Chapter IX

Excuses

Chapter Overview:

While justification provides that an individual who is responsible for their actions may have been justified in carrying them out, excuses are applied to cases in which an individual is considered to not be responsible for their actions to begin with. Excuses include things like insanity, diminished capacity, intoxication, age, duress, mistake of law or fact, entrapment, and a host of new defenses that are based on modern scientific, sociological, and cultural factors.

The claim made with the insanity defense is that a perpetrator was legally insane at the time of the crime and so was unable to know that their actions were wrong. Insanity is typically established by the use of expert witnesses who interview defendants to determine their sanity or likely sanity at the time the crime was committed. If a defendant is found not guilty by reason of insanity, they are often subject to required institutionalization by the state. There are numerous ways that defendants can be tested to determine if their plea of insanity is valid.

Intoxication is sometimes considered a valid excuse for criminal conduct. A distinction is made between voluntary and involuntary intoxication, and voluntary intoxication is often not recognized as excusing a crime. Involuntary intoxication, however, excuses a crime if the intoxication creates a state of mind in the defendant that satisfies the standards for legal insanity.

Some factors are seen to inhibit a defendant's ability to form criminal intent. These include such things as diminished capacity, age of the defendant, and a mistake of fact. Diminished capacity does not amount to legal insanity, but can include other lesser forms of mental illness. Mistake of fact can cause a defendant to believe something false about the circumstances of their crime that if it were true would make the act an innocent one, meaning that the defendant could not form a criminal intent.

When a person faces a threat of death or serious bodily harm, they are said to be acting under duress. In some cases this can be used to excuse the use of force. There is a reasonable person standard used to evaluate whether the defendant is truly under duress due to a reasonable fear of an immediate and imminent threat.

If a government or police agent induces an otherwise innocent individual to commit a crime that they would not otherwise have committed through the use of some type of fraud, the individual cannot be held criminally accountable for the commission of the crime. This is known as the defense of entrapment. There are many other new defenses that are raised all the time with advances in science and changes in social theory. These include a variety of defenses based on psychology, biology, sociology, and other diverse fields. In this chapter of the supplement you will see Virginia case law reflecting some of these new defense techniques, as well as the standard excuses discussed above. You will also read Virginia statutes relevant to these issues.

I. Insanity

Section Introduction: A person who is found by the court to be legally insane may not be held criminally liable for their actions. This is an affirmative defense that places the burden of proof on the defendant. If a person is found not guilty for the reason of insanity, the court may order them to be institutionalized for treatment of their mental defect rather than imprisoned for criminal behavior. The following statute and case illustrate how Virginia defines and utilizes the insanity defense.

Virginia Code § 19.2-168. Notice to Commonwealth of intention to present evidence of insanity; continuance if notice not given.

In any case in which a person charged with a crime intends (i) to put in issue his sanity at the time of the crime charged and (ii) to present testimony of an expert to support his claim on this issue at his trial, he, or his counsel, shall give notice in writing to the attorney for the Commonwealth, at least twenty-one days prior to his trial, of his intention to present such evidence. In the event that such notice is not given, and the person proffers such evidence at his trial as a defense, then the court may in its discretion, either allow the Commonwealth a continuance or, under appropriate circumstances, bar the defendant from presenting such evidence. The period of any such continuance shall not be counted for speedy trial purposes under § 19.2-243.

Boswell v. Commonwealth, 20 Gratt. 860, 61 Va. 860 (1871).

Procedural History: In the progress of the trial, two instructions were asked for by the accused; but the court refused to give them, and gave several instructions of its own. The accused excepted to the action of the court in refusing and giving instructions as aforesaid, and the facts proved on the trial are set out in the bill of exceptions. The jury found the accused guilty of murder in the second degree, and fixed the term of his imprisonment in the penitentiary at eleven years. The accused then moved for a new trial, and in arrest of judgment; but both motions were overruled by the court. No exception was taken, however, to those rulings of the court, and they need not be noticed again. The court having rendered judgment according to the verdict, this writ of error brings up that judgment for review before this court.

Issue(s): If a person kills another without provocation, but at the time of doing so, his condition, from intoxication, was such as to render him incapable of doing a willful, deliberate and premeditated act, is he guilty of murder in the second degree?

Facts: The facts proved on the trial, and on which the said instructions were founded, are in substance as follows: On the evening of the 4th of July, 1870, Boswell (the accused), being drunk and staggering, came up King street (in Alexandria) to West street, and upset a barrel in front of a store on King street, as he went by; that he turned down West street, going in a northerly direction, and keeping on the east side of the latter street; that, as he walked along, he exclaimed, in violent tones, “I will blow his damn brains out; will kill the damn little sons of bitches;” that there was at the time two little negro girls passing along the west side of West street, going in a southerly direction and towards King street, a number of ducks in the street about ten feet from him, and still further on, a cart, both the ducks and the cart being between

prisoner and the other side of the street, though it did not appear that the cart was between prisoner and the little girls; that, when about midway of the square, Boswell picked up a brick, and, casting it across the street, struck one of the little girls on the right side of the head, above the ear; that the girl fell in a dying condition, and expired at 10 o'clock in the night of that day; that the girl so struck was named Martha French, and was about six years and nine months old; that, after throwing the brick, Boswell turned and walked to the corner of King and West streets, took off his coat or jacket, put it on the curbstone, and sat down; while there he was told by a witness not to go away, and replied, "If I have done anything wrong, you can take out your penknife and cut my throat. I give myself up - If I killed the child, I did not intend to do it;" that Boswell had been grossly intoxicated for a week, except on the day preceding the day on which the alleged crime was committed, and had no previous acquaintance with the deceased; that Boswell, the day before the killing of the child, when asked by Thos. Huntington why he did not reform and behave himself, said he wanted to die, but did not know why; that, one day in the latter part of June, 1870, he threw himself into a small stream near Alexandria, called Hooff's run, at a place where the water is about eight inches deep, and Lucien Hooff and another man, who was passing by, found him lying on his face in the water, out of which they pulled him, and laid him on the grass; if he had been left in the water, he would have drowned; that they then went away, and Hooff, on looking back, saw Boswell again throw himself into the water, and Hooff and a man named Cunningham pulled him out, and left him lying on the bank in an insensible condition; he would have been drowned in two minutes, had he not been rescued; that, in June, 1870, some two weeks prior to the killing of the child, Boswell came to the depot of the Orange, Alexandria and Manassas railroad, excessively drunk, and staggering and throwing himself about, and threw himself across the cow-catcher of an engine in motion, which dragged him some distance; that the engineer stopped, and two men took him off the cow-catcher, and threw him on a pile of manure; that about an hour afterwards, as the southern-bound train was leaving the depot, Boswell was discovered lying on one or both rails of the track, near the culvert, a short distance from the depot; that the engineer stopped the train, and the same two men dragged him off the track, and threw him down the embankment; that each month, about the change of the moon, John Boswell, the prisoner's younger brother, would go home, refuse to work, and, when approached with directions to go to work, would be listless, indifferent, and seem not to understand.

Holding: *Reversed.*

Opinion: MONCURE, P.

After the evidence was heard by the jury, the accused, by counsel, moved the court to give them the following instructions:

> 1st. If the jury shall believe, from the evidence, that the prisoner was drunk at the time of the killing, in the indictment mentioned, and that such drunkenness was brought on by sensual or social gratification, with no criminal intent, then they are justified in finding a verdict of voluntary manslaughter; provided they also believe, from the evidence, that there was no malice.

2d. If the jury believe, from the evidence, that the drunkenness aforesaid was the result of long-continued and habitual drinking, without any purpose to commit crime, and that the drunkenness produced insanity, whether temporary or permanent, and that the prisoner was in such condition at the time of the killing aforesaid, then the jury may find a verdict of not guilty; and further, that where the jury, from the evidence, should entertain a rational doubt on the question of insanity, they should find in favor of insanity; or if they should entertain, from the evidence, reasonable doubt of any material portion of the charge, the prisoner shall have the benefit of that doubt.

And the court refused to give the said instructions, and gave the following to the jury:

1st. That every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their satisfaction; that if, from the evidence, the jury believe that, at the time of throwing the brick, the blow from which caused the death of the deceased, the prisoner was laboring under such a defect of reason from disease of the mind (remotely produced by previous habits of gross intemperance), as not to know the nature and possible consequences of his act, or if he did know, then that he did not know he was doing what was wrong, they will find the prisoner not guilty.

2d. That if the jury shall believe beyond reasonable doubt, from the evidence, that the prisoner threw the brick at the deceased without provocation and through reckless wickedness of heart, but that, at the time of doing so, his condition, from intoxication or other causes, was such as to render him incapable of doing a willful, deliberate and premeditated act, then they will find the prisoner guilty of murder in the second degree.

3d. That if the jury believe, from the evidence, beyond reasonable doubt, that the prisoner, though intoxicated at the time of throwing the brick which caused the death of the deceased, was capable of knowing the nature and consequence of his act, and if he did know, then that he knew he was doing wrong, and that, so knowing, he threw the brick at the deceased with the willful, deliberate and premeditated purpose of killing her, then they will find the prisoner guilty of murder in the first degree.

4th. That if the jury believe, from the evidence, that the prisoner, at the time of throwing the brick at the deceased, was in such a condition as to render him incapable of a willful, deliberate and premeditated purpose, and that he did not so throw it out of any reckless wickedness of heart or purpose, then they will find the prisoner guilty of voluntary manslaughter.

5th. If the jury should acquit the prisoner, by reason of their believing him insane, that they will so state in their verdict.

The law in regard to the extent to which intoxication affects responsibility for crime, seems to be now well settled; and the only difficulty is in the application of the law to the facts of a particular case.

The American cases establish the same doctrine with the English on this subject. In *Pirtle v. The State*, 9 Humph. R. 663, the court, in explaining the decision in *Swan v. The State*, 4 Humph. R. 136, say: "This reasoning is alone applicable to cases of murder under our act of 1829, ch. 23, which provides 'that all murder committed by means of poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing,' &c. "shall be deemed murder in the first degree, and all other kinds of murder shall be deemed murder in the second degree.' Now, this is drawing a distinction unknown to the common law, solely with a view to the punishment; murder in the first degree being punishable with death, and murder in the second degree by confinement in the penitentiary. In order to inflict the punishment of death, the murder must have been committed willfully, deliberately, maliciously and premeditatedly. This state of mind is conclusively proven when the death has been inflicted by poison or by lying in wait for that purpose; but if neither of these concomitants attended the killing, then the state of mind necessary to constitute murder in the first degree, by the willfulness, the deliberation, the maliciousness, the premeditation, if it exist, must be otherwise proven."

