Chapter Four: Actus Reus

Chapter Overview:

Actus reus is a criminal act or omission which, when concurrently combined with criminal intent, constitutes a crime. In order for *actus reus* to exist it is critical that the act be a voluntary criminal act. If someone is forced to commit an act, or commits an act without their own knowledge or due to circumstances beyond their control, it is not voluntary and they may not be held accountable. The idea of a voluntary act also re-raises the issue of status offenses, by which an individual is charged with a crime related to their status in life as opposed to an action they have taken. While courts have continued to hold that people cannot be charged with a crime for mere status, omissions are one way that an individual can commit a crime without an overt act.

Actus reus can be satisfied by a criminal omission when it violates a law that requires an individual to act. In the United States, individuals do not have a duty to intervene when someone else is in danger. This is known as the American bystander rule and is different from the European rule that obligates intervention, called the Good Samaritan rule. There are exceptions to the American bystander rule, however. If one's child, spouse, or employee is in danger, then an individual has an obligation to provide assistance. This can include situations like the need to obtain medical treatment. Parents can be held responsible, for example, for the death of a child if it is clear that the child requires medical attention but the parents fail to procure such attention. A person also incurs a duty to act if that person causes another individual to be put in harm's way. If someone voluntarily acts to assist another, then they also incur a duty and can be held responsible for what happens to the individual they are assisting. A duty to act may also be required by a contractual agreement between parties.

Possession is considered to meet the requirement for actus reus because it involves an act of obtaining the contraband, as well as an omission in the perpetrator's failure to dispose of the contraband. There are several different categories of possession. Actual possession is the most straightforward, involving an actual physical possession of contraband, either being carried by the individual or within their immediate reach. Constructive possession does not involve a person physically carrying the contraband, but rather that the individual has control over the object by virtue of its location, such as in the private room of the perpetrator. Joint possession involves multiple individuals maintaining control over contraband. Knowing possession simply refers to the perpetrator's awareness of his or her possession of the contraband, while mere possession refers to a perpetrator being unaware of his or her possession. In the remainder of this chapter of the supplement you will read Virginia cases that exemplify the importance of *actus reus*, as well as Virginia statutes regarding acts of omission and possession.

I. A Voluntary Criminal Act:

Section Introduction: In order for the *actus reus* of most crimes to be satisfied, the defendant must have voluntarily committed a criminal act. In crimes where the *actus reus* does not include an overt physical action, it is more difficult to ascertain whether a voluntary criminal act was committed. In some cases the defendant will focus on this aspect of the crime to draw their guilt

into question. When reading the following case, consider what act is required for the defendant to be found guilty of the crime.

Nobles v. Commonwealth, 218 Va. 548 (1977)

Procedural History: Convicted by the trial court, sitting without a jury, of attempted murder, the defendant, James Calloway Nobles, IV, was sentenced to serve eight years in the penitentiary, with four years suspended.

Issue(s): Was the evidence sufficient to show that the defendant harbored the specific intent to kill, which is required to sustain a conviction for attempted murder?

Facts: The incident in question occurred May 27, 1976. Stated in the light most favorable to the Commonwealth, the evidence shows that the defendant and the victim of the alleged murder attempt, Margaret Ann Lowman, previously had "dated." Their relationship had terminated, however, when, approximately a year before the May 27th incident, he broke into her home. She threatened to report the occurrence to the police "if he ever spoke to (her) again."

In the early morning hours of May 27, 1976, the defendant, accompanied by a friend, John Vadas, drove to Mrs. Lowman's home in the City of Richmond. Finding the front door locked, the defendant used a screwdriver to enter through a side window. He then admitted Vadas by a side door. Because the situation "seemed weird," Vadas immediately left the house to return to the defendant's car.

The defendant proceeded to Mrs. Lowman's bedroom. Awakened by a noise, Mrs. Lowman turned on her bedside lamp and saw "a man's body lying face down on the floor" beside her bed. When she screamed, the man "jumped up," struck her in the face with his fist, and covered her nose and mouth with his hands, "trying to smother (her)." She "could actually feel (her) eyes starting to pop out," and she "thought (she) was dying," but she "managed to get his fingers off (her) face." Immediately, he covered her face with a pillow. She struggled with him, and they fell to the floor. Holding her face-down on the floor, he tied a pillowcase around her head and then struck her on the head "over and over" with "some blunt object." In a disguised voice, the defendant told Mrs. Lowman he had come "to rob (her)."

Meanwhile, hearing Mrs. Lowman's screams, Vadas had reentered the house, and he made his way toward the bedroom where the attack was occurring. Apparently alerted to Vadas' approach, the assailant told Mrs. Lowman: "Don't you move. If you move, I will kill you."

