.E.2d 238, 241 (1991). The evidence permits the finding that the two troopers suffered bodily injury when they received soft-tissue injuries that required medical treatment and caused pain and stiffness. If those injuries did not meet the requirements for bodily injury, we would have the anomaly of an "everyday, ordinary" phrase having different meanings in criminal law and tort law.

"[I]ntent is the purpose to use a particular means to effect a definite result." *Banovitch v. Commonwealth*, 196 Va. 210, 218, 83 S.E.2d 369, 374 (1954). "The nature and extent of the bodily injury and the means by which [it is] accomplished may reflect this intent but are not exclusive factors." *Campbell*, 12 Va.App. at 483, 405 S.E.2d at 4. The requisite intent may be proven from circumstances, which include the defendant's conduct. *See id.* at 484, 405 S.E.2d at 4; *Banovitch*, 196 Va. at 216, 83 S.E.2d at 373. "The fact finder is entitled to draw inferences from those facts proven to be true, so long as the inferences are reasonable and justified." *Cottee v. Commonwealth*, 31 Va.App. 546, 555, 525 S.E.2d 25, 30 (2000) (citation omitted). " '[T]he finder of fact may [also] infer that a person intends the immediate, direct, and necessary consequences of his voluntary acts.' " *Id.* (citations omitted). *See Campbell*, 12 Va.App. at 484, 405 S.E.2d at 4.

Marked police vehicles, with lights flashing and sirens sounding, chased the defendant for sixteen miles at 80 miles per hour. The defendant weaved in and out of traffic, never stopped for red traffic lights, and passed cars while crossing into the oncoming lane of travel. At dangerous

speeds, he repeatedly steered into the police vehicles even forcing one into the opposite lane of travel. When the troopers attempted a rolling roadblock, the defendant accelerated and struck them from behind. The defendant rammed the police vehicle to avoid being passed, locked the vehicles together, and forced the troopers off the road.

The fact finder could draw the reasonable and justified inference that the defendant intended to maim, disfigure, disable or kill when he repeatedly rammed the police vehicle while traveling at 80 miles per hour. Indeed, such a finding is consistent with the defendant's claim that he was merely trying to elude the police because he was driving a stolen vehicle in violation of probation. His assertion provides the motive and explanation for his intentional acts, which could obviously cause a serious wreck, maiming, disfiguring, disabling, or killing anyone involved in it. *See* *Moody v. Commonwealth*, 28 Va.App. 702, 707, 508 S.E.2d 354, 356 (1998) (even though defendant warned victim, it was reasonable to infer he "formed specific intent to run over" him because he did not decelerate, brake, or swerve to avoid hitting him).

From those same acts a fact finder could reasonably and justifiably infer that the defendant acted maliciously and that his acts were purposeful, done deliberately, and while under the control of reason. " 'Malice inheres in the doing of a wrongful act intentionally, or without just cause or excuse, or as a result of ill will.' " *Long v. Commonwealth*, 8 Va.App. 194, 198, 379 S.E.2d 473, 475 (1989) (citation omitted). "Malice is evidenced either when the accused acted with a sedate, deliberate mind, and formed design, or committed any purposeful and cruel act without any or without great provocation." *Branch v. Commonwealth*, 14 Va.App. 836, 841, 419 S.E.2d 422, 426 (1992) (citation omitted). Volitional acts, purposefully or willfully committed, are consistent with a finding of malice and inconsistent with inadvertence. *See* *Porter v. Commonwealth*, 17 Va.App. 58, 61, 435 S.E.2d 148, 149 (1993). The presence of malice is a question of fact to be determined by the fact finder. *See* *Long*, 8 Va.App. at 198, 379 S.E.2d at 476.

The manner in which the defendant drove turned his truck into a weapon. "A motor vehicle, wrongfully used, can be a weapon as deadly as a gun or a knife." *Essex v. Commonwealth*, 228 Va. 273, 281, 322 S.E.2d 216, 220 (1984). *Cf.* *Paytes v. Davis*, 156 Va. 229, 234, 157 S.E. 557, 558 (1931) ("A high-powered car moving rapidly is quite as deadly as a locomotive."). *Compare* *Moody*, 28 Va.App. at 708, 508 S.E.2d at 357 (attempted malicious wounding conviction upheld where reasonable to infer defendant intended to run down victim), *Haywood v. Commonwealth*, 20 Va.App. 562, 567-68, 458 S.E.2d 606, 609 (1995) (from the evidence could not exclude reasonable hypothesis that driver intended to elude police, not to kill them by running roadblocks). Malice may be inferred from the deliberate use of a deadly weapon. *See* *Morris v. Commonwealth*, 17 Va.App. 575, 578, 439 S.E.2d 867, 870 (1994).

For the foregoing reasons, we affirm the convictions.

Affirmed.

BENTON, Judge, dissenting.

I agree that the evidence was sufficient to prove beyond a reasonable doubt that the officers suffered bodily injuries and that Andrew Gordon Luck, a seventeen-year-old juvenile, acted

maliciously in committing the acts that caused those injuries. I do not agree that the evidence proved Luck had the specific intent to maim, disfigure, disable, or kill. Indeed, the trial judge found the evidence did not prove Luck had an intent to kill but, rather, proved Luck had an intent to injure.

"The necessary intent ... is the intent in fact, as distinguished from an intent in law." *Hargrave v. Commonwealth*, 214 Va. 436, 437, 201 S.E.2d 597, 598 (1974). "Intent in fact is the purpose formed in a person's mind, which may be shown by the circumstances surrounding the offense, including the person's conduct and his statements." *Nobles v. Commonwealth*, 218 Va. 548, 551, 238 S.E.2d 808, 810 (1977). The evidence proved Luck was trying to elude and escape from the officers as they attempted to use their cars to stop his truck. Immediately prior to the first collision, Luck was travelling southbound on a four lane highway at approximately eighty miles per hour. An officer first attempted to pass Luck on the left and "backed off" when Luck veered his truck into the travel lane in which the police car was travelling. The officer then tried to pass Luck on the right and, when he had almost completely passed Luck's truck, the officer applied the brakes in an attempt to slow Luck's truck. One officer said the vehicles were then travelling about sixty-five miles per hour because the traffic had increased. At that point, Luck accelerated, hit the left rear of the officer's car, and moved ahead of that officer's car. The officer then attempted once again to pass Luck on the left. As he did so, Luck's truck abruptly hit the right side of the officer's vehicle, forcing both vehicles into the northbound lanes. The officer's front bumper and Luck's rear bumper interlocked, causing the officer to lose control of his car. Luck's truck continued to the left pushing the officer's car off the road until Trooper Thomas "really hit the brakes." The vehicles then disconnected. Luck lost control of his truck and rolled repeatedly until he came to rest off the roadway in front of a restaurant. The officer's vehicle slowed and stopped on the highway.

