

Canons of Judicial Construction of Statutes:

1. As applied, the decision violated the "plain meaning rule":

The plain meaning of the language of the statute requires that the defendant must have done some act "in such manner" that a person might have been reasonably put in fear. The focus is on the defendant's behavior, not the emotional reaction of a witness to the act. In this case, the focus was entirely on the subjective perceptions of the complaining witness, and there was no evidence that the Defendant ever did anything with the purpose or intent of intimidating that person or of putting him in fear.

2. As applied, the canon that words in a list are to be taken together ("noscitur a sociis") was violated:

The phrase, "to point, hold, or brandish" must be taken as a series of words meaning the same thing - each has the properties of the others, and the group is taken together to make the meaning clearer, not more diverse. In this case, the evidence is that the word, "hold", was taken out of context, because the defendant never did "point" or "brandish" the firearm, or do anything like pointing or brandishing. In order to be found guilty upon the fact of his having held a firearm, he must have held it in a manner consistent with both pointing and brandishing. The list of descriptive words taken otherwise creates three separate criminal acts, when the legislative intent was clearly to specify a particular kind of act.

3. As applied, the principle, "ejusdem generis" has been violated:

Ejusdem generis means that, in a list of descriptive terms, the meaning of the most specific controls that of the more general terms. In this case, "point" is a more specific term than either "hold" or "brandish", and thus, both "hold" and "brandish" are limited in their meaning to that of the word, "point". The statute forbids an act that results in the muzzle of a firearm being aimed in such a way as would make a reasonable person think that he's about to be shot and killed or injured. In this case, the evidence was that the defendant held the gun in such a way that no one could have been shot - his testimony was that the gun was upside down and pointed upwards and to his left, at the top of the door frame of his car, as he was inserting the magazine; the complaining witness testified that the defendant held the gun in such a way that the muzzle was pointed straight up. There was no evidence that the defendant held the gun in such a manner that the complaining witness could reasonably have thought that he was about to be shot. He testified repeatedly that he was afraid because he did not know what the defendant was going to do next. That is, he was not the victim of an act of brandishing, but was afraid that he might be, because of the presence of the firearm.

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1) The brandishing statute has become unconstitutionally vague and ambiguous (and thus a violation of the right to due process of law), because of the decision in Morris.

hypothetically, you lift your jacket to shift the holster to a more comfortable position in a state where both OC and CC are lawful. Someone observes you, say some shrill, tree hugging

Kalifornia transplant, and is "apprehensive" because she is neurotically afraid of evil guns. She files a complaint. Here, the facts of the case for the prosecution must rest on intent, and the 'evil mind' of the defendant.

If there is no other indication of threatening behavior, no behavior other than the display of the firearm that communicates intent to use deadly force. In *Morris*, the defendant was actively engaged in terrorizing other people and made verbal threats and displayed the firearm in such a way as to confirm his present ability to carry out his threats.

The average person then, has to guess where the line is between the kind of situation represented by the hypothetical and in *Morris*. That is (a) too vague to be enforceable; and (b) creates a situation not previously considered in connection with the brandishing statute, in that the statute has never been construed before to include the mere display of a firearm, even in conjunction with threatening words. Is it the presence of the verbal threat that makes the mere display of the firearm an act of "brandishing"? If so, one might think that the statute would have said so, the legislature being presumed to know how to construct a statute. In the absence of the clear identification of a new and different element of the offense, the statute is too ambiguous and vague to inform the average person what behavior is prohibited, and thus unconstitutional and therefore unenforceable.

2) The Supreme Court's prior handling of the requirement that the defendant behave in a way that reasonably induces "fear" in the mind of the observer: the Court has construed that term by analogy to common law definition of the crime of assault, suggesting that the Legislature did not, in fact, mean "fear", but "apprehension". The Court has gone so far as to explain why the Legislature's term is inadequate, in that a brave person may nevertheless perceive that his life is being threatened. But the way that the statute is written makes it clear that this brave man and his feelings are not important - the statute proscribes behavior that relate to what the average reasonable mind would find frightening, irrespective of the feelings of any actual observer. This represents an impermissible extension and broadening of the scope of the statute. The Supreme Court is not a common law court in the sense that the Court of King's Bench was in the Eighteenth Century; its role was changed by the Virginia Constitution into a court that applies the common law, but lacks the legislative power to extend or modify the law. The inherent sovereignty that the Court has and may exercise is limited to the judicial function. The Court of King's Bench had all the powers of the King, including the legislative function, and thus had the power to "find" or "discover" or to simply invent, new law. Our Supreme Court is limited in its function to the application of the words the legislature actually used.

