NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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January 22, 2019

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Re: *Commonwealth of Virginia v. Richard G. Davis*
Case No. FE–2017–1514

Dear Counsel:

The issue before the Court is whether the crime of "Aiding in Unlawfully Obtaining Documents from the Department of Motor Vehicles ("DMV") When Not Entitled Thereto" under Virginia Code § 46.2–105.2(B) contains a *mens rea* element. The Court holds the Code section does and therefore concludes it improperly instructed the jury to the contrary. For this reason, the Court grants Richard Davis' Motion to Set Aside Verdict. The Commonwealth may schedule this matter for a re-trial if so inclined.

OPINION LETTER

I. OVERVIEW: CARS PARKED LONG TERM MAY BE CLAIMED BY ANYONE?

The Commonwealth indicted Davis on December 18, 2017 for unlawfully obtaining documents from the DMV when not entitled thereto under Virginia Code § 46.2–105.2(A).[1] Later, the indictment was amended to *aiding* another person unlawfully obtain documents from the DMV under Virginia Code § 46.2–105.2(B). Davis pled not guilty and a jury trial ensued from September 17–18, 2018. The jury found Davis guilty as charged and fixed a sentence of nine months in jail and a $1,700.00 fine. The Court sentenced him to the same by Order dated December 17, 2018.

At trial, the Commonwealth alleged Davis unlawfully aided Roger Taylor obtain title to a vehicle owned by Oswaldo Martinez-Rodriguez via an obscure DMV procedure whereupon one reports an apparently abandoned vehicle and, if the owner fails to take certain responsive actions, the reporter may take title to the vehicle. *See* VA. CODE § 46.2–1202.[2] Davis did not testify on his own behalf, but his counsel's chief argument in defense was Davis thought he was helping Taylor lawfully claim an abandoned vehicle without any fraudulent intent.

Both the Commonwealth and Davis offered proposed jury instructions. There are no model jury instructions for this crime and there is a dearth of case law on point. *But cf. Wilson v. Commonwealth*, No. 0550–11–2, 2012 WL 443944 (Va. Ct. App. Feb. 14, 2012). The Court rejected Davis' proposed instruction and, over Davis' objection, accepted the Commonwealth's, which read:

> Richard Davis is charged with the crime of Obtaining Documents from the Department of Motor Vehicles when not entitled thereto. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:
>
> (1) That Richard Davis aided any person to obtain a vehicle certificate of title; AND
> (2) That the person had not satisfied all legal and procedural requirements for the issuance thereof, OR
> (3) That the person was not otherwise legally entitled to the title.
>
> The above includes obtaining any document issued by DMV through the use of counterfeit, forged, or altered documents.

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[1] The Indictment also contained two counts of Grand Larceny. The Commonwealth dismissed on motion of *nolle prosequi* one of those counts. The jury acquitted Davis on the other.

[2] The statute does not actually state that the reporter has a right to obtain the title in these circumstances. It merely states that the owner prior to abandonment forfeits his right to title. However, the parties conducted the trial on the assumption that the DMV does award title to those who successfully report an abandoned vehicle.

> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find Richard Davis guilty of obtaining documents from the [D]epartment of [M]otor [V]ehicles when not entitled thereto[.]
>
> If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the two elements of the offense (element 1 AND either element 2 or 3) then you shall find Richard Davis not guilty.

Davis' proposed instruction paralleled the Commonwealth's but added a fourth element: "That the defendant obtained such document with fraudulent intent."

When proposing instructions and in his Motion to Set Aside the Verdict, Davis argued Virginia Code § 46.2–105.2(B) contains an implicit *mens rea* of fraudulent intent and argued the Court was required to instruct the jury accordingly. He acknowledged, however, Subsection (B) is "completely silent as to a *mens rea*."[3]

The Commonwealth responded Virginia Code § 46.2–105.2(A) is a strict liability offense. The Commonwealth also points out Virginia Code § 46.2–105.2(C) does utilize a *mens rea*, drawing out a distinction between that subsection and Subsection (A). The Commonwealth argues this demonstrates the General Assembly intends there be no *mens rea* element implied into Virginia Code § 46.2–105.2(A).

II. ANALYSIS: AN IMPLIED *MENS REA*.

Davis moves to set aside the jury verdict under Rule 3A:15(b) of the Rules of the Supreme Court of Virginia, which provides:

> If the jury returns a verdict of guilty, the court may, on motion of the accused made not later than 21 days after entry of a final order, set aside the verdict for error committed during the trial or if the evidence is insufficient as a matter of law to sustain a conviction.