That injuries resulted is not dispositive proof of Luck's intent in fact. "Rather, the question is whether [Luck], while driving his truck, formed the specific intent to use his vehicle as a weapon for the unequivocal purpose of [maiming, disfiguring, or disabling,] the police officers." *Haywood v. Commonwealth*, 20 Va.App. 562, 566, 458 S.E.2d 606, 608 (1995). No evidence proved that Luck had any intent other than to get away. Even assuming, however, as the trial judge found, the evidence proved an intent to commit bodily injury, that proof was not sufficient to prove an intent to maim, disfigure, or disable, to the exclusion of a malicious intent to do bodily harm. *See Boone v. Commonwealth*, 14 Va.App. 130, 132, 415 S.E.2d 250, 251 (1992) (an intent "to do physical injury to the person of another, 'whether from *malice* or from wantonness' " is consistent with the elements of assault and battery).

For these reasons, I would reverse the convictions for malicious bodily injuries to law enforcement officers with the intent to maim, disfigure or disable.

Critical Thinking Question(s): Do you agree with the majority opinion or that of the dissent? Recall that in reviewing a case, the appellate courts look at issues of law and leave factual matters to the triers of fact – judge or jury. At what point did the defendant form the intent to cause bodily injury in this case? Is it fair to have jurors infer the "level of intent" of a defendant from circumstantial evidence in the face of statements by the defendant to the contrary that he only intended to elude the officers? Why or why not?

Knowingly: A defendant reaches this level of criminal intent if they act with the knowledge that their behavior constitutes a crime. The following case examines whether a particular defendant met this requirement of the crime for which he was charged.

***Gottlieb v. Commonwealth*, 126 Va.App. 807, 101 S.E. 872 (1920).**

Procedural History: The accused was convicted first before the police justice, and then, on an appeal, in the corporation court.

Issue(s): What does the term "knowing" mean as used in Acts 1914, p. 394; Code 1919, § 1923?

Facts: The warrant charges that the defendant being over 18 years of age, "did unlawfully and knowingly permit Tillie Oleinick, a child under the age of 18 years, to remain in his boarding house for and permitting and encouraging the said Tillie Oleinick to be guilty of vicious and immoral conduct."

Holding: *Reversed and remanded.*

Opinion: PRENTIS, J.

This is a prosecution under the act making it a misdemeanor for any person over the age of 18 years to cause or encourage any child under the age of 18 years to commit a misdemeanor. Acts 1914, p. 394; Code 1919, § 1923.

His first assignment of error is that the verdict is contrary to the law and the evidence. The evidence is in irreconcilable conflict. It is not necessary to summarize it further than to say that, considered as upon a demurrer to the evidence, it shows that the defendant exposed Tillie Oleinick, who was between 17 and 18 years old, to immoral influences in his boarding house, in which he resided with his wife and four children, the said Tillie Oleinick being by him employed there as a servant. It does not, however, show that the accused knew that she was under 18 years of age, and upon this omission the accused relies. This makes it necessary to construe the word "knowingly" in the statute creating the offense charged in the warrant.

There have been many cases construing this word, and they are collected in the note to Crawford v. Joslyn, 83 Vt. 361, 76 Atl. 108, Ann. Cas. 1912A, 428. It is there shown that the term "knowingly," when used in a prohibitory statute, is usually held to import a knowledge of the essential facts from which the law presumes a knowledge of the legal consequences arising therefrom. State v. Williams, 139 Ind. 43, 38 N. E. 339, 47 Am. St. Rep. 255.

In 24 Cyc. at p. 805, it is said that, as used in statutes imposing a liability, whether civil or criminal, upon persons knowing certain facts, the word is to be construed as implying actual knowledge, or constructive notice, or lack of information by reason of neglect or inadvertence.

In State v. Washed Sand & Gravel Co., 136 Minn. 361, 162 N. W. 451, L. R. A. 1917D, 1127, construing an ordinance imposing a penalty for knowingly selling commodities at short weight, it is held that knowledge is an essential element of the offense so defined.

In O'Donnell v. Commonwealth, 108 Va. 887, 62 S. E. 373, it is said with reference to the act making it a crime "knowingly" to sell ardent spirits "to an intoxicated person" that the words "knowingly sell" refer to the condition of the person to whom the liquor is sold.

The word, then, in such statutes, usually means a perception of the facts requisite to constitute the crime. 8 R. C. L. 63.

So in this statute an essential element of the crime created by the statute is the knowledge of the accused that the child is under 18 years of age. Without such knowledge there is no crime thereunder. This construction may make it difficult in some cases to secure the punishment of persons actually guilty; but this obstacle to conviction cannot be removed or ignored by the courts. The Legislature has defined the offense, and the courts cannot by construction create a crime which the language of the act does not import.

In this case there is no word of evidence from which it can be inferred that the accused knew the age of Tillie Oleinick, and one of the instructions granted on behalf of the commonwealth shows that the case was tried upon the assumption that such knowledge on his part was immaterial. As indicated, we think that this was error, and that the court should have sustained the motion of the accused to set aside the verdict as contrary to the law and the evidence, because it is an axiom of the criminal law that the commonwealth must prove every essential element of the crime charged to the satisfaction of the jury beyond a reasonable doubt. Under our statutory demurrer to the evidence rule, we would not set aside this verdict if any evidence had been introduced from which the jury could have inferred that the accused knew the prosecutrix was then under 18 years old; but, as stated, there was no such evidence, and the case appears to have been tried upon an erroneous theory as to the essential elements of the crime charged.

For the reasons indicated, we are of opinion that the judgment should be reversed, and a new trial awarded, to be had in accordance with the views here expressed.

Critical Thinking Question(s): Should the element of "knowing" be restricted to the "encouragement of immorality" or should it extend also to the person's age? Why or why not? What do you imagine will be the outcome of a new trial? What must the prosecution do to secure a conviction? Does this case, upon remand, raise concerns about double jeopardy since the prosecution already had "one bite at the apple" and it was determined that the elements of the crime were not proven?

Recklessly: To commit a crime with reckless intent, a defendant must have engaged in risky behavior while being aware of the dangerous nature of the act.

Negligently: If a defendant commits a criminal act while engaged in risky behavior, the dangerous nature of which the defendant was unaware at the time of the act, then they have negligently committed the crime. The following case examines the requirements for and consequences of negligent and reckless intent.

***Wright v. Commonwealth*, 39 Va.App. 698, 576 S.E.2d 242 (2003).**

Procedural History: Thomas Tyler Wright appeals his conviction, after a bench trial, for maiming, in violation of Code § 18.2-51.4.

Issue(s): Did the trial court err in finding the evidence sufficient to establish that the defendant drove in a manner so gross, wanton, and culpable as to show a reckless disregard for human life, as required by the statute?

