In The

Supreme Court of Virginia

RECORD NO. 091911

ELIZABETH POLLARD NOAKES,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

The trial court erred in refusing to dismiss the charge of involuntary manslaughter against Noakes because her acts did not rise to the level of criminal negligence nor could she have anticipated the unforeseeable acts that would be performed by the child while inside the crib.

STATEMENT OF THE NATURE OF THE CASE AND OF THE MATERIAL PROCEEDINGS IN THE TRIAL COURT

Ms. Elizabeth Pollard Noakes (hereinafter "Noakes") was convicted of involuntary manslaughter in the Chesterfield Circuit Court by final order of the Honorable Herbert C. Gill, Judge, dated October 25, 2007. Noakes timely noted her appeal to the Court of Appeals. On March 17, 2008, Noakes' Petition for Appeal was filed with the Court and was granted on or about May 6, 2008. Noakes' Brief was filed on June 16, 2008 and on January 13, 2009, by unpublished opinion, the Court of Appeals affirmed the Circuit Court's decision by a vote of 2 to 1 from which Judge Clemmons dissented. Noakes filed a Petition for Rehearing on January 27, 2009 and on February 20, 2009, the Court of Appeals granted the Petition for Rehearing *En Banc*. Briefs were timely filed and a hearing before the full Court was heard on May 28, 2009. On August 18, 2009, by published opinion, Noakes' conviction was affirmed with Judge Elder dissenting. Noakes timely noted an appeal to this Court, petitions were filed, and on

January 19, 2010 Noakes was awarded an appeal from the judgment rendered by the Virginia Court of Appeals.

STATEMENT OF THE QUESTION PRESENTED

I. DID THE TRIAL COURT ERR IN CONVICTING THE DEFENDANT OF INVOLUNTARY MANSLAUGHTER WHERE THE EVIDENCE WAS INSUFFICIENT, AS A MATTER OF LAW, TO SUSTAIN THE CONVICTION? (App. 246) (See Sole Assignment of Error).

STANDARD OF REVIEW

When the sufficiency of the evidence is challenged on appeal, the evidence is reviewed "in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible there from." The Court will not disturb the conviction unless it is plainly wrong or unsupported by the evidence. Sutphin v. Commonwealth, 1 Va. App. 241, 243, 337 S.E.2d 897, 898 (1985).

STATEMENT OF THE FACTS

The facts of the case were largely not in dispute.

On October 18, 2006, fifteen (15) month old Noah Colassaco, (hereinafter "the child") was placed in the care of Noakes who was the child's day care provider. (App. 163). There was no evidence to suggest that Noakes was not a good child care provider. (App. 164).

Detective George Burgess (hereinafter "Burgess") of the Chesterfield County Police Department arrived at Noakes' home at approximately 5:00

p.m. on October 18, 2006 to investigate the death of the child. (App. 28). Noakes was cooperative throughout her interaction with police. (App 31, 65). She was interviewed by Burgess (App 29) and agreed to provide a videotaped, on-scene explanation and demonstration of the events leading up to the child's death that same afternoon. (App. 35).

At trial, the Commonwealth played the videotaped demonstration (App. 45 to 63) and introduced it into evidence as Commonwealth's Exhibit 12 (hereinafter Exhibit 12).

In this published demonstration, Noakes explained that in the three weeks she had been caring for the child, he had not been napping well and she had discussed this problem with the child's mother. (App. 49). Rather than sleep, the child would stand in his portable crib, cry, and look for Noakes or his mother over the side. (App. 48, Exhibit 12 at 2:41). Noakes had been "brainstorming trying to find different things to get him to go to sleep". (App. 50).

The crib where the child was placed to nap (hereinafter "the crib") was in the back right corner of the nursery. It was abutted on the left side by another portable crib (hereinafter "Zach's crib"). When facing the child's rectangular crib, one long side (hereinafter "back') was against the back wall of the room. The right short side (hereinafter "right side") was against

the right wall of the room and the left short side (hereinafter “left side”) was abutted by Zach’s crib. The remaining long side of the crib (hereinafter “front”) faced outward into the room. (Exhibits 6 and 12).

At approximately 12:00 noon on the date of the offense, Noakes placed the child in his crib for a nap. (App. 47). She then went downstairs to get another toddler (hereinafter “Zach”) who she put down for a nap in Zach’s crib. (App. 47). Noakes then turned on a window air conditioning unit which she regularly used to create white noise to help the child sleep and to prevent the children from awaking each other when they awoke from their naps. (App. 48-49, Exhibit 12 at 3:55). The air conditioning unit sat in a window on the back wall. The unit was located approximately a foot and one half above and two feet to the left of the crib. (Exhibits 6, 12).

