Chapter VIII

Justifications

Chapter Overview:

Sometimes a person can commit an otherwise criminal act but there are circumstances surrounding the act that cause it not to be considered a crime. These are affirmative defenses against criminal prosecution by which the defendant acquires the burden to produce supporting evidence and to persuade the court of his or her justification. These include such things as self-defense, defense of others or of the home, execution of public duties, and necessity. The defenses of consent and resisting an unlawful arrest are sometimes also utilized, but are generally not considered valid defenses.

The justification of self-defense is the claim that use of force was necessary to protect one's own safety. In order to justify the use of force in self-defense an individual must reasonably believe that force to be necessary to prevent his or her own death or serious injury. The force used in defense of self must also be proportional to the threat and must not be in excess of what is necessary. In some jurisdictions an individual is also required to make an attempt to retreat before resorting to the use of deadly force in self-defense. It is also a generally recognized rule that an aggressor who started a confrontation is not entitled to self-defense. Sometimes an aggressor may regain the right to self-defense by withdrawing from the struggle.

Justification may also be allowed on the grounds of the defense of others or defense of the home. In some jurisdictions, defense of others follows the same guidelines as self-defense in that the use of force is justified by the same conditions in either case. In other jurisdictions, however, defense of others is more limited and one can only be justified in using force to defend a certain set of individuals whom the defender is related to in a specific way. Justification based on defense of the home is meant to provide individuals with a sense of security within their homes. Some jurisdictions provide for broad discretion in the use of force, including deadly force, by occupants of a home that is being intruded upon. Others require occupants of a dwelling to be more limited in their use of force.

The use of varying degrees of force is also justified in the case of execution of public duties. This rule is applies to police officers who must use force in their line of duty. The justification for allowing police officers the discretion and use of force that they maintain is that a basic public interest is served in having police officers who are able to forcefully protect others. Due to the fear and danger of power abuses, however, even the ability of police officers to use force is limited dependent upon the nature of the situation.

The defense of necessity maintains the principle that an otherwise criminal act is justified if it is done in order to avoid a greater harm. This defense is evaluated on an individual case-by-case basis, allowing for a certain degree of flexibility on the part of the courts to determine when a use of force was necessary to protect against a significant danger.

Some defendants claim justification based on consent or the resist of an unlawful arrest. The idea of consent is that a victim agreed to have the crime acted upon them. Neither resisting unlawful arrest nor consent is generally considered to be valid justification for the use of force. In this chapter of the supplement you will find Virginia statutes and case law relevant to these questions of justifying the use of force.

I. Self-Defense:

Section Introduction: The use of force, up to and including deadly force, can be justified if it was necessary in the defense of one's own safety. Below you will find Virginia cases that involve the use of the self-defense justification.

Yarborough v. State, 217 Va. 971, 234 S.E.2d 286 (1977).

Procedural History: Upon an indictment for the murder of Charles Augusta Vines, defendant Rose Ella Yarborough was convicted by the trial court, sitting without a jury, of voluntary manslaughter and sentenced to confinement in the penitentiary for a term of five years.

Issue(s): Did the record fail to disclose circumstances of excuse to create a reasonable doubt that defendant had acted in self-defense?

Facts: On September 11, 1975 near 6:30 p. m., defendant and Vines appeared at the back door of the residence of Rosa Lee McNeill, defendant's sister-in-law, located in the City of Newport News. McNeill refused to admit them to her home because they "had been drinking" and were "arguing." Thereafter, the couple remained on McNeill's back porch for about 35 minutes and continued to argue. Then McNeill, who had stayed within her home watching television, heard the sound of gunfire outside. She went to her back door, saw Vines "laying on the ground", and determined he had been shot.

Defendant, testifying as the only defense witness, said Vines had been her "boyfriend" for about seven years. She stated that during the period of their relationship they had argued and that Vines had been "violent" to her. She testified that on prior occasions, he had "shot me with a sawed off shotgun, shot half of my breast off and I had a hole in my arm", all resulting in three separate operations. She also said that in the past defendant "throwed me down the steps one time and broke my shoulder."

Testifying about the event in question, defendant said that shortly before the shooting, she and Vines, both of whom had been drinking intoxicating beverages, were together at her mother's house, located near McNeill's home, when Vines gave her a loaded .22 caliber revolver. At the time, according to defendant, Vines "said he wanted (the gun) for protection" - "protection" of whom being unclear from the record.

Defendant further testified the couple then went to McNeill's back porch where Vines "got to arguing" with her. When the argument continued, Vines became "nasty" and "violent". Finally, Vines "knocked" defendant from McNeill's back porch into some nearby bushes. She then "shoved" him "back in the bushes" and then he "knocked" her to the ground and again into the shrubbery. As defendant "tried to get up," Vines, who was then close to defendant, reached down toward a boot he was wearing. Defendant knew he was carrying a 14-inch long-bladed knife in the boot so, as his hand was "a little past his knee", she pulled the revolver from her "bosom" and shot him. Vines, who later died from one gunshot wound of the chest, never drew the knife.

Defendant testified: "I didn't intend to shoot him; I tried to get him off of me. I knew when he was drunk he was violent." Asked whether at the time she fired the weapon she was able to "retreat anywhere", defendant said "I was at that time . . . in the hedges; at that time it was thick." Defendant stated she shot Vines without first asking him not to use the knife because she was "scared of him" and because she knew he would not heed her request; she said that when Vines shot her with the shotgun on the prior occasion, she first pleaded with him not to fire.

Leaving Vines lying on the ground, defendant ran to her mother's home and hid the revolver under a mattress. She then "ran around the block", because she was "excited", and eventually returned to the scene. In the meantime, Vines had been removed from the area by ambulance and the police had arrived to investigate. When defendant returned, she approached the officers who, by then, suspected defendant "was involved" in the crime. After being given the warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and being told she would be charged with murder if Vines died, defendant stated "I shot him." She then led one of the officers to the room where the revolver was hidden and identified it as being the weapon she used to shoot Vines.

Holding: *Affirmed.*

Opinion: COMPTON, Justice.

Defendant … contends the trial court "erred as a matter of law in ignoring the theory of excusable homicide in self-defense and in precluding the defendant from relying upon such defense." She points to certain comments made during the trial by the court below and interprets them to mean the court improperly refused to consider the foregoing defense when, under the evidence, the defendant was entitled to rely thereon. Actually, defendant's argument reaches farther than the above-stated position which, if sustained, would warrant a reversal and remand; she seeks a judgment here of acquittal as a matter of law, not a new trial, contending the "evidence is sufficient to sustain her plea of excusable homicide *se defendendo*."

Killing in self-defense may be either justifiable or excusable homicide. "Justifiable homicide in self-defense occurs where a person, without any fault on his part in provoking or bringing on the difficulty, kills another under reasonable apprehension of

death or great bodily harm to himself." Bailey v. Commonwealth, 200 Va. 92, 96, 104 S.E.2d 28, 31 (1958); Dodson v. Commonwealth, 159 Va. 976, 167 S.E. 260 (1933). "Excusable homicide in self-defense occurs where the accused, although in some fault in the first instance in provoking or bringing on the difficulty, when attacked retreats as far as possible, announces his desire for peace, and kills his adversary from a reasonably apparent necessity to preserve his own life or save himself from great bodily harm." 200 Va. at 96, 104 S.E.2d at 31. But bare fear that a person intends to inflict serious bodily injury on the accused, however well-grounded, unaccompanied by any overt act indicating such intention, will not warrant killing such person. Harper v. Commonwealth,196 Va. 723, 731, 85 S.E.2d 249, 254 (1955).