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Code § 18.2-282 "makes it a Class 1 misdemeanor to point, hold, or brandish a firearm in such manner as to reasonably induce fear in the mind of another." *Morris v. Commonwealth*, 269 Va. 127, 129, 607 S.E.2d 110, 111 (2005). A conviction for brandishing, thus, requires proof of two basic elements: "(1) pointing or brandishing a firearm, and (2) doing so in such a manner as to reasonably induce fear in the mind of a victim." *Kelsoe v. Commonwealth*, 226 Va. 197, 198, 308 S.E.2d 104, 104 (1983). "'Brandish' means 'to exhibit or expose in an ostentatious,

shameless, or aggressive manner." Morris, 269 Va. at 135, 607 S.E.2d at 114 (quoting Webster's Third New International Dictionary 268 (1993)). And "[t]his Court has held, in connection with robbery, that 'the word "fear" . . . does not so much mean "fright" as it means "apprehension"; one too brave to be frightened may yet be apprehensive of bodily harm.'" Huffman v. Commonwealth, 51 Va. App. 469, 472, 658 S.E.2d 713, 714 (2008) (emphasis in original) (quoting Seaton v. Commonwealth, 42 Va. App. 739, 749, 595 S.E.2d 9, 14 (2004)).

-- Dezfuli v. Commonwealth, 58 Va. App. 1, 9, 707 S.E.2d 1 (2011).

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The only objective facts upon which the police relied to seize Christian were that he was carrying a weapon in public in "a high drug area." However, carrying an openly displayed firearm in public is not illegal in Virginia. Indeed, if a person desires to transport a firearm from his automobile to his residence, the firearm must be openly displayed. Cf. Code § 18.2-308 (prohibiting generally the carrying of concealed weapons). The record contains no indication that Christian was "brandishing" a firearm in violation of Code § 18.2-282(A). In a state that permits ownership and open display of firearms, the mere fact that a person may be armed does not provide a reason to suspect that the person is violating the law.

Moreover, "the characteristic of an area cannot serve to impute criminal activity to a person by virtue of that person's presence in the area." Riley v. Commonwealth, 13 Va. App. 494, 498-99, 412 S.E.2d 724, 726 (1992). In Brown, the United [Page 719] States Supreme Court has also noted that a neighborhood's characteristic tells nothing about the conduct of the person in it.

--Christian v. Commonwealth, 33 Va. App. 704, 536 S.E.2d 477 (2000)

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The phrase beginning with "in such a manner as to reasonably induce fear", is an adverbial phrase - the element of the offense is not the reaction of an observer, but a description and qualification of the defendant's behavior. It is essential to prove that the firearm was used in that particular way, but it is irrelevant who saw it, or how many people saw it. It is not necessary that anyone actually felt fear or apprehension.

This is a criminal statute, so all that is at issue is the behavior of the defendant, not the perceptions of witnesses.

There are several cases that discuss brandishing in terms of assault, though each of those cases specifically holds that the phrase, "reasonably induce fear" really means "capable of producing the apprehension", using the same standard as would apply in an assault case. Brandishing is the equivalent, basically, of what many states call, "assault with a deadly weapon".

In support of that contention, I emphasize that it is the act of the defendant that subjects him to criminal punishment, not the perceptions, emotions, or number of onlookers. Note the use of the word, "acts" in the following:

Here's another argument: the use of the singular to describe the person subjected to fear for his life includes the plural. Va. Code §1-227. So the phrase, "in such manner as to reasonably induce fear in the mind of another..." is equivalent to, "in such manner as to reasonably induce fear in the minds of many other people".