The child continued to cry when Noakes left the room. (App. 49). The child’s crying turned to a calling for his mother as though he was mad. (App. 49). Noakes returned to the room to find the child still standing at the front side of the crib. (App. 49-50).

At that point, Noakes decided to place a padded cloth-covered piece of cardboard over the crib to prevent the child from standing. (App. 50-51, Exhibit 12 at 5:20). Noakes knew from past experience that if she could get the child to at least sit, he would lie down and go to sleep. (App. 51).

This piece of cardboard was creased width-wise in three places allowing it to be folded in fourths. (Exhibit 12 at 5:30). Noakes placed the cardboard so that it covered the top of the crib in its entirety. One crease rested atop of the rail on the right side at the "fold" so that the last portion of the cardboard hung over the right side of the crib between the crib and the wall. (Exhibit 12 at 5:55, App. 50-51). Noakes also made sure the cardboard would "overhang" the left and front sides of the crib. (Exhibit 12 at 6:00, App. 51).

Next, Noakes picked up a collapsible animal crate (hereinafter "crate") (Exhibit 12 at 6:35, App. 51) which had been collapsed and was prepared for storage. (Exhibit 12 at 1:45, App. 46). The crate was approximately three inches thick (Exhibit 12) and weighed 33 pounds, 4 ounces. (App. 164).

Noakes placed the crate on top of the cardboard "very carefully," insuring that it was long enough to span the crib lengthwise hanging over both the left and right sides of the crib and "made sure that it was hanging over both of the [left and right] sides because [she] didn't want to take any chances that [the crate] would fall on [the child]." (App. 51, Exhibit 12 at 6:55). The child then sat down "because he couldn't stand up." (App. 51).

Shortly before 1:00 p.m., when she entered her adjoining bedroom to put away clothes, Noakes heard the child crying, and checked on him. (Exhibit 12 at 7:55, App. 52-53). Upon checking on him she noticed that the child was looking for her out of the mesh covering of the front side with his face pressed against the upper corner where the front side meets the left side. (Exhibit 12 at 8:00, App. 52). However, the child was not standing. (App. 52). Noakes moved Zach's crib closer to the child's crib on the left side to prevent the child from looking out of the mesh wall of the left side of the crib. (Exhibit 12 at 8:13). Noakes also picked up a large collapsible canvas toy truck and placed it so that it covered the front side of the crib. Noakes reasoned that if the child could not see out the front or left side meshing, the child would stop looking for her and would go to sleep. (Exhibit 12 at 8:20, App. 52).

At approximately 1:00 p.m., Noakes received a call from one of the children's parents and commented that all of the children, including the child, had gone to sleep. (App. 53). Noakes thought that the child had gone from his sitting position to sleep and that's why she hadn't heard anymore noise from him. (App. 53). It was not her habit to enter the child's room to check on the child frequently because if he saw or heard her he

would cry and “start the whole process over again”. (App. 128). She did check on the child repeatedly from outside the room. (App.71).

At approximately 3:15 p.m. to 3:30 p.m., Noakes returned upstairs and picked up Zach who had awakened. (App. 53). At that time, she turned off the window air conditioning unit just above the cribs. (App. 49, Exhibit 12 at 4:13). Noakes did not specifically look over at the child because she assumed if she didn’t hear him he must be asleep. (App. 53-54). However, her uncontradicted testimony at trial was that due to the closeness of the cribs, she walked past the child’s crib on her way to Zach and would have seen him in her peripheral vision. (App. 73).

At approximately 4:10 p.m., Noakes returned to wake the child and found him standing with his head over the front rail. The child was unconscious. He appeared to have lifted the cardboard near the corner where the front rail meets the left rail. (App 56-58, Exhibit 12 at 10:30). This caused the crate to slide back from the front edge, only slightly, but enough to allow the child to lift the cardboard and extend his head out of the crib in the front, left corner. (Exhibit 12 at 10:45, App. 56-58).

Noakes further explained that while the crate had slid back allowing the cardboard to be raised at the left front corner, she found the child with his head hanging over the front rail of the crib in the center. (Exhibit 12 at

14:00, App. 56-58). Based on where the child was found, he appeared to have stuck his head out of the left front corner, and then slid his neck along the front rail, with his head protruding from the crib, until it was wedged under the crate more towards the center of the front rail. (Exhibit 12 at 14:30, App. 56-58). Noakes took the child out of the crib and brought him to the downstairs living area where she called 9-1-1 and tried to revive him. (App. 58-59).

Chesterfield County firefighter/EMT Jason Maddox (hereinafter "Maddox) testified that when he arrived at Noakes' home he found the child lying in the living room. Maddox picked up the child and brought him to an ambulance where he turned him over to Chesterfield firefighter Colin McCaffrey (hereinafter "McCaffrey") for medical attention. (App. 14-15).