In all such cases, whatever fact is calculated to cast light upon the mental *status* of the offender, is legitimate proof; and among others the fact that he was at the time drunk; not that this will excuse or mitigate the offence if it were done willfully, deliberately, maliciously and premeditatedly; (which it might well be, though the perpetrator was drunk at the time), but to show that the killing did not spring from a premeditated purpose." "This distinction can never exist except between murder in the first degree and murder in the second degree under our statute." "As between the two offences of murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of enquiry; the killing being voluntary, the offence is necessarily murder in the second degree, unless the provocation were of such a character as would at common law constitute it manslaughter, and for which latter offence a drunken man is equally responsible as a sober one." I have quoted thus largely from this case, because it lays down the law very correctly, and is especially applicable in this State, in which there is a law very much, if not precisely, like that of Tennessee, distinguishing between murder in the first and second degree. The most material cases, English and American, bearing upon this whole subject, are collected in a note to the case of *United States v. Drew*, 5 Mason R. 28, in 1 Lead. Crim. Ca. pp. 113-124. See also 1 Wharton's Am. C. L. §§ 32-44.

With this general view of the law on the subject, I will now take some notice of the instructions in detail; and first, of those asked for by the accused.

The first instruction asked for was properly refused. It states a case of murder, and asks the court to instruct the jury that it was a case of voluntary manslaughter. The words at the conclusion, "provided they also believe, from the evidence, that there was no malice," do not alter the case. The law implies malice, from the facts stated in the former part of the instruction. The word "malice," in the proviso, can mean only *express* malice, which is unnecessary to constitute murder; malice, express or implied, being sufficient. Or if it mean malice generally, then the proviso is in conflict with the body of the instruction, which is therefore faulty, and it was proper on that ground, if no other, to refuse to give it.

The second instruction asked for was also properly refused. Drunkenness is no excuse for crime, although such drunkenness may be "the result of long-continued and habitual drinking, without

any purpose to commit crime," and may have produced temporary insanity, during the existence of which the criminal act is committed. In other words, a person, whether he be an habitual drinker or not, cannot, voluntarily, make himself so drunk as to become, on that account, irresponsible for his conduct during such drunkenness. He may be perfectly unconscious of what he does, and yet he is responsible. He may be incapable of *express* malice, but the law *implies* malice in such a case, from the nature of the instrument used, the absence of provocation, and other circumstances under which the act is done. Public policy and public safety imperatively require that such should be the law. If permanent insanity be produced by habitual drunkenness, then, like any other insanity, it excuses an act which would be otherwise criminal. The law looks at proximate, and not remote, causes in this matter. Finding the accused to be permanently insane, it enquires not into the cause of his insanity.

In the leading case of the United States v. Drew, before referred to, which was a case of murder, Mr. Justice Story held the accused not responsible, the act having been done under an insane delusion, produced by a disease, brought on by intemperance, called *delirium tremens.* "In general," said the judge, "insanity is an excuse for the commission of every crime, because the party has not the possession of that reason which includes responsibility. An exception is, when the crime is committed by a party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. But the crime must take place and be the *immediate* result of the fit of intoxication, *and while it lasts;* and not, as in this case, a remote consequence, super-induced by the antecedent exhaustion of the party, arising from gross and habitual drunkenness." Had the crime been committed while Drew was in a fit of intoxication, he would have been liable to be convicted of murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offence. The law looks to the immediate, not to the remote, cause; to the actual state of the party, and not to the causes which remotely produced it." That is the first case in which it has been held that an act otherwise criminal, done by a person laboring under the disease of *delirium tremens,* might be excusable on the ground of insanity. Without meaning to question the authority of that case, and conceding it to be good law, as it may be, still it does not apply to this case; for it expressly admits that "had the crime been committed while Drew was in a fit of intoxication, he would have been liable to be convicted of murder." In this case, it is not pretended that the accused had *delirium tremens,* or anything like it, when he committed the act, and the instruction asked for expressly admits that the act was done by the accused while he was drunk. So that, according to the law, as it was admitted to be in the case of the *United States v. Drew,* such drunkenness is no excuse. This is a sufficient reason for refusing to give the second instruction asked for. The latter part of that instruction embraces another proposition, which will be noticed presently.

As to the instructions which were given by the court, the first, I think, is unexceptionable. To the greater part, and all but the first two or three lines, no objection has been, or properly can, be taken. To the first part of it, which is in these words: "That every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their satisfaction," the accused objects. Of course he does not, and cannot, object to so much even of that part as says "that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes." He only objects to the concluding words of the sentence, "until the contrary is proved to their satisfaction." Indeed, the objection only goes

to the three concluding words, “to their satisfaction;” which he seems to think is an excessive measure of the proof required by law to repel the presumption of sanity. He seems to think (and that is the thought which is embodied in the latter part of the second instruction asked for) that all the proof required by law, to repel the said presumption, was only so much as would raise a rational doubt of his sanity at the time of committing the act charged against him. Now, I think this is not law; and that the law is correctly expounded in the first instruction given by the court.

There are, certainly, several American cases which seem to sustain the view of the accused, and are referred to by his counsel. But I think the decided weight of authority, English and American, is the other way, as the cases referred to by the attorney-general will show. In 1 Wharton's Am. Cr. L. § 711, the writer says: “At common law, the preponderance of authority is, that if the defence be insanity, it must be substantially proved as an independent fact;” and for this he cites *Rex v. Stokes,* 3 C. & K. 138; *Rex v. Taylor,* 4 Cox C. C. 155; *State v. Bringer,* 5 Alab. R. 244; *State v. Starke,* 1 Strobh. R. 479; *State v. Huting,* 6 Bennett's R. 474; *State v. Starling,* 6 Jones' N. C. R. 471; *State v. Spencer,* 1 Zabr. R. 202; *State v. Bonfant,* 3 Minne. R. 123; *State v. Brandon,* 8 Jones' N. C. R. 463; *People v. Myers,* 20 Calif. R. 518. “On the other hand,” he proceeds, “it has been ruled in Massachusetts, in 1856, that the defence is made out if the prisoner satisfied the jury, by a preponderance of evidence, that he is insane.” And for this he cites *Com. v. Eddy,* 7 Gray R. 583; *Com. v. Rogers,* 7 Metc. R. 500. “And in other courts it has been held, that in this, as in all other constituents of guilt, the burden is on the prosecution.” And for this he cites *People v. McCann,* 2 E. P. Smith (16 N. Y.) 58; *Ogleton v. State,* 28 Alab. R. 692; *U. S. v. McClure,* 7 Law R. n. s. 439; *State v. Bartlett,* 43 N. Hamp. R. 224; *Polk v. State,* 19 Ind. R. 170; *Hopps v. State,* 31 Ill. R. 385; see also *Chase v. The People,* 40 Ill. R. 358, in which *Hopps v. The State* is explained. Now, here we have a reference to nearly all the authorities on either side bearing upon this question. And I think the fair result of them is to show that insanity, when it is relied on as a defence to a charge of crime, must be proved to the satisfaction of the jury, to entitle the accused to be acquitted on that ground; though such proof may be furnished by evidence introduced by the Commonwealth to sustain the charge, as well as by evidence introduced by the accused to sustain the defence.

This result consists with reason and principle. The law presumes every person sane till the contrary is proved. The Commonwealth having proved the *corpus delicti,* and that the act was done by the accused, has made out her case. If he relies on the defence of insanity, he must prove it to the satisfaction of the jury. If, upon the whole evidence, they believed he was insane when he committed the act, they will acquit him on that ground. But not upon any fanciful ground, that, though they believe he was then sane, yet, as there may be a rational doubt of such sanity, he is therefore entitled to an acquittal. Insanity is easily feigned, and hard to be disproved, and public safety requires that it should not be established by less than satisfactory evidence. Some of the cases have gone so far as to place the presumption of sanity on the same ground with the presumption of innocence, and to require the same degree of evidence to repel it. But I do not think it is necessary or proper to go to that extent. See, also, Roscoe's Cr. Ev., library edition, pp. 905-909; opinions of the judges on questions propounded by the House of Lords, 47 Eng. C. L. R. p. 129; *State v. Willis,* 63 N. C. R. 26; *Graham v. Commonwealth,* 16 B. Mon. R. 587; *Commonwealth v. York,* 9 Metc. R. 93.

As to the second instruction given by the court, it seems to be free from any just ground of objection, except that I think the words "other causes" ought to have been omitted. If a person be incapable from *other causes* than intoxication, of doing a willful, deliberate and premeditated act, he would seem to be incapable of murder in the second degree, or any other crime. To be sure, the words "through reckless wickedness of heart," in the former part of the instruction, imply malice; but it is difficult to see how a person guilty of doing an act through reckless wickedness of heart, could, at the same time, be in such condition from other causes than intoxication, as to render him incapable of doing a willful, deliberate and premeditated act. There is, therefore, an apparent conflict between the different parts of the instruction, and, at all events, it was calculated to mislead the jury.

The result of my opinion is, that there is no other error in the judgment than those in the second and fourth instructions given by the court as aforesaid; but for those errors the said judgment ought to be reversed, the verdict set aside, and the cause remanded for a new trial to be had therein.

JOYNES, J., concurred in the opinion of *Moncure,* P., except as to what is said therein upon the burden of proof on the question of insanity. He was of opinion that the burden was on the Commonwealth to prove the sanity of the prisoner. The other judges concurred in the opinion of *Moncure,* P.

Critical Thinking Question(s): Why would the court want to "excuse" someone for criminal actions based on insanity? Describe the legal test for insanity in Virginia. How does it differ from the Model Penal Code's test? Although voluntary intoxication does not excuse someone from culpability on the basis of (temporary) insanity, is it applicable to any elements of such a crime? What element(s) and how would it affect the outcome of the case? Would the results be altogether different if the defendant was acting under involuntary intoxication?

II. Diminished Capacity:

Section Introduction: Diminished capacity is a term used to describe the condition of a defendant who is unable, or less able than the average defendant, to appreciate the nature of their criminal behavior due to some form of mental defect that does not reach the standard for legal insanity. Such a defendant is found to have a diminished capacity to form criminal intent. The following Virginia statute visits a specific case of diminished capacity and is accompanied by a case addressing the issue.

Virginia Code § 18.2-10. Punishment for conviction of felony; penalty.
The authorized punishments for conviction of a felony are:
(a) For Class 1 felonies, death, if the person so convicted was 18 years of age or older at the time of the offense and is not determined to be mentally retarded pursuant to § 19.2-264.3:1.1, or imprisonment for life and, subject to subdivision (g), a fine of not more than $100,000. If the person was under 18 years of age at the time of the offense or is determined to be mentally retarded pursuant to § 19.2-264.3:1.1, the punishment shall be imprisonment for life and, subject to subdivision (g), a fine of not more than $100,000.

Virginia Code § 19.2-264.3:1.1. Capital cases; determination of mental retardation.

A. As used in this section and § 19.2-264.3:1.2, the following definition applies:

"Mentally retarded" means a disability, originating before the age of 18 years, characterized concurrently by (i) significantly sub-average intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.

