Chapter Eleven: Criminal Homicide

Chapter Overview:

Chapter eleven discusses the fourth category of crime against the person, criminal homicide. This is considered to be the most serious of all criminal offenses. There are four different types of homicide: justifiable homicide, excusable homicide, murder, and manslaughter. Criminal homicide is divided into murder and manslaughter, with the distinction being the presence or lack of malice. Murder can include a broad group of crimes, such as depraved heart murders, which is a killing caused by an extreme level of negligence on the part of perpetrator, and felony murder, which is killing that takes place during the course of another felony crime. There are also separate distinctions within the terms murder and manslaughter that serve to identify different levels of crime. In order of greatest to least severity, the different types of homicide in Virginia are: capital murder, first degree murder, felony murder, second degree murder, felony homicide, voluntary manslaughter, and involuntary manslaughter.

This chapter also addresses important questions such as when human life begins and ends. Due the limits of medical science, common law utilized the rule that a person could not be criminally responsible for the murder of a fetus unless the child is born alive. At this time doctors could not determine whether a fetus was alive inside the womb immediately prior to being attacked. As this is no longer the case, however, this rule has largely been abandoned in favor of a rule which sites the viability of a fetus as the point at which life begins for the purposes of homicide. The answer to the question of when life ends has also changed due to advances in science. Whereas previous definitions of death required a complete stop of circulation and other bodily functions such as respiration, medical advances came to allow some brain dead individuals to maintain these functions through the use of machines. To simplify things, most states now use a brain death test to determine the end of life.

Corporations can also be held responsible for the death of an individual by a crime called corporate murder. A car company, for example, may be held liable for the death of a person riding in a card which the company can be shown to have known was unsafe.

In this chapter of the supplement, you will see how Virginia's laws are unique in these various areas and how Virginia defines and applies the different elements of these crimes.

I. Murder

Section Introduction: Murder is the most serious form of criminal homicide and it is typically divided into first and second degree. In Virginia, however, courts utilize three degrees of murder, capital, first, and second. Below you will find the statutes on all three, along with case law exhibiting how these statutes are applied.

Virginia Code § 18.2-31. Capital murder defined; punishment.
The following offenses shall constitute capital murder, punishable as a Class 1 felony:

1. The willful, deliberate, and premeditated killing of any person in the commission of

abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit or with the intent to defile the victim of such abduction;

2. The willful, deliberate, and premeditated killing of any person by another for hire;

3. The willful, deliberate, and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof;

4. The willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery;

5. The willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration;

6. The willful, deliberate, and premeditated killing of a law-enforcement officer as defined in § 9.1-101 or any law-enforcement officer of another state or the United States having the power to arrest for a felony under the laws of such state or the United States, when such killing is for the purpose of interfering with the performance of his official duties;

7. The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction;

8. The willful, deliberate, and premeditated killing of more than one person within a three-year period;

9. The willful, deliberate, and premeditated killing of any person in the commission of or attempted commission of a violation of § 18.2-248, involving a Schedule I or II controlled substance, when such killing is for the purpose of furthering the commission or attempted commission of such violation;

10. The willful, deliberate, and premeditated killing of any person by another pursuant to the direction or order of one who is engaged in a continuing criminal enterprise as defined in subsection I of § 18.2-248;

11. The willful, deliberate, and premeditated killing of a pregnant woman by one who knows that the woman is pregnant and has the intent to cause the involuntary termination of the woman's pregnancy without a live birth;

12. The willful, deliberate, and premeditated killing of a person under the age of fourteen by a person age twenty-one or older;

13. The willful, deliberate, and premeditated killing of any person by another in the commission of or attempted commission of an act of terrorism as defined in § 18.2-46.4;

14. The willful, deliberate, and premeditated killing of a justice of the Supreme Court, a judge of the Court of Appeals, a judge of a circuit court or district court, a retired judge sitting by designation or under temporary recall, or a substitute judge appointed under § 16.1-69.9:1 when the killing is for the purpose of interfering with his official duties as a judge; and

15. The willful, deliberate, and premeditated killing of any witness in a criminal case after a subpoena has been issued for such witness by the court, the clerk, or an attorney, when the killing is for the purpose of interfering with the person's duties in such case.

Virginia Code § 18.2-32. First and second degree murder defined; punishment.
Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary or abduction, except as provided in § 18.2-31, is murder of the first degree, punishable as a Class 2 felony.

All murder other than capital murder and murder in the first degree is murder of the second degree and is punishable by confinement in a state correctional facility for not less than five nor more than forty years.

Virginia Code § 18.2-33. Felony homicide defined; punishment.
The killing of one accidentally, contrary to the intention 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.

Essex v. Commonwealth, **228 Va. 273, 322 S.E.2d 216 (1984)**

Procedural History: A jury convicted Warren Wesley Essex of one count of driving under the influence of alcohol (defined as a misdemeanor in Code § 18.2-266) and three counts of second-degree murder for deaths resulting from injuries sustained in an automobile collision. By final order entered November 22, 1982, the trial court entered judgment on the four verdicts.

Issue(s): Does driving under the influence of alcohol, resulting in a fatal collision, supply the requisite element of implied malice to support a conviction of second-degree murder?

Facts: On November 20, 1981, Essex entered Route 28, a two-lane, hard-surfaced highway, north of the intersection and headed south. Linda Bates, who was traveling south on Route 28, testified that the Duster entered the highway behind her, passed her across a solid center line, almost struck her car as it returned to the right lane, and ran onto the shoulder of the road, nearly striking a mailbox before it re-entered the southbound lane. She said that the Duster passed another vehicle across a solid line and returned to the right lane just in time to avoid a northbound pickup truck. Later, it crossed double solid lines on a curve to pass yet another vehicle. For a distance of six miles, Mrs. Bates watched the car as it swerved from one lane to the other and off the edge of the hard surface.

Although there were “speed bumps” in the pavement north of the intersection, the Duster ran through a red traffic signal at a speed Mrs. Bates estimated at 55 m.p.h. A tractor-trailer truck moving through the intersection on Route 17 “nearly hit the back end of the Plymouth.” A mile and a half south of the intersection, the Duster collided with a northbound pickup truck driven by John Gouldthorpe.

Gouldthorpe testified that “[t]he last thing I remember was seeing four headlights, one set in one lane and one in the other.” State Trooper Donald Johnson, the investigating officer, testified that when he asked Essex what had happened, the defendant replied, “I was in his lane because my steering had gone ... I had been having trouble with it all night.” An expert mechanic who inspected the Duster at the officer's request testified that “there was nothing loose” and “no failures” in any part of the steering linkage, and that the only damage he found was a break in the steering column which he said was “due to the impact where the front end had been shoved back about a foot.”