McCaffrey testified that he placed the child on a stretcher in the ambulance and unsuccessfully attempted to open the child's airway. When he found it impossible to open the child's airway due to the onset of rigor mortis he pronounced the child dead. (App. 17-18).

Dr. Wendy Stroh (hereinafter "Stroh"), of the Medical Examiner's office, examined the child on scene and also conducted an investigation including an inspection of the home and a discussion with Noakes. (App. 19-20). Stroh also performed the autopsy of the child. (App. 21). Stroh

opined that the child's death was caused by the compression of the blood vessels in his neck which restricted the flow of oxygen to the child's brain. (App. 21, 25-26). Stroh testified that the injuries that she observed and the child's cause of death were consistent with Noakes' explanation. (App. 21).

During her testimony at trial, Noakes stated that prior to the date of the offense, she had tried several "traditional" methods of getting the child to fall asleep including a white noise fan, rocking him to sleep, remaining in the nursery beside his crib until he slept, changing his crib, using a crib vibrator and lullaby, and patting his back until he fell asleep. None of these means were successful. (App. 92).

Prior to covering the crib with the crate, Noakes attempted a test. She moved the child to a separate crib, placed the crate on top of the crib and shook it to be sure it was stable and that it would not fall into the crib. (App. 68, 82, 89). Once the child was in the crib, she placed the padded cardboard on top of the crib before placing the crate atop it so that if the child attempted to stand "he wouldn't hurt his head". (App. 68, 87). Noakes also placed the crate over top of the crib with enough "overhang" to insure its stability. (App. 68-69).

Noakes was also concerned that the child might try to stick his fingers between the crib and the cardboard lodging and injure them in the holes of

the crate. (App. 68). Accordingly, she created the overhang in the cardboard so the child could not stick his fingers through. (App. 68-69, 83-84). Noakes then bent over and examined the set up from underneath to make sure that the cardboard was properly positioned under the crate. (App. 68-69, 83-84). Noakes also made sure that the crate, which did not cover the entire crib, was placed in the front where the child would normally attempt to stand. (App. 79 83-84). Noakes assured flexibility of the cardboard at the back end of the crib so that if the child insisted on standing he would be able to do so without consequence. (App. 69, 81, 83-85). Noakes also remained in the nursery after assembling the cover to be sure that it did not cause him any distress. (App. 69-70, 87). Noakes testified that in addition to the number of times that she checked on the child, she went back and forth to her bedroom which adjoined the nursery loft so that she could listen and monitor that things were okay. (App. 71).

ARGUMENT

Involuntary manslaughter is defined as the accidental killing of a person, contrary to the intention of the parties, during the prosecution of an unlawful, but not felonious, act, or during the improper performance of some lawful act. Beck v. Commonwealth, 216 Va. 1, 4, 216 S.E.2d 8, 9-10 (1975); Mundy v. Commonwealth, 144 Va. 609, 615, 131 S.E. 242, 244

(1926). The “improper” performance of the lawful act, to constitute involuntary manslaughter, must amount to an unlawful commission of such lawful act, not merely a negligent performance. The negligence must be criminal negligence. Kirk v. Commonwealth, 186 Va. 839, 847, 44 S.E.2d 409, 413 (1947). The accidental killing must be the proximate result of a lawful act performed in a manner “so gross, wanton, and culpable as to show a reckless disregard of human life”. King v. Commonwealth, 217 Va. 601, 607, 231 S.E.2d 312, 316 (1977). See Bell v. Commonwealth, 170 Va. 597, 611-12, 195 S.E. 675, 681 (1938).

A. Noakes’ act did not rise to the level of criminal negligence.

The Virginia Supreme Court has acknowledged that “the application of distinctions between [the various] degrees of negligence [recognized by the law] is frequently difficult to apply.” Town of Big Stone Gap v. Johnson, 184 Va. 375, 379, 35 S.E.2d 71, 73 (1945). Ordinary negligence is “failure to use that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury to another”. Tubman v. Commonwealth, 3 Va. App. 267, 271, 348 S.E.2d 871, 873 (1986) (quoting Griffin v. Shively, 227 Va. 317, 321, 315 S.E.2d 210, 212-13 (1984)). Gross negligence is “a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a

person of ordinary prudence." Newell v. Riggins, 197 Va. 490, 495, 90 S.E.2d 150, 153 (1955). It is "that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence . . . It must be such a degree of negligence as would shock fair minded men although something less than willful recklessness, [i.e. criminal negligence]". Ferguson v. Ferguson, 212 Va. 86, 92, 181 S.E.2d 648, 653 (1971) (emphasis added). Finally, criminal or willful and wanton negligence is "marked by or manifesting arrogant recklessness of justice, of the rights or feelings of others . . . merciless; inhumane". Forbes v. Commonwealth, 27 Va. App. 304, 310, 498 S.E.2d 457, 459 (1998) (citation omitted). Conrad v. Commonwealth, 31 Va. App. 113 (1999).