B. Assessments of mental retardation under this section and § 19.2-264.3:1.2 shall conform to the following requirements:

1. Assessment of intellectual functioning shall include administration of at least one standardized measure generally accepted by the field of psychological testing and appropriate for administration to the particular defendant being assessed, taking into account cultural, linguistic, sensory, motor, behavioral and other individual factors. Testing of intellectual functioning shall be carried out in conformity with accepted professional practice, and whenever indicated, the assessment shall include information from multiple sources. The Commissioner of Mental Health, Mental Retardation and Substance Abuse Services shall maintain an exclusive list of standardized measures of intellectual functioning generally accepted by the field of psychological testing.

2. Assessment of adaptive behavior shall be based on multiple sources of information, including clinical interview, psychological testing and educational, correctional and vocational records. The assessment shall include at least one standardized measure generally accepted by the field of psychological testing for assessing adaptive behavior and appropriate for administration to the particular defendant being assessed, unless not feasible. In reaching a clinical judgment regarding whether the defendant exhibits significant limitations in adaptive behavior, the examiner shall give performance on standardized measures whatever weight is clinically appropriate in light of the defendant's history and characteristics and the context of the assessment.

3. Assessment of developmental origin shall be based on multiple sources of information generally accepted by the field of psychological testing and appropriate for the particular defendant being assessed, including, whenever available, educational, social service, medical records, prior disability assessments, parental or caregiver reports, and other collateral data, recognizing that valid clinical assessment conducted during the defendant's childhood may not have conformed to current practice standards.

C. In any case in which the offense may be punishable by death and is tried before a jury, the issue of mental retardation, if raised by the defendant in accordance with the notice provisions of subsection E of § 19.2-264.3:1.2, shall be determined by the jury as part of the sentencing proceeding required by § 19.2-264.4.

In any case in which the offense may be punishable by death and is tried before a judge, the issue of mental retardation, if raised by the defendant in accordance with the notice provisions of subsection E of § 19.2-264.3:1.2, shall be determined by the judge as part of the sentencing proceeding required by § 19.2-264.4.

The defendant shall bear the burden of proving that he is mentally retarded by a preponderance of the evidence.

D. The verdict of the jury, if the issue of mental retardation is raised, shall be in writing, and, in addition to the forms specified in § 19.2-264.4, shall include one of the following forms:
(1) "We the jury, on the issue joined, having found the defendant guilty of (here set out the statutory language of the offense charged), and that the defendant has proven by a preponderance of the evidence that he is mentally retarded, fix his punishment at (i) imprisonment for life or (ii) imprisonment for life and a fine of $_____. Signed _____ foreman"
or
(2) "We the jury, on the issue joined, having found the defendant guilty of (here set out the statutory language of the offense charged) find that the defendant has not proven by a preponderance of the evidence that he is mentally retarded.
Signed _____ foreman"

***Vann v. Commonwealth*, 35 Va. App. 304, 544 S.E.2d 879 (2001).**

Procedural History: Prior to trial, Vann submitted a Notice of Insanity Defense. At trial, Vann presented the testimony of his expert psychiatrist, Dr. N.A. Emiliani. Dr. Emiliani testified that he had examined Vann on April 29, 1999, and diagnosed him as suffering from "schizo effective disorder bipolar type," "varied personality," and "skin discoloration." In his report, Dr. Emiliani noted that Vann had been hospitalized at Central State Hospital in 1977, 1990, and 1996.

At the conclusion of Dr. Emiliani's testimony, the Commonwealth asked the court to find, as a matter of law, that Vann had failed to meet his burden of establishing that he was legally insane at the time of the offense. The Commonwealth argued that the expert conceded he could not offer an opinion that Vann was insane at the time of the offense. In response, Vann reiterated Dr. Emiliani's testimony concerning Vann's history of schizophrenia, his uncontrollable impulse to use cocaine as a result of the addiction, and the residual schizophrenia. Vann contended that this evidence, in combination with Jones' and Carpenter's testimony as to Vann's "bizarre" behavior at the time of the offenses, was sufficient to meet "the burden in showing that his inability to resist impulse is not just a factor or condition of voluntary intoxication, but is a factor of his mental state itself, schizo effective disorder or residual schizophrenia psychosis."

The court "sustain[ed] the motion to strike the [in]sanity defense based on the lack of the expert's ability to form an opinion" as to Vann's sanity at the time of the offense. Vann was ultimately found guilty of all three charges and sentenced to an active jail term of two years.

Issue(s): Did the trial court err in ruling that the defendant's evidence failed as a matter of law to establish that he was legally insane at the time of the offense?

Facts: The evidence presented at trial established that Sergeant E.S. Jones, of the Petersburg Police Department, saw Vann walking near the street at approximately 1:00 a.m. on June 30, 1998. Jones recognized Vann as a known drug offender and observed Vann reach into his pocket with his right hand, make a "throwing drop-type motion," and begin to "walk." Jones, who was in his squad car at the time, got out of his car and placed Vann in handcuffs. Jones told the other

officer who was present with him to watch Vann while he searched for the item Vann dropped. Jones found a metal smoking device of the type he knew to be used for smoking crack cocaine where Vann had been standing when he dropped/threw the item. Jones showed the item to Vann and Vann became angry, started twisting and jumping around, and began screaming "at the top of his lungs." He yelled: "I can't go back. I am not going back to jail. Why are y'all always coming at me? I am not the only one out here doing something wrong. Can't y'all find somebody else to arrest." Jones placed Vann under arrest and placed him in the squad car. After being read his rights, Vann accused local judges of supplying the City of Petersburg with crack cocaine and accused Jones of selling crack cocaine for the judges. He then started kicking the back of Jones' seat, stating: "I'll kill you. I'll get you. I know you. You know me. I'm tired of you arresting me."

Vann was calm by the time he reached the jail. Once there, Jones interviewed him and Vann stated "he didn't know how many times he had used [the pipe]." Vann was ultimately charged with possession of cocaine.

Subsequently, while out of jail on bond on October 15, 1998, at approximately 5:15 p.m., Vann was walking alone near Harding Recreation Center, "yelling and screaming," "like talking loud to himself or to someone." At the same time, Detective E.F. Carpenter and a female were leaving the recreation center after having attended a neighborhood watch meeting. Carpenter was dressed in plain clothes. The female recognized Vann and said, "John, what are you making all of that noise for?" Vann yelled, "Hey baby. Hey baby, do you want some of this?" As Vann walked to where the female and Carpenter were standing, the female said, "Unless you have a cigarette, you know, I don't want anything." Carpenter noticed that Vann had something cupped in his hand. It was a "plastic bag with white rock-like material and a metal smoking device." Vann was shoving the smoking device into the plastic bag, putting the white substance into it.

Carpenter motioned to another officer who had just come out of the building from the meeting, and advised Vann that he was placing him under arrest. Vann clenched both hands together, with the smoking device in one hand and the plastic bag in the other, and raised his arms up yelling, "You're not getting this." Carpenter had to take Vann "down to the ground" to place him in custody.

Carpenter then took Vann to the jail and advised him of his rights. Vann told Carpenter that he thought Carpenter was trying to steal his drugs. Carpenter testified that Vann seemed to be intoxicated at the time. When he was before the magistrate, Vann would not sit and walked behind Carpenter and tried to kick him.

Vann was charged with possession of cocaine, possession of cocaine with the intent to distribute as an accommodation, and possession of cocaine with intent to distribute as an accommodation within 1000 feet of a recreation center.

Holding: *Affirmed.*

Opinion: HUMPHREYS, Judge.

"Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved to the satisfaction of the [trier of fact]." *Jones v. Commonwealth*, 202 Va. 236, 239-40, 117 S.E.2d 67, 70 (1960). The burden of proving insanity rests on the individual asserting it as a defense. *See Fines v. Kendrick*, 219 Va. 1084, 254 S.E.2d 108 (1979). "When the *[c]orpus delicti* has been established and proof adduced that the accused committed the act, it is not sufficient for the accused to raise a reasonable doubt as to his sanity; he must go one step further and prove to the satisfaction of the [trier of fact] that he was insane at the time of the commission of the act." *Taylor v. Commonwealth*, 208 Va. 316, 322, 157 S.E.2d 185, 190 (1967) (citation omitted).

In *Wessells v. Commonwealth*, 164 Va. 664, 180 S.E. 419 (1935), the Supreme Court of Virginia elaborated on this standard stating:

[T]he Commonwealth, having established the *corpus delicti*, and that the act was done by the accused, has made out her case. If [the accused] relies on the defense of insanity, he must prove it to the satisfaction of the jury. If, upon the whole evidence, they believe he was insane when he committed the act, they will acquit him on that ground; but not upon any fanciful idea that they believe he was then sane, yet, as there may be a rational doubt of such sanity, he is therefore entitled to an acquittal. Insanity is easily feigned and hard to be disproved, and public safety requires that it should not be established by less than satisfactory evidence. *Wessells*, 164 Va. at 674, 180 S.E. at 423 (citation omitted).

"Virginia law recognizes two tests by which an accused can establish criminal insanity, the M'Naghten Rule and the irresistible impulse doctrine. The irresistible impulse defense is available when the accused's mind has become so impaired by disease that he is totally deprived of the mental power to control or restrain his act." *Bennett v. Commonwealth*, 29 Va.App. 261, 277, 511 S.E.2d 439, 447 (1999) (citations omitted). However, the accused must prove that his or her mental state met the appropriate legal definition of insanity "*at the time the offense was committed.*" *Gibson v. Commonwealth*, 216 Va. 412, 417, 219 S.E.2d 845, 849 (1975) (emphasis in original).

Here, although there was ample testimony pertaining to Vann's schizo effective disorder, his past hospitalizations, and his apparent inability to resist the impulse to use cocaine at the time of Dr. Emiliani's evaluation, there was no testimony establishing that Vann was "totally deprived of the mental power to control or restrain" himself from acting at the time of the offenses. In fact, Dr. Emiliani very carefully avoided any opportunity to opine as to Vann's mental state at the time of the offenses, explaining that he had been unable to examine Vann either before the offenses or relatively close in time thereafter.

Furthermore, "[t]he word 'impulse' implies that which is sudden, spontaneous, unpremeditated." *Rollins v. Commonwealth*, 207 Va. 575, 580, 151 S.E.2d 622, 625 (1966). Acting on an impulse involves no planning; it could occur at any place in the presence of anyone, and further, the lack of restraint inherent in an impulsive act is inconsistent with a contemporaneous concealment of the impulsive act. *See id.; see also Penn v. Commonwealth*, 210 Va. 213, 221, 169 S.E.2d 409, 414 (1969). Vann methodically tried to conceal the contraband on both occasions immediately

after he realized he was being observed by a police officer. Such actions are inconsistent with the notion of an individual having no mental power or control over his or her own conduct.

Accordingly, we find that the trial court was not plainly wrong in determining that Vann failed to meet his burden and, thereby, finding as a matter of law that the affirmative defense of insanity by reason of an irresistible impulse had not been established.

Critical Thinking Question(s): How does this case compare with status offenses such as Robinson, *(supra in text)*? How effective do you believe the "irresistible impulse" test is in cases of homicide? If a gun was the weapon, do you believe it would be more successful? Why or why not? Compare the "irresistible impulse" test with that of M'Naghten. Which do you think is an "easier" standard? Age and retardation are two common forms of "diminished capacity." What is the purpose behind having such a defense rather than employing full-blown insanity?