When Vadas entered the bedroom and remonstrated with the assailant, the latter "got up off of" Mrs. Lowman and "jerked" the pillowcase from her head. She then recognized the defendant as her attacker.

The three parties went to the kitchen, where Vadas attempted to calm the hysterical victim. In an ensuing conversation, the defendant claimed that he had entered the house only because he wanted to talk to Mrs. Lowman. When Mrs. Lowman picked up the telephone to call her "ex-husband," the defendant and Vadas departed. Mrs. Lowman then went to a local hospital, where

she was examined and treated for her injuries.

Later, upon learning he was wanted by the police for the incident involving Mrs. Lowman, the defendant fled to Florida. He was arrested in that state and was returned to Virginia for trial.

Holding: Affirmed.

Opinion: PER CURIAM.

Initially, in connection with the May 27, 1976 incident, the defendant was indicted not only for attempted murder but also for breaking and entering with intent to commit murder. Upon the breaking and entering indictment, however, the trial court found the defendant guilty only of trespass. The court held that the evidence had failed to show beyond a reasonable doubt that, at the time he entered the house, the defendant intended to kill Mrs. Lowman. Thus, the crucial question with respect to the attempted murder conviction is whether the evidence supports the trial court's further holding that the defendant formed the intent to kill after he entered the house.

To sustain a conviction of attempted murder, the evidence must establish both a specific intent to kill the victim and an overt but ineffectual act committed in furtherance of this criminal purpose. Hargrave v. Commonwealth, 214 Va. 436, 437, 201 S.E.2d 597, 598 (1974). The defendant argues that the evidence in this case was insufficient to establish the first of the required elements, viz., that he intended to kill the victim. His actions, he says, amounted only to an assault upon Mrs. Lowman; he intended merely to “shut her up” and “to hide his identity,” without any intent to kill her.

The intent which must be shown in a prosecution for attempted murder is “the intent in fact, as distinguished from an intent in law.” Epps v. Commonwealth, 216 Va. 150, 156, 216 S.E.2d 64, 69 (1975). Thus, whether the required intent exists is generally a question for the trier of fact.

Intent in fact is the purpose formed in a person's mind, which may be shown by the circumstances surrounding the offense, including the person's conduct and his statements. Howard v. Commonwealth, 207 Va. 222, 228, 148 S.E.2d 800, 804 (1966). And a person is presumed to intend the immediate, direct, and necessary consequences of his voluntary act. Dawkins v. Commonwealth, 186 Va. 55, 62, 41 S.E.2d 500, 504 (1947).

Here, the defendant committed at least three specific acts, any one of which, if not thwarted, would have resulted in the immediate, direct, and necessary consequence of Mrs. Lowman's death. He covered her nose and mouth with his hands, “trying to smother (her);” she foiled this attempt by pulling his hands from her face. He covered her face with a pillow; he failed in this attempt because of her struggles. He struck her on the head “over and over” with “some blunt object;” he desisted from this attempt because his friend, Vadas, intervened.

Added to the overt actions of the defendant is his statement to Mrs. Lowman that, if she moved, he would kill her. While this may have been a conditional threat, and while no overt act appears to have occurred after the threat was made, the statement tended to show the state of mind of the defendant, and state of mind is the subject of any inquiry concerning whether

an intent to kill exists in an attempted murder case. Howard v. Commonwealth, 207 Va. at 228, 148 S.E.2d at 804; Hardy v. Commonwealth, 110 Va. 910, 919, 67 S.E. 522, 526 (1910).

Considering the conduct and the statement of the defendant, it was for the trier of fact, drawing all reasonable inferences from the evidence, to determine whether, in attacking Mrs. Lowman, the defendant intended to kill her. The evidence was sufficient to support the trial court's conclusion that the requisite intent was present. For this reason, the judgment of conviction will be affirmed.

Critical Thinking Question(s): Since the court found that the defendant did not have the intent to commit kill the victim upon entering the home, how could he have been held to have the specific intent to do so subsequently barring any statements? Recall that he made no overt acts after saying "he would kill her." Thus, the question arises as to how one goes about proving specific intent? Did the defendant have the specific intent to kill the victim or did he merely desire to threaten her with his actions? How closely are *mens rea* and *actus reus* intertwined?

II. Status Offenses:

Section Introduction: As the commission of a crime requires an act be committed, it is unlawful to criminally charge someone based merely upon their status in life. Some defendants claim that the charges against them are designed to criminalize their status as, for example, a drug addict, a homeless person, or a certain personality type. In the following Virginia case, a defendant claims that he has been the target of such unlawful prosecution.