With these principles in mind, we now turn to the comments of the trial judge which defendant contends demonstrate the court below refused to apply the doctrine of excusable homicide. But we will not set forth the trial court's comments out of the context in which they were made, so far as we are able to ascertain that context from the transcript, which contains only excerpts from the colloquy between court and counsel, and which does not fully set forth the arguments on the law of the case of either the prosecutor or defense counsel. We will italicize the court's comments which are singled out and relied on by defendant to sustain her position.

The Commonwealth's case-in-chief was presented through the testimony of two of the investigating officers and McNeill, who stated defendant told her the killing was in "self-defense or something." At the conclusion of this evidence the following transpired:

"MR. OLSON (prosecutor): That's the Commonwealth's case, your Honor.

"COURT: The Commonwealth rests.

"MR. FOX (attorney for defendant): Move to strike, Judge. The Commonwealth has brought out the evidence we would bring out. It was a case of self-defense. We don't know what happened there. Other than the fact that this man

"COURT: Where is the self-defense? Where is any evidence of self-defense?

"MR. FOX: The Commonwealth has brought that out.

"COURT: I must have missed it.

"MR. FOX: From the witness McNeill as to what happened, and she said (defendant) told her as to the circumstances of the shooting. We admit from the evidence that we are the one who fired the gun, but the Commonwealth hasn't brought out the reason, other than the fact of our statement that it was self-defense.

"COURT: It takes more than a statement of self-defense. It takes more than that. That's a conclusion.

“MR. FOX: Yes sir, we'll put on the evidence.”

The defendant then testified and rested her case. No evidence in rebuttal was offered by the Commonwealth. Then, according to the record, each counsel presented his closing argument to the court, neither of which was transcribed. But the record does not contain a transcript of the following colloquy which occurred during the argument of defendant's attorney:

“MR. FOX: Judge, if we subscribe to that theory, I would be representing a corpse today, with what this man's record was. I don't know.

“COURT: I'm surprised - a little surprised that the Commonwealth is willing to talk about manslaughter. Here this woman going with that man who had broken her shoulder, shot her breast off with a shotgun, one time or another. She said she's scared of him. Yet, she continued to go with him. Armed herself. And then she gets in an argument with him and shoots him. It doesn't look like it to me, Mr. Fox, she put herself in that position. Frankly I don't see any self-defense in this matter. I really don't. He never pulled the gun; she said he was going for it. Maybe he was. He never pulled it. I think she's guilty of manslaughter too.

“MR. FOX: What more did she have to do under these circumstances with what this man did to her?

“COURT: In the first place, she had no business arming herself and being - and going in volatile company where this man had shot her once, broken her shoulder once. She's got no business to do that, and then arm herself to protect herself.

“MR. FOX: She didn't arm herself. The evidence ought to be brought out from the Police Department this was this man's gun. He gave it to her.

“COURT: She had the gun.

“MR. FOX: He gave it; he had the bullets on him.

“COURT: I think she's guilty. I really think she's guilty of second degree murder, but I'm going to find her guilty of voluntary manslaughter.”

During the March 2, 1976 sentencing hearing, held about one month after the trial, the record shows that after the pre-sentence report had been discussed, counsel again presented argument to the court. This argument has also been omitted from the record, however the transcript does contain the following statements made by the trial judge:

“COURT: This man was - that the deceased was not a paragon of virtue, of course, is shown by the evidence. And assuming everything is true that this woman said about how this man had mistreated her and that he had maimed her in the past and attempted to kill her on occasion, or on, maybe, several occasions, let's assume that all of that is absolutely gospel just as it came from her mouth.

She isn't charged with carrying on an affair with the man who was disposed to violence. That's not the charge. What she did was she went with the man, whom she knew was disposed to violence, armed herself, and became voluntarily intoxicated at the same time. And she killed him, and from the physical evidence at least, he was armed too, but he had not drawn his weapon, according to the physical evidence. The weapon was in his sock when he was admitted to the hospital. And I say that the word has got to go out that people can't arm themselves and place themselves in the position where they voluntarily, where they can expect violence to erupt and then claim self-defense. You just cannot do that. And I recognize that this woman would probably never be a threat to any one on the street, but that doesn't give her the right to take someone's life because she would never take another one."

The defendant contends the italicized language demonstrates conclusively "the trial court erroneously instructed itself" and that the trial judge "misapprehended the standard against which the Defendant's conduct is to be measured." We disagree.
In this case, taking the foregoing comments as a whole, we construe the trial judge's statements as furnishing alternative bases, one correct and one erroneous, for his finding of defendant's guilt.

On the one hand, he clearly, and correctly, made a finding of fact that the defense of self-defense had not been sustained by the evidence. Such was the obvious import of his comment in response to defendant's motion to strike made at the conclusion of the Commonwealth's case-in-chief when he said, in effect, that more than a conclusory statement is necessary to furnish a factual basis for self-defense. And then during the colloquy following the closing arguments on the day of trial, the court said: "I don't see any self-defense in this matter. I really don't. He never pulled the gun." This train of thought continued to the sentencing hearing when the court observed Vines "had not drawn his weapon." The clear meaning of these latter comments is that, factually, the plea of excusable homicide in self-defense had not been sustained because the vital element of a "reasonably apparent necessity" to kill did not exist. Stated another way, the court either decided not to believe all the defendant said, as it had a perfect right to do, or it held, as a matter of fact, that Vines' mere reaching down toward his boot was not such an overt act indicative of his intention to kill or do great bodily harm to defendant as would excuse the homicide. In essence, whether or not defendant showed such circumstances of excuse to create a reasonable doubt that she acted in self-defense was an issue of fact. That being the case, we cannot say a judgment of conviction having the foregoing factual basis "is plainly wrong or without evidence to support it." Code s 8-491.

On the other hand, many of the trial judge's comments, supra, tend to show he concluded the defendant, as a matter of law, was not entitled to rely upon a plea of self-defense. The court apparently focused, in part, on the inapplicable doctrine of justifiable homicide only, as indicated by repeated references to defendant's fault, and may have ignored, at times, the applicable doctrine of excusable homicide. But, at the most, such an interpretation, if correct, of what the trial judge may have believed was the relevant law

merely furnishes an alternative albeit incorrect, basis for his judgment. The fact remains, as we have said, it is clear he considered the proper doctrine of excusable homicide. So where, as here, we can be satisfied the conviction was based on a correct application of the law, we will not reverse the judgment, even though an incorrect theory may also have been considered by the court.

For these reasons, the judgment of conviction will be Affirmed.

Critical Thinking Question(s): If you were the judge, what charge would you hand down to the defendant based on the facts in this case? What are the elements specified in the text regarding self-defense? Do you believe the defendant was in "imminent" dangerous of serious bodily injury or death? Would it have helped the defendant to present expert psychiatric testimony as to the effect of the victim's prior acts on her ability to "reason" within the context of the situation?

***Thomason v. Commonwealth*, 178 Va. 489, 17 S.E.2d 374 (1941).**

Procedural History: Russell O. Thomason, indicted for the murder of Clyde Wilson Kirk, has been found guilty by a jury of murder in the second degree, and his punishment fixed at five years confinement in the penitentiary.

Issue(s): Was the evidence sufficient to sustain a verdict of murder in the second degree?

Facts: Both the accused and the deceased were middle-aged married men. About ten years prior to the homicide they had lived as next-door neighbors. Thomason's attentions to Mrs. Kirk ended the friendly relations of the two men and they had not spoken to each other for a number of years. There is evidence that Kirk had made a number of threats against Thomason and that these had reached Thomason's ears.