Davis challenges an alleged "error committed during the trial," not that the "evidence is insufficient as a matter of law." The error alleged is the failure to properly instruct the jury as to the *mens rea* element of Virginia Code § 46.2–105.2(B).

While "[w]hether to give or deny jury instructions 'rest[s] in the sound discretion of the trial court,'" *Hilton v. Commonwealth*, 293 Va. 293, 302 (2017) (citations omitted), "[i]t is error to give an instruction that incorrectly states the law," *Payne v. Commonwealth*, 292 Va. 855, 869

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[3] In his Motion to Set Aside the Jury Verdict, Davis also argued that the statute was unconstitutionally vague and overly broad. However, since the Court can decide the case on other grounds it will not reach the constitutional grounds. *See Bd. of Sup'rs v. Commonwealth ex rel. Petersburg*, 116 Va. 311, 81 S.E. 112, 112 (Va. 1914).

(2016) (citations omitted). "[A] correct statement of the law applicable to the case . . . (is one of the) essentials of a fair trial." *Dowdy v. Commonwealth*, 220 Va. 114, 116 (1979) (quoting *Limbaugh v. Commonwealth*, 149 Va. 383, 400 (1927)). Thus, "[a] trial court has a duty when instructing the jury to define each element of the relevant offense." *Lawlor v. Commonwealth*, 285 Va. 187, 229 (2013) (footnote omitted) (citing *Dowdy*, 220 Va. at 116); *see also Dowdy*, 220 Va. at 116 ("Unless those elements are defined by instructions available to the members of the jury during their deliberation, they cannot properly determine whether the Commonwealth has carried its burden."). Failure to instruct the jury as to each element of the crime charged is an abuse of discretion and constitutes a reversible error. *Dowdy*, 220 Va. at 116.

To determine whether the Court abused its discretion in the case at bar, the Court must discern whether Virginia Code § 46.2–105.2(B) contains a *mens rea* element. In relevant part, the Code section reads as follows:

> A. It shall be unlawful for any person to obtain a Virginia driver's license, special identification card, vehicle registration, certificate of title, or other document issued by the Department if such person has not satisfied all legal and procedural requirements for the issuance thereof, or is otherwise not legally entitled thereto, including obtaining any document issued by the Department through the use of counterfeit, forged, or altered documents.
>
> B. It shall be unlawful to aid any person to obtain any driver's license, special identification card, vehicle registration, certificate of title, or other document in violation of the provisions of subsection A.
>
> C. It shall be unlawful to knowingly possess or use for any purpose any driver's license, special identification card, vehicle registration, certificate of title, or other document obtained in violation of the provisions of subsection A.

VA. CODE § 46.2–105.2.

"[T]he law is clear that the legislature may create strict liability offenses as it sees fit, and there is no constitutional requirement that an offense contain a *mens rea* or *scienter* element." *Esteban v. Commonwealth*, 266 Va. 605, 609 (2003) (citing *Maye v. Commonwealth*, 213 Va. 48, 49 (1972)). "Thus, courts construe statutes and regulations that make no mention of intent as dispensing with it and hold that the guilty act alone makes out the crime." *Id.* (citing *Morissette v. United States*, 342 U.S. 246, 256, 258 (1952); *Makarov v. Commonwealth*, 217 Va. 381, 385–86 (1976)).

Underlying Subsection (A) of Virginia Code § 46.2–105.2 is the clear intent of the General Assembly to criminalize the act of obtaining documents from the DMV to which the person is not legally entitled to (either inherently or due to a procedural flaw). It is equally clear Subsection (C) contains a *mens rea* element: "to *knowingly* possess." VA. CODE § 46.2–105.2(C) (emphasis added).

Davis argues Subsection (B) of Virginia Code § 46.2–105.2 has an implied *mens rea* element of fraudulent intent. To the extent Subsection (B) has an implied *mens rea*, the Court finds Davis is correct. Subsection (B) makes it unlawful to "aid" another person in obtaining documents under Subsection (A). Resolution of the issue before the Court hinges on the *mens rea* inferable, if any, to one who "aids" another in an unlawful act. "[T]he *mens rea* requirement under a criminal statute is a question of law, to be determined by the court." *Staples v. United States*, 511 U.S. 600, 613 n.6 (1994).