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[9-11] Morris says further that he “never touched the gun in the presence” of Molina or his wife and there is no evidence that “he pointed the flare gun.” Hence, Morris concludes, the evidence is insufficient to support a conviction for brandishing a firearm.

We disagree with Morris. “Brandish” means “to exhibit or expose in an ostentatious, shameless, or aggressive manner.” Webster's Third New International Dictionary, 268 (1993). When Morris looked at Ms. Molina, said “[he'd] like that,” and then pulled up his shirt to uncover the flare gun, he exhibited or exposed the weapon in a shameless or aggressive manner. And Morris brandished the weapon in such a manner as to reasonably induce fear in the mind of Peter Molina. Although Molina may not have said he was in fear for his own safety, he stated unequivocally that he feared for the safety of his wife, and that is sufficient to prove the “induced fear” element of a conviction for brandishing a firearm under Code § 18.2-282.

Morris v. Commonwealth, 269 Va. 127, 135, 607 S.E.2d 110, ___ (2005)

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Brandishing a firearm means using it “in such manner as to reasonably induce fear in the mind of another or holding a firearm in a public place in such a manner as to reasonably induce fear in the mind of another of being shot or injured.” Code § 18.2-282(A). The ordinary meaning of the word tracks its statutory definition. Brandishing a firearm means to “wave, shake, or exhibit in a menacing, challenging, or exultant way.” Webster's New World Dictionary 170 (3d college ed. 1988).

Jackson v. Commonwealth, 39 Va. App. 624, 642, 576 S.E.2d 206, ___ (2003)

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Appellant argues that because he was acting in self-defense, his brandishing of the firearm was not prohibited criminal conduct.

“Self-defense is an affirmative defense which the accused must prove by introducing sufficient evidence to raise a reasonable doubt about his guilt.” Smith v. Commonwealth, 17 Va. App. 68,

71, 435 S.E.2d 414, 416 (1993) (citing *McGhee v. Commonwealth*, 219 Va. 560, 562, 248 S.E.2d 808, 810 (1978)). Whether appellant “prove[d] circumstances sufficient to create a reasonable doubt that he acted in self-defense is a question of fact.” *Id.* (citing *Yarborough v. Commonwealth*, 217 Va. 971, 979, 234 S.E.2d 286, 292 (1977)). “The trier of fact determines the weight of evidence in support of a claim of self-defense.” *Gardner v. Commonwealth*, 3 Va. App. 418, 426, 350 S.E.2d 229, 233-34 (1986) (citing *Yarborough*, 217 Va. at 979, 234 S.E.2d at 291-92; *Dodson v. Commonwealth*, 159 Va. 976, 984-85, 167 S.E. 260, 262 (1933)). The “trial judge’s factual findings will not be disturbed on appeal unless plainly wrong or without evidence to support them.” *Smith*, 17 Va. App. at 71, 435 S.E.2d at 416 (citing *Yarborough*, 217 Va. at 979, 234 S.E.2d at 292).

Virginia courts have long recognized that

a person who reasonably apprehends bodily harm by another is privileged to exercise reasonable force to repel the assault. *Jackson v. Commonwealth*, 96 Va. 107, 113, 30 S.E. 452, 454 (1898); see also *Montgomery v. Commonwealth*, 99 Va. 833, 835, 37 S.E. 841, 842 (1901) (recognizing the right of a landowner “to order [a trespasser] away, and if he refuse[s] to go, to use proper force to expel him” so long as no breach of the peace is committed in the outset). The privilege to use such force is limited by the equally well recognized rule that a person “shall not, except in extreme cases, endanger human life or do great bodily harm.” *Montgomery v. Commonwealth*, 98 Va. 840, 843, 36 S.E. 371, 372 (1900). Moreover, the amount of force used must be reasonable in relation to the harm threatened. See *id.* at 844, 36 S.E. at 373 (“it is not reasonable to use deadly force to prevent threatened harm to property, such as a mere trespass or theft”); *W. LaFave & A. Scott, Criminal Law* § 5.9(a) (2d ed. 1986).