The application of the distinctions between these degrees of negligence is frequently difficult to apply and this Court has not hesitated to set aside verdicts predicated upon a finding of the higher degree of negligence where a review of the evidence convinced it that the minds of reasonable men could not differ as to the conclusion that such higher degree had not been shown. Tubman v. Commonwealth, 3 Va. App. 267 (1986) citing Town of Big Stone Gap v. Johnson, 184 Va. 375, 379, 35 S.E.2d 71, 73 (1945).

"These distinctions establish that criminal responsibility cannot be predicated upon every act carelessly performed merely because the carelessness results in the death of another." Conrad citing Goodman v. Commonwealth, 153 Va. 943, 948, 151 S.E. 168, 169 (1930). Criminal negligence "is acting *consciously* in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct *probably* would cause injury to another." Tubman, 3 Va. App. at 271, 348 S.E.2d at 873 (emphasis added) (quoting Griffin v. Shively, 227 Va. 317, 321, 315 S.E.2d 210, 213 (1984); Friedman v. Jordan, 166 Va. 65, 68, 184 S.E. 186, 187 (1936)). It is acting in a "reckless, wanton or flagrant nature as to indicate a *callous* disregard for human life," Davis v. Commonwealth, 230 Va. 201, 335 S.E.2d 375 (1985) (quoting Lewis v. Commonwealth, 211 Va. 684, 179 S.E.2d 506 (1971) (emphasis added).

The distinction is well illustrated in this Court's comparison of Hargrove v. Commonwealth, 10 Va. App. 618 (1990) and Conrad v. Commonwealth, Va. App. 113 (1999) two involuntary manslaughter cases which arose from the accidental killing of pedestrians by drivers who had

fallen asleep at the wheel. Conrad v. Commonwealth, 31 Va. App. 113 (1999).

The defendant in Hargrove admitted that he knew he was "extremely tired" yet continued to drive before falling asleep and striking and killing a pedestrian. In reversing Hargrove's conviction for **involuntary manslaughter**, this Court concluded that the evidence failed to show that he should have known that his conduct constituted a reckless disregard for human life. "We do not know . . . that Hargrove should have known that it was not improbable that he would fall asleep during his travel from the workplace to home . . . **[*123].** The evidence does not exclude the reasonable hypothesis that, although Hargrove had worked all night, *he had not fallen asleep, had not previously dozed during the trip before the accident,* and, although tired and in need of sleep and having only a short distance or a trip of a few minutes to reach his home, he could reasonably have believed that he could negotiate his vehicle a short distance without endangering human life." Id. citing Hargrove, 10 Va. App. 618 (1990).

In Conrad, this Court upheld the defendant's conviction. The court found that Conrad's behavior was distinguished by the fact that he had briefly fallen asleep 4-5 times yet continued to drive before striking the pedestrian. Conrad's behavior rose to the level of criminal negligence

because it was “acting consciously in disregard of another person’s rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct *probably* would cause injury to another.” Id. citing Tubman, 3 Va. App. at 271, 348 S.E.2d at 873 (emphasis added) (quoting Griffin at 213; Friedman v. Jordan, 166 Va. 65, 68, 184 S.E. 186, 187 (1936).

The other involuntary manslaughter cases upheld by the appellate courts share the same facts and principle. There was evidence not only that the defendant knew or should have known of a probable danger, but also that he took no steps to prevent the harm. The defendants’ failure to take any steps to address a known or obvious danger was evidence that they were consciously, callously and recklessly ignoring it in the face of probable injury.

In Bell v. Commonwealth, 170 Va. 597 (1938) the defendant drove down a narrow street at night without headlights and, after being warned, struck pedestrians. In Keech v. Commonwealth, 9 Va. App. 272 (1989) the defendant drove the wrong way down the highway for 8 miles notwithstanding open and obvious signs including oncoming traffic. In Kelly v. Commonwealth, 42 Va. App. 347 (2004) the defendant failed to take his

child from it's car seat, or check on the child, leaving him trapped inside a car on a hot day for over 7 hours. In Gallimore v. Commonwealth, 246 Va. 441 (1993) the defendant falsely reported an abduction then did nothing when she knew armed family members of the alleged victim were confronting the accused.

In Banks v. Commonwealth, 41 Va. App. 539 (2003), the defendant chased his victim down an off-ramp of highway I 95 and, after catching him, knocked him to the ground. The defendant struck the victim in the face as he lie on the road then left him "all balled up" in the fetal position as a car approached. That car struck and killed the victim. Id.