Facts: Virginia State Police Trooper Mike Bradley was dispatched to the scene of a car accident at approximately 2:10 a.m. on June 3, 2001. When he arrived, emergency personnel were already present and treating two individuals on the ground. Bradley observed Wright standing nearby, in the company of two deputies. Trooper Bradley approached Wright and asked him what he knew about the accident. Wright stated, "I'm f---ing drunk, okay? I was driving. Run off the f---ing road. I'm f---ing drunk." Bradley asked Wright how much he had had to drink, and Wright responded "I don't f---ing know. A lot." He then asked Wright how fast he had been driving. Wright stated, "Don't know. Too f---ing fast."

As emergency personnel attempted to treat Wright's injuries, Trooper Bradley observed that Wright cursed and spat at them. Wright's demeanor fluctuated from "one extreme to the other," as he was calm one moment and then "yelling, cursing and screaming," the next. Wright was eventually restrained by medical personnel and transported to the hospital. Trooper Bradley then obtained a search warrant for a sample of Wright's blood. The analysis showed that Wright had a blood alcohol content of 0.09%. Wright was arrested on charges of driving while intoxicated, in violation of Code § 18.2-266 and maiming, in violation of Code § 18.2-51.4.

At trial, Trooper Bradley testified that, when he arrived at the scene, he observed emergency personnel performing CPR on Matthew Switzer, a passenger in Wright's car. He further stated that, according to Wright, the accident occurred when he was travelling south on Route 640 and approached a sharp right curve in the road. Instead of making the turn, Wright continued straight and drove off the left side of the road, over an embankment, crashing into a tree. The "total distance off the left side of the road to the impact was one hundred forty-seven feet." The skid marks measured sixty-four feet. Trooper Bradley testified that there was no posted speed limit on that road, so the speed limit was "fifty-five" miles per hour.

Switzer testified that he was a passenger in Wright's car when the accident occurred. Switzer stated that Wright picked him up that evening at about 5:00 or 6:00 p.m. and that they went riding around with another passenger named "Shaney." Switzer stated that at some point, they stopped and obtained over a dozen Xanax pills. He stated that everyone in the car took the pills. He personally took three-and-a-half pills. They later obtained some beer and drank while they continued to drive around. Switzer did not recall the accident. The doctor who treated Switzer testified that Switzer presented to the emergency room with "a lot of superficial lacerations," and a severely fractured jaw.

At the close of the evidence, Wright moved to strike, contending that the Commonwealth had failed to establish that he drove in a manner so gross, wanton and culpable as to show a reckless

disregard for human life. The trial court denied the motion finding that although the evidence may not have proven that Wright was driving "in excess of the speed limit," "his speed was clearly too fast for the conditions and clearly too fast for him to be able to maintain proper control." The court then found Wright guilty of the charge and sentenced him to five years in prison, with four years suspended.

Holding: *Affirmed.*

Opinion: HUMPHREYS, Judge.

Wright contends the trial court erred in finding the evidence sufficient to establish that he drove in a manner so gross, wanton and culpable as to show a reckless disregard for human life, as required by the statute. For the reasons that follow, we affirm the judgment of the trial court.

On appeal, Wright contends the trial court erred in finding the evidence sufficient, as a matter of law, to support his conviction. Specifically, Wright contends Code § 18.2-51.4 mandates "three elements of proof: 1) The person must drive while intoxicated; 2) The manner of driving while intoxicated must be so 'gross, wanton and culpable as to show a reckless disregard for human life'; and 3) The driving while intoxicated in the requisite manner must cause serious injury resulting in permanent physical impairment." Thus, Wright argues the element of driving while intoxicated is separate and distinct from the element of driving in a "gross, wanton and culpable" manner and that driving while intoxicated cannot serve as evidence to support the requisite manner of driving. We disagree.

We first note that the standard for appellate review of criminal convictions is well established. "When a defendant challenges the sufficiency of the evidence, we are required to review the evidence 'in the light most favorable to the Commonwealth and give it all reasonable inferences fairly deducible therefrom.' " *Collins v. Commonwealth*, 13 Va.App. 177, 179, 409 S.E.2d 175, 176 (1991) (quoting *Higginbotham v. Commonwealth*, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975)). "The conviction will not be reversed unless it is plainly wrong or without evidence to support it." *Id.; see also* Code § 8.01-680.

Code § 18.2-51.4 provides that

> [a]ny person who, as a result of driving while intoxicated ... in a manner so gross, wanton and culpable as to show a reckless disregard for human life, unintentionally causes the serious bodily injury of another person resulting in permanent and significant physical impairment shall be guilty of a Class 6 felony.

While no Virginia appellate court has issued a decision interpreting this particular statute, the common law definition of criminal negligence, as stated in the statute, is well settled. Indeed, in *Bell v. Commonwealth*, 170 Va. 597, 611, 195 S.E. 675, 681 (1938), the Supreme Court of Virginia defined criminal negligence in terms of "gross negligence," stating that conduct "is culpable or criminal when accompanied by acts of commission or omission of a wanton or wil[l]ful nature, showing a reckless or indifferent disregard of the rights of others, under circumstances reasonably calculated to produce injury, or which make it not improbable that

injury will be occasioned, and the offender knows, or is charged with the knowledge of, the probable result of his acts." 170 Va. at 611-12, 195 S.E. at 681. *Ellis v. Commonwealth*, 29 Va.App. 548, 557, 513 S.E.2d 453, 457-58 (1999).

Thus, [w]hile willful misconduct requires an intentional or purposeful act or failure to act, gross or criminal negligence involves [an act or] a failure to act under circumstances that indicate a passive and indifferent attitude toward the welfare of others. Moreover, the defendant must be proved indifferent in the face of knowledge that injury or illegality will be the probable result or, in the alternative, that circumstances exist under which the defendant may be chargeable with such knowledge. *Id.* (citations omitted).

The Supreme Court of Virginia has further held that in determining the degree of a defendant's negligence, intoxication is relevant as an aggravating factor, increasing with the level of intoxication. *Essex v. Commonwealth*, 228 Va. 273, 283, 322 S.E.2d 216, 221-22 (1984); *see also Huffman v. Love*, 245 Va. 311, 315, 427 S.E.2d 357, 360 (1993). Nevertheless, although the Court has been consistent in stating that " '[o]ne who knowingly drives [an] automobile on the highway under the influence of intoxicants, in violation of statute, is, of course, negligent[,]' " [*Essex*, 228 Va. at 282, 322 S.E.2d at 221] (quoting *Baker v. Marcus*, 201 Va. 905, 910, 114 S.E.2d 617, 621 (1960))[,] [t]he Supreme Court [of Virginia] also has observed that "no case ... holds that one driving under the influence of an intoxicant must necessarily be driving recklessly." *Spickard v. City of Lynchburg*, 174 Va. 502, 505, 6 S.E.2d 610, 611 (1940). Thus, while evidence of intoxication is a factor that might bear upon proof of dangerous or reckless driving in a given case, it does not, of itself, prove reckless driving. *Bishop v. Commonwealth*, 20 Va.App. 206, 210, 455 S.E.2d 765, 766-67 (1995).

