

COURT OF APPEALS OF VIRGINIA

Present: Judges Baker, Coleman and Overton
Argued at Salem, Virginia

JAMES EDWARD IRVINE, S/K/A
JAMES EDWARD IRVINE, JR.

v. Record No. 2910-96-3

MEMORANDUM OPINION* BY
JUDGE NELSON T. OVERTON
JANUARY 13, 1998

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF ROCKBRIDGE COUNTY
George E. Honts, III, Judge

H. David Natkin, Assistant Public Defender,
for appellant.

Eugene Murphy, Assistant Attorney General
(Richard Cullen, Attorney General; Monica S.
McElyea, Assistant Attorney General, on
brief), for appellee.

James Irvine (defendant) was convicted of malicious wounding in violation of Code § 18.2-51. Defendant argues on appeal that he committed the wounding in the heat of passion, not with malice, and therefore cannot be guilty of malicious wounding. Because we find the evidence sufficient to prove malice, we affirm.

The parties are fully conversant with the record in the cause, and because this memorandum opinion carries no precedential value, no recitation of the facts is necessary.

"Unlawful wounding is a lesser included offense of malicious wounding. The element of malice constitutes the distinction

*Pursuant to Code § 17-116.010 this opinion is not designated for publication.

between malicious and unlawful wounding." Miller v. Commonwealth, 5 Va. App. 22, 24, 359 S.E.2d 841, 842 (1987) (citing Barrett v. Commonwealth, 231 Va. 102, 105-06, 341 S.E.2d 190, 192 (1986)). "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). If, upon review of the evidence, we find that the trial court was plainly wrong when it decided that defendant was acting with malice, we must reverse. "In order to determine whether the accused acted in the heat of passion, it is necessary to consider the nature and degree of provocation as well as the manner in which it was resisted." Miller, 5 Va. App. at 25, 359 S.E.2d at 842 (citing Ballard v. Commonwealth, 156 Va. 980, 993, 159 S.E. 222, 226 (1931)).

In the instant case, it is abundantly clear that defendant acted with malice. The only provocations offered by him to explain his attack were the profanities issued towards him by the victim, the act of the victim in exiting his pickup truck, and the victim's close physical proximity to defendant's wife. Words alone are not adequate provocation. See Martin v. Commonwealth, 184 Va. 1009, 1016-18, 37 S.E.2d 43, 46-47 (1946). Neither exiting one's truck nor simply sitting next to another's wife provides adequate justification either. Under these circumstances we cannot hold that defendant's reaction, to repeatedly strike the victim with a clawed roofing hammer,

constituted a reasonable response to the victim's actions.

Because we find sufficient evidence to support the trial court's finding that defendant acted with malice, we affirm the conviction.

Affirmed.