

COURT OF APPEALS OF VIRGINIA

Present: Chief Judge Fitzpatrick, Judges Coleman and Bray
Argued at Richmond, Virginia

ERIC DONNELL SAUNDERS

v. Record No. 1929-98-2

COMMONWEALTH OF VIRGINIA

OPINION BY
JUDGE RICHARD S. BRAY
JANUARY 18, 2000

FROM THE CIRCUIT COURT OF GREENSVILLE COUNTY
Robert G. O'Hara, Jr., Judge

(Andrew E. Weaver; Traylor, Morris & Wornom,
on brief), for appellant. Appellant
submitting on brief.

(Mark L. Earley, Attorney General; Eugene
Murphy, Assistant Attorney General, on
brief), for appellee. Appellee submitting on
brief.

Eric Donnell Saunders (defendant) was convicted by a jury for
"writ[ing] or compos[ing] and send[ing]" a letter to another
"containing a threat to kill or do bodily injury" to such person,
a violation of Code § 18.2-60(A). On appeal, he complains that
the trial court erroneously refused to instruct the jury on the
element of malice. We disagree and affirm the conviction.

Code § 18.2-60(A) provides, in pertinent part:

If any person write or compose and also
send or procure the sending of any letter
. . . , so written or composed, . . . to any
person, containing a threat to kill or do
bodily injury to the person to whom such
letter or communication was sent or to kill
or do bodily injury to any member of his or
her family, the person so writing or

composing and sending or procuring the sending of such letter or communication shall be guilty of a Class 6 felony.

Accordingly, the court instructed the jury, in pertinent part:

The defendant is charged with the crime of threatening bodily injury to another person. The Commonwealth must prove beyond a reasonable doubt the following elements of that crime: (1) That the defendant wrote or composed a letter or written communication signed or unsigned to [another]; and (2) That the letter or written communication contained a threat to do bodily harm to [such other] or his family; and (3) That the defendant sent such letter or written communication to [him].

Arguing that malice was indispensable to the "unlawful mens rea" implicit in the statutory offense, defendant proffered an instruction which required the Commonwealth to prove that he committed the proscribed acts "with malice," together with a companion instruction defining malice. In refusing both instructions, the court noted that the statute did not "contain . . . the word malicious."

"A reviewing court's responsibility in reviewing jury instructions is 'to see that the law has been clearly stated and that the instructions cover all the issues which the evidence fairly raises.' It is elementary that a jury must be informed as to the essential elements of the offense; a correct statement of the law is one of the 'essentials of a fair trial.'" Darnell v. Commonwealth, 6 Va. App. 485, 488, 370 S.E.2d 717, 719 (1988)

(citations omitted). "An instruction should not be given which incorrectly states the applicable law or which would be confusing or misleading to . . . the jury." Bruce v. Commonwealth, 9 Va. App. 298, 300, 387 S.E.2d 279, 280 (1990) (citation omitted).

Malice is "that state of mind which results in the intentional doing of a wrongful act to another without legal excuse or justification, at a time when the mind of the actor is under the control of reason." Lynn v. Commonwealth, 27 Va. App. 336, 344-45 n.1, 499 S.E.2d 1, 5-6 n.1 (1998); see also 1 Virginia Model Jury Instructions - Criminal 33.220 (1998 repl. ed. with 1999 Supp.). Thus, "[m]alice is evidenced either when the accused acted with a sedate, deliberate mind, and formed design, or committed any purposeful and cruel act without any or without great provocation." Branch v. Commonwealth, 14 Va. App. 836, 841, 419 S.E.2d 422, 426 (1992). The legislature has expressly required malice as an element of numerous statutory offenses. See, e.g., Code §§ 18.2-77, -79, -80, -86, -127, -152.7(B), -212, and -279.

In contrast, mens rea or scienter is simply the unlawful intent or design necessary to any criminal act that is not a strict liability offense. See Reed v. Commonwealth, 15 Va. App. 467, 424 S.E.2d 718 (1992); 1 Wayne R. LaFave, Substantive Criminal Law § 3.4 (1986); Livingston v. Commonwealth, 184 Va. 830, 36 S.E.2d 561 (1946). Thus, although malice is a species of mens rea, see Christian v. Commonwealth, 221 Va. 1078, 227

S.E.2d 205 (1981); Berkley v. Commonwealth, 19 Va. App. 279, 451 S.E.2d 41 (1994), mens rea does not always evince malice. See e.g., Mosby v. Commonwealth, 23 Va. App. 53, 473 S.E.2d 732 (1996) (criminal negligence); Fortune v. Commonwealth, 12 Va. App. 643, 406 S.E.2d 47 (1991) (unlawful behavior). Hence, a wrongful act done intentionally is not always malicious. See Mason v. Commonwealth, 7 Va. App. 339, 373 S.E.2d 603 (1988).

Although Code § 18.2-60(A) makes no mention of malice, defendant, nevertheless, relies on Perkins v. Commonwealth, 12 Va. App. 7, 402 S.E.2d 229 (1991), to infer malice as an element of the offense. In Perkins, the accused challenged Code § 18.2-83(A)¹ as unconstitutionally overbroad because it required no mens rea to complete the crime. We disagreed, reasoning that:

In Maye v. Commonwealth, 213 Va. 48, 189 S.E.2d 350 (1972) the Supreme Court of Virginia stated:

A claim that a statute on its face contains no requirement of mens rea or scienter is no ground for holding the statute unconstitutional since such requirement will be read into the statute by the court when it appears the legislature implicitly intended that it must be proved.

213 Va. 48, 49, 189 S.E.2d 350, 351 (1972). . . . Therefore, § 18.2-83 can be read as requiring mens rea. Such a narrowing construction of this statute prevents

¹ Code § 18.2-83(A) prohibits any person from "mak[ing] or communicat[ing] to another by any means any threat to bomb, burn, destroy or in any manner damage any place of assembly, building or other structure."

overbreadth. Only an individual who maliciously "makes and communicates . . . any threat" prohibited by the statute will be punished.

Id. at 15, 402 S.E.2d at 234 (emphasis added).

Defendant acknowledges that Perkins clearly instructs that mens rea or scienter "will be read into a [criminal] statute" to satisfy constitutional imperatives. Additionally, however, he construes dicta in Perkins, "[o]nly an individual who maliciously" engages in conduct "prohibited by [Code § 18.2-83(A)] will be punished," to also graft the element of malice onto the subject Code § 18.2-60(A), a statute similar to Code § 18.2-83(A). Perkins, 12 Va. App. at 15, 402 S.E.2d at 234 (emphasis added).

We are not persuaded that this Court in Perkins intended to equate mens rea with malice, a concept clearly at odds with well-established jurisprudence, and, therefore, decline defendant's invitation to imply both mens rea and malice as elements of Code § 18.2-60(A). "We may not add to a statute language which the legislature has chosen not to include." County of Amherst Bd. of Supervisors v. Brockman, 224 Va. 391, 397, 297 S.E.2d 805, 808 (1992) (citations omitted).

Accordingly, we affirm the conviction.

Affirmed.