Here, Wright conceded to Trooper Bradley that he was driving "too fast." Wright's conduct of driving his car in a manner that was too fast for him to control it properly, was necessarily rendered more culpable because Wright was driving while his intellectual and motor functions were substantially impaired by his voluntary consumption of alcohol and drugs. Indeed, immediately after the accident, Wright admitted he was drunk and despite only slight injury, was behaving in a considerably irrational manner. Accordingly, there was ample evidence on this record to justify the trial court's determination that Wright was guilty of such a callous indifference or disregard for "the rules of law and safety, and of the rights of others, as was incompatible with a proper regard for human life, and amounted to gross, wanton and culpable misconduct." *Bell*, 170 Va. at 613, 195 S.E. at 682.

Furthermore, we reject Wright's argument that *Jenkins v. Commonwealth*, 220 Va. 104, 255 S.E.2d 504 (1979), and *Tubman v. Commonwealth*, 3 Va.App. 267, 348 S.E.2d 871 (1986), compel a different result. The facts presented in those cases are distinguishable from those presented here. In *Jenkins*, the Court held that the evidence was insufficient to demonstrate recklessness when it demonstrated merely that Jenkins struck a pedestrian while driving "down the center of a narrow, unlighted, unmarked, rural, secondary road in the early morning hours at a time when he was unlikely to encounter other traffic or pedestrians." *Jenkins*, 220 Va. at 107, 255 S.E.2d at 506. Indeed, the Court noted that the evidence proved "Jenkins was driving at a speed well within the posted speed limit," and had not been drinking, or reckless in the operation of his truck. *Id.* In *Tubman*, there was also no evidence that the defendant had been drinking, and

we found that the evidence merely proved simple negligence where Tubman failed to come to a "complete stop before entering Route 3," causing him to fail to see a motorcycle, "which was admittedly partially obstructed by [a] hedge." *Tubman*, 3 Va.App. at 275, 348 S.E.2d at 875.

Accordingly, because we find that the trial court's determination that Wright's conduct amounted to criminal negligence, as provided for in Code § 18.2-51.4, was not "plainly wrong or without evidence to support it," we affirm the judgment of the trial court.

Critical Thinking Question(s): Having read the two definitions above – reckless and negligence – which of these levels of intent do you believe the defendant exhibited in the present case? Support your answer with reasoning. Since the definitions are so close, do you believe that they should be merged together for the purpose of trial? If they were made into one level of intent, how would you determine whether a particular defendant deserved a harsher punishment?

II. Strict Liability

Section Introduction: Some crimes do not require that the element of *mens rea* be satisfied for prosecution. These are known as strict liability crimes and a defendant can be held criminally accountable for commission of such acts regardless of a lack of criminal intent. The following statute and Virginia case exemplify one such strict liability offense.

Virginia Code § 18.2-308.1. Possession of firearm, stun weapon, or other weapon on school property prohibited.

A. If any person possesses any (i) stun weapon as defined in this section; (ii) knife, except a pocket knife having a folding metal blade of less than three inches; or (iii) weapon, including a weapon of like kind, designated in subsection A of § 18.2-308, other than a firearm; upon (a) the property of any public, private or religious elementary, middle or high school, including buildings and grounds; (b) that portion of any property open to the public and then exclusively used for school-sponsored functions or extracurricular activities while such functions or activities are taking place; or (c) any school bus owned or operated by any such school, he shall be guilty of a Class 1 misdemeanor.

B. If any person possesses any firearm designed or intended to expel a projectile by action of an explosion of a combustible material while such person is upon (i) any public, private or religious elementary, middle or high school, including buildings and grounds; (ii) that portion of any property open to the public and then exclusively used for school-sponsored functions or extracurricular activities while such functions or activities are taking place; or (iii) any school bus owned or operated by any such school, he shall be guilty of a Class 6 felony; however, if the person possesses any firearm within a public, private or religious elementary, middle or high school building and intends to use, or attempts to use, such firearm, or displays such weapon in a threatening manner, such person shall be sentenced to a mandatory minimum term of imprisonment of five years to be served consecutively with any other sentence.

The exemptions set out in § 18.2-308 shall apply, mutatis mutandis, to the provisions of this section. The provisions of this section shall not apply to (i) persons who possess such weapon or

weapons as a part of the school's curriculum or activities; (ii) a person possessing a knife customarily used for food preparation or service and using it for such purpose; (iii) persons who possess such weapon or weapons as a part of any program sponsored or facilitated by either the school or any organization authorized by the school to conduct its programs either on or off the school premises; (iv) any law-enforcement officer; (v) any person who possesses a knife or blade which he uses customarily in his trade; (vi) a person who possesses an unloaded firearm that is in a closed container, or a knife having a metal blade, in or upon a motor vehicle, or an unloaded shotgun or rifle in a firearms rack in or upon a motor vehicle; or (vii) a person who has a valid concealed handgun permit and possesses a concealed handgun while in a motor vehicle in a parking lot, traffic circle, or other means of vehicular ingress or egress to the school. For the purposes of this paragraph, "weapon" includes a knife having a metal blade of three inches or longer and "closed container" includes a locked vehicle trunk.

As used in this section:

"Stun weapon" means any device that emits a momentary or pulsed output, which is electrical, audible, optical or electromagnetic in nature and which is designed to temporarily incapacitate a person.

***Esteban v. Commonwealth*, 266 Va. 605, 587 S.E.2d 523 (2003).**

Procedural History: Indicted by a grand jury in Prince William County for violation of Code § 18.2-308.1(B), defendant Deena Anne Esteban was tried by a jury in October 2000. During the trial, the court refused to grant an instruction tendered by the defendant requiring the Commonwealth to prove *mens rea* or *scienter*. The court ruled "that this is a strict liability crime." The defendant was found guilty and sentenced to a suspended term of incarceration plus a fine.

Upon review, a panel of the Court of Appeals of Virginia, one judge dissenting, affirmed the conviction in an unpublished order and opinion. *Esteban v. Commonwealth*, Record No. 0028-01-4 (August 27, 2002). The Court of Appeals stated: "Assuming, but not deciding, that a *mens rea* instruction regarding whether Esteban knowingly possessed the firearm should have been given, we find any error in the trial court's failure to [so] instruct the jury to be harmless."

We awarded the defendant this appeal limited to consideration of the harmless error issue and to the claim that the Court of Appeals erred "in not holding that *mens rea* is an element of Code § 18.2-308.1[(B)]." In the view we take of the case, the only issue we need discuss is the *mens rea* question.