In affirming the trial court's conviction, the Court of Appeals concluded that assaulting the victim and leaving him lying apparently injured on the unlit exit ramp in the dark, with a vehicle approaching, was conduct so wanton and willful that it showed utter disregard for the safety of human life. A reasonable person would have known that these circumstances would likely lead to the victim's injury or death. Accordingly, the evidence proved that Banks' acts of commission and omission rose to the level of criminal negligence. Id.

In Coyle v. Commonwealth, 50 Va. App. 656 (2007) the defendant sold the victim two drugs that were not illegal, however, the defendant had

knowledge from a previous distribution that the drug could be fatal. The victim died after ingesting the drug. In upholding Coyle's conviction, the court cited the defendant's knowledge of the danger of the drug and the fact that he distributed it to the victim with the knowledge and intent that the victim would ingest it. Accordingly, his performance of an unlawful act was done with reckless disregard for human life. Id.

These failures to take any steps to address known or obvious dangers distinguish Noakes from cases where this Court has found that a defendant's acts rose to the level of criminal negligence. In the case at bar, while the court undertakes to evaluate the forseeability of death or serious injury to the child, it must do so in conjunction with the measures that Noakes took to insure that death or serious injury would not occur; for these are the circumstances and conditions as they existed to Noakes at the time. Tubman, Va. at 271, S.E.2d at 873 (emphasis added) (quoting Griffin v. Shively, 227 Va. 317, 321, 315 S.E.2d 210, 213 (1984); Friedman v. Jordan, 166 Va. 65, 68, 184 S.E. 186, 187 (1936)).

Noakes expressed a genuine concern only for the child's well being and lack of sleep. There was not a scintilla of evidence to suggest that her actions were born of frustration, inconvenience or any other selfish motivation.

Before covering the crib, Noakes tried, without success, a number of other methods to assist the child in sleeping. She knew only that if the child could be compelled to sit, he would fall asleep. Accordingly, she undertook to cover the front of the crib, where the child normally stood, to compel him to sit and then, ultimately, lie down and fall asleep.

In covering the crib, Noakes went to painstaking lengths to anticipate possible dangers and prevent them. She padded the bottom of the crate with cardboard to prevent the child from hurting his head in the event that he stood. She adjusted the cardboard to hang over the sides of the crib so the child could not reach through it and injure his fingers. She positioned the crate so that it hung over the cribs rails on three sides to ensure its stability. She also shook the crate to be certain that, under forces even greater then those which could be generated by the child, it would not fall into the crib. (It is noteworthy that this most apparent danger, the crate falling, was, in fact, prevented by the measures taken by Noakes.) She then remained in the room for a period to ensure the child was not distressed. (App. 50-53, 68-70, 82, 87, 89).

Noakes returned regularly to the adjoining bedroom so that she could monitor the child as she did housework. When she returned to the nursery to check on the child who continued to cry, her belief that the cover was

stable was reinforced. It had not been manipulated by the child who, as intended, was no longer standing in the crib. (App. 69-70, 87).

She noted that the child was looking out of the crib, through the side meshing, to see Noakes or his mother. She then covered the sides of the crib to prevent the child from seeing out in the hopes that lack of stimulus would further encourage sleep. Throughout the naptime, she frequently entered the adjoining bedroom so she was never far from the child. When Noakes returned to the room a few hours later to retrieve Zach, she did not notice anything amiss notwithstanding passing within inches of the crib and being able to see it in her peripheral vision.

Analogous to the case at bar is the case of Forbes v. Commonwealth, 27 Va. App. 304 (1998). In Forbes, a diabetic episode caused the defendant to black out while driving and resulted in his rear ending and killing another driver. Forbes reported that he had blacked out two to three times in the past as a result of his diabetes. Prior to driving on the day of the accident, he felt woozy so much so that he ate mints and drank orange juice then waited 15 minutes until he felt better. He did not take a blood sugar reading prior to driving. Id.

In reversing his conviction for involuntary manslaughter, the court cited his precautionary measures and belief that he felt fine before driving

in finding that his decision to drive, while negligent, did not amount to wanton negligence so culpable as to show a "reckless disregard for human life." Id. Similarly, in the case at bar, it was Noakes' precautionary measures that distinguish her acts from those that show wanton negligence and a reckless disregard for human life.

In Goodman v. Commonwealth, 153 Va. 943 (1930), the defendant was the driver of a vehicle that negligently overtook a farm truck stopped on the side of a highway. As he did so, he did not yield to a vehicle lawfully traveling in the opposite direction. That vehicle collided with Goodman causing Goodman to collide with the farm truck. A passenger of Goodman's was killed in the collision when he was struck by a metal rod protruding from the stopped truck. Id.

In reversing Goodman's conviction, the court found that although Goodman may have been negligent as there were many dangers inherent in traffic offenses, he could not have foreseen the full extent of the danger of his act, the protruding rod, and therefore was not guilty of criminal negligence.