III. Intoxication:

Section Introduction: A defendant who is intoxicated at the time that he or she commits a criminal act is still held criminally accountable for that act, even if the intoxication diminished the defendant's capacity to understand the criminal nature of the act. This condition is upheld by the following Virginia case, and again in the statute cited below in section five.

Johnson v. Commonwealth, 135 Va. 524, 115 S.E. 764 (673)

Procedural History: The indictment in this case charged that the defendant, Albert Johnson, "unlawfully, feloniously and maliciously" shot and wounded one A. C. Holt with the intent to "unlawfully, feloniously and maliciously maim, disfigure, disable and kill" him. The verdict of the jury upon which the court entered the judgment here complained of was as follows: "We, the jury, find the prisoner guilty, and fix his punishment at three years in the penitentiary."

Issue(s): Can intoxication be used as a defense to criminal action?

Facts: At the time of the alleged offense the defendant was more or less under the influence of liquor, which he claimed to have taken to relieve a toothache. He had been reported to police headquarters for "shooting up Clay Street," in Richmond, and for that reason two policemen, one of whom was Holt, were arresting him and another negro when he shot Holt in the head, inflicting a serious but not a fatal wound.

Holding: *Affirmed.*

Opinion: KELLY, Justice.

The evidence was in conflict as to the extent to which the defendant was intoxicated. Some of the testimony for the commonwealth tended to show that he was only very slightly under the influence of liquor - "drinking a little, but not drunk," as one of the witnesses described his condition. Other witnesses, some for the commonwealth and some for the defendant, said he

appeared to be “crazy drunk,” or “wild and crazy.” Whether he was drunk, and, if so, how drunk, was an inquiry exclusively within the province of the jury, and the only question for us to decide is whether they were properly instructed as to how his state of intoxication, if they believed he was in that state, would affect his guilt. This question, in turn, depends upon the further question as to whether his intoxication is to be viewed in the light of an ordinary case of “voluntary drunkenness.” There was no effort to prove anything like settled insanity from the use of whisky. If he was intoxicated to a degree which affected his reason and self-control, he was simply on a spree of recent origin. If his drunken condition is to be regarded as voluntary on his part (and, to all intents and purposes, it was so treated by the court and counsel below, and in the assignments of error which bring the case before us), the instruction offered was plainly wrong, and the one given by the court was plainly right.

The indictment embraced a charge of malicious shooting with intent to kill. The verdict, hereinafter more specifically dealt with, fixed a punishment which might lawfully have been prescribed for either a malicious shooting with the intent aforesaid, or merely an unlawful shooting; but we must assume that the defendant has been convicted of the larger offense. See Lee's Case (Va.) 115 S. E. 671, decided today.

Whether a prisoner on trial for malicious shooting with intent to kill is guilty of that charge depends upon whether, if death had resulted, he would have been guilty of murder - either in the first or second degree, it matters not which. Read's Case, 22 Grat. (63 Va.) 924, 937. The principles of law, therefore, governing the effect of intoxication upon the defendant's guilt, are the same as those which apply in homicide cases. We are not concerned here with the law as applied to cases in which a specific intent is an essential element of the offense charged. It is generally said that in contemplation of law no specific intent is essential to the crime of murder in the second degree, but in this case it is sufficient to say that, where one man wounds another with a deadly weapon, the law imputes a malicious intent to the act. 17 Am. & Eng. Ency. L. (2d Ed.) 413, and cases cited, and also authorities infra. It is quite true that murder in the first degree involves a premeditated purpose of which an intoxicated person may be incapable, but this distinction is not material to the issues arising under the instructions here. We speak in this case as if we were dealing with a conviction of murder in the second degree. It has long been settled in Virginia, and elsewhere generally, that voluntary drunkenness (as distinguished from settled insanity produced by drink) affords no excuse for crime, save only that where premeditation is a material question the intoxication of the accused may be considered by the jury. As between murder in the first degree and murder in the second degree, voluntary drunkenness may be a legitimate subject of inquiry; but, as between murder in the second degree and manslaughter, it is never material and cannot be considered. 1 Hurst's Ency. of Va. Law, 552; Minor's Syn. Cr. Law, 8; Davis' Crim. Law, 29; Boswell's Case, 20 Grat. (61 Va.) 860; Willis' Case, 32 Grat. (73 Va.) 929; Longley's Case, 99 Va. 807, 37 S. E. 339; State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799; State v. Kidwell, 62 W. Va. 466, 59 S. E. 494, 13 L. R. A. (N. S.) 1024; State v. Wilson, 116 Iowa, 309, 144 N. W. 47, 147 N. W. 739; State v. Morris, 83 Or. 429, 163 Pac. 567; Atkins v. State, 119 Tenn. 458, 105 S. W. 353, 13 L. R. A. (N. S.) 1031; Wilson v. State, 60 N. J. Law, 171, 37 Atl. 954, 38 Atl. 428.

The specific objection urged against the instruction given by the court in the instant case is that it told the jury in effect that if the defendant shot Holt without provocation, he was guilty of

malicious shooting with the intent to kill. This contention necessarily raises the question whether, if the defendant had killed Holt, he would have been guilty of murder in at least the second degree. The answer clearly is in the affirmative. There was no pretense of provocation, and the defendant used a deadly weapon. In Boswell's Case, supra, this court unreservedly and unequivocally approved the following holding of the Supreme Court of Tennessee in Pirtle v. State, 9 Humph. (Tenn.) 663:

> "As between the two offenses of murder in the second degree, and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry; the killing being voluntary, the offense is necessarily murder in the second degree, unless the provocation were of such a character as would at common law constitute it manslaughter, and for which latter offense a drunken man is equally responsible as a sober man."

Precisely the same thing was held in Willis' Case, supra, wherein this court approved the following instruction given by the trial judge upon his own motion:

> "Voluntary drunkenness does not excuse crime. Every crime committed by one in a state of intoxication, however great, is punished just as if he were sober. Drunkenness, therefore, can never be relied on as an excuse for murder. It matters not how drunk one is, if he purposely slay another, without other excuse, palliation or justification than that of his drunkenness, he is just as guilty of murder as if he had been sober. There are certain grades of crime, however, which a drunk man may not be capable of committing. When a man has become so greatly intoxicated as not to be able to deliberate and premeditate, he cannot commit murder of the first degree, or that class of murder under our statute denominated a willful, deliberate and premeditated killing. But so long as he retains the faculty of willing, deliberating and premeditating, though drunk, he is capable of committing murder in the first degree; and if a drunk man is guilty of a willful, deliberate and premeditated killing, he is guilty of murder in the first degree. *If a mortal wound be given with a deadly weapon in the previous possession of the slayer, without any or on very slight provocation, but at the time of inflicting the wound the slayer's condition from intoxication is such as to render him incapable of doing a willful, deliberate and premeditated act, he is then guilty of murder in the second degree.*" (Italics added.)

In the course of the opinion in the Willis Case, Judge Anderson, speaking with the unanimous concurrence of Judge Moncure, Christian, Staples, and Burks, said:

> "Voluntary immediate drunkenness is not admissible to disprove malice, or reduce the offense to manslaughter. But where, by reason of it, there is wanting that deliberation and premeditation which are necessary to elevate the offense to murder in the first degree, it is properly ranked as murder in the second degree; as the courts have repeatedly decided" - citing Jones' Case, 1 Leigh (28 Va.) 598; Pirtle v. State, 9 Humph. (Tenn.) 663; Swan v. State, 4 Humph. (Tenn.) 136; Boswell's Case, 20 Grat. (61 Va.) 860.

By one of the instructions given in Hite's Case, 96 Va. 489, 31 S. E. 895, and by one given in Longley's Case, supra, the trial court had in effect told the jury that voluntary intoxication might so affect the mental capacity of the accused as to reduce the offense to manslaughter. Hite was

convicted of murder in the first degree, and Longley of murder in the second degree, and both sentences were affirmed by this court, with the result that, in a sense, the instructions in both cases were approved; but in neither case was the accused complaining of this particular feature of the instructions, and the commonwealth, of course, did not, and could not, assign the same as error. Hence it is clear that these two cases can only be regarded in this respect as holding that, as expressly stated by Judge Buchanan in the Hite Case, the instruction contained no error to the prejudice of the accused

It is manifest, therefore, that, as already stated, the only question as to the instructions here is whether the trial court erred in treating the case as one involving *voluntary* drunkenness. We have no difficulty or hesitancy in sustaining the action of the court upon this point. For purposes of convenience and clarity we have deferred until we reached this stage of the discussion any specific statement of the facts material to this particular question.

The defendant was sober on the morning of the shooting. He was suffering from toothache. His material testimony on this point is as follows:

"A. At the beginning of it I had the toothache, and I called up the dentist and asked him if he could pull it. He said he could pull it at 1 o'clock. I got up and went to Dr. Pettus' house. He said he was lying down taking it easy and could not pull it before 2 o'clock.

Q. You went to Dr. Pettus in the morning?

A. He said he would pull it at 2 o'clock. I went to Dr. Calling's office. The boy said he would be there in an hour. It looked like 25 to me. The tooth was aching so bad I asked if I could get anything to drink, and he called and got me some corn whisky.

Q. Do you know how much you drank?

A. About three good swallows.

Q. Do you know where you went from there?

A. Just by the time I drank it I didn't know where I was."

In the petition containing the assignment of error (no other brief being filed in the case) no reference is made to any distinction between voluntary and involuntary drunkenness; the whole argument being addressed to the contention that (1) "intoxication may and does negative a specific intent," and (2) "does affect the degree of guilt." The alleged involuntary feature of the defendant's intoxication was suggested, however, at the oral argument before us, and while the rules of practice in this court require counsel to specifically state and point out the errors relied upon as ground of reversal, the question here raised is one of importance, and if the court erred in regard to it, the error vitally affected the merits of the case. We shall therefore consider the question, and shall bring to its consideration the light of what seems to us the reason of the matter and such authorities as we have found upon the subject.

In cases of involuntary drunkenness the law properly recognizes an exception to the general rule above discussed. The instances in which the exception is allowed, however, are rare, and it is only recognized under strict limitations.

In Davis' Crim. Law, 29, it is said: “If, however, a person by the unskillfulness of his physician, or by the contrivance of his enemies, eat or drink anything which causes frenzy or madness, he is entitled to the same exemption from punishment for his acts thereby occasioned as other madmen.”

Mr. Minor, in his Synopsis of Criminal Law, at page 8, citing 1 Russ. Cr. 8, says: “Involuntary drunkenness, brought about by the contrivance of enemies or by casualty, exempts from punishment, if it unsettles the reason.”

In 16 Corpus Juris, 109, it is said that - The general rule “does not apply where one involuntarily becomes drunk by being compelled to drink against his will, or through another's fraud or stratagem, or by taking liquor prescribed by a physician.”