Debra Gouldthorpe and Nora Neale, passengers in the pickup, and James Carter, a passenger in the defendant's car, died from injuries sustained in the collision.

Essex was treated at Fauquier Hospital for “a large laceration on his knee” and “a small laceration of the tongue.” Dr. Steven Von Elton, the attending physician in the emergency room who examined Essex about 12:30 a.m., testified that Essex was in a “stuperous condition” and that although “the lady next to him was screaming very intensely ... he was totally unaware of that.” Because he could “very easily ... smell the odor of alcohol ... at that bedside,” Dr. Elton ordered a blood alcohol content test. The test, conducted about two and a half hours after the collision, disclosed an alcohol content of .144 percent. Over the defendant's objection, the trial court admitted testimonial and documentary evidence concerning the results of the test. The defendant assigns error to that ruling.

As further proof of intoxication, the Commonwealth introduced a number of lay witnesses who had an opportunity after the wreck to observe Essex. Louise Bender, one of the first to arrive at the scene, testified that she smelled “some liquor on Essex” and “he was confused.” John Mills, a member of the first rescue squad on the scene, found Essex “a little bit disoriented.” Mills detected “an odor of alcohol” while he was attending one of the women passengers, but he could not say whether it came from her or the defendant standing nearby. Donald Mason, another member of the rescue squad, found no “indication of alcohol on her whatsoever.” Melvin Jones, who rode in the back of the rescue vehicle which transported Essex and the women to the hospital, testified that he “did not smell any [alcohol] on her” but that “there was a strong odor of alcohol on him,” his speech “was slurred,” and he was not making “very much sense.” Trooper Johnson said that when he interrogated the defendant at the hospital the odor of alcohol “was easily smelled” and Essex “had a slight glaze to his eyes.” Essex told the officer that “the last time he had anything to drink ... was somewhere around 5 o'clock that night” when he consumed “about three beers.”
Holding: Reversed and remanded.

Opinion: RUSSELL, Justice.

In this case of first impression, we must determine whether driving under the influence of alcohol, resulting in a fatal collision, can supply the requisite element of implied malice to support a conviction of second-degree murder.

Where death proximately results from the want of ordinary care as practiced by a reasonably prudent person, the causative negligence is actionable as a tort. If the negligence is so gross, wanton, and culpable as to show a reckless disregard of human life, a killing resulting therefrom, although unintentional, is both a tort and a crime, punishable as involuntary manslaughter. *King v. Commonwealth,* 217 Va. 601, 607, 231 S.E.2d 312, 316 (1977).

Malice, a requisite element for murder of any kind, is unnecessary in manslaughter cases and is the touchstone by which murder and manslaughter cases are distinguished. *Moxley v. Commonwealth,* 195 Va. 151, 157, 77 S.E.2d 389, 393 (1953). Malice may be either express or implied by conduct. *Coleman v. Commonwealth,* 184 Va. 197, 201, 35 S.E.2d 96, 97 (1945). Whether the defendant acted with malice is a question for the trier of fact. "Express malice is evidenced when 'one person kills another with a sedate, deliberate mind, and formed design.' .... Implied malice exists when any *purposeful, cruel act* is committed by one individual against another without any, or without great, provocation; ...." *Pugh v. Commonwealth,* 223 Va. 663, 668, 292 S.E.2d 339, 341 (1982) (emphasis added) (citation omitted).

The authorities are replete with definitions of malice, but a common theme running through them is a requirement that a wrongful act be done "willfully or purposefully." *Williamson v. Commonwealth,* 180 Va. 277, 280, 23 S.E.2d 240, 241 (1942). This requirement of volitional action is inconsistent with inadvertence. Thus, if a killing results from negligence, however gross or culpable, and the killing is contrary to the defendant's intention, malice cannot be implied. In order to elevate the crime to second-degree murder, the defendant must be shown to have willfully or purposefully, rather than negligently, embarked upon a course of wrongful conduct likely to cause death or great bodily harm.

A motor vehicle, wrongfully used, can be a weapon as deadly as a gun or a knife. Circumstances can be imagined in which a killing caused by the wrongful use of a motor vehicle might fit any one of the five categories of homicide known to our law. We recognized in *Harrison v. Commonwealth,* 183 Va. 394, 401, 32 S.E.2d 136, 139-40 (1944), that the premeditated use of an automobile to kill can be first-degree murder. If such an act fits within the statutory categories of Code § 18.2-31, such a killing could be capital murder. A killing in sudden heat of passion, upon reasonable provocation, by the use of a motor vehicle, could be voluntary manslaughter. Killings caused by the grossly negligent operation of motor vehicles, showing a reckless disregard of human life, have frequently resulted in convictions of involuntary manslaughter.

We have not, heretofore, had occasion to review a second-degree murder conviction based upon the use of an automobile, but the governing principles are the same as those which apply to any other kind of second-degree murder: the victim must be shown to have died as a result of the defendant's conduct, and the defendant's conduct must be shown to be malicious. In the absence of express malice, this element may only be implied from conduct likely to cause death or great bodily harm, willfully or purposefully undertaken. Thus, for example, one who deliberately drives a car into a crowd of people at a high speed, not intending to kill or injury any particular

person, but rather seeking the perverse thrill of terrifying them and causing them to scatter, might be convicted of second-degree murder if death results. One who accomplishes the same result inadvertently, because of grossly negligent driving, causing him to lose control of his car, could be convicted only of involuntary manslaughter. In the first case the act was volitional; in the second it was inadvertent, however reckless and irresponsible.

What effect has the defendant's degree of intoxication, if any, upon the fact-finder's determination? The defendant may negate the specific intent requisite for capital or first-degree murder by showing that he was so greatly intoxicated as to be incapable of deliberation or premeditation, *Giarratano v. Commonwealth,* 220 Va. 1064, 266 S.E.2d 94 (1980), but voluntary intoxication is no defense to the lesser degrees of homicide, or to any other crime. *Chittum v. Commonwealth,* 211 Va. 12, 17, 174 S.E.2d 779, 783 (1970). Particularly, his state of intoxication, however great, will not repel an inference of malice, implied by the circumstances surrounding his conduct. *Id.*

In some jurisdictions, drunken driving is held to be *mala in se,* and where death is the proximate result of any degree of negligence attributable to intoxication, malice may be inferred by the fact-finder. *See e.g. Shiflet v. State,* 216 Tenn. 365, 392 S.W.2d 676 (1965). We do not follow that view because of our distinction between volitional and inadvertent conduct. *Cf. Hamilton v. Com.,* 560 S.W.2d 539 (Ky.1977) (statute penalizing as murder "wanton" conduct causing death, supports murder conviction for unintentional homicide). Other states have enacted vehicular homicide statutes, which create a statutory felony, more serious than manslaughter, covering deaths caused by the negligence of drunken drivers. Ga.Code Ann. § 40-6-393 (Supp.1984); N.C.Gen.Stat. § 20-141.4 (1983). Our General Assembly has not seen fit to adopt such legislation.