***Grifin v. Commonwealth*, 33 Va.App. 413, 533 S.E.2d 653 (2000)**

Procedural History: James Edward Griffin, Jr. (appellant) was convicted in a jury trial of felony murder, in violation of Code § 18.2-33, use of a firearm in the commission of felony murder, in violation of Code § 18.2-53.1, and possession of a firearm by a convicted felon, in violation of Code § 18.2-308.2.

Issue(s): On appeal, he argues that: (1) the evidence was insufficient to establish that the accidental killing occurred within the *res gestae* of the predicate felony, possession of a firearm by a convicted felon; and (2) the use of his juvenile adjudications for purposes of establishing his "felon" status constituted an *ex post facto* application of the law.

Facts: The evidence established that on January 21, 1994, appellant, who was a juvenile at the time, pled guilty in the Juvenile and Domestic Relations Court of Prince William County to breaking and entering and grand larceny. These adjudications were later used as the basis for his "felon" status in the instant offenses.

In October 1998, appellant was sharing an apartment in Prince William County with his best friend, Shaquwn Thomas (Thomas). The two had known each other for approximately three and one-half years and considered themselves "like brothers." On October 16, 1998, appellant and Thomas returned from their jobs and were preparing to go out for the evening. Appellant left the

apartment to visit his two children, who lived in a nearby apartment building.

When he returned to his apartment, appellant saw a gun, which he and Thomas had previously purchased, lying on Thomas's bed. Appellant picked up the gun and began dancing to music. The gun discharged and a bullet hit Thomas in the chest from a distance of three feet or less. Appellant testified as follows:

> All I know is when I picked the gun up, ... and I don't know, I didn't notice if the hammer was back ... but all I remember was I seen [sic] sparks and I heard a pop go off and when I looked down the gun was pointing towards where I know where I was just talking to [Thomas].

Appellant panicked, ran out of the apartment to a nearby wooded area, and buried the gun. Jan Quigley, who lived near appellant's apartment, saw an individual run down the steps to the edge of the wooded area, squat down for three to five seconds, and then run back in the opposite direction. After disposing of the gun, appellant returned to the apartment and called 911.

Appellant told the 911 operator that a masked assailant had broken into the apartment, entered Thomas's bedroom, and shot Thomas. Appellant then called Thomas's father and told him to come to the apartment because someone had shot Thomas. When the police arrived at the scene, appellant told two different officers that he was in the bathroom when he heard the gunshot. A police dog found the weapon in the wooded area, and a gunshot residue test performed at the scene revealed the presence of primer residue on appellant's hands.

At police headquarters, after learning that Thomas had died, appellant confessed to Detective Pete Barlow (Barlow) that the shooting was an accident. According to Barlow, [appellant] started crying and said, “I didn't mean to shoot him.” ... [Appellant] picked the gun up off the bed, was talking to [Thomas] and the gun just went off.... He said he doesn't remember if he pulled the trigger. He said he remembered that his finger was inside the trigger guard and on the trigger, but- Appellant explained to Barlow that he knew they were not “supposed to have the gun in the first place” and that he held the gun for approximately one minute before it discharged.

Holding: Affirmed, in part, and reversed, in part.

Opinion: FITZPATRICK, Chief Judge.

Appellant was charged with first-degree murder, felony murder, use of a firearm in the commission of a felony, and possession of a firearm by a convicted felon. At trial, Ronald Kovacs (Kovacs), a jailhouse informant, testified that appellant admitted to him in jail that appellant shot Thomas during an argument over a girl. However, two other jailhouse informants testified that Kovacs admitted to fabricating his testimony against appellant in an effort to get a reduced sentence in his pending cases.

In his defense, appellant testified that the shooting was an accident and that he had never met Kovacs while incarcerated. He admitted that he was “kind of feeling [the beat of the music]” at the time the gun discharged. Appellant explained that he had lied to the authorities because he “was in a state of panic” and his “mind was running like ... a hundred thousand miles per hour.”

After deliberations, the jury acquitted appellant of first-degree murder, including the lesser-included offenses of second-degree murder and involuntary manslaughter. However, the jury found appellant guilty of the remaining three charges, felony murder, use of a firearm in the commission of a felony, and possession of a firearm by a convicted felon.

In this appeal, we determine whether the evidence was sufficient to convict appellant of felony murder, in violation of Code § 18.2-33. That section provides:

The killing of one accidentally, contrary to the intentions of the parties, *while in the prosecution of some felonious act* other than those specified in §§ 18.2-31 and 18.2-32, is murder of the second degree and is punishable by confinement in a state correctional facility for not less than five years nor more than forty years.

In short, whether there is a sufficient causal connection between the felony and the homicide *depends on whether the defendant's felony dictated his conduct which led to the homicide.* If it did, and the matters of time and place are not too remote, the homicide may be "in the commission" of the felony; but if it did not, it may not be.