Diffendal v. Commonwealth, 8 Va. App. 417, 421, 382 S.E.2d 24, 25-26 (1989).

In addition, “whether the danger is reasonably apparent is always to be determined from the viewpoint of the defendant at the time he acted.” *McGhee*, 219 Va. at 562, 248 S.E.2d at 810. “[P]rior acts of violence by the victim [are] relevant as bearing on the reasonable apprehension which the defendant may have experienced” *Luck v. Commonwealth*, 30 Va. App. 36, 43, 515 S.E.2d 325, 328 (1999) (quoting *Edwards v. Commonwealth*, 10 Va. App. 140, 142, 390 S.E.2d 204, 206 (1990)).

Neither Oakley nor Roberts displayed or threatened to use a firearm or other weapon on the date of the instant offense, and the statement of facts indicates the men were not armed. Furthermore, while there was evidence that they shouted at appellant, there is no evidence that these shouts evidenced an intention by either Oakley or Roberts to inflict bodily harm on appellant. Moreover, although appellant fled when Oakley arrived, the fact-finder was free to conclude that appellant failed to prove that he reasonably apprehended a danger of harm to himself. While Oakley had held appellant at gunpoint two years earlier in another confrontation, which would have supported a finding that appellant could reasonably have feared for his safety when Oakley and Roberts confronted him on April 21, 2009, the trier of fact was free to conclude appellant failed to prove he in fact harbored such fear on that date.

“The credibility of the witnesses and the weight accorded the evidence are matters solely for the fact finder who has the opportunity to see and hear that evidence as it is presented.” *Sandoval v. Commonwealth*, 20 Va. App. 133, 138, 455 S.E.2d 730, 732 (1995) (citing *Schneider v. Commonwealth*, 230 Va. 379, 382, 337 S.E.2d 735, 736-37 (1985); *Carter v. Commonwealth*, 223 Va. 528, 532, 290 S.E.2d 865, 867 (1982)). Based on the record before this Court, we cannot say that the trial court's factual determination that appellant did not act in self-defense when he brandished the handgun was plainly wrong.

Swilling v. Commonwealth, 11 Vap UNP 0548101 (2011)

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This Court has held, in connection with robbery, that “the word “fear” . . . does not so much mean “fright” as it means “apprehension”; one too brave to be frightened may yet be apprehensive of bodily harm.” *Seaton*, 42 Va. App. at 749, 595 S.E.2d at 14 (quoting 3 Wayne R. LaFare, *Substantive [Page 473] Criminal Law § 20.3(d)*, at 187-88 (2d ed. 2003)) (emphasis in original). In other words, “[w]hen the pertinent test is cast in terms of a victim being put in “fear” of injury, it is not necessary that the victim be frightened; it is necessary merely that he be reasonably apprehensive of injury.” *Id.* (quoting Charles E. Torcia, 4 *Wharton's Criminal Law § 462*, at 21 (15th ed. 1996)) (emphasis in original).

The dispositive issue in this case, therefore, is whether there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Moon was reasonably apprehensive of bodily harm induced by Huffman brandishing the gun in her presence.

Huffman v. Commonwealth, 51 Va. App. 469, 472-473, 658 S.E.2d 713, ___ (2008)

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Instruction No. P18.710

Pointing or Brandishing Firearm or Object Similar in Appearance to a Firearm

Punishment Phase:

You have found the defendant guilty of the crime of [pointing; brandishing] [a firearm; an object similar in appearance to a firearm].

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

- 1) Confinement in jail for a specific time, but not more than twelve (12) months; or
- 2) A fine of a specific amount, but not more than \$2,500; or
- 3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than \$2,500.

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Instruction No. G18.710

Pointing or Brandishing Firearm or Object Similar in Appearance to a

Firearm

Guilt Phase:

The defendant is charged with the crime of [pointing; brandishing] [a firearm; an object similar in appearance to a firearm]. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

- 1) That the defendant [pointed; brandished] [a firearm; an object similar in appearance to a firearm]; and
- 2) That the defendant did so in such a manner as to reasonably induce fear or apprehension of bodily harm in the mind of another person.