Indeed, Code § 18.2-33, enacted in 1975, provides: "The killing of one accidentally, contrary to the intention 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 as a Class 3 felony." We think it significant that the General Assembly elected not to expand the ambit of this statute so as to include killings occurring in the commission of drunken driving, a misdemeanor.

We therefore apply the common-law principles mentioned above and hold that the defendant's degree of intoxication, however great, neither enhances nor impairs the set of facts relied upon to establish implied malice. In making the determination whether malice exists, the fact-finder must be guided by the quality of the defendant's conduct, its likelihood of causing death or great bodily harm, and whether it was volitional or inadvertent; not by the defendant's blood-alcohol level.

In *Baker v. Marcus,* 201 Va. 905, 114 S.E.2d 617 (1960), we considered, in a civil context, whether malice could be inferred from drunken driving so as to support an award of punitive damages. There we said: "One who knowingly drives his automobile on the highway under the influence of intoxicants, in violation of statute is, of course, negligent. It is a wrong, reckless and unlawful thing to do; but it is not necessarily a malicious act." *Id.* at 910, 114 S.E.2d at 621. A sober driver may be eminently malicious, while a drunken driver may be merely reckless.

Even though the fact of the defendant's intoxication, and its degree, are irrelevant to the determination whether his conduct was volitional or inadvertent, and thus whether it was malicious or merely negligent, the question remains whether such evidence is relevant for any other purpose. Evidence which tends to establish the probability or improbability of any fact in issue is relevant. *See Epperly v. Commonwealth,* 224 Va. 214, 230, 294 S.E.2d 882, 891 (1982). Drunken driving is not only unlawful in itself, but it tends to make the defendant's dangerous conduct more dangerous. A sober but reckless driver may rely on his skill and prompt reflexes to extricate himself from any emergency created by his reckless driving. A drunken driver has dulled his perceptions, blunted his skill, and slowed his reflexes in advance. The same reckless driving is more dangerous at his hands than it would be if he was sober, and his conduct is therefore more culpable. Intoxication, therefore, is relevant as an aggravating factor, increasing with its degree, bearing upon the relative culpability of the defendant's conduct, even though it is irrelevant to the determination of malice.

Intoxication is, accordingly, relevant to a determination of the degree of the defendant's negligence: whether ordinary, gross, or wanton. *See Grifin v. Shively,* 227 Va. 317, 315 S.E.2d 210 (1984). It may serve to elevate the defendant's conduct to the level of "negligence so gross, wanton, and culpable as to show a reckless disregard of human life," a requisite element for a conviction of involuntary manslaughter. *King v. Commonwealth,* 217 Va. at 607, 231 S.E.2d at 316.

The defendant's degree of intoxication is also relevant to a determination of the appropriate quantum of punishment. In Virginia, the fact-finder, whether judge or jury, has the duty, if it convicts the defendant, of fixing his punishment, usually within wide limits. The principal criterion for the discharge of the responsibility must be the relative seriousness of the offense, within its grade. All aggravating and mitigating factors shown by the evidence must be taken into account. Voluntary intoxication, in the case of a driver, is an aggravating factor properly considered for this purpose.

Applying these principles to the record before us, we find the evidence, viewed in the light most favorable to the Commonwealth, insufficient to support a finding of implied malice. The defendant was intoxicated and guilty of an appalling degree of reckless driving. His multiple tortious acts conjoined as proximate causes of three tragic deaths, *see King v. Commonwealth,* 217 Va. at 607-08, 231 S.E.2d at 317 (dissenting opinion of Poff, J.), and clearly met the *King* standard for proof of involuntary manslaughter: an "accidental killing which, although unintended, is the proximate result of negligence so gross, wanton, and culpable as to show a reckless disregard of human life." *Id.* (majority opinion) at 607, 231 S.E.2d at 316. The Commonwealth, however, has the burden of proving malice beyond a reasonable doubt. The jury could only speculate, upon this evidence, whether the defendant embarked upon his ill-fated course of conduct willfully and with a malicious purpose. No facts were proved from which such a purpose can be inferred. The distinction is close but crucial.

> [T]he intent to do an act in wanton and willful disregard of the *obvious likelihood* of causing death or great bodily injury is a malicious intent .... [A] motorist who attempts to pass another car on a "blind curve" may be acting with such criminal

> negligence that if he causes the death of another in a resulting traffic accident he will be guilty of manslaughter. And such a motorist may be creating fully as great a human hazard as one who shoots into a house or train "just for kicks," who is guilty of murder if loss of life results. The difference is that in the act of the shooter there is an element of *viciousness* - an extreme indifference to the value of human life - that is not found in the act of the motorist. *Blackwell v. State*, 34 Md.App. 547, 553-54, 369 A.2d 153, 158 (1977) (quoting Perkins, Criminal Law § 1 p. 37 (2d ed. 1969)) (emphasis added).

Because the evidence was insufficient to support a finding of malice, it was error to instruct the jury that it might find the defendant guilty of second-degree murder.

For the foregoing reasons, the convictions of second-degree murder will be vacated and the three homicide cases remanded for further proceedings, consistent with this opinion, wherein the Commonwealth may, if it be so advised, retry the defendant for offenses no greater than involuntary manslaughter. The conviction of driving under the influence of alcohol will also be reversed and remanded for further proceedings consistent with this opinion.

Dissent: POFF, Justice, concurring in part, dissenting in part.

I agree that there must be a new trial of all counts charged in the indictment. I disagree, however, with the majority's view of the law of criminal homicide.

Negligence resulting in an accidental death may be a tort or a crime, or both. The character of such negligence is the determinative factor. Ordinary negligence, i.e., the want of ordinary care as practiced by a reasonably prudent person, is actionable as a tort. Negligence so gross as to manifest depravity of mind and a callous disregard for human safety is criminal negligence, and if death results, constitutes criminal homicide. Unlike violations of some statutory rules of the road, the offense of driving under the influence of intoxicants constitutes criminal negligence. *See King v. Commonwealth*, 217 Va. 601, 606, 231 S.E.2d 312, 316 (1977), *citing Beck v. Commonwealth*, 216 Va. 1, 216 S.E.2d 8 (1975); *Albert v. Commonwealth*, 181 Va. 894, 902, 27 S.E.2d 177, 180 (1943).

In Virginia, criminal homicide is divided into two major categories, murder and manslaughter. Malice is the element which distinguishes the two. *Moxley v. Commonwealth*, 195 Va. 151, 157, 77 S.E.2d 389, 393 (1953). Malice may be either express or implied by conduct, *Coleman v. Commonwealth*, 184 Va. 197, 201, 35 S.E.2d 96, 97 (1945), and "whether a defendant acted with malice is generally a question to be decided by the trier of fact," *Pugh v. Commonwealth, 223* Va. 663, 667, 292 S.E.2d 339, 341 (1982).