The homicide occurred on the night of July 15, 1940, at the plant of the Southern States Mill, in Roanoke County, where Thomason was employed and while he was engaged in superintending the unloading of corn from a freight car which was standing on a siding in front of the mill. The mill faces in a northerly direction, and in front of it is a concrete platform about nine feet wide. The building is entered from the platform through a door about six feet wide. The siding on which the freight car was located runs parallel to and is just north of the platform. The car had been placed on the siding so that its door was west of and not directly opposite the doorway leading into the building.

Kirk, who lived near by, came to the mill to procure some grain doors which Howard Patton, one of the mill employees, had authorized him to remove from the premises. He entered the freight car through a door on its far side and stood for a few minutes talking to Paul and Howard Patton, who were shoveling corn from the eastern end of the car to the conveyor which led from the center of the car into the mill. While Kirk was in the car, Thomason entered and hung up a light on an extension cord for the purpose of facilitating the unloading of the car. Both he and Kirk observed each other but no word passed between them. After a few minutes Kirk left the freight car through the door leading to

the platform. He walked past the mill door to the eastern end of the platform where he smoked a cigarette. At this time Thomason was standing in the lighted doorway of the mill. Kirk left the eastern end of the platform and proceeded toward the mill doorway. When he reached the door he was struck a single blow over the head with a pick handle by Thomason. The blow was a severe one. It struck Kirk over the right eye, crushed his skull, injured his brain, rendered him immediately unconscious, and resulted in his death within twenty-four hours.

Swanson and Lantz, two witnesses who were sitting on the edge of the platform east of the mill door, heard the blow and ran to Kirk who was unconscious and who lay with his feet toward the door and his head toward the outer edge of the platform. Paul and Howard Patton also came from the freight car where they were working. They heard Thomason say, pointing to an open knife beside Kirk's body, 'You see what he came after me with. He told me he was going to cut my heart out.'

Realizing that Kirk was seriously injured, Thomason phoned for an ambulance and for the sheriff.

Holding: *Reversed and remanded.*

Opinion: EGGLESTON, Judge.

The Commonwealth's contention is that the jury had the right to disregard Thomason's story *in toto;* that when this was done it had the right to infer from the Commonwealth's evidence that Thomason, seeing Kirk on the premises and anticipating trouble, armed himself with the pick handle which he concealed near the door; and that when he later saw Kirk with an open knife in his hand, he (Thomason) became unduly alarmed for his safety and struck him, although the latter, according to the testimony of Howard Patton, had committed no overt act which threatened actual harm to the accused.

The Attorney General argues that if there had been any such encounter, as Thomason detailed, it would have taken place in front of the door leading into the mill, where the actions of the two men would have been plainly visible from the light shining through the doorway, and would have been observed by both Paul and Howard Patton who, he says, were looking at the scene of the alleged altercation at the time of its occurrence. Since neither of these witnesses saw any such altercation, it is argued that it never took place.

This argument does not survive an analysis of the situation. According to the testimony of both of the Pattons, just before the blow was struck Thomason was standing at the eastern end of the doorway, and the undisputed testimony is that Kirk approached from the eastern or darkened end of the platform. Thus, neither Thomason nor Kirk came clearly between the light from the doorway and the point in the car where the Pattons were standing. In fact, Paul Patton testified that at the time the blow was struck, Thomason was standing in the light and Kirk was standing in the dark, and that before the actual blow he could see neither Thomason nor Kirk.

While Howard Patton testified that at the time the blow was struck, Kirk ‘wasn't doing anything that I know of, just standing there on the platform ‘ with his ‘left side‘ toward Thomason, he had previously testified that while he could distinguish some object at which Thomason was striking, ‘I couldn't just exactly see his face, who he was swinging at.‘ It also developed, on cross examination, that at the preliminary hearing Howard Patton had testified that, ‘I couldn't see Mr. Kirk from where I was on account of the dust.’

Moreover, it does not appear from the testimony that either of the Pattons was looking at Thomason for any length of time prior to the striking of the blow. Paul Patton testified that just as he ‘glanced back,’ he saw ‘Thomason make a swing.’ Consequently, he did not know what had previously taken place between the two men. Howard Patton did not testify as to how long he had been observing the two men when the blow was struck. At the preliminary hearing he said, ‘I happened to look up and then I looked back and looked up again, and I happened to see him make a swing,’ which indicates that he had a mere glimpse of the two men at the time the blow was struck.

Consequently, it is entirely possible that these two witnesses may not have seen the overt act of Kirk which preceded the blow.

Again, Howard Patton's statement that at the time the blow was struck Kirk was standing with the left side of his face exposed to Thomason is inconsistent with the physical facts. The undisputed evidence is that Thomason is left-handed and delivered a left-handed blow which struck Kirk over the right eye. This would indicate that Kirk was facing Thomason.

There is nothing inherently incredible in Thomason's story. In the main it is not contradicted by any witness. Hence, we cannot agree that the jury had the right to totally disregard it. Indeed, the fact that the jury fixed the punishment at the minimum for murder in the second degree shows that it gave some credence to Thomason's testimony.

Giving to Thomason's testimony the credence it deserves, we think the homicide was accompanied by such extenuating circumstances as to preclude a finding that the accused was guilty of murder in the first or second degree. The undisputed evidence shows that Thomason did not seek this encounter. He was at work where he had the right to be. He knew that Kirk had repeatedly made threats against him. Assuming that Kirk had the right to be on the premises, it is undisputed that just before he received the fatal blow he had in his hand an open knife and was facing and approaching the accused. Under such circumstances of extenuation there is no presumption of malice, and hence the accused cannot be convicted of murder in either the first or second degree. *Brown v. Commonwealth,* 138 Va. 807, 814, 122 S.E. 421; *Richardson v. Commonwealth,* 128 Va. 691, 696, 104 S.E. 788.

Counsel for the plaintiff in error earnestly contends that despite the adverse verdict of the jury, this is a case of justifiable homicide, and that we should so hold. With this contention we cannot agree.

Justifiable homicide in self-defense is an affirmative defense based upon necessity. The necessity to kill must affirmatively appear from the evidence adduced by the accused unless the fact appears from the Commonwealth's own evidence or other circumstances in the case. *Potts v. Commonwealth*, 113 Va. 732, 734, 73 S.E. 470.

The right to kill begins where the necessity begins and ends where it ends. *Fortune v. Commonwealth*, 133 Va. 669, 689, 112 S.E. 861; *Byrd v. Commonwealth*, 89 Va. 536, 540, 16 S.E. 727.

Here it does not conclusively appear from either the evidence of the accused or that of the Commonwealth, that necessity to kill existed at the time the fatal blow was struck. Although Kirk may have been the aggressor in the first instance, and the necessity to kill may have been apparent to the accused when the latter seized the pick handle in self-defense, yet the jury may have concluded from the testimony of Howard Patton (who said that Kirk 'wasn't doing anythin' at the time the blow was struck) that Kirk had abandoned the attack on the accused. If this be so, the necessity for Thomason's killing Kirk had ended, and the accused would be guilty of voluntary manslaughter. *Byrd v. Commonwealth, supra.*

Again, while the accused testified that he grabbed the pick handle in self-defense after Kirk had lunged at him with an open knife, he made no claim that thereafter Kirk continued the attack. On cross examination he was three times asked the question, 'Was he (Kirk) still coming at you when you hit him?' and in each instance he gave an evasive answer. Thus the accused himself does not say that the necessity to kill existed at the time the fatal blow was struck.

In our opinion it is for the jury to say, under proper instructions, whether the killing was done in justifiable self-defense or whether the accused was guilty of voluntary manslaughter. *Wilkins v. Commonwealth*, 176 Va. 580, 584, 11 S.E.(2d) 653, 655.