Wayne R. LaFave, *Criminal Law §* 7.5, at 634-36 (1998) (emphasis added). Thus, "the collateral crime and the homicide must be integrated and related in a causal way.... The death must be caused by the felonious act. *The death need not be in furtherance of the felony, but the act that caused the death should be in furtherance of the felony."* 40 Am.Jur.2d *Homicide* § 70 (1999) (emphasis added).

We hold that Code § 18.2-33 applies where the initial felony and the accidental killing are parts of one continuous transaction and are closely related in point of time, place and causal connection. The phrase "in the prosecution" requires proof that the killing resulted from an act which was an integral part of the felony or an act in direct furtherance of or necessitated by the felony. Where the evidence fails to support a finding that the killing occurred "in the prosecution of" or "in the furtherance of" the underlying felony, as in the present case, there is "no basis ... to find that the accidental death was part or a result of the criminal enterprise." *King*, 6 Va.App. at 358, 368 S.E.2d at 708.

Several of our sister states have addressed whether the "status offense" of possession of a firearm by a convicted felon may serve as the predicate felony for felony murder. Some jurisdictions require that the underlying felony be "inherently dangerous to human life" and use two different approaches to this analysis. Under the abstract approach, the elements of the "status offense" are considered in the abstract and the factual circumstances of the felony are not considered. *See, e.g., People v. Satchell*, 6 Cal.3d 28, 98 Cal.Rptr. 33, 489 P.2d 1361 (1971) (holding that the unlawful possession of a firearm by a convicted felon, when viewed in the abstract, is not a felony inherently dangerous to human life and will not support a felony-murder charge); *State v. Underwood*, 228 Kan. 294, 615 P.2d 153 (1980) ("The unlawful possession of a firearm ... when considered in the abstract is not a felony inherently dangerous to human life and will not sustain a conviction for murder in the first degree under the felony murder rule.").

A second view analyzes the particular circumstances of each case to determine whether the possession of a firearm by a convicted felon is inherently dangerous. *Compare* Ford v. State, *262* Ga. 602, 423 S.E.2d 255, 256 (1992) (reversing felony murder conviction because the "status felony, ... the possession of a firearm by a previously convicted felon, is not inherently dangerous"), *with* *Metts v. State*, 270 Ga. 481, 511 S.E.2d 508, 510 (1999) (affirming felony-murder conviction because the defendant's "possession of the firearm was dangerous, and life-threatening, and had 'an undeniable connection to the homicide....' ").

We decline to adopt *a per se* rule that the "status offense" of possession of a firearm by a convicted felon may never serve as the underlying felony for felony murder, or that only "inherently dangerous" felonies may serve as the predicate for felony murder. Indeed, the Court in *Heacock* rejected a similar argument, stating the following:

> Yet, Heacock maintains that he is not criminally responsible for Wilson's death because, he says, that was not a foreseeable consequence of the criminal conduct charged in the indictment. "[A]pplication of the [felony-murder] rule to felonies not foreseeably dangerous," he reasons, "would be unsound analytically, because there is no logical basis for imputing malice from the intent to commit a felony not dangerous to human life." *But nothing in [Code] § 18.2-33 limits its scope to such felonies; rather, that statute encompasses all felonious acts* except capital murder and the several crimes particularly named in [Code] § 18.2-32. *Heacock*, 228 Va. at 404, 323 S.E.2d at 94 (emphasis added).

Because the evidence was insufficient to establish that the accidental killing of Thomas occurred in furtherance of the charge of possession of a firearm by a convicted felon, the killing cannot be considered within the *res gestae* of the underlying felony. Accordingly, we reverse and dismiss appellant's convictions for felony murder, in violation of Code § 18.2-33, and use of a firearm in the commission of felony murder, in violation of Code § 18.2-53.1.

We hold that the evidence is insufficient to establish a causal connection between the accidental killing and the underlying felony and, therefore, reverse and dismiss appellant's convictions for felony murder and use of a firearm in the commission of felony murder. However, because we find no *ex post facto* application of Code § 16.1-308, we affirm appellant's conviction for possession of a firearm by a convicted felon.

Critical Thinking Questions: Do you agree that the charges of felony murder and use of a firearm in commission of a felony should be dismissed against the appellant? Can a person ever be charged with felony murder if s/he does not "bring" the gun to the scene of the crime? What other facts would you need to substantiate the charge of felony murder against the defendant in this case? Should the facts that the defendant fled the scene, disposed of the gun, and lied to police be used as proof of the defendant's intent to shot the victim?

III. Omisssions

Section Introduction: While the *actus reus* of most crimes involves a specific action, some

crimes can be committed through the omission of proper action. The following Virginia statutes define some such crimes of omission.

§ 63.2-1509. Physicians, nurses, teachers, etc., to report certain injuries to children; penalty for failure to report.