The level of culpability of criminal negligence determines the grade of the offense. Between the class of deliberate deeds committed with premeditated intent to kill, which is the essence of murder of the first degree, and the type of negligence inherent in the definition of involuntary manslaughter there is a species of reckless behavior so willful and wanton, so heedless of foreseeable consequences, and so indifferent to the value of human life that it supplies the element of malice which distinguishes murder of the second degree from manslaughter. More

than a century and a half ago, this court observed that a killing caused by "criminal carelessness" could constitute "murder in the second degree". *Whiteford v. Commonwealth*, 27 Va. (6 Rand.) 721, 724-25 (1828).

While, as the majority notes, we have never, until now, had occasion to review a second-degree murder conviction based upon malice inferred from the negligent operation of a motor vehicle, we have commented upon the question in rather unmistakable language.

When men, while drunk or sober, drive automobiles along highways and through crowded streets recklessly, the killing of human beings is a natural and probable result to be anticipated. When a homicide follows as a consequence of such conduct, a criminal intent is imputed to the offender and he may be punished for his crime. The precise grade of such a homicide, whether murder or manslaughter, depends upon the facts of the particular case. *Goodman v. Commonwealth*, 153 Va. 943, 952, 151 S.E. 168, 171 (1930).

I acknowledge that the language in *Goodman* is *dicta*. But it is in harmony with the common law in most jurisdictions. The great weight of authority holds that a motorist's negligence may be so gross and culpable as to imply a malicious intent to kill and that, in determining whether the homicide is manslaughter or murder, intoxication is an aggravating factor. *See* Annot., 21 A.L.R.3d 116 (1968).

The vehicular homicide statutes adopted by some states abandon the definitional differences the common law makes between manslaughter and murder and define homicide resulting from the criminal negligence of the driver of a motor vehicle as a unique offense, graded according to the nature and extent of the driver's negligence. *See Trafic Laws Annotated §* 11-903. *See also* Model Penal Code § 210.4, at 88. Virginia has no such statute, and as defined by the majority opinion, vehicular homicide is hereafter relegated to the lowest grade of criminal homicide. The degree of culpability is immaterial.

Reaffirming what we said in *Whiteford* and *Goodman* and adopting what appears to be the judicial consensus, I would hold that where the evidence is sufficient to show that the driver of a motor vehicle, whether drunk or sober, is guilty of criminal negligence which is the sole proximate cause of a homicide, such evidence raises a question of fact whether the offense is manslaughter or murder of the second degree. Unless the finding made by the trier of fact is plainly wrong or without evidence to support it, the finding should be upheld by this Court.

I am of opinion that the evidence of record in this case is fully sufficient to justify the jury's finding that the defendant's negligence was the sole proximate cause of three deaths and that such negligence was so willful and wanton, so heedless of foreseeable consequences, and so indifferent to the value of human life as to imply the element of malice charged in the homicide counts of the indictment.

Critical Thinking Question(s): Do you agree with the majority or the concurring/dissenting opinion? What are the bases upon which you agree with one opinion over the other? Should a defendant be "rewarded" for being more heavily intoxicated – thus negating specific intent and malice – as opposed to a driver who is "technically" over the limit but still in control of his

mental faculties? In the present case, would it make a difference if the defendant had prior convictions for driving under the influence and homicide by vehicle? In your impression, would it make a difference in the court's decision if the defendant continued to drive from the accident and caused a second fatal accident? Why or why not?

II. Manslaughter

Section Introduction: Manslaughter is the lesser of the two forms of criminal homicide, typically divided into voluntary and involuntary. This is the case in Virginia. While § 18.2-35 makes voluntary manslaughter a class 5 felony, it does not define the crime. Below, you will find the statute for involuntary manslaughter, along with a Virginia case that applies it, *McWhirt v. Commonwealth,* and provides a definition. .

Virginia Code § 18.2-36.1. Certain conduct punishable as involuntary manslaughter.
A. Any person who, as a result of driving under the influence in violation of clause (ii), (iii), or (iv) of § 18.2-266 or any local ordinance substantially similar thereto unintentionally causes the death of another person, shall be guilty of involuntary manslaughter.

B. If, in addition, the conduct of the defendant was so gross, wanton and culpable as to show a reckless disregard for human life, he shall be guilty of aggravated involuntary manslaughter, a felony punishable by a term of imprisonment of not less than one nor more than 20 years, one year of which shall be a mandatory minimum term of imprisonment.

C. The provisions of this section shall not preclude prosecution under any other homicide statute. This section shall not preclude any other revocation or suspension required by law. The driver's license of any person convicted under this section shall be revoked pursuant to subsection B of § 46.2-391.

McWhirt v. Commonwealth, 3 Gratt. 594 (1846)

Procedural History: This is an application for a writ of error, to a judgment of the Circuit Court of *Spottsylvania,* overruling a motion for a new trial, made in that Court on behalf of the prisoner, who had been convicted of murder in the second degree; and whose term of imprisonment in the penitentiary was fixed by the verdict to fifteen years. The motion was made partly because of certain alleged irregularities in the proceedings of the Circuit Court, which, as is alleged, vacated the finding of the jury; and partly upon the merits.

Issue(s): Was the homicide in question murder or manslaughter?

Facts: The alleged provocation is that the deceased had whipped the prisoner's son, travelling inoffensively, in his father's business, upon the turnpike road. Information of this whipping was communicated soon after it happened, by the son to the father, about sundown or dusk of the same day. The prisoner slept a night upon this provocation. He, the next morning, resumed his work about getting timber for building *Magee's* house. He discoursed about his son's injuries, expressing his desire to have "recompense." Having finished his labours for the day, he was returning home in the evening, in company with *Magee, Ferguson, Powell* and *Bowling.* When

on his way out of the woods, where he had been working, he reached the turnpike road, the deceased was seen approaching, driving his wagon along the same road; and he was pointed out to the prisoner as the person who had whipped his son. There seems, then, to have been some deliberation between the prisoner and others of his party, about sending for the son. The prisoner, leaving at that time the deceased behind him, proceeded with *Ferguson* to the prisoner's house, which was a half mile further up the road; and situated on a hill, which they had to ascend. The deceased followed on, driving his wagon, and stopped at a branch, with the other wagons in company, to water his team. He then drove along up the hill, preceded by *Powell's* wagon, which as driven by *Magee;* and when he arrived opposite the prisoner's house, *Powell* stopped his own wagon, and that also which was driven by the deceased; or rather by the brother of the deceased; for the deceased was walking by the side of the wagon. The son, as it seems, not being at home, his presence for the purpose of identifying the deceased as the person who had whipped him, was dispensed with; and *Powell*, thereupon, proceeded to make the investigation by which this identity could be ascertained.