Issue(s): The dispositive question in this criminal appeal is whether the statute proscribing possession of a firearm on school property is one of strict criminal liability, or whether proof of *mens rea* or *scienter* is required to support a conviction for its violation.

Facts: On March 6, 2000, a Monday, a teacher in a public elementary school in Prince William County discovered a zippered yellow canvas bag on her classroom floor about 1:30 p.m. The bag contained a loaded .38 caliber revolver, as well as other items, belonging to the defendant.

The bag had been left there by the defendant, employed by the school system as an art teacher. She had come to the room earlier that day to teach the students, most of whom were in wheelchairs due to physical handicaps.

According to the defendant, she had removed numerous items from the bag on the previous Saturday, placed the gun in the bag, and took "it down to the store with me." Upon returning to her home from shopping, she placed the bag in a closet without removing the gun.

On Monday, the day of the incident, defendant took the yellow bag, along with a portfolio case and a book bag, to the school. She usually carried in the bag small tools, which she used in her instruction to fourth-grade students. As she entered the classroom, she carried the yellow bag containing the revolver and a number of teaching aids. Later, as defendant left the classroom, she took the teaching aids but left the yellow bag.

When confronted with the presence of the gun in the bag on school property, defendant said, "I don't usually carry the bag. I forgot it was in there. I had been using it over the weekend." Defendant maintained there was nothing about the bag that led her to believe the firearm was inside. However, she did not dispute that she was in possession of the bag and thus the revolver.

Holding: Affirmed. The District Court of Appeal, Oftedal, Richard L., Associate Judge, held that: (1) removal of the disabilities of nonage from victim was an affirmative defense, and (2) crime was a strict liability crime.

Opinion: COMPTON, A. CHRISTIAN, Senior Justice.

At trial, the instruction in issue would have required the Commonwealth to prove that defendant "knew she possessed the firearm." The defendant contends the trial court erred in refusing the instruction because, she argues, *mens rea* is an element of this statutory offense.

In support of her argument, the defendant refers to Code § 1-10, which provides that the common law of England, "insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly." *See* *Weishaupt v. Commonwealth*, 227 Va. 389, 399-400, 315 S.E.2d 847, 852 (1984).

The defendant relies upon the proposition, set forth in *Wicks v. Charlottesville*, 215 Va. 274, 276, 208 S.E.2d 752, 755 (1974), that a statute must be "read along with the provisions of the common law, and the latter will be read into the statute unless it clearly appears from express language or by necessary implication that the purpose of the statute was to change the common law." This is because the General Assembly "is presumed to have known and to have had the common law in mind in the enactment of a statute." *Id.*

Continuing, the defendant relies upon the following statement in *Parrish v. Commonwealth*, 81 Va. 1, 14 (1884), that "whenever a statute makes any offence [a] felony, it incidentally gives it all the properties of a felony at common law." The defendant points out that the requirement of

some *mens rea* for a crime was deeply embedded in the common law, and that the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence, citing *Staples v. United States*, 511 U.S. 600, 605, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994).

Thus, defendant contends, because the offense charged here is a felony, *mens rea* must be read into the statute as an element of the offense, even though the statute does not include an express *mens rea* element. We do not agree with defendant.

At the outset, it should be recognized that Code § 18.2-308.1 is purely a statutory offense, there being no equivalent common law crime. And, as the Attorney General points out, the defendant does not argue that the General Assembly could not have dispensed with a *mens rea* element in enacting § 18.2-308.1(B); she merely argues that it did not do so.

Additionally, the law is clear that the legislature may create strict liability offenses as it sees fit, and there is no constitutional requirement that an offense contain a *mens rea* or *scienter* element. *Maye v. Commonwealth*, 213 Va. 48, 49, 189 S.E.2d 350, 351 (1972). Thus, courts construe statutes and regulations that make no mention of intent as dispensing with it and hold that the guilty act alone makes out the crime. *Morissette v. United States*, 342 U.S. 246, 256, 258, 72 S.Ct. 240, 96 L.Ed. 288 (1952); *Makarov v. Commonwealth*, 217 Va. 381, 385-86, 228 S.E.2d 573, 575-76 (1976) (statute on its face did not support contention that a *mens rea* or *scienter* requirement should be read into the enactment).

In the final analysis, the issue whether *mens rea* or *scienter* is a necessary element in the indictment and proof of a particular crime becomes a question of legislative intent to be construed by the court. *United States v. Balint*, 258 U.S. 250, 251-52, 42 S.Ct. 301, 66 L.Ed. 604 (1922).

A statute must be construed with reference to its subject matter, the object sought to be attained, and the legislative purpose in enacting it; the provisions should receive a construction that will render it harmonious with that purpose rather than one which will defeat it. *Stanley v. Tomlin*, 143 Va. 187, 195, 129 S.E. 379, 382 (1925).

Clearly, the intent underlying Code § 18.2-308.1(B) is to assure that a safe environment exists on or about school grounds. Manifestly, the General Assembly recognized that the presence of a loaded revolver on school property creates great dangers for students, teachers, and other school personnel, either from the accidental or intentional discharge of the weapon. The fact that a person, under the circumstances of this case, innocently brings a loaded revolver onto school property does not diminish that danger.

Thus, to insert a *mens rea* element into the offense, and to require proof thereof, would defeat the statutory purpose, which is to criminalize the introduction of firearms into a school environment. So we will not add, by implication, language to the statute that the legislature expressly has chosen not to include.

Consequently, we hold that the trial court correctly decided, in refusing the instruction in question, that this statute is one of strict criminal liability, and that the Commonwealth was required to prove only that the defendant had possessed, on school property, a firearm of the type described in the statute.

Accordingly, the judgment of the Court of Appeals will be affirmed because it reached the correct result, albeit for the wrong reason. *See Mitchem v. Counts*, 259 Va. 179, 191, 523 S.E.2d 246, 253 (2000).

Critical Thinking Question(s): Strict liability offenses have long been a concern of the law because they require no *mens rea* as to certain offenses. Does the use of statutory crimes undermine the basic principles of criminal law which requires *mens rea*, *actus reus* and concurrence? If not, what are the justifications for instituting such statues? Do you believe that *mens rea* should, in fact, be a required element for all offenses? What about offenses such as statutory rape or sale of alcohol to minors where defendants can claim ignorance of the "victim's" age?

III. Concurrence:

Section Introduction: In order for a defendant to be convicted of a crime for which *actus reus* and *mens rea* are both required, it must be proven that the *actus reus* and *mens rea* occurred at the same time. Read the following Virginia case keeping in mind the issue of concurrence.

Battle v. Commonwealth, 50 Va.App. 135, 647 S.E.2d 499 (2007).