In 1 Bishop, Crim. Law (4th Ed.) § 489, the author says: “Yet, ‘if a party be made drunk by stratagem, or the fraud of another, or the unskillfulness of his physician,’ he is not responsible.”

To the same effect is 17 Am. & Eng. Ency. L. (2d Ed.) p. 414. See, also, 1 Hale, P. C. p. 32; People v. Robinson, 2 Parker, Cr. R. (N. Y.) 235, 304; Bartholomew v. People, 104 Ill. 601, 605, 660, 44 Am. Rep. 97. In the last-named case, the decision was controlled by a statute of the state of Illinois, but the defense of involuntary intoxication allowed to be set up in that case would undoubtedly have been allowed under the common-law exception recognized in the other authorities which we have cited on this point, since the statute referred to was even stricter than the common law in this respect.

In none of the authorities quoted or referred to above do we find anything to warrant the contention that the drunkenness of the defendant in this case entitled him to claim the benefit of the exception to the general rule. His toothache could well be regarded as a “casualty,” but not so as to his drunkenness. He procured the whisky contrary to law and drank it contrary to law, and did both of his own volition and without even a suggestion from his physician. Even before the days of prohibition, when his conduct in procuring and taking the whisky would have been lawful, his consequent drunkenness would not have availed him as a defense for crime. It was said then by Judge Moncure in Boswell's Case, supra, and certainly must not be less true under present conditions, that “public policy and public safety imperatively require that such should be the law.”

Drunkenness has always been recognized as a vice, and the reason most usually assigned for the rule that it does not excuse crime is that no man may be allowed to expose the public to the danger of harm or violence caused by his own misconduct in voluntarily rendering himself dangerous. Strong drink varies in its effect upon different individuals. Some are rendered violent and dangerous by it, and others are not. This difference is probably due to the fact that some men are by nature of better principle and disposition than others; but, whether this be so or not, we need not stop here to inquire. The important principle to keep in mind is that when a man

voluntarily drinks liquor and is thereby led to commit a crime, he cannot be allowed to hide behind his condition as an excuse. He and not others must take the risk.

The law has always jealously guarded the effect of drunkenness as a defense in criminal cases, and even with all the restrictions surrounding it, the doctrine is a dangerous one and liable to be abused. We are not willing to render it more so by holding that an accused person can bring himself within the exception applicable in cases of involuntary intoxication by simply claiming that he drank intoxicants because he was suffering from pain or illness. This is exactly where our decision would logically lead if we should hold that the defendant in this case was not voluntarily intoxicated. It is too plain for argument that such a precedent would open wide the door for false and fraudulent evasion of the general rule, and would in large measure destroy its efficiency. The rule has for ages been regarded as necessary for the safety of society, and its preservation and enforcement was never more important than under present conditions. The country is full of "bootleg" liquor - much of it impure and calculated to produce a state of wild intoxication. Provision is made by law for procuring upon prescription from reputable physicians a reasonable amount of pure whisky for medical purposes. When people undertake, as the defendant in this case did, to prescribe for themselves and to select their own supply, they must be held responsible for the consequences. The only safe test of involuntary drunkenness, and the one almost if not quite universally found in the authorities, is the absence of an exercise of independent judgment and volition on the part of the accused in taking the intoxicant - as, for example, when he has been made drunk by fraudulent contrivance of others, by casualty, or by error of his physician.

The remaining assignment of error calls in question the action of the court in refusing to set aside the verdict because, as alleged, "it did not find whether the accused was guilty of malicious or simply unlawful shooting, nor did it find that the act was done with intent to maim, disfigure, disable, or kill," citing Randall's Case, 24 Grat. (65 Va.) 644, and Jones' Case, 87 Va. 63, 12 S. E. 226. These two cases tend strongly to support the proposition for which they are cited. They have never been expressly overruled, but have not been looked on with favor, and have been by the subsequent decisions of this court strictly confined in their effect to the particular facts upon which they were based. Without undertaking a further comparison or review of these two cases in the light of others upon the same general subject, we deem it sufficient to say that the form of the verdict in the present case was clearly good under the holding of this court in Hoback's Case, 28 Grat. (69 Va.) 922; Jones' Case, 31 Grat. (72 Va.) 830; Carr's Case, 134 Va. 656, 114 S. E. 791; and Lee's Case (Va.) 115 S. E. 671, decided to-day.

The judgment is affirmed.

Critical Thinking Question(s): In this case, the defendant claims that the intoxication was for medicinal purposes. Would the court have held differently if the defendant was taking prescription medication rather thank drinking liquor? While not an outright defense, do you think intoxication should be considered as a mitigating factor during sentencing? Should intoxication, voluntary or involuntary, negate the charge of "homicide by vehicle while under the influence" due to a defendant's inability to form the specific intent to kill? Why or why not?

IV. Age:

Section Introduction: The young age of an offender allows criminal courts to provide some special consideration in sentencing of a defendant. This is largely based on the old-age consideration that juveniles have not yet fully-formed their minds and thus cannot, depending on age, make intelligent, informed decisions all the time. What follows in this section is the Virginia statute that deals with the sentencing of youthful offenders.

Virginia Code § 16.1-278.8. Delinquent juveniles.

A. If a juvenile is found to be delinquent, except where such finding involves a refusal to take a blood or breath test in violation of § 18.2-268.2 or a similar ordinance, the juvenile court or the circuit court may make any of the following orders of disposition for his supervision, care and rehabilitation:

1. Enter an order pursuant to the provisions of § 16.1-278;

2. Permit the juvenile to remain with his parent, subject to such conditions and limitations as the court may order with respect to the juvenile and his parent;

3. Order the parent of a juvenile living with him to participate in such programs, cooperate in such treatment or be subject to such conditions and limitations as the court may order and as are designed for the rehabilitation of the juvenile and his parent;

4. Defer disposition for a specific period of time established by the court with due regard for the gravity of the offense and the juvenile's history, after which time the charge may be dismissed by the judge if the juvenile exhibits good behavior during the period for which disposition is deferred;

4a. Defer disposition and place the juvenile in the temporary custody of the Department to attend a boot camp established pursuant to § 66-13 provided bed space is available for confinement and the juvenile (i) has been found delinquent for an offense that would be a Class 1 misdemeanor or felony if committed by an adult, (ii) has not previously been and is not currently being adjudicated delinquent or found guilty of a violent juvenile felony, (iii) has not previously attended a boot camp, (iv) has not previously been committed to and received by the Department, and (v) has had an assessment completed by the Department or its contractor concerning the appropriateness of the candidate for a boot camp. Upon the juvenile's withdrawal, removal or refusal to comply with the terms and conditions of participation in the program, he shall be brought before the court for a hearing at which the court may impose any other disposition as authorized by this section which could have been imposed at the time the juvenile was placed in the custody of the Department;

5. Without entering a judgment of guilty and with the consent of the juvenile and his attorney, defer disposition of the delinquency charge for a specific period of time established by the court with due regard for the gravity of the offense and the juvenile's history, and place the juvenile on probation under such conditions and limitations as the court may prescribe. Upon fulfillment of the terms and conditions, the court shall discharge the juvenile and dismiss the proceedings against him. Discharge and dismissal under these provisions shall be without adjudication of guilt;

6. Order the parent of a juvenile with whom the juvenile does not reside to participate in such programs, cooperate in such treatment or be subject to such conditions and limitations as the court may order and as are designed for the rehabilitation of the juvenile where the court determines this participation to be in the best interest of the juvenile and other parties concerned

and where the court determines it reasonable to expect the parent to be able to comply with such order;
7. Place the juvenile on probation under such conditions and limitations as the court may prescribe;
7a. Place the juvenile on probation and order treatment for the abuse or dependence on alcohol or drugs in a program licensed by the Department of Mental Health, Mental Retardation and Substance Abuse Services for the treatment of juveniles for substance abuse provided that (i) the juvenile has received a substance abuse screening and assessment pursuant to § 16.1-273 and that such assessment reasonably indicates that the commission of the offense was motivated by, or closely related to, the habitual use of alcohol or drugs and indicates that the juvenile is in need of treatment for this condition; (ii) the juvenile has not previously been and is not currently being adjudicated for a violent juvenile felony; and (iii) such facility is available. Upon the juvenile's withdrawal, removal, or refusal to comply with the conditions of participation in the program, he shall be brought before the court for a hearing at which the court may impose any other disposition authorized by this section. The court shall review such placements at 30-day intervals;
8. Impose a fine not to exceed $500 upon such juvenile;
9. Suspend the motor vehicle and driver's license of such juvenile or impose a curfew on the juvenile as to the hours during which he may operate a motor vehicle. Any juvenile whose driver's license is suspended may be referred for an assessment and subsequent referral to appropriate services, upon such terms and conditions as the court may order. The court, in its discretion and upon a demonstration of hardship, may authorize the use of a restricted permit to operate a motor vehicle by any juvenile who enters such program for any of the purposes set forth in subsection E of § 18.2-271.1 or for travel to and from school. The restricted permit shall be issued in accordance with the provisions of such subsection. However, only an abstract of the court order that identifies the juvenile and the conditions under which the restricted license is to be issued shall be sent to the Department of Motor Vehicles.
If a curfew is imposed, the juvenile shall surrender his driver's license, which shall be held in the physical custody of the court during any period of curfew restriction. The court shall send an abstract of any order issued under the provisions of this section to the Department of Motor Vehicles, which shall preserve a record thereof. Notwithstanding the provisions of Article 12 (§ 16.1-299 et seq.) of this chapter or the provisions of Title 46.2, this record shall be available only to all law-enforcement officers, attorneys for the Commonwealth and courts. A copy of the court order, upon which shall be noted all curfew restrictions, shall be provided to the juvenile and shall contain such information regarding the juvenile as is reasonably necessary to identify him. The juvenile may operate a motor vehicle under the court order in accordance with its terms. Any juvenile who operates a motor vehicle in violation of any restrictions imposed pursuant to this section shall be guilty of a violation of § 46.2-301.
The Department of Motor Vehicles shall refuse to issue a driver's license to any juvenile denied a driver's license until such time as is stipulated in the court order or until notification by the court of withdrawal of the order imposing the curfew;
10. Require the juvenile to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which the juvenile was found to be delinquent;
11. Require the juvenile to participate in a public service project under such conditions as the court prescribes;