As a general rule, "a common-law term of art should be given its established common-law meaning." *Johnson v. United States*, 559 U.S. 133, 139 (2010) (citing *United States v. Turley*, 352 U.S. 407, 411 (1957)). Virginia courts adhere to this same rule: "[w]hen a statute employs a common-law term of art, the General Assembly 'is presumed to have known and to have had the common law in mind in the enactment of [the] statute.'" *Game Place, L.L.C. v. Fredericksburg 35, LLC*, 295 Va. 396, 402 (2018) (quoting *Jenkins v. Mehra*, 281 Va. 37, 44 (2011) (citations omitted)) (citation omitted); *see also Wicks v. City of Charlottesville*, 215 Va. 274, 276 (1974) (reaching same conclusion interpreting criminal statute). Notwithstanding, courts "do not assume that a statutory word is used as a term of art where that meaning does not fit . . . and [courts] 'do not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense.'" *Johnson*, 559 U.S. at 139 (first citing *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961); then quoting *Gonzales v. Oregon*, 546 U.S. 243, 282 (2006) (Scalia, J., dissenting)).

"Aid," as used in Virginia Code § 46.2–105.2(B), is a common law term of art. "At common law all persons present giving *aid* and comfort to another committing an offense, even a felony, are regarded as principals." *Adkins v. Commonwealth*, 175 Va. 590, 599 (1940) (emphasis added) (quoting Bishop, STATUTORY CRIMES §§ 135, 139 (2d Ed.)). "The common law imposed aiding and abetting liability on a person (possessing the requisite intent) who facilitated any part—even though not every part—of a criminal venture." *Rosemond v. United States*, 572 U.S. 65, 72 (2014).

More specifically, "an aider . . . is one who is present, actually or constructively, assisting the perpetrator in the commission of the crime." *Muhammed v. Commonwealth*, 269 Va. 451, 482 (2005) (quoting *Jones v. Commonwealth*, 208 Va. 370, 372–73 (1967)). "The test is whether or not he was encouraging, inciting, or in some manner offering aid in the commission of the crime." *Id.* "The prosecution must prove that the accused did or said something showing his consent to the felonious purpose and his contribution to its execution."[4] *Hall v. Commonwealth*, 225 Va. 533, 536 (1983) (citing *Jones*, 208 Va. at 373). That is, for criminal liability for aiding another to attach, the defendant must have the requisite *mens rea*.

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[4] For sake of clarity, while the Commonwealth must show the underlying crime was committed by the principal, it is unnecessary that the principal be convicted of the underlying offense for the aider to be convicted under a theory of accomplice liability. *See Taylor v. Commonwealth*, 260 Va. 683, 688 (2000) (citing *Snyder v. Commonwealth*, 202 Va. 1009, 1015, 1017 (1961)).

Mens rea, or criminal intent, is the culpable design manifested within one's mind and is an essential element of every non-strict liability crime. *See, e.g.*, *Secret v. Commonwealth*, 819 S.E.2d 234, 248 (Va. 2018). For a defendant to be liable as an "aider," his intent "must go to the specific and entire crime charged." *Rosemond v. United States*, 572 U.S. 65, 76 (2014). "[A] defendant must not just 'in some sort associate himself with the venture,' but [must] also 'participate in it as in something that he wishes to bring about' and 'seek by his action to make it succeed.'" *Id.* (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (citation omitted)).

Generally, the "intent requirement [is] satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense." *Rosemond*, 572 U.S. at 77. "[U]nless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." *Dixon v. United States*, 548 U.S. 1, 5 (2006) (quoting *Bryan v. United States*, 524 U.S. 184, 193 (1998) (footnote omitted)).[5]

The "mere omission . . . of any mention of intent will not [necessarily] be construed as eliminating that element." *Morissette*, 342 U.S. at 263. In this instance, the omission of a *mens rea* in Subsection (B) does not eliminate the element of *mens rea* from the Commonwealth's burden of proof during its case-in-chief. Given the employ of "aid," a common-law term-of-art, implicit in Subsection (B) of Virginia Code § 46.2–105.2 is a *mens rea* element of "knowledge" on the part of the aider.

The application of "aid" as a common law term of art is not forced but fits appropriately into the context of Virginia Code § 46.2–105.2(B). While the principal can be held strictly liable under Subsection (A), it is logical to apply the common law meaning of "aid" to a defendant charged under Subsection (B). If an "aider" under Subsection (B) were to be held strictly liable, ridiculous results might ensue. For example, an actor who simply assists another—such as by filling out paperwork on the principal's behalf—could be held liable without any knowledge he assisted with a criminal venture. Whereas, holding liable only those who are aware of the criminal nature of the undertaking is more judicious.

Thus, this Court holds, to be liable under Virginia Code § 46.2–105.2(B), a defendant must *knowingly* aid another person obtain the listed documents with the knowledge the principal has not satisfied all legal and procedural DMV requirements or is otherwise not legally entitled to the document obtained. More simply put, Subsection (B) contains an implied and necessary *mens rea* element of knowledge.