Procedural History: At Battle's trial for disorderly conduct, the Commonwealth presented Martin's testimony and then rested its case. Battle moved to strike, arguing the disorderly conduct statute, Code § 18.2-415, did not apply to words or conduct "otherwise made punishable" under Title 18.2 of the Code. Battle's conduct, counsel contended, could have been punished under other criminal code provisions, thus exempting it from the scope of the disorderly conduct statute. The trial court denied the motion.

In his case-in-chief, Battle offered only one witness, Hakeem Johnson. He testified that Battled "pushed" but did not strike him outside the club. Battle was justified in doing so, Johnson said, because he had earlier "smacked" Battle. After Battle renewed his motion to strike, the trial court denied the motion and found him guilty of disorderly conduct. On appeal, Battle repeats his argument that his conduct falls outside the scope of Code § 18.2-415 as a matter of law.

Issue(s): Did the factual record support the conviction, despite the fact that the statute specifically excludes "conduct otherwise made punishable" by other Title 18.2 criminal statutes?

Facts: A Richmond police officer, Carlos Martin, worked an off-duty assignment at a nightclub one night in January 2006. While outside the club, Martin saw two club security guards escort Battle and several of his friends out of the club. Battle and his companions argued loudly with each other. Martin and two other officers, all in their police uniforms, approached Battle and his

friends and told them to “move outside the doorway of the club” because there were “100 to 200 people coming in and going out of the club” that night.

Battle and his friends walked thirty to forty feet down the sidewalk. On that same sidewalk were “a number of people coming up and down” to enter and exit the club. Martin heard Battle and his friends continue to argue among themselves. He then saw Battle make a “striking motion toward another individual.” Martin could not see whether a blow landed. Martin ran to them and ordered both to leave the sidewalk area. When Battle refused to obey, Martin repeated his order several times. At that location on the sidewalk, Martin explained, were groups of “people at my back” and “in front of me” still trying to get into the club. Battle cursed Martin so loudly that spit came out of his mouth. Martin pushed Battle against a wall and told him he would be arrested for disorderly conduct if he did not leave as ordered. Battle did not leave, and Martin arrested him.

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Holding: *Reversed and warrant dismissed*

Opinion: KELSEY, Judge.

Referring to Code § 18.2-415 as the “disorderly conduct” statute, as we often do, tends to oversimplify its reach and betray its conceptual subtleties. Code § 18.2-415 does indeed criminalize conduct that is disorderly, but only subject to various statutory caveats and limitations. The relevant portion of the text reads:

A person is guilty of disorderly conduct if, with the intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

> A. In any street, highway, public building, or while in or on a public conveyance, or public place engages in conduct having a direct tendency to cause acts of violence by the person or persons at whom, individually, such conduct is directed; or
>
> B. Willfully or being intoxicated, whether willfully or not, and whether such intoxication results from self-administered alcohol or other drug of whatever nature, disrupts any funeral, memorial service, or meeting of the governing body of any political subdivision of this Commonwealth or a division or agency thereof, or of any school, literary society

> or place of religious worship, if the disruption (i) prevents or interferes with the orderly conduct of the funeral, memorial service, or meeting or (ii) has a direct tendency to cause acts of violence by the person or persons at whom, individually, the disruption is directed; or
>
> C. Willfully or while intoxicated, whether willfully or not, and whether such intoxication results from self-administered alcohol or other drug of whatever nature, disrupts the operation of any school or any activity conducted or sponsored by any school, if the disruption (i) prevents or interferes with the orderly conduct of the operation or activity or (ii) has a direct tendency to cause acts of violence by the person or persons at whom, individually, the disruption is directed.

However, the conduct prohibited under subdivision A, B or C of this section shall not be deemed to include the utterance or display of any words or to include conduct otherwise made punishable under this title.

The essential elements of a disorderly conduct charge include the specified *mens rea* ("intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof") and a concomitant *actus reus* (public conduct tending to cause acts of violence under subsection A, behavior disrupting certain formal public gatherings under subsection B, and behavior disrupting school functions under subsection C).

Following these state-of-mind and conduct elements, Code § 18.2-415 includes a proviso stating "conduct prohibited under subdivision A, B or C of this section shall not be deemed to include the utterance or display of any words or to include conduct otherwise made punishable under this title." This provision, added in 1976, followed *Squire v. Pace*, 516 F.2d 240 (4th Cir.1975), which held the statute unconstitutionally vague and overbroad particularly given its potential impact on free speech protections. *See generally Twenty-First Annual Survey of Developments in Virginia Law*, 62 Va. L.Rev. 1352, 1403-05 (1976).

The 1976 proviso, however, went beyond sheltering the statute from First Amendment scrutiny. The amendment also exempted defendants from disorderly conduct culpability if their "conduct" (prohibited in subsections A, B, or C) was "otherwise made punishable" under Title 18.2. *See* 1976 Va. Acts, ch. 244. Ordinarily, a "prosecutor has the discretion to decide under which of several applicable statutes the charges shall be instituted." *Bishop v. Commonwealth*, 49 Va.App. 251, 260, 639 S.E.2d 683, 687 (2007) (footnote and citation omitted). The proviso added to Code § 18.2-415, however, limits prosecutorial discretion by reserving disorderly conduct convictions only for conduct not punishable elsewhere in the criminal code. *See* Ronald J. Bacigal, *Virginia Practice Series: Criminal Offenses & Defenses* 166 (2007) (recognizing that conduct "of sufficient gravity to violate some other provision of Title 18.2 ... must be prosecuted as that crime rather than as disorderly conduct").

The scope of the other-crimes proviso, however, is finely calibrated. It does not say a disorderly conduct charge must be dismissed anytime a defendant could be prosecuted under both the disorderly conduct statute and another provision of Title 18.2. The proviso, instead, focuses specifically on "conduct prohibited under subdivision A, B or C" and instructs that such conduct

cannot include words or conduct "otherwise made punishable under this title." Code § 18.2-415. Conduct cannot be punishable under Title 18.2 without first being criminal.

Thus, the conduct exempted from the reach of Code § 18.2-415 includes only Title 18.2 crimes for which the defendant could be found guilty beyond a reasonable doubt. It is not enough that the defendant could merely be prosecuted for a Title 18.2 crime because that requires only a showing of probable cause. The proviso only applies when a rational fact-finder could find the defendant guilty beyond a reasonable doubt for a Title 18.2 crime. Any other view would lead to the anomaly of negating the disorderly conduct statute in its entirety even in cases where no rational fact-finder could find the defendant guilty of any criminal offense "punishable" under Title 18.2. *See* Code § 18.2-415.