In affirming Noakes conviction, the Court of Appeals, citing Griffin v. Shively, 227 Va. 317 (1984), placed great weight on the precautions that Noakes took to protect the child from harm as evidence that she was

conscious of the danger involved, an essential element in willful or wanton negligence. Id.

However, facts supporting the dispositive issue in Griffin v. Shively are absent from the case at bar. In Griffin, the contributory negligence of the decedent was the issue in a civil suit. The decedent, who had been shot by Shively, had been aware that Shively had an intense fear of snakes. The decedent was also aware that Shively was armed when he persisted in teasing Shively, left Shively's presence to obtain a "real snake" and then returned and tossed an object at Shively. Shively shot and killed the decedent. The Court in Shively found that the decedent's actions constituted willful negligence because under the circumstances, he knew or should have known that harm was likely to result from his persistent actions under the circumstances known to him. Id.

The case at bar is a mirror opposite to Shively on the dispositive issue. Not only did the decedent in Shively do nothing to lessen the chances of harm in light of the circumstances, he *exacerbated* them. Conversely, Noakes acted only in the child's best interests. It was not disputed at trial that she was an excellent caregiver and that her sole motivation in covering the crib was to help the child to sleep. (App. 164, 50-51). Motivated by this sole purpose, Noakes employed test after test

and precaution after precaution to insure that what otherwise might appear to have the possibility of harming the child, would not. (App. 50-53).

To impute to Noakes' knowledge of danger because of the precautions that she took to prevent it would have a disastrous effect. Parents who place a child in a bath seat would be negligent to a higher degree then those that do not as evidenced by the precaution they employ. Additional safety equipment employed by parents in transport or confinement of children would impute knowledge of the dangers of those acts and increase their negligence should the precaution be ineffective. Following this logic makes determination of negligence simply outcome based. Conversely, the established law in the Commonwealth has been that negligence is to be determined based on what the party knew or should have known as the facts and circumstances presented themselves at the time of action. Tubman, 3 Va. App. at 271.

The obvious concern in placing the crate atop the child's crib was that the crate would be dislodged and fall into the crib harming the child; or that the child would somehow wedge its fingers or strike its head on the crate. Noakes took numerous precautions and intentionally chose a heavy object to insure that the child could not manipulate or dislodge the crate. The underside of the crate was padded with cardboard and its size, weight and

placement insured that it could not be dislodged or fall into the crib. Not only did Noakes' precautions make the dangers that she knew or should have known about unlikely, they in fact prevented them.

Unfortunately, a danger that was not apparent to Noakes and one whose knowledge is not fairly imputed to her was that the child would lift an object that weighed 30% greater than his own body weight and, without displacing it, would maneuver his head underneath it and asphyxiate himself.

The Court of Appeals correctly noted that it is not necessary for a defendant to foresee the specific matter in which injury occurred, citing Gallimore v. Commonwealth, 15 Va. App. 288 (1992). However, the manner in which the injury occurred should certainly be considered in determining whether or not the defendant knew or should have known his actions would *probably* cause injury, the standard for willful negligence. Tubman, 3 Va. App. at 271. This important distinction is well illustrated by the differences between the Gallimore case and the case at bar.

In Gallimore, 15 Va. App. 288 (1992) the defendant created a dangerous situation by falsely reporting, to a group of friends, that another friend had been abducted. In fact she had gone willingly with another man who was not her husband. When one of the friends learned that the others

had found the alleged abductee, he armed himself and indicated he was going to confront the alleged abductee. This was done in the presence of the defendant who had created the fabrication and did nothing to dissuade him. Ultimately, an innocent man was shot as a result of the confrontation. Id.

As part of her appeal, Gallimore alleged that the specific manner in which the decedent was killed was not foreseen by Gallimore who was not at the scene of the shooting. The Court disagreed finding that while the specific manner in which the decedent was killed may not have been foreseen, because one friend was responding to the dangerous situation that Gallimore had created, and because Gallimore knew he was armed and upset as he approached, Gallimore knew or should have known that death or that type of injury was likely to occur. Id.

Conversely, in the case at bar, while danger of injury from Noakes' act may have been foreseen as a possibility to Noakes, once she employed numerous precautions and monitored the situation to prevent the danger, it was no longer a likely outcome as the circumstances presented themselves to Noakes.

The Court of Appeals, citing Lynchburg Cotton Mills v. Stanley, 102 Va. 590 (1904) also opined that Noakes owed a greater duty of care

because of the child's age. Citing language in Lynchburg Cotton Mills, the court opined that a course of conduct that ordinarily would apply to persons of mature judgment could be gross and even criminally negligent when applied to a child. In this case, the court found that because Noakes knew the child might stand, she should have anticipated the end result.