A. The following persons who, in their professional or official capacity, have reason to suspect that a child is an abused or neglected child, shall report the matter immediately to the local department of the county or city wherein the child resides or wherein the abuse or neglect is believed to have occurred or to the Department's toll-free child abuse and neglect hotline:

1. Any person licensed to practice medicine or any of the healing arts;

2. Any hospital resident or intern, and any person employed in the nursing profession;

3. Any person employed as a social worker;

4. Any probation officer;

5. Any teacher or other person employed in a public or private school, kindergarten or nursery school;

6. Any person providing full-time or part-time child care for pay on a regularly planned basis;

7. Any mental health professional;

8. Any law-enforcement officer or animal control officer;

9. Any mediator eligible to receive court referrals pursuant to § 8.01-576.8;

10. Any professional staff person, not previously enumerated, employed by a private or state-operated hospital, institution or facility to which children have been committed or where children have been placed for care and treatment;

11. Any person associated with or employed by any private organization responsible for the care, custody or control of children;

12. Any person who is designated a court-appointed special advocate pursuant to Article 5 (§ 9.1-151 et seq.) of Chapter 1 of Title 9.1;

13. Any person, over the age of 18 years, who has received training approved by the Department of Social Services for the purposes of recognizing and reporting child abuse and neglect;

14. Any person employed by a local department as defined in § 63.2-100 who determines eligibility for public assistance; and

15. Any emergency medical services personnel certified by the Board of Health pursuant to §32.1-111.5, unless such personnel immediately reports the matter directly to the attending physician at the hospital to which the child is transported, who shall make such report forthwith.

This subsection shall not apply to any regular minister, priest, rabbi, imam, or duly accredited practitioner of any religious organization or denomination usually referred to as a church as it relates to (i) information required by the doctrine of the religious organization or denomination to be kept in a confidential manner or (ii) information that would be subject to § 8.01-400 or 19.2-271.3 if offered as evidence in court.

If neither the locality in which the child resides nor where the abuse or neglect is believed to have occurred is known, then such report shall be made to the local department of the county or city where the abuse or neglect was discovered or to the Department's toll-free child abuse and neglect hotline.

If an employee of the local department is suspected of abusing or neglecting a child, the report shall be made to the court of the county or city where the abuse or neglect was discovered. Upon receipt of such a report by the court, the judge shall assign the report to a local department that is not the employer of the suspected employee for investigation or family assessment. The judge may consult with the Department in selecting a local department to respond to the report or the complaint.

If the information is received by a teacher, staff member, resident, intern or nurse in the course of professional services in a hospital, school or similar institution, such person may, in place of said report, immediately notify the person in charge of the institution or department, or his designee, who shall make such report forthwith.

The initial report may be an oral report but such report shall be reduced to writing by the child abuse coordinator of the local department on a form prescribed by the Board. Any person required to make the report pursuant to this subsection shall disclose all information that is the basis for his suspicion of abuse or neglect of the child and, upon request, shall make available to the child-protective services coordinator and the local department, which is the agency of jurisdiction, any information, records, or reports that document the basis for the report. All persons required by this subsection to report suspected abuse or neglect who maintain a record of a child who is the subject of such a report shall cooperate with the investigating agency and shall make related information, records and reports available to the investigating agency unless such disclosure violates the federal Family Educational Rights and Privacy Act (20 U.S.C. § 1232g). Provision of such information, records, and reports by a health care provider shall not be prohibited by § 8.01-399. Criminal investigative reports received from law-enforcement agencies shall not be further disseminated by the investigating agency nor shall they be subject to public disclosure.

B. For purposes of subsection A, "reason to suspect that a child is abused or neglected" shall include (i) a finding made by an attending physician within seven days of a child's birth that the

results of a blood or urine test conducted within 48 hours of the birth of the child indicate the presence of a controlled substance not prescribed for the mother by a physician; (ii) a finding by an attending physician made within 48 hours of a child's birth that the child was born dependent on a controlled substance which was not prescribed by a physician for the mother and has demonstrated withdrawal symptoms; (iii) a diagnosis by an attending physician made within seven days of a child's birth that the child has an illness, disease or condition which, to a reasonable degree of medical certainty, is attributable to in utero exposure to a controlled substance which was not prescribed by a physician for the mother or the child; or (iv) a diagnosis by an attending physician made within seven days of a child's birth that the child has fetal alcohol syndrome attributable to in utero exposure to alcohol. When "reason to suspect" is based upon this subsection, such fact shall be included in the report along with the facts relied upon by the person making the report.

C. Any person who makes a report or provides records or information pursuant to subsection A or who testifies in any judicial proceeding arising from such report, records, or information shall be immune from any civil or criminal liability or administrative penalty or sanction on account of such report, records, information, or testimony, unless such person acted in bad faith or with malicious purpose.