Having asked the deceased if he was the person who had whipped the boy, he was answered by a faint denial, and contrite apology. When it had been ascertained, at least to the satisfaction of the prisoners, that the deceased was the person, this prisoner was prompted by *Ferguson* to "give it to him." Thereupon, this prisoner advanced up to the deceased, challenging him to a fight, and threatening him with a whipping any how. He attacked him with his fists, and knocked him to the ground. In that condition, he continued, for a space as it would seem of five minutes, to beat with his fists and stamp with his feet, the prostrate, unresisting, supplicant, begging his assailant to desist, and invoking the Lord. He broke the nose, and inflicted on the face, the neck, the head, the chest, the belly, and even the privates of the deceased, injuries and bruises, exhibiting the marks of the most outrageous violence. At the call of some of the party present to stop, the prisoner then desisted from further violence: but threatened to renew the attack, when the deceased complained that he had been beaten for nothing. That night the deceased died in consequence of the injuries received by him from this beating.

Holding: Judgment sustained; Writ of Error Denied.

Opinion: LOMAX, Justice.

The third exception, (which is the first upon the merits,) to the judgment of the Circuit Court overruling the motion for a new trial, is, that the verdict was contrary to law and evidence; and this presents for consideration, whether the homicide in question was murder or manslaughter.

Murder is the unlawful killing of any person with malice aforethought: and malice is either *express;* as where one person kills another with a sedate, deliberate mind, and formed design; such formed design being evidenced by external circumstances, discovering the inward intention; as by lying in wait, antecedent menaces, former grudges, and concerted schemes. 4 Bl. Com. 198. And so, where, upon a sudden provocation, one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice: that is, by an express evil design, the genuine sense of *malitia.* Id. 199. Or malice is *implied* by law from any deliberate, cruel act, committed by one person against another,

however sudden: as where a man kills another suddenly, without any, or without a considerable provocation, the law implies malice: for no person, unless of abandoned heart, would be guilty of such an act upon a slight, or no apparent cause. 1 Russ. Cr. L. 421-2; 4 Bl. Com. 200-1.

Manslaughter is the unlawful killing of another, without malice either express or implied; which may be, either voluntarily, upon a sudden heat, or involuntarily in the commission of some unlawful act. 4 Bl. Com. 191. The difference between the crimes of murder and manslaughter, consists in this, that manslaughter, (where voluntary,) arises from the sudden heat of the passions, murder from the wickedness of the heart. Malice aforethought is the grand criterion which distinguishes murder from other killings. 4 Bl. Com. 198. All homicide, is in presumption of law, malicious; and of course amounts to murder, unless justified, excused or alleviated; and it is incumbent upon the prisoner to make out, to the satisfaction of the Court and jury, the circumstances of justification, excuse and alleviation. 4 Bl. Com. 201; *Honeyman's Case,* Add. 148; *Bell's Case,* Id. 162; *M'Fall's Case,* Id. *257; Lewis' Case,* Id. 282. This presumption of malice, which makes the homicide to be murder, may be repelled by the accused, where the act, though intentional of death, or great bodily harm, was not the result of a cool, deliberate judgment, and previous malignity of heart; but is imputable to human infirmity alone, when death ensues from sudden transport of passion or heat of blood, if upon reasonable provocation, and without malice: for on such proofs, the homicide will be manslaughter. 1 East's Cr. L. 232. Nevertheless, whilst the law makes allowances for the provocation, if reasonable, yet if the provocation be not such, or if the blood has had reasonable time or opportunity to cool, or if there be evidence of express malice, it will be murder. Fost. Cr. L. 296.

In no instance, it has been observed, can the party killing alleviate his case by referring to a previous provocation, if it appear by any means that he acted upon express malice. 1 East's Cr. L. 232. In the case of the most grievous provocation to which a man can be exposed, that of finding another in the act of adultery with the wife of the slayer, though it would be but manslaughter if he should kill the adulterer in the first transport of passion, yet if he kill him deliberately and upon revenge, after the fact and sufficient cooling time, it would undoubtedly be murder. 1 East's Cr. L. 234, 251; Fost. Cr. L. 296. For let it be observed, (says *Foster,)* that in all possible cases, deliberate homicide, upon a principle of revenge, is murder. No man under the protection of the law, is to be the avenger of his own wrongs. If they be of a nature for which the laws of society will give him an adequate remedy, thither he ought to resort: but be they of what nature soever, he ought to bear his lot with patience, and remember that vengeance belongs to the Most High. And, with respect to the interval of time which shall be allowed for passion to subside, it has been observed, that it is much more easy to lay down rules for determining what cases are without the limits, than how far exactly those limits extend. 1 East's Cr. L. 251. In cases of this kind, the immediate object of enquiry is, whether the suspension of reason arising from sudden passion, continued from the time of provocation received to the very instant of the mortal stroke given: for if from any circumstances whatever, it appear, that the party reflected, deliberated, or cooled any time before the fatal stroke given; or if in legal presumption, there was time or opportunity for cooling, the killing will amount to murder; as being attributable to malice and revenge, rather than to human frailty. *Oneby's Case,* 2 Ld. Raym. R. 1489; 1 Russ. Cr. L. 442-3; *Fisher's Case,* 34 Eng. C. L. R. 345.
Again, the law, in connection with the provocation, will take into consideration also the nature, the manner, the means of the retaliation for the provocation which has been given. 1 East's Cr. L.

234. And in this connection, if the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in the manner or continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal, diabolical malignity, than of human frailty. It is one of the true symptoms of what the law denominates malice; and, therefore, the crime will amount to murder, notwithstanding such provocation. Barbarity, Lord *Holt* has said, will often make malice.

The foregoing principles seem decisive of the character of the homicide in question; and plainly to rank it in the class of murder, and not of manslaughter.

If the provocation in the first impulse of feeling in detecting an adulterer with the slayer's wife, will repel the presumption of malice, that provocation becomes itself express malice and forethought, if the first impulse of feeling has had time and opportunity to subside. Fost. 296; 1 East's P. C. 234-251. If, however, in this case, we are to date the provocation, as the counsel insisted, not from the whipping of the son and the time that whipping came to the knowledge of the father, but even from the time that the deceased first came in view of the prisoner, it does not appear that he was kindled at the sight of the deceased, into any extraordinary manifestation of passion. If any great excitement had inflamed him, was there not ample cooling time allowed him, during his walk of half a mile, tardily ascending a hill for a considerable portion of the distance, and whilst the deceased was watering his team at the branch. We need not advert, moreover, to the circumstances of deliberation, if not of contrivance, which gathered around the closing scene of these transactions.