Once again, Lynchburg Cotton Mills actually supports Noakes' position on the dispositive issue. In that case, an employer was found to be aware that twelve-year old children employed in his factory routinely played with belts that were part of the machinery. It was also found, as a matter of fact, that the employer did nothing to try to stop the children from playing with the belts or warn them of their dangers. In short, the employer took no precautions to prevent the children from being harmed while playing with the belts. When one of the children was seriously injured, the employer argued that they owed no duty to warn their employees of the danger. Citing the age of the children, and the prohibition against an assertion of contributory negligence against a child between the ages of seven and fourteen, the court found that a greater duty of care was owed the children.

In the case at bar, the dispositive issue is not the duty of care owed the child by Noakes. As his caregiver, the law recognizes that she owed

the child a greater duty of care than an ordinary person. The dispositive issue is whether the circumstances as known to her at the time, including the tests and precautions that she had taken, were such that she knew or should have known that injury to the child was likely. If Noakes was attempting to defend a civil action by asserting a contributory negligence claim against the child, Lynchburg Cotton Mills would be dispositive. On the issue of whether she is criminally negligent, it is not.

Finally, the Court of Appeals cited Noakes' inattentiveness to the danger in which she placed the child as reinforcement for the finding of involuntary manslaughter. In support of this, the Court cited her failure to return to the child's room for two and one-half hours and her failure to "look in Noah's direction" at 3:30 p.m. when she returned to the room to retrieve Zach. Moreover, they cited her leaving the child unattended for another half an hour until he was discovered at 4:00 p.m. as support. The Court reasoned that because asphyxiation took minutes not hours, leaving the child unattended for even a half an hour was an unjustifiable risk.

The inherent flaw in this reasoning is that it assumes as fact an element necessary to be proven; that the circumstances as known to Noakes were such that she knew or should have known that serious injury was likely. It also ignores the undisputed facts presented at trial.

In fact, the evidence presented at trial was that after Noakes took the numerous precautions previously discussed, she waited in the room with the child to ensure that he was not in distress. (App. 69-70, 87). She continued to monitor the child for distress and returned to the room when he cried. (App. 71, 52-53). At that point, she noted that the child was not standing and had not dislodged the crate or attempted to do so. (App. 52). After covering the front of the crate so the child would not be distressed by looking out to see her, she continued to audibly monitor the child for distress. An important fact was that the child's room was simply an extension of her room which she continuously returned to throughout the afternoon so she could do housework and monitor the child. (App. 71).

When she entered the room at 3:30 p.m. to retrieve the other child, she noted nothing awry with the child. A review of the testimony at trial as well as the photographic and video evidence clearly shows that because of the small size of the room and the close proximity of the children's sleeping pens, a standing child would have been immediately noticed as it was when Noakes ultimately discovered the child. (App. 73, Exhibit 12).

The Court of Appeals suggestion that items placed in front of the crib by Noakes added to her negligence by impeding her view is also not supported by the testimonial or photographic evidence. The evidence

presented at trial shows that the item placed in front of the crib would not have obstructed her view of the standing child and, in fact, did not obstruct her view in the least when she ultimately discovered the child. (App. 56-58, Exhibit 12).

Each of these precautions and acts to monitor the child made the circumstances, as they appeared to Noakes, suggest that serious injury to the child was *unlikely.*

While the means used by Noakes were unconventional and ultimately dangerous, it simply cannot be said at the time that she placed the crate atop the crib that the child would *probably* asphyxiate himself with the crate or even be harmed by it. In fact, the chances that any harm would come to the child were diminished by each precaution that Noakes took and each check she made on the child. The use of an item heavy enough so that it could not be easily moved, the use of an item large enough so that it would be stable atop the crib, the use of overhangs so that the child's fingers could not be harmed and so that the child could not easily manipulate the crate, the use of padding underneath the crate so the child would not harm himself if he stood. Each of these measures reduced the probability of harm to the child to the point that no reasonably intelligent person, using an objective standard, could be charged with the knowledge not simply that

the child *might* or *could* be harmed, but that the child *probably would* be harmed by the object. Similarly, each check on the child and each minute that Noakes monitored the child from within earshot reinforced the belief that the condition was safe. Moreover, each of these precautions demonstrate that the child's welfare was foremost in Noakes' mind and that she lacked the necessary element of a callous disregard for the child's life as required under Virginia law.

It is a sad truth that crib death is not without precedent. Many a child has been seriously injured or killed as a result of head or neck injury from guardrail posts placed too closely or too far apart. Or injured or killed by suffocating on an errant blanket, pillow, or poorly secured padded bumper rail. The frequency and publicity of these tragedies may make them somewhat foreseeable and a case may be made that a parent or guardian who allows this to happen is negligent in failing to provide adequate protection for a child. The children are helpless and therefore it is always the parent that has created the dangerous situation. However, these cases are distinguished from criminal negligence in that the injury caused, while not unforeseeable, is improbable.