By the final assignment of error the accused contends that the court erred in permitting the Commonwealth to introduce, in rebuttal, evidence of the reputation of Kirk, the deceased, as a peaceful and law-abiding citizen. Reliance is placed upon *Dock v. Commonwealth*, 21 Gratt. (62 Va.) 909. There it was held that on a trial for murder it is not competent for the Commonwealth to introduce evidence *in chief* as to the character of the person on whom the offense was committed. This is so because until the reputation of the deceased has been attacked it is presumed to be good. 1 Wharton's Criminal Evidence, 10th Ed., § 57.

But the converse of the proposition is equally true, - that is, if the accused opens the door by introducing evidence of the character of the deceased, the Commonwealth may in rebuttal show the latter's good character. *Dock v. Commonwealth, supra* (21 Gratt. (62 Va.), at page 911).

In the case at bar the accused offered evidence that Kirk, the deceased, had on numerous occasions made threats against him (the accused). It is generally held that the proof by the accused of such threats is a direct attack on the character of the deceased and justifies proof by the prosecution, in rebuttal, of the prior good character of the deceased. See Wharton's Criminal Evidence, 10th Ed., § 57. See also, the recent case of *State v. Pusey*, 118 W.Va. 95, 188 S.E. 745, 747, where the pertinent authorities are collected.

We hold, therefore, that there was no error in the admission of the evidence in rebuttal of the good character of the deceased.

For the reasons stated the judgment complained of will be reversed and the case remanded for a new trial.

Critical Thinking Question(s): How does this case differ from the previous case? Was the fact that the victim allegedly had a knife in his hand at the time of being struck, verses the prior victim's knife in the sock, make a significant difference? Should the court give more weight to substantiated violence by the victim as in the first case compared to the mere threats suggested in this case? Is manslaughter a proper outcome for both cases?

IV. Defense of Others:

Section Introduction: Defending the safety of other people can also justify the use of force, similarly to the justification of self-defense. The actor in a case of defense of others, however, "steps into the shoes" of the person s/he seeks to protect and, thus, his/her case will be based upon a reasonable belief as to whether or not that person was legally permitted act upon the "victim" and to what extent, and whether or not that person was at fault. The following is a case in which a defendant claims to have been lawfully defending others through the use of force.

Foster v. Commonwealth, 13 Va.App. 380, 412 S.E.2d 198 (1991).

Procedural History: Defendant was convicted in the Circuit Court, Southhampton County, Westbrook J. Parker, J., of unlawful wounding, and he appealed.

Issue(s): Was the defendant entitled to a jury instruction on the defense of others?

Facts: On July 11, 1986, Foster, who was an inmate at the Southampton Correctional Center in Southampton County, Virginia, was playing horseshoes with several other inmates in the prison's recreation yard. Foster was standing at one end of the pit, and David Robinson and James Hooks, who were at the other end, were arguing over whose turn it was to play. Foster took his turn, and both Robinson and Hooks grabbed one of the horseshoes he had thrown. They engaged in a tugging match over the horseshoe. Robinson held another horseshoe in his right hand.

The evidence was in conflict as to the subsequent events. According to the Commonwealth's evidence, James Hooks moved behind Robinson after Hooks released the horseshoe. Robinson turned toward Hooks in anticipation of a fight, and when he did,

Foster came from behind and hit Robinson in the head with a horseshoe. Robinson and Foster then began to fight. According to Foster's evidence, he walked from his end of the horseshoe pit to the other in order to prevent a fight between Hooks and Robinson. When Foster reached them, Robinson drew back a horseshoe as if to hit either him or Hooks, and, to defend against the blow, Foster struck Robinson one time. Then, either Foster walked away and Robinson pursued and hit him with a horseshoe, or the men began to exchange blows with horseshoes immediately. Thereafter, correctional officers interceded to break up the fight.

Holding: Reversed and remanded.

Opinion: COLEMAN, Judge.

Foster contends that the trial court erred in refusing to instruct the jury on the law of self-defense and/or defense of others. A party is entitled to have the jury instructed according to the law favorable to his or her theory of the case if evidence in the record supports it. *Delacruz v. Commonwealth*, 11 Va.App. 335, 338, 398 S.E.2d 103, 105 (1990). Thus, in deciding whether the trial court should have instructed on self-defense or defense of others, we must look at the evidence in the light most favorable to Foster's theory of what occurred between him and Robinson, since a trial judge may not refuse to grant a proper, proffered instruction if evidence in the record supports the defendant's theory of defense. *See id.* Because evidence in the record tends to support Foster's self-defense theory, we agree with his contention that the proffered self-defense instruction should have been given. We reject his contention regarding the proffered defense of others instruction because it misstates the applicable law.

"[A] person who reasonably apprehends bodily harm by another is privileged to exercise reasonable force to repel the assault." *Diffendal v. Commonwealth*, 8 Va.App. 417, 421, 382 S.E.2d 24, 25 (1989). However, the amount of force used to defend oneself must not be excessive and must be reasonable in relation to the perceived threat. *Id.* at 421, 382 S.E.2d at 26. Further, "[i]f there is evidence in the record to support the defendant's theory of defense, the trial judge may not refuse to grant a proper, proffered instruction." *Delacruz*, 11 Va.App. at 338, 398 S.E.2d at 105. Where the conflicting evidence tends to sustain either the prosecution's or defense's theory of the case, the trial judge must instruct the jury as to both theories. *Id.* The jury as the finder of fact has the right to "reject that part of the evidence believed by them to be untrue and to accept that found by them to be true." *Belton v. Commonwealth*, 200 Va. 5, 9, 104 S.E.2d 1, 4 (1958). Therefore, the trial court must instruct on both theories to guide a jury in their deliberations as to the law applicable to the case, depending upon how the jury decides the facts. *See Cooper v. Commonwealth*, 2 Va.App. 497, 500, 345 S.E.2d 775, 777 (1986).

At trial, Foster testified that he "thought he [Robinson] was going to hit me or Hooks so I reacted." Three other inmates, Steven Skutans, James Hooks, and Derrick Brown, also testified that Robinson drew back with a horseshoe in his hand as if he were going to strike either Foster or Hooks before Foster struck him. Additionally, both Foster and

Derrick Brown testified that Foster struck Robinson once with a horseshoe and that he then began to walk away when Robinson "retaliated and came back at him." Based on the above evidence, Foster tendered jury instruction 6A which is nearly identical to the self-defense justifiable homicide instruction approved by the Supreme Court in *Perricllia v. Commonwealth*, 229 Va. 85, 93, 326 S.E.2d 679, 684 (1985). Nevertheless, the trial court refused to give instruction 6A.

We find that if the jury believed the foregoing evidence which Foster presented, as it had the right to do, that evidence supported Foster's self-defense theory. He proffered an instruction correctly stating the law of self-defense in Virginia. We cannot say, as a matter of law, that if Foster retaliated against a perceived attack with a horseshoe by Robinson with the same type instrumentality, by so doing, he used excessive or unreasonable force. The evidence raised factual issues regarding the reasonableness of the force used, the reasonableness of the perceived threat and whether Foster was without fault in the incident. These issues are properly within the province of the jury to resolve as part of considering the claim of self-defense. *See Diffendal,* 8 Va.App. at 421-22, 382 S.E.2d at 26.