Applying these principles here, we assume *arguendo* the trial court correctly found Battle's conduct fell within the scope of subsection A of Code § 18.2-415 because Battle intended "to cause public inconvenience, annoyance or alarm" and engaged in conduct "having a direct tendency to cause acts of violence by the person or persons at whom, individually, such conduct is directed." Code § 18.2-415. The issue before us is whether Battle's convictable disorderly conduct was comprised *solely* of conduct "otherwise made punishable under this title." *Id.*

We agree with Battle that the subsection A conduct could not be, as the statute puts it, "deemed to include" his assault on Johnson because that action could be punishable under Code § 18.2-57. Battle's subsection A conduct likewise could not include cursing at Martin because that could only be punished, if at all, as fighting words under Code § 18.2-416. *See generally Mercer v. Winston*, 214 Va. 281, 283-84, 199 S.E.2d 724, 725-26 (1973) (limiting the curse-and-abuse statute to the "fighting" words holding of *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573-74, 62 S.Ct. 766, 770, 86 L.Ed. 1031 (1942)).

Finally, Battle's refusal to obey Martin's lawful order to move away from the sidewalk so others could come and go from the club in an unobstructed manner could have been punished under Code § 18.2-404, which specifically criminalizes the refusal by someone obstructing the "free passage" of others coming and going from a public place to "move on when requested to do so" by a law enforcement officer. *See Tinsley v. Richmond*, 202 Va. 707, 715, 119 S.E.2d 488, 493 (1961) (construing analogous municipal ordinance); *see generally Gregory v. Chicago*, 394 U.S. 111, 112, 89 S.Ct. 946, 947, 22 L.Ed.2d 134 (1969) (distinguishing between charge alleging a "refusal to obey a police officer" and a charge asserting "disorderly conduct").

In short, the other-crimes proviso of Code § 18.2-415 applies as a matter of law to the disorderly conduct for which Battle was found guilty in this case. His conviction is therefore reversed and the corresponding arrest warrant dismissed.

Critical Thinking Questions: Do you agree with the opinion of the court? Why or why not? Even if the holding makes sense from a strict legal reading of it, should the conviction of the defendant have been upheld based on the totality of circumstances in this case such as the several actions by the defendant – pushing, yelling at police, and resisting arrest – particularly with a "ready" crowd at the scene? Did the defendant not exhibit the element of concurrence between

intent and act in this case? Should the prosecution be able to re-file against the defendant for the offenses listed in the question above?

IV. Causality:

Section Introduction: Conviction for certain types of criminal behavior also requires that the criminal act be either the factual or proximate cause of some harm. In these cases a defendant may draw his or her guilt into question based upon the idea that their actions did not properly cause the harm that followed. Read the following case with regard to the issue of causality.

Bailey v. Commonwealth, 229 Va. 258, 329 S.E.2d 37 (1985).

Procedural History: Indicted for involuntary manslaughter, Joseph A. Bailey was convicted in a jury trial and sentenced in accordance with the jury's verdict to serve six months in jail and to pay a fine of $1,000.

Issue(s): Was it was proper to convict Bailey of involuntary manslaughter when, in his absence, the victim was killed by police officers responding to reports from Bailey concerning the victim's conduct?

Facts: The death of the victim, Gordon E. Murdock, occurred during the late evening of May 21, 1983, in the aftermath of an extended and vituperative conversation between Bailey and Murdock over their citizens' band radios. During the conversation, which was to be the last in a series of such violent incidents, Bailey and Murdock cursed and threatened each other repeatedly.

Bailey and Murdock lived about two miles apart in the Roanoke area. On the evening in question, each was intoxicated. Bailey had consumed a “twelve-pack” of beer and a “fifth of liquor” since mid-afternoon; a test of Murdock's blood made during an autopsy showed alcoholic content of “.271% ... by weight.” Murdock was also “legally blind,” with vision of only 3/200 in the right eye and 2/200 in the left. Bailey knew that Murdock had “a problem with vision” and that he was intoxicated on the night in question.

Bailey also knew that Murdock owned a handgun and had boasted “about how he would use it and shoot it and scare people off with it.” Bailey knew further that Murdock was easily agitated and that he became especially angry if anyone disparaged his war hero, General George S. Patton. During the conversation in question, Bailey implied that General Patton and Murdock himself were homosexuals.

Also during the conversation, Bailey persistently demanded that Murdock arm himself with his handgun and wait on his front porch for Bailey to come and injure or kill him. Murdock responded by saying he would be waiting on his front porch, and he told Bailey to “kiss [his] mother or [his] wife and children good-bye because [he would] never go back home.”

Bailey then made two anonymous telephone calls to the Roanoke City Police Department. In the first, Bailey reported "a man ... out on the porch [at Murdock's address] waving a gun around." A police car was dispatched to the address, but the officers reported they did not "see anything."

Bailey called Murdock back on the radio and chided him for not "going out on the porch." More epithets and threats were exchanged. Bailey told Murdock he was "going to come up there in a blue and white car" and demanded that Murdock "step out there on the ... porch" with his gun "in [his] hands" because he, Bailey, would "be there in just a minute."

Bailey telephoned the police again. This time, Bailey identified Murdock by name and told the dispatcher that Murdock had "a gun on the porch," had "threatened to shoot up the neighborhood," and was "talking about shooting anything that moves." Bailey insisted that the police "come out here and straighten this man out." Bailey refused to identify himself, explaining that he was "right next to [Murdock] out here" and feared revealing his identity.

Three uniformed police officers, Chambers, Beavers, and Turner, were dispatched to Murdock's home. None of the officers knew that Murdock was intoxicated or that he was in an agitated state of mind. Only Officer Beavers knew that Murdock's eyesight was bad, and he did not know "exactly how bad it was." Beavers also knew that Murdock would get "a little 10-96 (mental subject) occasionally" and would "curse and carry on" when he was drinking.

When the officers arrived on the scene, they found that Murdock's "porch light was on" but observed no one on the porch. After several minutes had elapsed, the officers observed Murdock come out of his house with "something shiny in his hand." Murdock sat down on the top step of the porch and placed the shiny object beside him.

Officer Chambers approached Murdock from the side of the porch and told him to "[l]eave the gun alone and walk down the stairs away from it." Murdock "just sat there." When Chambers repeated his command, Murdock cursed him. Murdock then reached for the gun, stood up, advanced in Chambers' direction, and opened fire. Chambers retreated and was not struck.

All three officers returned fire, and Murdock was struck. Lying wounded on the porch, he said several times, "I didn't know you was the police." He died from "a gunshot wound of the left side of the chest." In the investigation which followed, Bailey stated that he was "the hoss that caused the loss."

Holding: *Affirmed.*

Opinion: CARRICO, Chief Justice.
In an instruction granted below and not questioned on appeal, the trial court told the jury it should convict Bailey if it found that his negligence or reckless conduct was so gross and culpable as to indicate a callous disregard for human life and that his actions were the proximate cause or a concurring cause of Murdock's death. Bailey concedes that the evidence at trial, viewed in the light most favorable to the Commonwealth, would support a finding that his actions constituted negligence so gross and culpable as to indicate a callous disregard for human life. He contends, however, that he "did not kill Murdock."