It was strongly contended, that chastisement and not death of the deceased was clearly intended. Malice aforethought may consist in the intention to do great bodily harm, as well as to kill: and whether the intention be the one or the other, and death happen, the law will not surrender its general presumption, that the homicide is murder. No one can review these transactions without seeing most clearly that great bodily harm at least was intended to be perpetrated upon the deceased.
Much stress was also laid upon the circumstance that the prisoner might have resorted to deadly weapons which were at hand, if he had designed any fatal injury to the deceased; and that instead of employing these, he had only availed himself of the weapons which nature had furnished him with. And it was moreover insisted, that no case had been found deciding the homicide to be murder, when, under such circumstances, the fatal attack had been made only with the fists, and the death of the party beaten was not immediately produced under the infliction of the violence; but followed some time afterwards. The fists may not, indeed, be regarded generally, as a deadly weapon; but they become most deadly, by blows often repeated, long continued, and applied to vital and delicate parts of the body of a defenceless, unresisting man, on the ground. And if to the injury they are capable of producing, when wielded by a strong man, you add all the accompanying injuries which the more powerful agency of stamping the party on the ground may inflict, there might be strong ground to infer the intention not merely to cause great bodily harm, but even death itself.

Without dwelling particularly upon the circumstances, and the degree of the violence under which the deceased suffered, it cannot be regarded otherwise than as excessive, cruel, greatly exceeding the widest boundaries of mere chastisement, outrageous in its nature, as well in the

manner as the continuance of it, and beyond all provocation to the offence. And we may apply to it with great propriety, the saying quoted above of Lord *Holt,* "that barbarity will often make malice." We cannot say, therefore, that the circumstance, that there was no use of any extraneous weapons, repels in this case the legal presumption of malice, or the legal presumption that this homicide was murder. We are not warranted to pronounce such a judgment in the face of a statute which makes "willful, malicious and excessive beating," by whatever mode of beating, one of the enumerated modes of perpetrating murder in the first degree: and, therefore, this Court is unanimous that the homicide in question was murder, and not manslaughter. Moreover, the jury, who have convicted the prisoner, were the proper tribunal to weigh the facts and circumstances, as well as the testimony in the case. And in conformity with the principles in regard to granting new trials, settled in *M'Cune's Case,* 2 Rob. R. 771, and *Hill's Case,* 2 Gratt. 232, this Court cannot, even if this Court had differed from the finding of the jury, undertake to set the verdict aside, because the jury decided against the evidence or without evidence.

The foregoing are all the grounds upon which the prisoner, *M'Whirt,* has asked for a new trial. These grounds having been unanimously overruled as to him, are also unanimously overruled as to *Ferguson,* whose case in the foregoing particulars, the Court regards as substantially the same in point of guilt with that of *M'Whirt,* with no other real discrimination than that of principal in the first and second degree in the same felony.

The judgment of the Circuit Court is unanimously sustained. Writ of error denied.

Critical Thinking Question(s): Had the defendant observed the beating of his son and acted upon it by immediately beating the victim to death, would he have been convicted of murder or manslaughter, or acquitted? Explain your answer. Would it make a difference if the defendant had just learned of the beating of his son when he came upon the victim? Why or why not? Would the outcome be any different if the defendant had learned that his young daughter was assaulted by the victim (i.e., the offense was more serious and the victim more defenseless)?

III. Other Relevant Statutes

Section Introduction: Following are two Virginia statutes that are also relevant to the issue of homicide. The first, § 54.1-2972, defines the point in time at which a person is deemed legally dead. Virginia addresses the issue of when life begins through § 18.2-32.2. In this section of the code, the premeditated killing of a fetus is criminalized as a Class 2 felony. The case that follows illuminates the issue further.

Virginia Code § 54.1-2972. When person deemed medically and legally dead; determination of death; nurses' or physician assistants' authority to pronounce death under certain circumstances.

A. A person shall be medically and legally dead if:

1. In the opinion of a physician duly authorized to practice medicine in this Commonwealth, based on the ordinary standards of medical practice, there is the absence of spontaneous respiratory and spontaneous cardiac functions and, because of the disease or condition which directly or indirectly caused these functions to cease, or

because of the passage of time since these functions ceased, attempts at resuscitation would not, in the opinion of such physician, be successful in restoring spontaneous life-sustaining functions, and, in such event, death shall be deemed to have occurred at the time these functions ceased; or

2. In the opinion of a physician, who shall be duly licensed and a specialist in the field of neurology, neurosurgery, or electroencephalography, when based on the ordinary standards of medical practice, there is the absence of brain stem reflexes, spontaneous brain functions and spontaneous respiratory functions and, in the opinion of another physician and such neurospecialist, based on the ordinary standards of medical practice and considering the absence of brain stem reflexes, spontaneous brain functions and spontaneous respiratory functions and the patient's medical record, further attempts at resuscitation or continued supportive maintenance would not be successful in restoring such reflexes or spontaneous functions, and, in such event, death shall be deemed to have occurred at the time when these conditions first coincide.

...

D. The alternative definitions of death provided in subdivisions A 1 and A 2 may be utilized for all purposes in the Commonwealth, including the trial of civil and criminal cases.

Virginia Code § 18.2-32.2. Killing a fetus; penalty.

A. Any person who unlawfully, willfully, deliberately, maliciously and with premeditation kills the fetus of another is guilty of a Class 2 felony.

B. Any person who unlawfully, willfully, deliberately and maliciously kills the fetus of another is guilty of a felony punishable by confinement in a state correctional facility for not less than five nor more than 40 years.

Aldridge v. Commonwealth, 44 Va.App. 618, 606 S.E.2d 539 (2004)

Procedural History: At the conclusion of the Commonwealth's evidence, and again at the conclusion of her own case, Aldridge moved to strike the Commonwealth's evidence, contending that the evidence was insufficient to prove the *corpus delicti* required for a homicide. After taking the matter under advisement, the trial court convicted Aldridge of first-degree murder on February 20, 2003, and sentenced her to twenty years incarceration, with all but three years suspended. This Court ... granted Aldridge's appeal on the issue of whether the evidence was sufficient to support her conviction for first-degree murder.

Issue(s): Aldridge contends that the trial court erred in holding that the Commonwealth presented sufficient corroborating evidence to prove the *corpus delicti* of homicide; and finding that the evidence was sufficient to show that she acted with premeditation and malice.