D. Any person required to file a report pursuant to this section who fails to do so within 72 hours of his first suspicion of child abuse or neglect shall be fined not more than $500 for the first failure and for any subsequent failures not less than $100 nor more than $1,000.

§ 18.2-403.2. Offenses involving animals - Class 3 misdemeanors.
The following unlawful acts and offenses against animals shall constitute and be punished as a Class 3 misdemeanor:

1. Violation of § 3.2-6511 pertaining to the failure of a shopkeeper or pet dealer to provide adequate care to animals.

2. Violation of § 3.2-6509 pertaining to the misrepresentation of an animal's condition by the shopkeeper or pet dealer.

3. Violation of § 3.2-6504 pertaining to the abandonment of animals.

4. Violation of § 3.2-6510 pertaining to the sale of baby fowl.

5. Violation of clause (iii) of subsection A of § 3.2-6570 pertaining to soring horses.

6. Violation of § 3.2-6519 pertaining to notice of consumer remedies required to be supplied by boarding establishments.

IV. Possession:

Section Introduction: Possession is another crime that does not require the perpetrator to carry out a specific physical action. Under these Virginia statutes a defendant may be charged with a crime for having in his or her possession certain items that have been

deemed illegal. This section also includes a Virginia criminal case regarding the charge of such a crime.

§ 18.2-250. Possession of controlled substances unlawful.

A. It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the Drug Control Act (§ 54.1-3400 et seq.).

Upon the prosecution of a person for a violation of this section, ownership or occupancy of premises or vehicle upon or in which a controlled substance was found shall not create a presumption that such person either knowingly or intentionally possessed such controlled substance.

(a) Any person who violates this section with respect to any controlled substance classified in Schedule I or II of the Drug Control Act shall be guilty of a Class 5 felony.

(b) Any person other than an inmate of a penal institution as defined in § 53.1-1 or in the custody of an employee thereof, who violates this section with respect to a controlled substance classified in Schedule III shall be guilty of a Class 1 misdemeanor.

(1) Violation of this section with respect to a controlled substance classified in Schedule IV shall be punishable as a Class 2 misdemeanor.
(2) Violation of this section with respect to a controlled substance classified in Schedule V shall be punishable as a Class 3 misdemeanor.

(c) Violation of this section with respect to a controlled substance classified in Schedule VI shall be punishable as a Class 4 misdemeanor.

B. The provisions of this section shall not apply to members of state, federal, county, city or town law-enforcement agencies, jail officers, or correctional officers, as defined in § 53.1-1, certified as handlers of dogs trained in the detection of controlled substances when possession of a controlled substance or substances is necessary in the performance of their duties.

§ 18.2-52.1. Possession of infectious biological substances or radiological agents; penalties.

A. Any person who possesses, with the intent thereby to injure another, an infectious biological substance or radiological agent is guilty of a Class 5 felony.

B. Any person who (i) destroys or damages, or attempts to destroy or damage, any facility, equipment or material involved in the sale, manufacturing, storage or distribution of an infectious biological substance or radiological agent, with the intent to injure another by releasing the substance, or (ii) manufactures, sells, gives, distributes or uses an infectious biological substance or radiological agent with the intent to injure another is guilty of a Class 4 felony.

C. Any person who maliciously and intentionally causes any other person bodily injury by means of an infectious biological substance or radiological agent is guilty of a felony and shall be punished by confinement in a state correctional facility for a period of not less than five years nor more than 30 years.

An "infectious biological substance" includes any bacteria, viruses, fungi, protozoa, or rickettsiae capable of causing death or serious bodily injury. This definition shall not include HIV as defined in § 18.2-67.4:1, syphilis or hepatitis B.

A "radiological agent" includes any substance able to release radiation at levels that are capable of causing death or serious bodily injury.

§ 18.2-94. Possession of burglarious tools, etc.
If any person have in his possession any tools, implements or outfit, with intent to commit burglary, robbery or larceny, upon conviction thereof he shall be guilty of a Class 5 felony. The possession of such burglarious tools, implements or outfit by any person other than a licensed dealer, shall be *prima facie* evidence of an intent to commit burglary, robbery or larceny.

***Cason v. Commonwealth,* 32 Va.App. 728, 530 S.E.2d 920 (2000)**

Procedural History: The defendant was charged with statutory burglary, possession of burglary tools, and grand larceny from Dennis Wyand. Prior to trial, appellant moved to suppress the items seized from the moped. He argued that the "search-incident-to-arrest" exception to the warrant requirement did not apply because the evidence did not establish appellant's recent occupancy of the moped. Appellant also argued that he did not consent to the search and that the search exceeded the scope of the original pat-down of appellant for weapons. The prosecutor argued that appellant's possession of the motorcycle helmet and his admission that the moped was his were sufficient to prove he was a recent occupant. He also argued that exigent circumstances justified the search in light of the fact that Officer Matos responded to a shots fired complaint and that appellant fit the description of the shooter.