The Commonwealth also contends that the trial court properly refused Foster's proffered self-defense instruction because he was not "without fault" when he interceded to stop the altercation between Hooks and Robinson. The question whether or not Foster was without fault in the incident is another factual issue to be resolved by a properly instructed jury. *See Bell v. Commonwealth*, 2 Va.App. 48, 58, 341 S.E.2d 654, 659 (1986) (not error for court to refuse instruction defining "fault" in self-defense context because "[i]t encompasses any form of conduct on the part of an accused which a jury may reasonably infer from the evidence to have contributed to an affray"). The jury could have found that Foster, by walking to the other end of the horseshoe pit to prevent an altercation, if that were his purpose, was not at fault and was entitled to stand his ground and to defend himself without withdrawing. Accordingly, we hold that the trial court erred by refusing to give to the jury a self-defense instruction.

As to Foster's contention that he was entitled to have the jury instructed on defense of others, we hold that the trial court did not err in refusing the instruction. Foster's tendered instruction was an erroneous statement of the Virginia law. However, because the issue will necessarily arise on remand, we address what is the state of the law in Virginia on defense of others. The Supreme Court has clearly recognized that one is privileged to use force in defense of family members. *See Newberry v. Commonwealth*, 191 Va. 445, 459, 61 S.E.2d 318, 324 (1950); *Green v. Commonwealth*, 122 Va. 862, 871, 94 S.E. 940, 942 (1918); *Hodges v. Commonwealth*, 89 Va. 265, 272, 15 S.E. 513, 516 (1892). We find no Virginia cases, nor have any been cited to us, determining whether and when a person can use force to protect or defend a third person. Generally, however, this privilege is not limited to family members and extends to anyone, even a stranger who is entitled to claim self-defense. *See* 40 Am.Jur.2d *Homicide* § 170 (1968); *In re Neagle*, 135 U.S. 1, 75-76, 10 S.Ct. 658, 672, 34 L.Ed. 55 (1890); *State v. Saunders*, 175 W.Va. 16, 330 S.E.2d 674, 675, 76 (1985); *Yardley v. State,* 50 Tex.Crim. 644, 100 S.W. 399, 400 (1907); *State v. Bowers*, 65 S.C. 207, 210-14, 43 S.E. 656, 657-58 (1903); *Stanley v. Commonwealth,* 86

Ky. 440, 440-45, 6 S.W. 155, 155-57 (1887); *Mitchell v. State*, 22 Ga. 211, 234 (1857). Like self-defense, the circumstances in which the protection of others may be raised as a defense are carefully circumscribed so as to preclude such a claim in situations where one has instigated the fray in order to provide an excuse for assaulting or murdering his enemy. In a majority of jurisdictions, a person asserting a claim of defense of others may do so only where the person to whose aid he or she went would have been legally entitled to defend himself or herself. 40 Am.Jur.2d Homicide § 171 (1968). Thus, the right to defend another "is commensurate with self-defense." *Id.* Consequently, in those jurisdictions which recognize the defense, the limitations on the right to defend one's self are equally applicable, with slight modifications, to one's right to defend another. One must reasonably apprehend death or serious bodily harm to another before he or she is privileged to use force in defense of the other person. The amount of force which may be used must be reasonable in relation to the harm threatened. *See Diffendal*, 8 Va.App. at 421, 382 S.E.2d at 25-26 (delineating limitations in self-defense context).

Jurisdictions which recognize the defense are split on the question whether the person to whose aid one comes must be free from fault in order to claim the defense of protection of others. The majority of those courts which have addressed the question have adopted an objective test so that one "may act on and is governed by the appearance of conditions when he arrives upon the scene, provided he acts honestly and according to what seems reasonably necessary in order to afford protection." 40 Am.Jur.2d *Homicide* § 172 (1968). Thus, under the majority view, in order to justifiably defend another, the defendant must reasonably believe that the person being defended was free from fault; whether the defended person was, in fact, free from fault is legally irrelevant to the defense in those jurisdictions. This view is based on the principle that one should not be convicted of a crime for attempting to protect one whom he or she perceives to be a faultless victim from a violent assault. Under this approach, the policy of the law is to encourage individuals to come to the aid of perceived victims of assault. *Id.* We find this position to be well-grounded in principle and policy. Accordingly, we hold that the law pertaining to defense of others is that one may avail himself or herself of the defense only where he or she reasonably believes, based on the attendant circumstances, that the person defended is without fault in provoking the fray.

Foster's proffered instruction, however, did not state the law as we have defined it and, thus, misstates the law. While the proffered instruction correctly noted that the defendant must reasonably believe that the person to be defended is in danger of great bodily harm, it did not address the issue that the defendant must reasonably believe that the person he or she is defending was without fault in instigating the altercation. Thus, even if Foster reasonably believed that Hooks was threatened with great bodily harm, he could not have availed himself of the protection of others defense unless he reasonably believed that Hooks was without fault in provoking the fray with Robinson. Because the chief purpose of jury instructions is to explain to the jury the law of the case, *Cooper*, 2 Va.App. at 500, 345 S.E.2d at 777, a trial court may refuse to grant an instruction which misstates the applicable law.

For the reasons stated, we reverse the judgment of conviction and remand the case for retrial if the Commonwealth be so advised.

Critical Thinking Question(s): How is "defense of others" similar to "self defense"? How do the two defenses differ? In 2005, Virginia enacted the stand your ground statute that expands the castle exception. How do you think this seemingly subtle change to the law will play out on the streets? Will there be more cases claiming self-defense? How does the court/jury determine whether the defendant's belief was "reasonable" in such cases?

III. Defense of the Home:

Section Introduction: Another defense that may justify the use of force, including deadly force (albeit limited to certain dangerous felonies), is the defense of home. This is often referred to as the "castle exception." The idea is that a man has retreated "enough" and should feel safe in the sanctity of his own home. Note, however, that the amount of force, as in all cases of self-defense, must be necessary under the circumstances. This section includes a Virginia case involving the justification of use of force in one's home.

Dodson v. *Commonwealth*, 159 Va. 976, 167 S.E. 260 (1933)

Procedural History: The plaintiff in error was found guilty of murder in the second degree and sentenced to the penitentiary for a term of eight years.

Issue(s): Was the jury instruction regarding self-defense appropriate?

Facts: After being found guilty of murder and sentenced, the defendant appealed his conviction based on the erroneous jury instructions. Two of the jury instructions pertaining to self-defense were granted review by this court. They are as follows:

'The court instructs the jury that where the plea of self-defense is relied upon in a trial for murder, the law is that the plea of self-defense is not available to a party unless he was without fault in bringing about the difficulty, and, in any case, the necessity relied upon to excuse the killing must not arise out of the prisoner's misconduct.'

'The court instructs the jury that as to the imminency of the danger which threatened the prisoner and the necessity of his killing in the first instance, the prisoner was the judge, but *he acted at his peril, as the jury must pass upon his action in the premises viewing said actions from the prisoner's standpoint at the time of the killing.* And if the jury believe from the facts and circumstances in the case that the prisoner had reasonable grounds to believe, and did believe, the danger imminent, and that the killing was necessary to preserve his own life, or to protect him from great bodily harm, he is excusable for using a deadly weapon in his defense, otherwise he is not.'

Holding: *Reversed and remanded.*

Opinion: CAMPBELL, Chief Justice.

It is assigned as error that the court gave this instruction:

'The court instructs the jury that where the plea of self-defense is relied upon in a trial for murder, the law is that the plea of self-defense is not available to a party unless he was without fault in bringing about the difficulty, and, in any case, the necessity relied upon to excuse the killing must not arise out of the prisoner's misconduct.'

In *Vaiden's Case,* 12 Gratt. (53 Va.) 717, and in *Wallen's Case,* 134 Va. 773, 114 S.E. 786, both cases in which the evidence warranted the giving of the instruction, the doctrine contained in the instruction herein involved was approved.