Facts: On October 28, 2001, Aldridge, then an eighteen-year-old student at Norfolk State University, was staying in a hotel room with her boyfriend. At that time, Aldridge was approximately nine months pregnant, but she had concealed the pregnancy from her boyfriend-the baby's father-as well as her family, roommates, and other acquaintances. At around 2:00 in the morning, Aldridge began to experience labor pains. Without waking her boyfriend, she went into the bathroom, where she gave birth to a baby girl. After delivering the placenta, Aldridge tied off the infant's umbilical cord. At that point, the infant was bluish-gray in color and was not

crying, but she was moving her arms and legs. Aldridge then began to run a warm bath. Once she had partially filled up the bathtub, she picked up the baby and leaned over the bathwater. After Aldridge started to bathe the infant, however, she let the baby slip off of her arm and into the water. The infant was submerged underwater for "about a minute." Aldridge then removed the baby from the bathwater and "started pressing on [the baby's] heart." Aldridge was unable to revive the infant.

Holding: Affirmed.

Opinion: HUMPHREYS, Judge.

Aldridge ... asserts on appeal that the Commonwealth failed to produce sufficient evidence to prove the *corpus delicti* of homicide. Where an appellant challenges the sufficiency of the evidence, we review the evidence in the light most favorable to the party prevailing below, and we will affirm the judgment of the trial court unless plainly wrong or without evidence to support it. *Beavers v. Commonwealth,* 245 Va. 268, 281-82, 427 S.E.2d 411, 421 (1993); *Pugh v. Commonwealth,* 223 Va. 663, 666, 292 S.E.2d 339, 340 (1982). Viewing the evidence in the light most favorable to the Commonwealth, the party prevailing below, we hold that the trial court's determination that the Commonwealth presented sufficient evidence to prove the *corpus delicti* of homicide was not plainly wrong or without evidence to support it.

Corpus delicti means, literally, "the body of a crime," or "[t]he fact of a transgression." *Black's Law Dictionary* 346 (7th ed.1999). In other words, "[t]he *corpus delicti* is the fact that the crime charged has been actually perpetrated." *Lucas v. Commonwealth,* 201 Va. 599, 603, 112 S.E.2d 915, 918 (1960); *see also Claxton v. City of Lynchburg,* 15 Va.App. 152, 154, 421 S.E.2d 891, 893 (1992). At its most basic, the *corpus delicti* of a crime includes two elements: (1) the act, and (2) the criminal agency of the act. *Claxton,* 15 Va.App. at 154, 421 S.E.2d at 893; *see also Lucas,* 201 Va. at 603, 112 S.E.2d at 918. Thus, the Commonwealth must establish that the alleged offense was attributable to a criminal act, and not to mere accident or chance.

The *corpus delicti* of homicide consists of two components: "(1) the death of the party alleged to have been murdered, and (2) the fact that death resulted from the criminal act or agency of another person." *Clark v. Commonwealth,* 220 Va. 201, 209, 257 S.E.2d 784, 789 (1979); *see also Swann v. Commonwealth,* 247 Va. 222, 236, 441 S.E.2d 195, 205 (1994). However, in a prosecution for killing a newborn baby, the Commonwealth must prove not only that the baby died, but also that "the child was born alive and had an independent and separate existence apart from its mother." *Lane v. Commonwealth,* 219 Va. 509, 514, 248 S.E.2d 781, 783 (1978) (*per curiam*). This rule is premised on the fundamental concept that a defendant cannot be convicted of killing a person who is already dead. Accordingly, to establish the *corpus delicti* of homicide in this case, the Commonwealth was required to present evidence: (1) that the baby was born alive, established an independent life of its own, and subsequently died; and (2) that the baby's death resulted from Aldridge's criminal conduct.

Here, the Commonwealth introduced Aldridge's confession to the police and her statements to Darlene Griffith, in which Aldridge admitted: (1) that the baby was born alive; (2) that she tied

off the baby's umbilical cord; (3) that the baby was still alive after she tied off the umbilical cord; (4) that the baby was still alive when Aldridge submerged her in the water; (5) that she purposefully left the baby underwater, knowing that her actions could lead to the baby's death; and (6) that the baby was no longer alive after Aldridge removed her from the water. This evidence was more than sufficient to prove that the baby was born alive, achieved an independent existence, and died as a result of Aldridge's criminal - rather than accidental - conduct.

We have held, however, that "an extrajudicial confession of an accused that he committed the offense with which he is charged is not, alone and uncorroborated, adequate proof of the *corpus delicti." Jeferson v. Commonwealth,* 6 Va.App. 421, 424, 369 S.E.2d 212, 214 (1988) (citing *Phillips v. Commonwealth,* 202 Va. 207, 211, 116 S.E.2d 282, 284-85 (1960)). Simply put, we will not convict a defendant based on her confession alone. Rather, the Commonwealth must present corroborative evidence that, "when taken with the evidence of the confession," is sufficient to "prove the commission of a crime beyond a reasonable doubt." *Claxton,* 15 Va.App. at 155, 421 S.E.2d at 893. "The purpose of the corroboration rule is to reduce the possibility of punishing a person for a crime which was never, in fact, committed." *Jeferson,* 6 Va.App. at 424, 369 S.E.2d at 214 (internal quotations omitted).

"It is not necessary, however, that there be independent corroboration of all the contents of the confession, or even of all the elements of the crime. The requirement of corroboration is limited to the facts constituting the *corpus delicti." Watkins v. Commonwealth,* 238 Va. 341, 348-49, 385 S.E.2d 50, 54 (1989) (citation omitted); *see also Roach v. Commonwealth,* 251 Va. 324, 344, 468 S.E.2d 98, 110 (1996) ("The Commonwealth need not corroborate an entire confession, but it must corroborate the elements of the *corpus delicti.")*. Also, corroborative evidence supporting the *corpus delicti* "may be furnished by circumstantial evidence as readily as by direct evidence." *Watkins,* 238 Va. at 349, 385 S.E.2d at 54; *see also Clark,* 220 Va. at 209, 257 S.E.2d at 789.

Moreover, where, as here, "'the commission of the crime has been fully confessed by the accused, only *slight* corroborative evidence is necessary to establish the *corpus delicti.'" Jeferson,* 6 Va.App. at 424, 369 S.E.2d at 214 (quoting *Clozza v. Commonwealth,* 228 Va. 124, 133, 321 S.E.2d 273, 274 (1984)) (emphasis in original); *see also Cherrix v. Commonwealth, 257* Va. 292, 306, 513 S.E.2d 642, 651 (1999); *Clagett v. Commonwealth,* 252 Va. 79, 92, 472 S.E.2d 263, 270-71 (1996); *Watkins,* 238 Va. at 348-49, 385 S.E.2d at 54; *Lucas,* 201 Va. at 604, 112 S.E.2d at 919. Under the circumstances of this case, we hold that the Commonwealth presented sufficient evidence to corroborate Aldridge's confession and, therefore, establish the *corpus delicti* of homicide.