12. In case of traffic violations, impose only those penalties that are authorized to be imposed on adults for such violations. However, for those violations punishable by confinement if committed by an adult, confinement shall be imposed only as authorized by this title;
13. Transfer legal custody to any of the following:
a. A relative or other individual who, after study, is found by the court to be qualified to receive and care for the juvenile;
b. A child welfare agency, private organization or facility that is licensed or otherwise authorized by law to receive and provide care for such juvenile. The court shall not transfer legal custody of a delinquent juvenile to an agency, organization or facility outside of the Commonwealth without the approval of the Director; or
c. The local board of social services of the county or city in which the court has jurisdiction or, at the discretion of the court, to the local board of the county or city in which the juvenile has residence if other than the county or city in which the court has jurisdiction. The board shall accept the juvenile for care and custody, provided that it has been given reasonable notice of the pendency of the case and an opportunity to be heard. However, in an emergency in the county or city in which the court has jurisdiction, such local board may be required to temporarily accept a juvenile for a period not to exceed 14 days without prior notice or an opportunity to be heard if the judge entering the placement order describes the emergency and the need for such temporary placement in the order. Nothing in this subdivision shall prohibit the commitment of a juvenile to any local board of social services in the Commonwealth when such local board consents to the commitment. The board to which the juvenile is committed shall have the final authority to determine the appropriate placement for the juvenile. Any order authorizing removal from the home and transferring legal custody of a juvenile to a local board of social services as provided in this subdivision shall be entered only upon a finding by the court that reasonable efforts have been made to prevent removal and that continued placement in the home would be contrary to the welfare of the juvenile, and the order shall so state;
14. Commit the juvenile to the Department of Juvenile Justice, but only if he is 11 years of age or older and the current offense is (i) an offense that would be a felony if committed by an adult, (ii) an offense that would be a Class 1 misdemeanor if committed by an adult and the juvenile has previously been found to be delinquent based on an offense that would be a felony if committed by an adult, or (iii) an offense that would be a Class 1 misdemeanor if committed by an adult and the juvenile has previously been adjudicated delinquent of three or more offenses that would be a Class 1 misdemeanor if committed by an adult, and each such offense was not a part of a common act, transaction or scheme;
15. Impose the penalty authorized by § 16.1-284;
16. Impose the penalty authorized by § 16.1-284.1;
17. Impose the penalty authorized by § 16.1-285.1;
18. Impose the penalty authorized by § 16.1-278.9; or
19. Require the juvenile to participate in a gang-activity prevention program including, but not limited to, programs funded under the Virginia Juvenile Community Crime Control Act pursuant to § 16.1-309.7, if available, when a juvenile has been found delinquent of any of the following violations: § 18.2-51, 18.2-51.1, 18.2-52, 18.2-53, 18.2-55, 18.2-56, 18.2-57, 18.2-57.2, 18.2-121, 18.2-127, 18.2-128, 18.2-137, 18.2-138, 18.2-146, or 18.2-147, or any violation of a local ordinance adopted pursuant to § 15.2-1812.2.
B. If the court finds a juvenile delinquent of any of the following offenses, the court shall require the juvenile to make at least partial restitution or reparation for any property damage, for loss

caused by the offense, or for actual medical expenses incurred by the victim as a result of the offense: § 18.2-51, 18.2-51.1, 18.2-52, 18.2-53, 18.2-55, 18.2-56, 18.2-57, 18.2-57.2, 18.2-121, 18.2-127, 18.2-128, 18.2-137, 18.2-138, 18.2-146, or 18.2-147; or for any violation of a local ordinance adopted pursuant to § 15.2-1812.2. The court shall further require the juvenile to participate in a community service project under such conditions as the court prescribes.

V. Duress:

Section Introduction: When a defendant has committed a crime while acting under the threat of immediate and serious infliction of harm may claim that he or she was under duress and so is entitled to special consideration in sentencing. All such claims that seek to justify a downward departure of sentence are collectively referred to as mitigating circumstances. The criminal case in this section examines the commission of a crime by a defendant claiming to have acted under extreme duress.

Sam v. *Commonwealth*, 13 Va. App. 312, 411 S.E.2d 832 (1991).

Procedural History: In a jury trial Daung Sam, appellant, was convicted of first degree murder, robbery, abduction, use of a firearm in the commission of these felonies and conspiracy to commit these felonies.

Issue(s): Did the trial court err in refusing to instruct the jury that the common law defense of duress can be based upon threats to harm the defendant's family?

Facts: The criminal charges against Daung arose from the following undisputed facts. On Monday, September 5, 1988, Fred Liu, the owner of a local restaurant known as the "Grand Garden," was found dead in his car in Glen Carlyn Park in Arlington County. His arms were tied behind his back with a necktie and he had been shot in the head and neck four times at close range. The positions of the bullets recovered from Liu's body and his car suggested that two of the bullets had been fired from the front seat of the car, and two more had been fired from outside the car on the driver's side. Although Liu always carried a wallet with him, and was last seen alive carrying a brief case, neither his wallet, his brief case, nor his keys were ever recovered. However, one of Liu's pants pockets had been turned inside out, and his identification card was found under the floor mat of the passenger side of his car.

Following an investigation by the police, Daung was charged with the crime along with John Cheng and Samo Kim. At Daung's trial, Mohamad Amir testified that he was a friend of Daung and Samo, and through them was acquainted with Cheng. Amir testified that on Saturday, September 3, he, Samo and Daung were helping Cheng and his girlfriend to move into a new home. During that time, in the presence of all three, Cheng said that he needed money and was going to get a lot of money. According to Amir, Cheng said "[h]e was going to do a restaurant," meaning that he was going to rob a restaurant. Cheng's plan was that he was going to go in at a certain time, and "we are going to go back at a certain time." No one responded verbally to Cheng, although Amir testified that some of the listeners may have nodded. While at Cheng's house, Amir saw a bag containing a sawed-off shotgun.

On that same night, Daung, Samo, Amir and Cheng went to the restaurant owned by Liu. Cheng claimed that he knew Liu and suggested that they go to his restaurant for a drink. Upon leaving the restaurant, Amir heard Cheng speak to the receptionist and ask her to have Liu call him. Cheng gave the receptionist a piece of paper with his phone number on it.

The next day, Sunday, September 4, the four men drove to Richmond in Amir's car. On the return trip, Cheng rode in the front and Daung and Samo rode in the back. During this time, Cheng said to Daung and Samo, “I am going to do it tonight. Bring the gun and the jeep.” Daung and Samo had been sleeping in the back seat during this part of the trip, and Amir could not see if they were awake or tell if they heard Cheng's remarks. Amir did not hear a verbal reply. Later that night, Amir saw Cheng put a bag containing the sawed-off shotgun into the jeep.

The jeep belonged to Cheng and he commonly allowed Daung or Samo to keep and use it. After the murder, the jeep was recovered by the police in Washington, D.C. In this vehicle the police found, among other things, an American Express receipt with Liu's name on it, a wad of electrical tape of the same type as a piece of tape found on the floorboards of Liu's car, and the sawed-off shotgun which had the same type of tape on its butt. From the door jam of the jeep, the police recovered a bullet which was later determined to have been fired from the same gun as the four bullets which had killed Liu.

When Daung was arrested and interviewed by the police, he initially told them that he knew Cheng but had not seen him for the last two or three months. He denied any knowledge of the Liu murder. Subsequently, when confronted with the fact that witnesses said they had seen Daung with Cheng several times during the weekend, Daung gave the police a statement concerning the Liu murder. This statement was transcribed and played for the jury. In contrast to his initial statement, Daung said that he, Samo, and Cheng went to Liu's restaurant in Cheng's jeep at about 10:00 or 10:30 on Sunday evening, September 4. At Cheng's direction, Daung parked the jeep on the far side of the street from the shopping center where the restaurant was located. Cheng went into the restaurant alone. After a short time, Cheng came out of the restaurant with his friend, Liu, and the two men got into Liu's car. Cheng directed Daung to follow them in the jeep. After following Liu's car over a round-about route, Liu finally stopped his car at a location adjacent to the Kenmore Elementary School soccer field. At that time, Cheng rolled down his window and directed Daung to wait at that location, saying he would return in ten to fifteen minutes. Daung and Samo did as they were instructed. Thereafter, they saw Cheng walking toward them across the soccer field, carrying a brief case. Cheng told Daung and Samo that he had killed Liu by shooting him three or four times. When Daung asked Cheng what was in the brief case, Cheng said it contained only papers. Daung claimed he was shocked and prevailed upon Cheng to drive him home.

In his statement, Daung admitted that he had thought it peculiar when Cheng directed him to park on the far side of the street from the restaurant, and had wondered why he could not come into the restaurant when Cheng went there to talk to “his friend.” However, because he was afraid of Cheng, he had not wanted to “know too much.”

Daung initially denied having been near Liu's car. However, when asked if his fingerprints might be on the car, he changed his statement and said that after Liu had been killed, at Cheng's

direction, he, Samo and Cheng walked from the jeep across the soccer field to Liu's car. At the car, Cheng directed Daung to see if Liu had any money in his pockets, and Daung pulled Liu's pants pockets inside out. Daung also stated that at that time, Liu's hands were tied behind his back with his necktie, but he did not know how Cheng alone could have tied Liu's hands in that fashion.

At trial, Daung's testimony was the primary basis of his defense. Daung testified that he thought Cheng was “joking” when Cheng had said he was going to “do a restaurant” on Saturday, September 3. He also testified that he had been asleep during the return trip from Richmond and had not heard Cheng discuss robbing a restaurant that night.

According to Daung's trial testimony, on the night of the murder Cheng drove his jeep to Daung's home at about 10:00. Cheng, Samo and Daung then proceeded in the jeep to Liu's restaurant. At Cheng's direction, Daung parked the jeep across the street from the restaurant while Cheng went alone into the restaurant to talk to Liu, who Daung believed was Cheng's friend. Fifteen to twenty minutes later, Cheng exited the restaurant and returned to the jeep. Cheng climbed into the driver's seat and drove the jeep into the parking lot of the shopping center where the restaurant was located. Cheng told Daung and Samo that he had to wait for Liu because Liu wanted to talk to Cheng at Liu's house. About half an hour later, Liu emerged from the restaurant alone, went straight to his car, and began to drive away. Cheng told Daung to drive the jeep and to follow Liu's car. When Liu stopped at a stop sign, Cheng directed Daung to ram Liu's car with the jeep. Daung thought Cheng was “joking,” but when he looked at Cheng, who was in the back of the jeep, Cheng was laying down and pointing a gun in Daung's face. Daung then drove the jeep into the back of Liu's car. Liu got out of his car, wrote down the license number of the jeep, and demanded to see the registration for the jeep. Daung gave Liu the registration. While Liu was writing down the registration information, Cheng exited the back of the jeep and confronted Liu with the gun. Liu recognized Cheng and asked him what was happening. Cheng told Liu to be quiet and to go to his car. Cheng also told Daung and Samo to get out of the jeep. Cheng told Daung he wanted him to tie up Liu, but Daung refused. Samo also refused. Cheng then told Daung and Samo that “if we try any stupid thing like try to run away from him,” he would go straight to Daung's house and kill anybody he found there, including Daung's fiancee. Thereupon, Cheng told Daung to drive the jeep with Samo to Kenmore School and wait for him there while he went with Liu.

Daung and Samo discussed abandoning Cheng, but Daung decided against doing so because of his concern for the safety of his family and fiancee. Consequently, Daung followed Cheng, who was riding with Liu, onto the beltway where Daung passed Cheng and proceeded to the school. After waiting twenty to thirty minutes at the school, Daung and Samo saw Cheng approach them from across the soccer field. Cheng told them that he had killed Liu and ordered them at gunpoint to walk with him to Liu's car. Once at Liu's car, Cheng order Daung to check Liu's pockets for money. Daung found no money.