Complaint is made of the instruction on the ground that under the evidence in the present case the court fails to differentiate between justifiable and excusable homicide. In other words, it is contended that by this instruction the court told the jury that the plea of self-defense interposed by the accused was not available unless he was entirely without fault in bringing about the difficulty, and then goes further and tells the jury that the necessity relied upon to excuse the killing must not arise out of the prisoner's own misconduct.

In the brief of the Attorney-General it is conceded that the instruction is erroneous in one respect, viz: That it speaks of self-defense as though confined to justifiable homicide only, and ignores the doctrine of excusable homicide in self-defense.

In *Jackson's Case,* 96 Va. 107, 30 S.E. 452, it was held that 'a person assaulted while in the discharge of a lawful act, and reasonably apprehending that his assailant will do him bodily harm, has the right to repel the assault by all the force he deems necessary, and is not compelled to retreat from his assailant, but may, in turn, become the assailant, inflicting bodily wounds until his person is out of danger.' That case laid down the accepted rule of justifiable homicide in self-defense, and is not qualified to any extent by the later case of *Jackson v. Commonwealth,* 98 Va. 845, 36 S.E. 487.

In *McCoy v. Commonwealth,* 125 Va. 771, 776, 99 S.E. 644, 646, Judge Burks, in speaking of the difference between justifiable and excusable homicide in self-defense, quotes with approval the following: 'The rule may be briefly stated thus: If the accused is in no fault whatever, but in the discharge of a lawful act, *he need not retreat,* but may repel force by force, *if need be,* to the extent of slaying his adversary. This is *justifiable* homicide in self-defense. But if a sudden fight is brought on, without malice or intention, the accused, if in fault, *must retreat as far as he safely can,* but, having done so and in good faith abandoned the fight, may kill his adversary, if he cannot in any other way preserve his life or save himself from great bodily harm. *Vaiden's Case,* 12 Gratt. (53 Va.) 717, 729'

In *Hodges v. Commonwealth,* 89 Va. 265, 272, 15 S.E. 513, 516, the Supreme Court approved the following instruction defining justifiable homicide: 'The court instructs the jury that justifiable homicide is the killing of a human being in the necessary, or

apparently necessary, defense of one's self or family from great bodily harm, apparently attempted to be committed by force, or in defense of home, property, or person, against one who apparently endeavors, by violence or surprise, to commit a felony on either.‘

In our investigation, the most satisfactory discussion of the distinction to be drawn between justifiable and excusable homicide is found in that oftentimes overlooked but most excellent work, Davis's Criminal Law, prepared by J. A. G. Davis, who at one time was professor of law in the University of Virginia. On pages 70, 72, 76 and 77, we read:

‘Homicide in defense of person or property, under certain circumstances of necessity; which is justifiable by the permission of the law. This takes place when a man, in defense of his person, habitation or property, kills another, who manifestly intends and endeavors, by violence or surprise, to commit a forcible or atrocious felony upon either. In the cases to which this ground of justification applies, no felony has been committed, but only attempted; and the homicide is justifiable in order to prevent it.

‘All felonies may not be so prevented. A distinction is made between such felonies as are attended with force, or any extraordinary degree of atrocity, which in their nature betoken such urgent necessity as will not allow of any delay, and others of a different kind and unaccompanied by violence on the part of the felon. Those only which come within the former description may be prevented by homicide; as murder, rape, robbery, arson, burglary and the like. In the attempt to commit either of these, the *party whose person or property* is attacked is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill him in so doing, it is called justifiable self-defense. And the same justification extends to homicide committed in the mutual and reciprocal defense of such as stand in the relations of husband and wife, parent and child, master and servant; for the act of the assistant shall have the same construction in such cases as the act of the party assisted should have had, if it had been done by himself, in consequence of the relation between them.

‘This right of self-defense is founded on the law of nature, which confers on every individual the right to defend and maintain the possession of that which belongs to him, by those means which are necessary to attain this object.‘

* * *

‘In these several kinds of *justifiable* homicide, it may be observed, that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame. But that is not quite the case in excusable homicide, the very name whereof imports some fault, some error, or omission; so trivial, however, that the common law excuses it from the guilt of felony, and our law from all punishment.

‘II. Excusable homicide is of two kinds; either by misfortune or misadventure; or in self-defense.

* * *

‘2. Homicide in self-defense, or *se defendendo,* is that committed by a man upon a sudden affray, in order to preserve his life. This species of self-defense must be distinguished from that which has been mentioned as one of the kinds of *justifiable* homicide. That takes place on the attempt to commit a felony, and its object is to hinder its perpetration; which is not only a matter of excuse but of justification. But the self-defense of which we are now speaking, is that whereby a man may protect himself from an assault or the like, in the course of a sudden broil or quarrel, by killing him who assaults him; a self-defense which is said to be culpable, but through the benignity of the law excusable. And this is what the law expresses by the term *chance-medley,* which in its etymology signifies a casual affray or sudden quarrel; though this term is in common speech often erroneously applied to any manner of homicide by misadventure.

‘This right of self-defense does not imply a right of attacking; for instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. Neither does it imply a right to take the life of an antagonist on every casual reencounter; for this would place human life too much at the mercy of those disposed to destroy it. It can only be exercised in sudden and violent cases, when great, certain and immediate suffering would be the consequence of waiting for the assistance of the law. For which reason, the law requires that the person who kills another in his own defense should have retreated as far as he conveniently or safely can, to avoid the violence of the assault; and that not fictitiously, or in order to watch his opportunity, or to gain breath, but from a real tenderness of shedding his brother's blood. The idea of dishonor being attached to such means of avoidance will not excuse the neglect of it; for the laws can acknowledge no dishonor in obedience to what they command, and will themselves avenge the injuries that are suffered. The party assaulted must therefore flee as far as he well can, by reason of some wall, ditch, or other impediment, unless he be prevented from doing so by falling; or as far as the fierceness of the assault will permit him, for it may be so fierce and violent as not to allow him to yield a step without manifest danger of his life, or enormous bodily harm, and then in his defense he may kill his assailant instantly. The only case in which the law does not require the party to retreat at all, or under any circumstances, is when he is assaulted in his own house; there he need not fly as far as he can; for he has the protection of his house to excuse him from flying; as that would be to give up by his flight the possession of his house to his adversary. But in this as in other cases, the assault must be of such a character as to expose him to imminent danger.

‘The law also requires, in order for homicide to be excusable in self-defense, that the party, besides retreating as far as he could with safety, should then have killed his adversary through mere necessity in order to avoid immediate death; and he can in no case excuse such killing, even after a retreat, unless there were reasonable ground to apprehend that he would otherwise have been killed himself.’

We are in entire accord with the doctrine above stated, and in our opinion it is consonant with the Virginia decisions, when read in the light of the facts in the particular case. The difficulty arises when there is a wrong application of the principles.

In a note in 6 Va. Law Reg., page 176, Judge Burks, after discussing the holdings in *Jackson's Case,* 96 Va. 107, 30 S.E. 452, and in *Jackson's Case,* 98 Va. 845, 36 S.E. 487, has this to say: 'But the law of *excusable* homicide in self-defense is equally well settled in Virginia. Here, although the accused were in some fault in the first instance, yet if he has abandoned the conflict in good faith and 'retreated to the wall,' he will be excused if he kill his adversary from a reasonably apparent necessity to preserve his own life or save himself from great bodily harm.