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 the defendant guilty but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the offense, then you shall find the defendant not guilty.

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THE PLAIN MEANING RULE:

Legislative intent is ascertained “by giving to all the words used their plain meaning, and construing all statutes in pari materia in such manner as to reconcile, if possible, any discordant feature which may exist, and make the body of the laws harmonious and just in their operation.” Thomas v. Commonwealth, 59 Va. App. 496, 500, 720 S.E.2d 157, 159-60 (2012) (quoting Lucy v. Cnty. of Albemarle, 258 Va. 118, 129-30, 516 S.E.2d 480, 485 (1999)). Furthermore, “[w]e . . . presume that the legislature chose, with care, the words it used when it enacted the relevant statute.” Seabolt v. Cnty. of Albermarle, 283 Va. 717, 720, 724 S.E.2d 715, 717 (2012) (alteration in original) (quoting Addison v. Jurgelsky, 281 Va. 205, 208, 704 S.E.2d 402, 404 (2011)).

Cumbo v. Dickenson Co. Social Svcs., 62 Va. App. 124, 128, 742 S.E.2d 885, ___ (2013)

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When considering the plain meaning of a statutory provision to determine the legislature's intent in adopting it, we may consider as a whole the entire legislative enactment from which it was codified. Eberhardt v. Fairfax County Emps. Ret. Sys. Bd. of Trs., 283 Va. 190, 194-95, 721 S.E.2d 524, 526 (2012). The current incarnations of both Code §§ 37.2-821 and 37.2-846 trace their origins to a single legislative enactment recommended by the Virginia Code Commission. 2005 Acts ch. 716; see also House Doc. No. 31, Virginia Code Commission, Report on the Revision of Title 37.1 of the Code of Virginia(2005). In particular, Chapter 8 was deliberately constructed to organize disparate provisions of former Title 37.1 into a “streamlined” and “comprehensible” structure when that former title was revised and recodified as Title 37.2. Id. at 5.

Paugh v. Henrico Area Mental Health, 286 Va. 85, 92, 743 S.E.2d 277, ___ (2013)

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“When interpreting a statute, courts are required to ascertain and give effect to the intention of the legislature, which is usually self-evident from the statutory language.” *Johnson v. Commonwealth*, 53 Va. App. 608, 612-13 (2009) (citations omitted) (quoting *Chase v. DaimlerChrysler Corp.*, 266 Va. 544, 547 (2003)) (“When the language of a statute is plain and unambiguous, we are bound by the plain meaning of that statutory language.”).

Robertshaw v. Commonwealth, 19 Cir. CL20131902 (2013)

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“Statutory interpretation is a question of law which we review de novo, and we determine the legislative intent from the words used in the statute, applying the plain meaning of the words unless they are ambiguous or would lead to an absurd result.” *Wright v. Commonwealth*, 278 Va. 754, 759, 685 S.E.2d 655, 657 (2009). The Virginia Supreme Court has long held that “when analyzing a statute, we must assume that ‘the legislature chose, with care, the words it used . . . and we are bound by those words as we interpret the statute.’” *City of Virginia Beach v. ESG Enters.*, 243 Va. 149, 153, 413 S.E.2d 642, 644 (1992) (quoting *Barr v. Town and Country Properties*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)). “Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed.” *Tazewell County Sch. Bd. v. Brown*, 267 Va. 150, 162, 591 S.E.2d 671, 676-77 (2004) (citation omitted).

Kepa, Inc. v. Virginia Dept. of Health, 61 Va. App. 696, 703, 740 S.E.2d 26, ___ (2013)