Bailey argues that his conviction can be sustained only if he was a principal in the first degree, a principal in the second degree, or an accessory before the fact to the killing of Murdock. The Attorney General concedes that Bailey was not a principal in the second degree or an accessory before the fact, but maintains that he was a principal in the first degree.

Countering, Bailey argues he was not a principal in the first degree because only the immediate perpetrators of crime occupy that status. Here, Bailey says, the immediate perpetrators of Murdock's killing were the police officers who returned Murdock's fire. He was in his own home two miles away, Bailey asserts, and did not control the actors in the confrontation at Murdock's home or otherwise participate in the events that occurred there. Hence, Bailey concludes, he could not have been a principal in the first degree.

We have adopted the rule in this Commonwealth, however, that one who effects a criminal act through an innocent or unwitting agent is a principal in the first degree. *Collins v. Commonwealth*, 226 Va. 223, 233, 307 S.E.2d 884, 890 (1983) (undercover policewoman ruled innocent agent to collect fees for defendant charged with pandering); *Dusenbery v. Commonwealth*, 220 Va. 770, 772, 263 S.E.2d 392, 393 (1980) (person who acts through an innocent or unwitting agent is a principal in first degree, but not in rape cases). And, in *State v. Benton*, 276 N.C. 641, 653, 174 S.E.2d 793, 801 (1970), cited with approval in *Collins*, the court stated that the innocent-agent rule applies even though the person accused was not present at the time and place of the offense.

Bailey argues that the present case is distinguishable from *Collins.* There, Bailey says, the accused and the undercover policewoman were working in concert, pursuing a common goal of soliciting and collecting fees for sexual favors; although the policewoman was innocent of the crime of pandering because she had no intent to perform sexual acts, the accused was guilty nevertheless because the fees were collected on his behalf. Here, Bailey asserts, he and the police shared no common scheme or goal. Neither, Bailey says, did he share a common goal with Murdock; indeed, "Murdock's intent was to kill Bailey."

The question is not, however, whether Murdock was Bailey's innocent or unwitting agent but whether the police officers who responded to Bailey's calls occupied that status. And, in resolving this question, we believe it is irrelevant whether Bailey and the police shared a common scheme or goal. What is relevant is whether Bailey undertook to cause Murdock harm and used the police to accomplish that purpose, a question which we believe must be answered affirmatively.

Knowing that Murdock was intoxicated, nearly blind, and in an agitated state of mind, Bailey orchestrated a scenario on the evening of May 21, 1983, whose finale was bound to include harmful consequences to Murdock, either in the form of his arrest or his injury or death. Bailey angered Murdock with accusations of homosexuality concerning Murdock himself as well as his war hero. Bailey then demanded repeatedly that Murdock arm himself with his handgun and wait on his front porch for Bailey to arrive. Bailey also threatened repeatedly that when he arrived at Murdock's home he would inflict serious injury upon Murdock and even kill him.

Having aroused Murdock's wrath and having led him to expect a violent confrontation, Bailey made two anonymous telephone calls to the police. In those calls, he falsely reported Murdock's conduct by saying the latter had threatened to "shoot up" the neighborhood and to shoot anything that moved, when Murdock had not made such threats. Bailey falsified his own ability to observe Murdock's conduct by telling the police that he, Bailey, was "right next to [Murdock] out here," when he was actually two miles away. And Bailey neglected to tell the police that Murdock was intoxicated and blind and in an agitated state of mind.

From a factual standpoint, it is clear from the sum total of Bailey's actions that his purpose in calling the police was to induce them to go to Murdock's home and unwittingly create the appearance that Bailey himself had arrived to carry out the threats he had made over the radio. And, from a legal standpoint, it is clear that, for Bailey's mischievous purpose, the police officers who went to Murdock's home and confronted him were acting as Bailey's innocent or unwitting agents.

But, Bailey argues, he cannot be held criminally liable in this case unless Murdock's death was the natural and probable result of Bailey's conduct. Bailey maintains that either Murdock's own reckless and criminal conduct in opening fire upon the police or the officers' return fire constituted an independent, intervening cause absolving Bailey of guilt.

We have held, however, that "[a]n intervening act which is reasonably foreseeable cannot be relied upon as breaking the chain of causal connection between an original act of negligence and subsequent injury." *Delawder v. Commonwealth*, 214 Va. 55, 58, 196 S.E.2d 913, 915 (1973) (defendant lost control of vehicle while racing and struck pedestrian; striking of defendant's vehicle by other car not intervening cause). Here, under instructions not questioned on appeal, the jury determined that the fatal consequences of Bailey's reckless conduct could reasonably have been foreseen and, accordingly, that Murdock's death was not the result of an independent, intervening cause but of Bailey's misconduct. At the least, the evidence presented a jury question on these issues. *See id.*

Finally, Bailey maintains that his conviction is improper in light of our decision in *Wooden v. Commonwealth*, 222 Va. 758, 284 S.E.2d 811 (1981). There, the accused participated in a robbery with accomplices Anthony and Frye. The victim shot and killed Anthony, and Frye then shot and killed the victim. The accused was convicted of felony-murder for both killings. We reversed the conviction for the killing of the co-felon. We said that because malice is an essential element of felony-murder and because there was no evidence that the victim killed the co-felon with malice, there was no malice in the death of the co-felon that could be imputed to the accused under the felony-murder rule. Accordingly, we held that "a criminal participant in a felony may not be convicted of the felony-murder of a co-felon killed by the victim of the initial felony." *Id.* at 765, 284 S.E.2d at 816.

Reading our opinion to say that we reversed in *Wooden* because the killing of the co-felon was a justifiable homicide, Bailey argues that we should take the same action here because "Murdock's death was [also] a justifiable homicide." As the Attorney General points out, however, we did not reverse in *Wooden* because the victim's killing of the co-felon constituted a justifiable homicide but because malice, an essential element of a murder prosecution, was lacking. In this

case, a manslaughter prosecution, proof of malice is not required, and, moreover, there is no lack of proof of any of the elements essential to Bailey's conviction. Accordingly, we will affirm the conviction.

Critical Thinking Question(s): If the defendant was considered a principle in the first degree for the death of the victim, why was he not charged with first degree murder? Should he have been at least convicted of voluntary manslaughter for his actions leading up to the death of the victim? Based upon what facts did the jury determine it was involuntary manslaughter? For proximate cause in such a case, it is important to determine whether justice dictates that the individual charged should be held blameworthy for the incident. In this case, do you believe that Bailey's actions were the proximate cause of the victim's death? If so, what were the specific acts?