There was obviously a serious and tragic flaw in the cover that Noakes made. With the benefit of hindsight, it is clear that Noakes did not

do enough to insure the child's safety and for that she was negligent. However, Noakes went to great lengths to anticipate potential risks and prevent them. So much so that it cannot be said that after all the precautions taken, her act demonstrated a conscious and callous disregard for a death or serious injury that was *likely* to occur. Tubman, 3 Va. App. at 271, 348 S.E.2d at 873 (emphasis added) (quoting Griffin v. Shively, 227 Va. 317, 321, 315 S.E.2d 210, 213 [(1984)]; Friedman v. Jordan, 166 Va. 65, 68, 184 S.E. 186, 187 (1936)). If anything, her conscious regard was to protect the child from all probable dangers and she did. It was her inability to predict any and all possible dangers that failed her.

B. The child's unforeseeable act was an intervening cause of death rendering Noakes' act no longer the proximate cause.

The Commonwealth must also prove beyond a reasonable doubt that the defendant's "criminally negligent acts were a proximate cause of the victim's death." Gallimore v. Commonwealth, 246 Va. 441, 446, 436 S.E.2d 421, 424, 10 Va. Law Rep. 470 (1993).

This Court has recognized that a decedent's actions could be an intervening cause "if the conduct of the deceased amounts to an independent, intervening act alone causing the fatal injury" in which the conduct of the accused becomes a "remote cause". Banks v. Commonwealth, 41 Va. App. 539 (2003) citing Hubbard v. Commonwealth,

243 Va. 1, 14, 413 S.E.2d 875, 882, 8 Va. Law Rep. 1675 (1992) (alterations in original) (quoting Bell Va. at 616, S.E. at 683). In evaluating an intervening cause, this Court and the Court of Appeals has consistently looked to the forseeability of the act. One that is foreseeable cannot be an intervening cause. Delawder v. Commonwealth, 214 Va. 55 (1973), Banks v. Commonwealth, 41 Va. App. 539 (2003), Coyle v. Commonwealth, 50 Va. App. 656 (2007).

In Banks, *supra*, the court rejected the argument that the victim's intoxication and flight, or a vehicle's failure to see the victim in the roadway before striking him were superseding intervening causes of his death. The Court of Appeals reasoned that the defendant's assault and act of leaving the victim in the road created the foreseeable risk of his being struck by a vehicle whose driver could not see him in the dark. Therefore, the defendant's acts were the proximate cause of death. Banks v. Commonwealth, 41 Va. App. 539 (2003).

In Coyle, *supra*, the Court of Appeals rejected the defendant's contention that the victim's voluntary ingestion of the drug rendered his act no longer the proximate cause of the victim's death. The Court found that the victim's ingestion of the drug was not only foreseeable but intended. Accordingly, because it did not interrupt the natural and probable

consequence of the defendant's act of distributing the drug for ingestion, his act remained the proximate cause. Coyle v. Commonwealth, 50 Va. App. 656 (2007).

The case at bar differs from Banks and Coyle in that while the danger of the crate falling into the crib and injuring the child may have been foreseeable, the defendant Noakes did not disregard it. Instead, she took a number of steps to ensure that this would not happen. In fact, Noakes' steps were successful in preventing that danger.

The child's ability to lift a crate 30 percent heavier then the child himself, and the affirmative act of doing so before sliding his head down the front rail to wedge it underneath the displaced crate was not foreseeable. In fact, had the child not performed this improbable feat, Noakes' actions would not have resulted in any harm to the child.

In rejecting this argument, the Court of Appeals cited Gallimore, *supra*, in finding that the child could not be considered a superseding intervening cause where the danger was set in motion by Noakes. However, in Gallimore, that superseding intervening cause was among the set of likely outcomes that the defendant knew or should have known about. That is simply not the case in the case at bar. Accordingly, the act

of the child is an intervening cause that renders the defendant's actions a remote rather then proximate cause of the child's death.

CONCLUSION

Noakes' acts did not rise to the level of criminal negligence. Moreover, the unforeseeable acts of the child were an intervening cause rendering Noakes act a remote not proximate cause of death.

Based on the above stated reasons, Appellant, Elizabeth P. Noakes' conviction of involuntary manslaughter should be reversed and the charge dismissed

Respectfully Submitted,
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CERTIFICATE

I hereby certify that Rule 5:26(d) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, fifteen (15) paper copies and one (1) electronic copy on CD of the foregoing Opening Brief of Appellant and Appendix have been hand-filed with the Clerk of the Supreme Court of Virginia and three (3) paper copies of the same have been served, via U.S. Mail, postage prepaid, upon Joshua M. Didlake, Esquire, Assistant Attorney General, 900 E. Main Street, Richmond, Virginia 23219 on this 25th day of February, 2010.

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