* * *

'To tell a jury that 'a prisoner cannot justify the killing of the deceased by a plea of necessity, unless he was without fault in bringing that necessity upon himself,' would be misleading *if* there was evidence tending to show excusable homicide in self-defense. Few juries will notice the distinction between '*justify*' and '*excuse*' unless their attention is called to it, and *where the evidence warrants it,* the court should point out the distinction by proper instructions upon the law of the subject.' Citing *Vaiden's Case, supra.*

A careful examination of the evidence in the case at bar leads to the conclusion that the doctrine applicable to a case of justifiable homicide is not involved, but that the doctrine applicable to a case of excusable homicide is directly involved; and, therefore, it was error to ignore in the instruction that phase of the case.

It was next assigned as error that the court gave this instruction:

'The court instructs the jury that as to the imminency of the danger which threatened the prisoner and the necessity of his killing in the first instance, the prisoner was the judge, but *he acted at his peril, as the jury must pass upon his action in the premises viewing said actions from the prisoner's standpoint at the time of the killing.* And if the jury believe from the facts and circumstances in the case that the prisoner had reasonable grounds to believe, and did believe, the danger imminent, and that the killing was necessary to preserve his own life, or to protect him from great bodily harm, he is excusable for using a deadly weapon in his defense, otherwise he is not.'

The complaint lodged against the instruction is the use of the italicized language. The instruction is concededly not in conformity with the 'stock' instructions given in cases of this character and approved by this court. Though we would be unwilling to reverse this case if that were the only error committed and the evidence clearly demonstrated the guilt of the accused, we do not approve the instruction, as it may have a tendency to mislead the jury. The test to be applied is not whether the accused acted at his peril, but whether or not he had reasonable grounds to act on appearances, and that question is one of fact for the determination of the jury.

* * *

For the error committed by the trial court in giving instruction Number 10, first hereinabove quoted, the case must be reversed and remanded for a new trial.

Critical Thinking Question(s): Does the castle exception add anything to the current self-defense statute? What, exactly, do they call it an exception? An exception to what? Consider the castle exception in light of cases where there was no threat of death or serious bodily harm. What are some circumstances that will allow a "homeowner" to act with more force upon a "perpetrator" other than threat of injury or death?

IV. Execution of Public Duties:

Section Introduction: Police officers have the right to use force as part of their official duties. The degree of force that is justified varies depending upon the situation. This is described in greater detail in the Virginia statutes below.

Virginia Code § 15.2-1521. Providing legal fees and expenses for officer or employee of county, city or town in certain proceedings.

If any officer or employee of any locality is investigated, arrested or indicted or otherwise prosecuted on any criminal charge arising out of any act committed in the discharge of his official duties, and no charges are brought, or the charge is subsequently dismissed, or upon trial he is found not guilty, the governing body of the locality may reimburse the officer or employee for reasonable legal fees and expenses incurred by him in defense of the investigation or charge, the reimbursement to be paid from the treasury of the locality.

Virginia Code § 15.2-1704. Powers and duties of police force.

A. The police force of a locality is hereby invested with all the power and authority which formerly belonged to the office of constable at common law and is responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances.

B. A police officer has no authority in civil matters, except (i) to execute and serve temporary detention and emergency custody orders and any other powers granted to law-enforcement officers in § 37.2-808 or § 37.2-809, (ii) to serve an order of protection pursuant to §§ 16.1-253.1, 16.1-253.4 and 16.1-279.1, (iii) to execute all warrants or summons as may be placed in his hands by any magistrate for the locality and to make due return thereof, and (iv) to deliver, serve, execute, and enforce orders of isolation and quarantine issued pursuant to §§ 32.1-48.09, 32.1-48.012, and 32.1-48.014 and to deliver, serve, execute, and enforce an emergency custody order issued pursuant to § 32.1-48.02. A town police officer, after receiving training under subdivision 8 of § 9.1-102, may,

with the concurrence of the local sheriff, also serve civil papers, and make return thereof, only when the town is the plaintiff and the defendant can be found within the corporate limits of the town.

V. Resisting an Unlawful Arrest:

Section Introduction: While the law does not allow for law enforcement officers to use unnecessary force in making an unlawful arrest, it also does not allow for individuals to use force in resisting such an arrest. The concept is that the person arrested has "peaceful" recourse to an unlawful arrest as s/he can seek relief from the courts. The statute regulating resisting a lawful arrest follows.

Virginia Code § 18.2-479.1. Resisting lawful arrest; penalty.
A. Any person who intentionally prevents or attempts to prevent a law-enforcement officer from lawfully arresting him, with or without a warrant, is guilty of a Class 1 misdemeanor.

B. For purposes of this section, intentionally preventing or attempting to prevent a lawful arrest means fleeing from a law-enforcement officer when (i) the officer applies physical force to the person, or (ii) the officer communicates to the person that he is under arrest and (a) the officer has the legal authority and the immediate physical ability to place the person under arrest, and (b) a reasonable person who receives such communication knows or should know that he is not free to leave.

Critical Thinking Question(s): Do you believe a citizen should have the right to resist and unlawful arrest? How would you determine if the arrest was unlawful at the time of the incident? Do you think that the definition of execution of lawful duties should be expanded or narrowed?

VI. Necessity:

Section Introduction: There may be other cases in which the use of force is justified that are not covered by any of the statutes already listed in this chapter. In such an event, the law provides for the use of a broader statute (within case below) on the justifiable use of force. A Virginia case which utilizes this necessity defense is presented.

***Buckley v. City of Falls Church, Virginia*, 7 Va.App. 32, 371 S.E.2d 827 (1988).**

Procedural History: Defendants were convicted in the Circuit Court of Fairfax County of trespass, and they appealed to the Virginia Court of Appeals.

Issue(s): Is the necessity defense available to defendants charged with trespassing on the premises of a women's medical clinic in order to give antiabortion literature to patients considering an abortion?

Facts: Defendants were charged with trespassing to give anti-abortion literature to patients considering an abortion outside a women's medical clinic.

Holding: Affirmed.

Opinion: BARROW, Judge.

In this criminal appeal we decide that necessity is not a defense to a charge of trespassing on the premises of a women's medical clinic in order to give anti-abortion literature to patients considering an abortion. The defense of necessity is not available to these defendants since there were reasonable and legal alternatives to their violation of the law.

The defense of necessity traditionally addresses the dilemma created when physical forces beyond the actor's control render "illegal conduct the lesser of two evils." *United States v. Bailey*, 444 U.S. 394, 410, 100 S.Ct. 624, 634, 62 L.Ed.2d 575 (1980). If one who is starving eats another's food to save his own life, the defense of necessity may bar a conviction for the larceny of the other's food. *Sigma Reproductive Health Center v. State*, 297 Md. 660, 676, 467 A.2d 483, 491 (1983). The essential elements of this defense include: (1) a reasonable belief that the action was necessary to avoid an imminent threatened harm; (2) a lack of other adequate means to avoid the threatened harm; and (3) a direct causal relationship that may be reasonably anticipated between the action taken and the avoidance of the harm. *United States v. Cassidy*, 616 F.2d 101, 102 (4th Cir.1979). One principle remains constant in modern cases considering the defense of necessity: if there is "a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' " the defense is not available. *Bailey*, 444 U.S. at 410, 100 S.Ct. at 635 (quoting W. LaFave & A. Scott, *Criminal Law* § 49 at 379 (1972)).

The consensus of courts that have addressed this issue is that the defense of necessity is not a valid defense for criminal trespass charges which stem from political or moral protests. *Cleveland v. Municipality of Anchorage*, 631 P.2d 1073 (Alaska 1981); *Gaetano v. United States*, 406 A.2d 1291 (D.C.1979); *People v. Smith*, 161 Ill.App.3d 213, 112 Ill.Dec. 745, 514 N.E.2d 211 (1987); *People v. Stiso*, 93 Ill.App.3d 101, 48 Ill.Dec. 687, 416 N.E.2d 1209 (1981); *People v. Krizka*, 92 Ill.App.3d 288, 48 Ill.Dec. 141, 416 N.E.2d 36 (1980); *Sigma*, 297 Md. 660, 467 A.2d 483 (1983); *City of St. Louis v. Klocker*, 637 S.W.2d 174 (Mo.App.1982); *State v. Horn*, 126 Wis.2d 447, 377 N.W.2d 176 (1985).