The trial court denied the motion to suppress, ruling, *inter alia,* that the evidence established appellant was in recent possession of the moped.

Issue(s): Did the trial court erroneously deny the defendant's motion to suppress items seized during a search of his moped? He argues no evidence established that, at the time of his arrest, he had been a "recent occupant" of the moped, as required to justify a warrantless search of the moped incident to arrest.

Facts: On November 11, 1998, Virginia Beach Police Officer William Matos responded to a call of "shots [being] fired" into the air by "a young black male." When he arrived at the scene, he observed "two subjects that matched the description on the call that we received." Appellant was one of those two subjects. When Matos first arrived, he saw appellant "coming around [a small] corner and just standing there" with another person next to a fence. Appellant was holding a motorcycle helmet, but Matos did not see a motorcycle or moped. Officer Matos told

appellant “what was going on and why he was there and that [he] need[ed] to pat [appellant] down for weapons.” Appellant “said, Okay.” Matos patted appellant down and recovered a pocketknife from his pocket. At some point after Matos arrived, a “third subject” came out of an apartment building and joined appellant and his companion.

Thereafter, Matos learned of an outstanding “pick-up order from juvenile court” for appellant. Matos took appellant into custody on the order and placed him in handcuffs. Officer R.J. Michael then arrived on the scene. As Matos and Michael were walking appellant toward Michael's vehicle, appellant said, “Hold on. I need to give my moped to my friend. My moped is in the yard.” After putting appellant in the back seat of Michael's vehicle, Matos asked appellant where the moped was located. Appellant responded that it was in the backyard, “not more than twenty-five, thirty feet from this yard.” Matos also said the distance from where appellant was “in the back seat of the car to the back yard where the moped was brought out from [was] approximately fifty to seventy-five feet.”

Matos “called [to] one of [appellant's] friends and said, Hey, does he have a moped in the back yard? The guy said, Yes,” retrieved the moped and brought it to Officer Matos. When retrieving the moped, appellant's friend went in “the same general direction” from which appellant had come when Matos first saw appellant approaching the scene. Matos did not see appellant with the moped and first saw it when appellant's friend retrieved it and brought it to Matos.

Matos began searching the moped without asking appellant for permission. When Matos had trouble opening the moped's under-seat “compartment,” he asked appellant for help, and appellant told him how to open it. Inside the compartment, Matos found a flashlight, pry bar, and an old coin. Matos said he searched the compartment because the original call to which he responded was for “shots fired.” He testified that for his own safety and the safety of the citizens in the area, he wanted to make sure there was no gun in appellant's moped before he turned it over to appellant's friend. Appellant originally said the moped belonged to him, but when Matos asked him if he was sure he wanted Matos to give the moped to the other person, appellant said, “yeah, that it was partly his [friend's] anyway,” because he and the friend had each paid for one-half the moped.

Holding: Affirmed.

Opinion: ELDER, Judge.

Shannon Detrick Cason (appellant) appeals from his jury trial convictions for one count each of statutory burglary, possession of burglary tools, and grand larceny. We hold that the circumstantial evidence was sufficient to establish appellant's “recent occupancy” of the moped and that, for this reason, the search did not violate the Fourth Amendment. Therefore, we affirm appellant's convictions.

At a hearing on a defendant's motion to suppress, the Commonwealth has the burden of proving that the challenged action did not violate the defendant's constitutional rights. *See* *Simmons v. Commonwealth*, 238 Va. 200, 204, 380 S.E.2d 656, 659 (1989). On appeal, we view the evidence in the light most favorable to the prevailing party, here the Commonwealth, granting to it all

reasonable inferences fairly deducible therefrom. *See* *Commonwealth v. Grimstead*, 12 Va.App. 1066, 1067, 407 S.E.2d 47, 48 (1991). "[W]e are bound by the trial court's findings of historical fact unless 'plainly wrong' or without evidence to support them [,] and we give due weight to the inferences drawn from those facts by resident judges and local law enforcement officers." *McGee v. Commonwealth*, 25 Va.App. 193, 198, 487 S.E.2d 259, 261 (1997) (*en banc)* (citing *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996)). However, we review *de novo* the trial court's application of defined legal standards such as probable cause and reasonable suspicion to the particular facts of the case. *See* *Ornelas*, 517 U.S. at 699, 116 S.Ct. at 1663.