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[5] Alternatively, a defendant can be held liable "if he shared in the criminal intent of the principal committing the crime." *McMorris v. Commonwealth*, 276 Va. 500, 505 (2008) (citations omitted). However, since Virginia Code § 46.2-105.2(A) is a strict liability offense, one can only be liable under Subsection (B) if they have knowledge of the criminal nature of the conduct of the principal.

Davis, for his part, urges this Court to go a step further and infer a higher level of mental culpability, one of "fraudulent intent," into Virginia Code § 46.2–105.2(B). This, however, is a step too far. Davis is correct the jury should have been instructed about the implicit *mens rea* embedded into Virginia Code § 46.2–105.2(B), as discussed above. Yet, the *mens rea* implied is not fraudulent intent as Davis maintains, but mere knowledge of the facts making the conduct illegal—the principal obtained DMV documents to which he was not legally entitled. *Cf. Crider v. Commonwealth*, 206 Va. 574 (1965) (declining to find "fraudulent intent" to be a necessary element of Code section utilizing "knowing" *mens rea*).

Setting aside a jury verdict and retrying a case is not something to take lightly. The Court has considered whether, on the facts of this case, the erroneous instruction constituted a harmless error. *See* VA. CODE § 8.01–678(2). The harmless-error doctrine is "'favored' by Virginia courts" and is "deeply embedded in [Virginia] jurisprudence." *Commonwealth v. White*, 293 Va. 411, 420 (2017) (first quoting *Windsor v. Carlton*, 136 Va. 652, 655 (1923); then quoting *Gilland v. Commonwealth*, 184 Va. 223, 235 (1945)). "[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Rose v. Clark*, 478 U.S. 570, 579 (1986) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)) (citing *United States v. Hastings*, 461 U.S. 499, 508–09 (1983)). "A perfect trial is one of the things hoped for but as yet [is] an iridescent dream." *White*, 293 Va. at 420 (alteration in original) (quoting *Gilland*, 184 Va. at 235).

The question for the Court, in determining whether an error was harmless, is: "Is it clear beyond a reasonable doubt that a rational [factfinder] *would have* found the defendant guilty absent the error?" *Id.* at 422 (emphasis supplied) (quoting *Neder v. United States*, 527 U.S. 1, 17 (1999)) (citations omitted).[6] "If so, the constitutional error should be disregarded as harmless." *Id.* If not, the error is not harmless and the Court must set aside the verdict and grant a new trial. Va. Sup. Ct. R. 3A:15(c).

Here, the Court has reasonable doubt as to whether the erroneous jury instruction constituted a harmless error. The instruction totally neutered Davis' chief defense—he thought he had the right to aid Taylor in obtaining the DMV documents. The jury should have had opportunity to consider whether Davis knew Taylor had not satisfied all legal and procedural requirements or was not otherwise legally entitled to the title he obtained. The Court is not unmindful a reasonable factfinder could conclude the Commonwealth's evidence at trial tended to show Davis did more than merely aid Taylor and in fact led the allegedly criminal enterprise. And, had Davis been charged under Subsection (A) of Virginia Code § 46.2–105.2, he would have been strictly liable for his conduct.

However, Davis was indicted pursuant to Subsection (B) of Virginia Code § 46.2–105.2, entitling him to a proper jury instruction as to that subsection. The failure to instruct the jury on the implied *mens rea* element of Subsection (B) subverted Davis' chief argument. For that reason, the Court cannot conclude the jury would have found Davis guilty absent the erroneous

[6] This is to be distinguished from the sufficiency of the evidence test, which asks "whether a rational jury *could have* found the defendant guilty." *White*, 293 Va. at 422 (emphasis in original).

instruction and therefore cannot conclude the error was harmless. Consequently, the Court must set aside the verdict and grant Davis a new trial. Va. Sup. Ct. R. 3A:15(c).

The Court does not grant a new trial as a matter of course. Both the United States Constitution and the Virginia Constitution afford a defendant the guarantee he will not be tried a second time for the same offense when the trial court "acquits" the defendant; *i.e.*, rules there is insufficient evidence to convict or renders a ruling relating to the ultimate question of the defendant's guilt or innocence. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; VA. CONST. art. 1, § 8; *see also Evans v. Michigan*, 568 U.S. 313, 319 (2013) (quoting *United States v. Scott*, 437 U.S. 82 (1978)); *Maryland v. Shatzer*, 559 U.S. 98, 103 (2010) (citing *Malloy v. Hogan*, 378 U.S. 1, 6 (1964)); *Severance v. Commonwealth*, 295 Va. 564, n.8 (2018) (quoting *Stephens v. Commonwealth*, 263 Va. 58, 62 (2002)). Nonetheless, "[t]he principle that [the Double Jeopardy Clause] does not preclude the Government's retrying a defendant whose conviction is set aside because of an *error in the proceedings* leading to conviction is a well-established part of our constitutional jurisprudence." *Burks v. United States*, 437 U.S. 1, 14 (1978) (emphasis supplied) (alteration in original) (quoting *United States v. Tateo*, 377 U.S. 463, 465 (1964)).