Subsequently, Cheng drove Daung back to Daung's home and again threatened him to ensure his silence. To emphasize his threat, Cheng fired a shot into the floorboard of the jeep. Daung did not report the incident to the police out of fear for his family's safety.

Holding: *Affirmed.*

Opinion: KOONTZ, Chief Judge.

We turn now to Daung's assertion that the trial court erred by refusing to instruct the jury that the common law defense of duress can be based upon threats to harm the defendant's family.

At the conclusion of all of the evidence and with Daung's consent, the trial court gave the jury the following model jury instruction on the defense of duress.

> If you find from the evidence that the defendant acted under duress, then you must find him not guilty. In order for the defendant to use the defense of duress, you must find from the evidence that he was threatened and that he had a reasonable fear of immediate death or serious bodily injury. The defense of duress is not available if the defendant had a reasonable opportunity to escape and did not do so or had a reasonable opportunity to avoid committing the crime without being harmed. 2 Virginia Model Jury Instructions-Criminal 353 (1989 repl. ed. with 1990 Supp.)

After deliberating for some time, the jury returned to ask the court whether under this instruction the defense of duress included threats made to the defendant's family and whether the word "immediate" can mean "as long as the individual who made the threat is able to carry through with it." Although Daung's counsel argued that the duress defense implicitly included threats of harm to family members and that "immediate" could cover a span of time depending on the circumstances, the court instructed the jury that the defense of duress did not extend to family members and that immediate meant "now" rather than some time in the future.

As we have noted, portions of Daung's testimony at trial and his previous recorded statements to the police conflict. The resolution of that conflict and the ultimate determination of the truthfulness of Daung's testimony is appropriately within the province of the jury. However, where evidence tends to sustain the defense theory of the case, the trial court is required to give requested instructions covering that theory. *See Diffendal v. Commonwealth*, 8 Va.App. 417, 422, 382 S.E.2d 24, 26 (1989). Accordingly, for purposes of resolving the issue of the trial court's jury instruction, we are only concerned with Daung's version of the events surrounding the crimes and not a determination of its truthfulness.

According to Daung, he thought Cheng was joking when Cheng had said he was going to "do a restaurant" and that he had been asleep when Cheng said he was going to do so that night. Daung maintained that he rammed the jeep into the victim's car because Cheng threatened him with a gun. Daung further maintained that he drove the jeep to the Kenmore School and waited for Cheng. Subsequently, he went to the murder scene and looked into the victim's pockets for money because of Cheng's threat that "if we do any stupid thing like trying to run away from him," he would go straight to Daun''s house and kill anybody he found there, including Daung's fiancee. There is no dispute that Cheng knew where Daung lived and that Cheng had the means to carry out his threat.

Initially, we note that the Commonwealth correctly points out that, according to Daung's version of the events surrounding the crimes in this case, when he rammed the victim's car he did so as a result of personal threats to him and not to members of his family. Accordingly, to that extent, the duress instruction given by the court was proper. However, Daung's version of the events in question also included threats to his family which occurred prior to the robbery and murder and a major portion of the abduction. It is this version of the events that requires that we decide whether in Virginia the defense of duress includes threats made to a defendant's family and whether the trial court erred in failing to give such an instruction to the jury in this case.

To date, no Virginia case has resolved the issue of whether the defense of duress should extend to criminal acts committed in response to threats made against anyone other than the defendant. However, a majority of jurisdictions and several legal scholars have addressed the issue and have determined that the defense is available when the defendant performed a criminal act in response to threats of harm against third persons. *See, e.g.,* 2 P. Robinson, *Criminal Law Defenses* 360 n. 29 (1984). Without deciding whether the defense of duress applies to threats of harm made against *any* third person, we hold the defense of duress may be available to a defendant who has committed a criminal act because of threats made against members of the defendant's family. We believe this holding is consistent with both human experience and the rationale behind the defense of duress. Human experience demonstrates that individuals often are more willing to subject themselves to great risks when a loved one is threatened with harm than when threatened with harm themselves. Thus, a person should not be expected to exercise greater restraint when faced with threats of harm to his family rather than to himself.

"The rationale of the defense of duress is that, for reasons of social policy, it is better that the defendant, faced with a choice of evils, choose to do the lesser evil (violate the criminal law) in order to avoid the greater evil threatened by the other person." 1 W. LaFave & A. Scott, *Substantive Criminal Law* 614 (1986). Thus, a person subject to duress may justifiably violate the literal language of the criminal law in order to avoid a harm of greater magnitude. *Id.* at 615; *Pancoast v. Commonwealth,* 2 Va.App. 28, 33, 340 S.E.2d 833, 836 (1986). When balanced against a lesser evil, a greater evil, whether committed against the defendant or a member of the defendant's family, is still less desirable for reasons of social policy. Therefore, we see no reason to distinguish between a threat of harm directed against the defendant and a threat of harm against members of the defendant's family.

Having determined that the defense of duress is applicable to cases involving threats of harm against a defendant's family members, we now turn to the issue of whether in the present case the trial court erred by refusing to instruct the jury that the defense can be based upon such threats. For purposes of our resolution of this issue, we assume that Daung was not a co-perpetrator with Cheng in the murder. We do not suggest that in such a case the murder of Liu would be a lesser evil that would justify the avoidance of the greater evil of the death or serious injury to Daung's family. However, viewed in the light most favorable to Daung's defense, Daung only actually participated in the abduction and robbery of Liu and was unaware that Cheng intended to kill Liu. In this context, Daung was guilty of felony murder for Liu's death based on his participation in the underlying abduction and robbery felonies. If Daung's participation in the underlying abduction and robbery is justified because of threats to kill his family, then the basis for Daung's felony murder conviction is eliminated and Daung also should

be excused for the murder. *See* LaFave & Scott, *supra* at 618. Consequently, we must decide whether the evidence, when viewed most favorably to Daung's duress defense, could support a finding that Daung was involved in the abduction and robbery because of threats to harm his family. *See McCoy v. Commonwealth,* 9 Va.App. 227, 229, 385 S.E.2d 628, 629 (1989).

To support a defense of duress, a defendant must demonstrate that his criminal conduct was the product of an unlawful threat that caused him reasonably to believe that performing the criminal conduct was his only reasonable opportunity to avoid imminent death or serious bodily harm, either to himself or to another. *See Pancoast,* 2 Va.App. at 33, 340 S.E.2d at 836; *United States v. Bailey,* 444 U.S. 394, 410-11, 100 S.Ct. 624, 634-35, 62 L.Ed.2d 575 (1980); LaFave & Scott, *supra* at 614. However, a defendant may not rely on the defense if he had a reasonable opportunity "'both to refuse to do the criminal act and also to avoid the threatened harm.'" *Bailey,* 444 U.S. at 410, 100 S.Ct. at 634 (quoting W. LaFave & A. Scott, *Handbook on Criminal Law* 379 (1972)); *accord Pancoast,* 2 Va.App. at 33, 340 S.E.2d at 836. In the present case, there is evidence that Cheng threatened to harm Daung's family. Therefore, we must determine whether Daung reasonably feared that his refusal to participate in the abduction of Liu would have resulted in *imminent* death or serious injury to his family, and whether participating in the abduction was Daung's *only* reasonable opportunity to avoid the harm to Daung's family.

At trial, the court ruled the defense of duress was only available if the threatened harm was "immediate," which the court interpreted as meaning "now" rather than some time in the future. On appeal, the Commonwealth argues the evidence does not warrant an instruction on the defense of duress for threats to harm Daung's family because none of his family members were present when Cheng made his threat, and, therefore, were not subject to "immediate" harm from Cheng. We believe the Commonwealth interprets too strictly the temporal aspect of the defense, and we choose not to adopt such an approach to the defense of duress.

Admittedly, we previously used the terms "imminent" and "immediate" interchangeably and did not distinguish between them when we discussed the defense of duress in *Pancoast.* Nonetheless, the difference between the two terms has been addressed by others, and we believe the distinction is a valid one that needs to be made in this case. Regardless of whether a court adheres to the imminent standard or the immediate standard or does not distinguish between them, threats of "future" harm are generally held insufficient to sustain a defense of duress. Like other courts, we have held that "[v]ague threats of future harm, however alarming, will not suffice to excuse criminal conduct." *Pancoast,* 2 Va.App. at 33, 340 S.E.2d at 836 (citations omitted). Nonetheless, the distinction of threats of imminent or immediate harm from threats of future harm is somewhat of a fiction. "To say that a threat of future harm is not sufficient is to ignore the fact that the nature of a threat is to hold out a future harm. All danger to the 'duressed' is in the future.... [When] one seeks to avoid it, such avoidance implies a temporality not coterminous with the harm threatened." Robinson, *supra* at 359. "Threats of future harm" denotes threats of harm that might occur at some uncertain time that is distant and separate from the period of duress or coercion. Therefore, the temporal proximity of the threat and the threatened harm is the true issue, and the proper distinction between imminent and immediate harm is how far in the future is the harm to occur from the time the threat is made.

While the term "immediate" is commonly understood to mean instant or direct, the term "imminent" has a connotation that is less than "immediate," yet still impending and present. In one jurisdiction that adopted the "imminent" harm approach to duress, the court explained that "a threat directed to some indefinite time in the future is not an imminent threat." *State v. Harding*, 635 P.2d 33, 35 (Utah 1981). Some courts have construed the imminence requirement to be a factual determination based on all of the circumstances, including the defendant's ability to avoid the harm. Robinson, *supra* at 359 (citing *e.g. People v. Maes*, 41 Colo.App. 75, 583 P.2d 942 (1978)). In view of the underlying rationale of the defense of duress, we believe that, to the extent a distinction needs to be made, the more appropriate approach to the defense of duress is to require a showing of "imminent" harm rather than the stricter and more limiting "immediate" harm. We also feel this approach is consistent with our *Pancoast* decision.

In *Pancoast*, a female intern at the Medical College of Virginia made out two prescriptions to fictitious patients in order to obtain drugs for her husband, who was addicted to drugs and also a pharmacist. At trial, she relied on the defense of duress and presented evidence that her husband used various forms of mental and physical abuse, including hitting her on occasion, to pressure her to write him prescriptions. For the first prescription, she claimed her husband denied her sleep after she finished working at the hospital for two days without sleep. Her husband reportedly was in a frantic state and threatened to do "something crazy" if she did not write him a prescription. We found that the evidence failed to support the defense of duress because there was "nothing in the record to indicate that she was in fear of imminent death or serious bodily injury." *Id.* 2 Va.App. at 34, 340 S.E.2d at 837. On the second occasion, she based her defense on her allegations that her husband had hit her and threatened her with death if she did not go with him to a drug store and help him obtain some drugs. However, we noted "[h]er husband did not stay with her at all times while in the pharmacy, nor was he then presently threatening her. Had she so desired, she could have informed the pharmacist, in some manner, that the prescription was fraudulent." *Id.* at 34, 340 S.E.2d at 836. While accepting that the appellant was subject to a threat of imminent harm, we held that the defense of duress did not excuse her since she failed to take advantage of an opportunity to avoid the criminal conduct when she wrote the second prescription.