One of the reasons why the necessity defense has been found to be inapplicable in such cases is the availability of alternative, noncriminal means of accomplishing the defendants' purposes. *Bailey*, 444 U.S. at 410, 100 S.Ct. at 634; *United States v. Seward*, 687 F.2d 1270, 1275 (10th Cir.1982), *cert. denied*, 459 U.S. 1147, 103 S.Ct. 789, 74 L.Ed.2d 995 (1983); *United States v. Best*, 476 F.Supp. 34, 46 (D.Colo.1979); *Cleveland*, 631 P.2d at 1078-79; *Nelson v. State*, 597 P.2d 977, 980 (Alaska 1979); *Griffin v. United States*, 447 A.2d 776, 778 (D.C.1982), *cert. denied*, 461 U.S. 907, 103 S.Ct. 1879, 76 L.Ed.2d 810 (1983); *State v. Marley*, 54 Hawaii 450, 472, 509 P.2d 1095, 1109 (1973);

Sigma, 297 Md. at 678, 467 A.2d at 492; *Commonwealth v. Hood*, 389 Mass. 581, 592, 452 N.E.2d 188, 195 (1983); *Commonwealth v. Brugmann*, 13 Mass.App. 373, 380, 433 N.E.2d 457, 462 (1982); *State v. Champa*, 494 A.2d 102, 104 (R.I.1985); *State v. Olsen*, 99 Wis.2d 572, 578, 299 N.W.2d 632, 636 (1980); LaFave & Scott, *supra.* § 50 at 387.

In this case, reasonable, noncriminal means were available to achieve the defendants' purposes. The defendants sought to communicate with patients concerning the impact of an abortion on both the fetus and the patient. This message could have been communicated off the clinic's private property by direct intervention with the patients, to the extent they were receptive to it, or by the use of placards, billboards or other media. That these other alternatives may have been thought by the defendants to be less effective or less efficient does not justify criminal action to accomplish their purposes. Since there were reasonable, legal alternatives to trespass that would have achieved the defendants' purposes, we hold that the defense of necessity is not available to them. Thus, the trial court did not err in prohibiting the defendants from presenting the defense of necessity, and we affirm the convictions.

Critical Thinking Question(s): Do you believe that defendants should legally have the right to claim necessity based on an assertion that they utilized the “most effective means” (at clinic) and the “extent of potential harm” (deleting fetuses)? Can you think of situations where the defense of necessity will apply and be successful? Is necessity an objective or subjective standard?

VII. Consent:

Section Introduction: While it may be the case that a victim consented to being harmed by a criminal action prior to the act being committed, this is typically not viewed as a valid justification. The purpose of the consent defense is to not unduly interfere with citizens’ freedom of activity. However, the law has an interest in protecting its citizens from harm. This issue is more closely examined by the Virginia case provided here.

Gnadt v. Commonwealth, 27 Va.App. 148, 497 S.E.2d 887 (1998)

Procedural History: Charlton E. Gnadt, Jr. was charged with sexual battery in violation of Code § 18.2-67.4. At the conclusion of the Commonwealth's case-in-chief, the court granted a motion to strike the charge of sexual battery and amended the charge to simple assault. The defendant objected, contending that assault and battery was not a lesser-included offense of the original charge and that the evidence was insufficient to prove lack of consent. The court overruled the objection and convicted the defendant of assault and battery.

Issue(s): Was assault and battery a lesser-included offense of the original charge of sexual battery? Was the touching without consent?

Facts: The victim, Pvt. Shawn A. Knowles, had been charged with driving under the influence. He appeared for the trial in the general district court. Charlton E. Gnadt, Jr. was the Assistant Commonwealth's attorney prosecuting Knowles. After discussing a

plea agreement, Gnadt told Knowles to accompany him to his office. When they arrived, Gnadt told Knowles that he needed to search him for weapons. He had Knowles take off his military jacket and stand against the wall. After an initial pat-down search, Gnadt told Knowles to unfasten his pants. Knowles complied. Gnadt placed his hands inside Knowles' pants but outside his underwear. He rubbed his hands across Knowles' buttocks and then around front over his genitals. Gnadt then placed his hands inside Knowles' underwear and again moved them over his buttocks and around front, touching his genitals. Knowles said nothing and did not resist or protest in any way. He testified that he was nervous, scared, and felt he would be in more trouble if he resisted.

Holding: Affirmed.

Opinion: BUMGARDNER, Judge.

An assault and battery is an unlawful touching of another. It is not necessary that the touching result in injury to the person. Whether a touching is a battery depends on the intent of the actor, not on the force applied. *Wood v. Commonwealth*, 149 Va. 401, 140 S.E. 114 (1927). For a touching to be a crime, it must be unlawful. If the victim consents to the touching, the touching is not unlawful and therefore not a battery. If the touching exceeds the scope of the consent given, the touching is not consensual and thus is unlawful. If consent is coerced or obtained by fraud, the touching is unlawful. *Banovitch v. Commonwealth*, 196 Va. 210, 83 S.E.2d 369 (1954).

A touching may also be justified or excused. When it is, the touching is not unlawful and therefore not a battery. A police officer does not commit a battery when he touches someone appropriately to make an arrest. An unlawful arrest or an arrest utilizing excessive force is a battery because that touching is not justified or excused and therefore is unlawful. *See generally*, Roger D. Groot, *Criminal Offenses and Defenses in Virginia* 26 (3d ed.1994).

In this case, the touching was unlawful and constituted a battery. Any consent given was coerced by the defendant using the power he wielded over the victim to take advantage of the situation and to play on the victim's vulnerability. The touching administered far exceeded the scope of any consent that may have been given voluntarily or which would have been justified or excused by any legitimate claim of authority to conduct a weapons search.

Assault and battery is a lesser-included offense of sexual battery as defined in Code § 18.2-67.4. A defendant commits sexual battery when he sexually abuses a victim against the victim's will, by force, threat or intimidation, or through the use of the complaining witness' mental incapacity or physical helplessness. Sexual abuse is defined in Code § 18.2-67.10(6) as an act committed with the intent to sexually molest, arouse, or gratify any person, where the accused intentionally touches the complaining witness' intimate parts or material directly covering such intimate parts. The elements of the offense consist of an intentional touching administered with the intent to sexually molest, arouse, or gratify. The more specific and aggravated state of mind necessary to commit sexual

abuse encompasses the less culpable mental state found in an assault and battery. Both offenses require a touching. Thus, each element of an assault and battery is encompassed within the elements of sexual battery. *See* Clark v. Commonwealth, 12 Va.App. 1163, 408 S.E.2d 564 (1991), and *Johnson v. Commonwealth*, 5 Va.App. 529, 365 S.E.2d 237 (1988).

For the foregoing reasons, we affirm.

Critical Thinking Question(s): Why do you believe the court decided to strike the sexual assault charge and proceed on the lesser assault and battery charge? Most consent cases deal with the issue of consent to sexual encounters, although minors are more strictly scrutinized due to their "lack of ability" to consent. Do you believe it is fair to restrict minors from consenting to sexual relations with other minors? What kind of practical implications does this have for adolescents that are intimately involved? Cases where the consent defense are successful usual involve athletic activities where there is contact. Can you delineate "permissible" from non-permissible" contact in three sports?