Pursuant to *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), an arresting officer may

> "search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape.... In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary item must, of course, be governed by a like rule."*Glasco v. Commonwealth*, 257 Va. 433, 437, 513 S.E.2d 137, 139 (1999) (quoting *Chimel*, 395 U.S. at 763, 89 S.Ct. at 2040).

In the years following *Chimel*, the Court recognized the difficulty in applying its holding to cases involving the search of a vehicle incident to arrest. *See id.* As a result, in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the Court "established a 'bright-line' rule to govern such searches: 'when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.' " *Glasco*, 257 Va. at 437-38, 513 S.E.2d at 139-40 (quoting *Belton*, 453 U.S. at 460, 101 S.Ct. at 2864 (footnote omitted)). Such a search may encompass "any containers found within the passenger compartment," including "closed or open glove compartments, consoles, or other receptacles." *Belton*, 453 U.S. at 460 & n. 4, 101 S.Ct. at 2864 & n. 4.

The Court also has made clear that the arrestee need not be in the vehicle at the time of the arrest or incident search. *See* *Glasco*, 257 Va. at 438, 513 S.E.2d at 140. Pursuant to *Belton*, " 'officers may conduct valid searches incident to arrest even when the officers have secured the suspects in a squad car and rendered them unable to reach any weapon or destroy evidence.' " *Id.* at 439, 513 S.E.2d at 140 (quoting *United States v. Willis*, 37 F.3d 313, 317 (7th Cir.1994)). As long as the arrestee is the " 'recent occupant' " of the vehicle searched, the search does not violate the Fourth Amendment. *Id.* at 437, 513 S.E.2d at 139 (quoting *Belton*, 453 U.S. at 460, 101 S.Ct. at 2864).

Finally, the Virginia Supreme Court has held that an arrestee is the "recent occupant" of a vehicle even if the police officer does not initiate contact until after the arrestee has left his vehicle and regardless of whether the arrestee was aware of the officer's presence prior to exiting the vehicle. *See id.* at 440-41, 513 S.E.2d at 141-42 (recognizing a split of authority in that "[a] number of jurisdictions have held that an arrestee is an occupant of a vehicle only when the

police officer arrests or at least initiates contact with the defendant while the defendant is inside the automobile"). Therefore, the only prerequisites to the lawful search of an automobile incident to arrest are that the search is contemporaneous with the arrest and the arrestee is a recent occupant of the vehicle. *See* Glasco v. Commonwealth, 26 Va.App. 763, 773, 497 S.E.2d 150, 154 (1998), *aff'd*, 257 Va. 433, 513 S.E.2d 137 (1999).

Appellant contends the evidence is insufficient to establish his "recent occupancy" of the moped because Officer Matos did not see appellant "occupying" or operating the moped and established, at most, his joint ownership of the moped. We disagree.

Any fact which may be proved with direct evidence also may be established with circumstantial evidence. *See* Stultz v. Commonwealth, 6 Va.App. 439, 442-43, 369 S.E.2d 215, 217 (1988). However, when proof of guilt is based on circumstantial evidence, the evidence as a whole must exclude all reasonable hypotheses of innocence flowing from it. *See* Hamilton v. Commonwealth, 16 Va.App. 751, 755, 433 S.E.2d 27, 29 (1993). Here, although Officer Matos did not see appellant on the moped as he approached the scene, the circumstantial evidence established that appellant had been in recent possession of the moped. Matos saw appellant, who was carrying a motorcycle helmet, approach from the location in a nearby yard where appellant later reported the moped was parked. Appellant described the location of the moped, indicated the moped was his and said he needed to give it to his friend, who shared ownership of the moped. Matos then observed one of appellant's friends retrieve the moped from the location where appellant had reported it was parked. The only reasonable hypothesis flowing from this evidence is that appellant not only owned the moped but that he had been in recent possession of it. He was carrying a motorcycle helmet, knew the moped's location, and voiced a need to transfer possession to his friend, the moped's co-owner. In light of these facts, we hold the evidence supported the trial court's finding that appellant was in recent possession, thereby justifying Officer Matos' search of the moped incident to appellant's arrest.

For these reasons, we affirm appellant's convictions.

Critical Thinking Question(s): Assuming that the defendant was a recent occupant of the moped, was there evidence to substantiate that the search occurred "contemporaneous" with the arrest? Obviously, the court found that it was, but based upon what premises? Why was there a need to search the moped when defendant was not on it when he was arrested, it was not in sight of the officers, and the defendant did not have physical access to it while in custody?

Essay Questions:

1. Identify the two types of crime and explain the elements of each that give rise to the general principles of liability.

2. Describe the various forms of possession and explain when they can qualify as *actus reus*.

3. Explain when and why omissions can qualify as *actus reus* and describe the two forms that criminal omissions can take.