Here, the Court is setting aside the jury verdict based on an error in the proceedings—the Court's failure to instruct the jury as to each element of the offense charged—upon Davis' motion. Importantly, the Court does not conclude the Commonwealth's evidence was insufficient to convict Davis based on a mistaken understanding of the elements or for any other reason. Although the Court recognizes an acquittal may occur and double jeopardy may attach where an erroneous jury instruction results in a factual finding the evidence was insufficient to convict the defendant, *Evans*, 568 U.S. at 318–19, this is not one of those cases. The Court's ruling here is not a determination the Commonwealth failed its burden but rather rests on a procedural ground unrelated to his factual guilt or innocence. *See Forman v. United States*, 361 U.S. 416, 424–25 (1960).[7] Therefore, double jeopardy does not attach and the Commonwealth's Attorney may reinstitute criminal proceedings against Davis.

III. CONCLUSION

For the reasons stated herein, the Court holds the crime of "Aiding in Unlawfully Obtaining Documents from the Department of Motor Vehicles When Not Entitled Thereto"

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[7] In *Burks*, the Supreme Court of the United States sharply criticized its decision in *Forman*. 437 U.S. at 8–11, 14–15. Indeed, the court condemned an entire line of its prior decisions for neglecting to clearly "distinguish between reversals due to trial error and those resulting from evidentiary insufficiency . . . contribut[ing] substantially to the [then] state of conceptual confusion existing in this area of the law." *Id.* at 14–15. Therefore, in *Burks*, the court held "[t]o the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled." *Id.* at 18. Nevertheless, the court in *Burks* "ha[d] no doubt that [the prior cases] w[ere] correct in allowing a new trial to rectify a trial error . . . '[and the Double Jeopardy Clause] does not preclude the Government's retrying a defendant.'" *Id.* at 14 (citing *United States v. Ball*, 163 U.S. 662, 672 (1896); *United States v. Wilson*, 420 U.S. 332, 341 n.9 (1975); *Forman*, 361 U.S. at 425) (quoting *Tateo*, 377 U.S. at 465).

under Subsection (B) of Virginia Code §46.2–105.2 contains an implied *mens rea* element of knowledge. Essential to a finding of criminal liability under Subsection (B) is the conclusion the defendant knew the principal had not satisfied all legal and procedural elements or was not otherwise legally entitled to the documents obtained from the DMV. As the instruction in this case failed to charge the jury as to the knowledge element of Subsection (B), the Motion to Set Aside Verdict must be granted. Since the Court cannot conclude the jury would have convicted Davis notwithstanding the erroneous instruction, it cannot conclude the error was harmless. Lastly, because the Double Jeopardy doctrine does not apply, the Commonwealth may retry Davis at its discretion.

An appropriate Order is attached.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,	)	
Plaintiff,	)	
v.	)	FE–2017–1514
RICHARD G. DAVIS,	)	
Defendant.	)	

ORDER

THIS MATTER comes before the Court on Defendant's Motion to Set Aside Verdict; and

UPON CONSIDERATION of Defendant's Motion and the Commonwealth's Response; and

UPON HEARING oral argument from counsel for Defendant and the Commonwealth's Attorney on January 4, 2019; it is hereby

ADJUDGED the jury was not instructed as to all elements of the crime of "Aiding in Unlawfully Obtaining Documents from the Department of Motor Vehicles When Not Entitled Thereto" under Virginia Code §46.2–105.2(B);

ORDERED and DECREED the Defendant's Motion to Set Aside the Verdict is GRANTED;

ORDERED and DECREED the jury's verdict of December 5, 2018 and the Court's sentencing order of December 17, 2018 are SET ASIDE;

ORDERED and DECREED double jeopardy did not attach and the Commonwealth's Attorney may commence a new trial within its prosecutorial discretion;

ORDERED and DECREED the Opinion Letter issued by this Court dated January 22, 2019 in this matter is hereby adopted by reference into this Order as though it were fully restated herein; and

ORDERED and DECREED the hearing currently scheduled for February 1, 2019 at 10:00 a.m. shall be converted into a status hearing to schedule a trial date.

JAN 2 2 2019 [redacted]

Dated

[redacted]

Judge David A. Oblon

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.