Specifically, to corroborate Aldridge's confession that the baby was born alive and established an independent life of its own, the Commonwealth presented the testimony of Dr. Kinnison. Dr. Kinnison testified that the baby was born full-term, without any apparent defects or abnormalities. Dr. Kinnison noted that she could not find any evidence of internal or external injuries and that she did not find any toxic substances in the baby's blood. Dr. Kinnison also verified that the baby's umbilical cord had been tied off.

Although this evidence is not, in and of itself, conclusive proof that the baby was born alive and established an independent life of her own, "the *corpus delicti* need not be established by evidence independent of the confession, but may be established by both." *Reid v. Commonwealth*, 206 Va. 464, 468, 144 S.E.2d 310, 313 (1965); *see also Watkins*, 238 Va. at 349, 385 S.E.2d at 54 ("The confession is itself competent evidence tending to prove the *corpus delicti*, and all that is required of the Commonwealth in such a case is to present evidence of such circumstances as will, when taken in connection with the confession establish the *corpus delicti* beyond a reasonable doubt."). Here, Dr. Kinnison's testimony presents "slight" corroborative evidence that, when considered in conjunction with Aldridge's statements to Griffith and the police, is sufficient to prove that the baby was born alive, achieved an existence apart from her mother, and then died. Accordingly, the trial court's conclusion that this element had been established beyond a reasonable doubt is not clearly wrong or without evidence to support it.

The Commonwealth also presented sufficient evidence to corroborate Aldridge's confession that the baby died as a result of Aldridge's own criminal actions. Specifically, Dr. Kinnison testified that the baby's death resulted from drowning rather than from natural causes. Dr. Kinnison explained that, because "[t]here are no specific findings to drowning," determining the cause of death in a drowning case generally requires "an examination of a body in addition to circumstances." *Cf. Opanowich v. Commonwealth*, 196 Va. 342, 355, 83 S.E.2d 432, 440 (1954) ("[Because] [a]n examination of the body of a dead person will not always disclose whether death was from natural causes or by means of violence[,] ... [t]he circumstances surrounding the cause of death may be inquired into." (internal quotations omitted)). After taking into consideration all of the circumstances in this case, Dr. Kinnison determined that the cause of death was drowning.

Aldridge contends, however, that Dr. Kinnison's testimony cannot be considered as corroborative evidence because, without Aldridge's confession, Dr. Kinnison would have been unable to determine the infant's cause of death. But as the dissent concedes, Dr. Kinnison's opinion "was based on two sources, appellant's confession and the autopsy." Although Dr. Kinnison considered Aldridge's confession when she determined the baby's cause of death, Dr. Kinnison also testified that she "found nothing inconsistent with the diagnosis of drowning" and that she additionally based her opinion on the lack of "any injuries ... [or] abnormalities" in the "full-term infant." Dr. Kinnison's testimony, therefore, sufficiently corroborates Aldridge's confession that she caused the baby's death by purposefully submerging the newborn under water while the baby was still alive.

Aldridge also relies on the Virginia Supreme Court's decision in *Lane* to argue that the Commonwealth failed to establish causation because the medical evidence was insufficient to prove to any degree of medical certainty that the baby died as a result of Aldridge's conduct rather than from natural causes. In *Lane*, the defendant gave birth to a baby who did not cry, was not breathing, and did not move or open its eyes. *Lane*, 219 Va. at 510-11, 248 S.E.2d at 781-82. Although there were no signs of violence, airway obstructions, or congenital defects, the physicians who examined the body were unable to ascertain whether the infant's cause of death was from suffocation (from being placed inside of a plastic bag) or from natural causes. Under those circumstances, the Virginia Supreme Court concluded that "[t]o hold that the child's death

was caused by the criminal act or acts of the defendant would be contrary to the medical evidence and amount to pure speculation and surmise." *Id.* at 515, 248 S.E.2d at 784.

Lane, however, differs from the present case in at least one significant respect: Here, Aldridge *confessed* to drowning her baby. The defendant in *Lane* did not. In *Lane*, then, the physicians' testimony was the *only* evidence relating to that baby's cause of death. In contrast, because the Commonwealth in this case had a confession from Aldridge in which she admitted that she submerged her baby underwater while the baby was still alive, the Commonwealth only needed to present "slight" additional evidence of causation in order to corroborate that confession. Here, Dr. Kinnison's testimony provided the requisite "slight" corroborating evidence. *Cf. Clozza, 228* Va. at 133, 321 S.E.2d at 279 (concluding that the defendant's confession had been adequately corroborated even though "the forensic evidence failed to confirm that a rape occurred").

Finally, the Commonwealth also presented sufficient corroborating evidence that Aldridge's conduct was criminal rather than accidental in nature. As we have already noted, circumstantial evidence may be used to corroborate a full confession. Here, there is ample corroborating evidence indicating that Aldridge's actions were criminal in nature.

Initially, Aldridge's statement to Darlene Griffith, in which she admitted that she was afraid her parents would be ashamed of her if they knew she was having a baby, is circumstantial proof of criminal agency because it tends to prove that Aldridge had a motive to get rid of her baby. Also, Aldridge did not wake up her boyfriend or otherwise ask for help while she was having the child, she carefully cleaned up the hotel bathroom and disposed of the soiled towels and bathmats in an outside dumpster, and she informed the nurses at Norfolk General Hospital that she had given her child up for adoption rather than telling them that she had given birth to a stillborn baby. These efforts to conceal the fact that she had given birth also support the inference that Aldridge's actions were criminal in nature.

Evidence of criminal agency can also be inferred from the fact that Aldridge did not tell anyone-even the baby's father that she had given birth to a baby who died. *Cf. Warmke v. Commonwealth*, 297 Ky. 649, 180 S.W.2d 872, 873 (1944) (defendant's "failure to notify any one that she had dropped the baby" from a train trestle provided sufficient corroborating evidence of the defendant's criminal agency). Moreover, "the secretive and unnatural manner in which she disposed of the body of the child," *Opanowich,* 196 Va. at 357, 83 S.E.2d at 441, gives rise to the inference that Aldridge's actions were criminal in nature, as does her apparent lack of remorse, evidenced by the fact that she went shopping with her boyfriend after dropping the baby's body off in her dorm room.

For all of these reasons, we hold that the trial court's determination that the Commonwealth had presented sufficient evidence of the *corpus delicti* of killing a newborn baby was not plainly wrong or without evidence to support it.

Critical Thinking Question(s): Do you believe Aldridge was guilty of homicide? Is movement of the arms and legs sufficient to show that the baby was alive? What if the results of the autopsy had been inconclusive? How does the court know that the defendant's account of the baby "being born alive" is accurate? Do you think the court would have reached a different decision if

Aldridge had not concealed her pregnancy and delivery?

Essay Questions:

1. According to the modern law of homicide, what are the definitions of premeditated killings and deliberate killings?

2. What are the main problems with applying murder statues to corporations?

3. Identify and describe the elements of voluntary manslaughter.