In the present case, the jury could have reasonably determined that Daung was subject to a threat of imminent harm to his family. If accepted by the jury, Cheng told Daung that he would go straight to Daung's home and kill anybody he found there if Daung did not assist him in the abduction and robbery of Liu by driving his jeep to Kenmore School. Though Cheng could not have killed any members of Daung's family at the moment he made the threat, Cheng intended to and was able to carry out the threatened harm as soon as he could drive to Daung's home. Cheng had the means to carry out his threat because he had a gun, a car, and knew where Daung lived. The harm was not to occur at some uncertain distant time in the future. Instead, the threat and the harm were separated only by the time it would take Cheng to drive to Daung's home. Thus, the jury could have determined that Daung was threatened with imminent harm.

We hold, however, that, under the circumstances of this case, the jury could not have reasonably found that Daung reasonably believed his participation in the crime was the *only* reasonable opportunity he had to prevent his family from being harmed. The evidence establishes as a matter of law that after Cheng left in Liu's car, Daung had a reasonable opportunity to avoid any

further participation in the crimes, and to obtain aid from the police or to warn his family before Cheng was able to carry out his threat. Therefore, we hold that the jury could not have found that Daung reasonably believed driving to Kenmore School was the only reasonable opportunity he had to avoid Cheng harming members of his family.

For these reasons, while we hold that the defense of duress encompasses threats to the defendant's family, we also hold that the trial court did not err in refusing to so instruct the jury because Daung was not entitled to such an instruction based on his own version of the facts. Having determined that the evidence was sufficient to support his convictions, we affirm those convictions.

Critical Thinking Question(s): How does the defense of duress in this case differ from self-defense pertaining to defense of others? The general rule is that even when faced with duress, it is not an excuse to commit, or participate in, a homicide. Do you think that the court should use a lesser standard of proof when the crime committed is something less egregious than homicide such as in the fraudulent prescription case discussed? Where would you draw the line for when duress can be considered a proper defense?

VI. Mistake of Law and Mistake of Fact:

Section Introduction: A mistake of law is typically viewed to not be a valid defense in any crime. Mistakes of fact, however, are sometimes an excuse. The following case addresses when an honest mistake of fact(s) excuses an otherwise criminal act.

State v. *Gilson*, 98 Va. 837, 36 S.E. 479 (1900).

Procedural History: This is a writ of error to a judgment of the county court of Washington county, sentencing Wise to pay a fine of five dollars for unlawfully tearing down and leaving open a fence of one H. A. Mann.

Issue(s): Can mistake of fact ever be a defense?

Facts: The defendant tore down a fence that he mistakenly believed was on his property.

Holding: *Reversed and remanded.*

Opinion: KEITH, P.

Section 3729 of the Code provides: "If any person unlawfully, but not feloniously, take and carry away, or destroy, deface, or injure any property, real or personal, not his own, *** he shall be fined not less than five nor more than five hundred dollars."

In support of his plea of "not guilty," prisoner offered to show that the land upon which he resided had formerly belonged to White, who sold to Counts. When a view was made with a view to the making of a deed to Counts by White, the lines of the survey were run at one point

upon land claimed by H. A. Mann, the prosecutor in this case. He making objection, White said to Counts that he would not convey to him any part of the disputed land, not because he meant to abandon any right he had, but because he did not consider the subject worthy of controversy, but at the same time agreed verbally with Counts to transfer to him any claim he might have to the parcel of land in dispute. Counts sold to Lilly, and Lilly to Mitchell, the immediate grantor of the prisoner. At the trial the prisoner offered, but was not permitted, to prove by Counts that this verbal contract with respect to the disputed land had been transferred to him. It is not pretended, of course, that this verbal contract or understanding passed title, but it does bear upon the bona fides of a claim of right asserted by the prisoner, and should have been admitted.

The prisoner asked the court to instruct the jury as follows: "The court instructs the jury, if they believe from the evidence that the defendant, John Wise, pulled down the fence and left it down under a claim of right, believing it to be his own, and believing that he had a bona fide right thereto, then the jury shall find for the defendant."

This instruction propounds the law correctly, and should have been given. Ratcliffe's Case, 5 Grat., at page 658; 2 Whart. Cr. Law, § 1072a. The county court seems to have recognized this principle in the instruction which it gave, and it might have been unnecessary to have reversed its judgment upon this ground if it stood alone; but, as the case must go back for a new trial on account of the error committed in the exclusion of evidence, it will be proper, upon a subsequent trial, to give the instruction as requested by the prisoner.

The judgment of the county court must be reversed, and a new trial awarded.

Critical Thinking Question(s): Why would the court be interested in excusing a defendant's charge based on mistake of fact but not on mistake of law? Are there other avenues that the "plaintiff/prosecutor" can take in the event that mistake of fact is granted as a defense? Compare mistake of law and mistake of fact with legal impossibility and factual impossibility? Is the premise for how law and fact are utilized/not permitted the same under the two concepts of "mistake" and "impossibility"? Why or why not?

VII. Entrapment:

Section Introduction: If a defendant is able to show that his or her commission of a crime was compelled by the actions of a government agent and would not otherwise have taken place, then they are entitled to the excuse of entrapment.

Johnson v. Commonwealth, 211 Va. 815, 180 S.E.2d 661 (1971).

Procedural History: James Harold Johnson, Jr., (Johnson) was found guilty after waiving trial by jury of possessing more than twenty-five grains of marijuana. His sentence was confinement in the penitentiary for twenty years and a $500.00 fine. Ten years of Johnson's confinement were suspended. A writ of error and *Supersedeas* was awarded to review the case.

Issue(s): Did the officer's actions in getting defendant to supply drugs amount to entrapment?

Facts: During the 1967-68 school year the Prince George County Sheriff's Office received numerous complaints from parents concerning the use of narcotic drugs at the Prince George High School. In the summer of 1968 Thomas Lauter (Lauter), a student at Prince George, agreed to assist the sheriff's office in uncovering the supplier or suppliers of drugs to students at the high school by attempting to make a purchase. Lauter 'had an idea' that Johnson was a supplier of marijuana. Lauter talked to Johnson on four or five separate occasions about purchasing marijuana before Johnson agreed to supply him.

Deputy Sheriff M. J. Vrable, Jr. (Vrable) testified, without objection, that Lauter reported to him, after first contacting Johnson, that Johnson would be unable to supply Lauter until Johnson's supplier in Hopewell received a supply. Vrable then instructed Lauter to continue in his efforts to purchase marijuana from Johnson.

Johnson phoned Lauter at home and told him that he (Johnson) could supply Lauter with marijuana. The two agreed that the purchase of marijuana for $200.00 would take place Thursday night, November 14, 1968.

On Thursday night Lauter obtained $200.00 in marked money from the sheriff's office. He then picked up Johnson at his home and the two drove to the Hopewell Tastee Freez. Enroute, Lauter gave Johnson the marked money. Lauter and Johnson met Stephen Jessup (Jessup) at the Tastee Freez. Jessup gave Johnson 21 small brown envelopes containing marijuana and Johnson gave Jessup the marked money.

Lauter and Johnson then proceeded to the parking lot of a restaurant in Prince George County. After parking there, Johnson gave Lauter five of the brown envelopes containing marijuana. At this point, Vrable, who was concealed nearby and had witnessed this exchange, stepped up to the car and arrested Johnson. Jessup was arrested by other officers after Lauter and Johnson had left the Tastee Freez.

Holding: *Reversed and remanded for resentencing on a separate issue.*

Opinion: HARMAN, Justice.

Consideration of the entrapment question requires a brief recital of the circumstances leading to Johnson's arrest. Johnson, who did not testify, relies entirely on the Commonwealth's evidence to establish the defense of entrapment.

In Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932), Mr. Justice Roberts, in a concurring opinion, stated that, '(e)ntrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.' 287 U.S. at p. 454, 53 S.Ct. at p. 217. We have adopted this definition of entrapment. Swift v. Commonwealth, 199 Va. 420, 424, 100 S.E.2d 9, 12 (1957); Ossen v. Commonwealth, 187 Va. 902, 911, 48 S.E.2d 204, 208 (1948); Falden v. Commonwealth, 167 Va. 549, 555-556, 189 S.E. 329, 332 (1937).

The defense of entrapment is, in essence, a rule of fairness that bars the conviction of an accused in the event of improper police conduct. Ritter v. Commonwealth, 210 Va. 732, 739, 173 S.E.2d 799, 804 (1970); Swift v. Commonwealth, Supra, 199 Va. at p. 424, 100 S.E.2d at 12; Ossen v. Commonwealth, Supra, 187 Va. at p. 911, 48 S.E.2d at p. 208; Guthrie v. Commonwealth, 171 Va. 461, 466, 198 S.E. 481, 483 (1938); See Sherman v. United States, 356 U.S. 369, 372, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958); Sorrells v. United States, Supra, 287 U.S. at p. 451, 53 S.Ct. 210. Police conduct that constitutes entrapment is contrary to public policy. Guthrie v. Commonwealth, Supra, 171 Va. at p. 466, 198 S.E. at p. 483; Bauer v. Commonwealth, 135 Va. 463, 466, 115 S.E. 514, 515 (1923); See Sherman v. United States, Supra, 356 U.S. at p. 372, 78 S.Ct. 819; Sorrells v. United States, Supra, 287 U.S. at pp. 448-449, 78 S.Ct. 819.

A distinction is made between police conduct that merely affords an opportunity for the commission of an offense and 'creative activity' that implants in the mind of an otherwise innocent person the disposition to commit an offense and induces its commission in order to prosecute. Where the police do no more than afford an opportunity for the commission of an offense a subsequent conviction will not be barred on the ground of entrapment. See Swift v. Commonwealth, Supra; Dorchincoz v. Commonwealth, 191 Va. 33, 59 S.E.2d 863 (1950); Harris v. Commonwealth, 174 Va. 486, 6 S.E.2d 678 (1940); Cf. Ossen v. Commonwealth, Supra.

In the case at bar the evidence does not support the alleged entrapment. The sheriff's office had received complaints that drugs were present in the high school. Alerted to the possibility of criminal activity the sheriff's office, quite properly, undertook to investigate and to detect offenders, if any. In the process they merely afforded an opportunity for the commission of an offense. The evidence clearly shows that Johnson was not a victim of improper police conduct.

The case will be remanded to the trial court for resentencing in accord with this opinion.

Critical Thinking Question(s): Basing entrapment on the level of police activity is commonly referred to as the "objective" test of entrapment; the "subjective" test for entrapment views the case from the "pre-disposition" of the defendant. Provide a set of circumstances within the case recited above that would enhance the level of police activity to the point of entrapment. Why is entrapment frowned upon by the courts? What are some of the considerations the court takes into account when applying the "subjective" test of entrapment?