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“Statutory interpretation is a question of law which we review de novo, and we determine the legislative intent from the words used in the statute, applying the plain meaning of the words unless they are ambiguous or would lead to an [Page 420] absurd result.” *Wright v. Commonwealth*, 278 Va. 754, 759, 685 S.E.2d 655, 657 (2009). The Virginia Supreme Court has long held that “when analyzing a statute, we must assume that ‘the legislature chose, with care, the words it used . . . and we are bound by those words as we interpret the statute.’” *City of Virginia Beach v. ESG Enters.*, 243 Va. 149, 153, 413 S.E.2d 642, 644 (1992) (quoting *Barr v. Town & Country Properties*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)). “Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed.” *Tazewell County Sch. Bd. v. Brown*, 267 Va. 150, 162, 591 S.E.2d 671, 676-77 (2004) (citation omitted). However, “[l]anguage is ambiguous if it admits of being understood in more than one way or refers to two or more things simultaneously. An ambiguity exists when the language is difficult to comprehend, is of doubtful import, or lacks clearness and definiteness.” *Brown v. Lukhard*, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985) (citations omitted). In addition, “penal statutes are to be construed strictly against the [Commonwealth and] cannot be extended

by implication, or be made to include cases which are not within the letter and spirit of the statute.” *Wade v. Commonwealth*, 202 Va. 117, 122, 116 S.E.2d 99, 103 (1960).

Doulgerakis v. Commonwealth, 61 Va. App. 417, 419-420, 737 S.E.2d 40, ___ (2013)

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“A primary rule of statutory construction is that courts must look first to the language of the statute. If a statute is clear and unambiguous, a court will give the statute its plain meaning.” *Loudoun County Dep't of Social Servs. v. Etzold*, 245 Va. 80, 85, 425 S.E.2d 800, 802 (1993).

Stokes v. Commonwealth, 61 Va. App. 388, 395, 736 S.E.2d 330, ___ (2013)

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The Commonwealth argues that this construction of the venue requirements for Code § 18.2-311.1 will make prosecution more difficult when the location of alteration is unknown. Whatever the policy merits of the Commonwealth's argument, it is best addressed by the General Assembly. This Court must follow the plain meaning of the statute and may not rewrite it.

“The duty of this court is not to make law, but to construe it; not to wrest its letter from its plain meaning in order to conform to what is conceived to be its spirit, in order to subserve and promote some principle of justice and equality which it is claimed the letter of the law has violated. It is our duty to take the words which the legislature has seen fit to employ and give to them their usual and ordinary signification, and having thus ascertained the legislative intent, to give effect to it, unless it transcends the legislative power as limited by the Constitution.”

Temple v. Petersburg, 182 Va. 418, 423, 29 S.E.2d 357, 359 (1944) (quoting *Commonwealth v. Sanderson*, 170 Va. 33, 38-39, 195 S.E. 516, 519 (1938)).

Bonner v. Commonwealth, 61 Va. App. 247, 253, 734 S.E.2d 692, ___ (2012)

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“Statutory construction is a question of law which we review de novo on appeal.” *Lynchburg Div. of Soc. Servs. v. Cook*, 276 Va. 465, 480, 666 S.E.2d 361, 368 (2008) (quoting *Parker v. Warren*, 273 Va. 20, 23, 639 S.E.2d 179, 181 (2007)). In accordance with well-established principles, we will “apply the plain language of a statute unless the terms are ambiguous.” *Id.* (quoting *Boynton v. Kilgore*, 271 Va. 220, 227, 623 S.E.2d 922, 926 (2006)). “[T]he primary objective of statutory construction is to ascertain and give effect to legislative intent.” *Commonwealth v. Amerson*, 281 Va. 414, 418, 706 S.E.2d 879, 882 (2011) (alteration in original) (quoting *Conger v. Barrett*, 280 Va. 627, 630, 702 S.E.2d 117, 118 (2010)); see also *B.P. v. Commonwealth*, 38 Va. App. 735, 739, 568 S.E.2d 412, 413 (2002) (“We will not place a construction upon a statute which leads to an absurd result or one plainly contrary [Page 285] to the expressed intent of the General Assembly . . .”). Indeed,

“[i]n the construction of statutes, the courts have but one object, to which all rules of construction are subservient, and that is to ascertain the will of the legislature, the true intent and meaning of the statute, which are to be gathered by giving to all the words used their plain meaning, and construing all statutes in pari materia in such manner as to reconcile, if possible, any discordant feature which may exist, and make the body of the laws harmonious and just in their operation.”

Thomas v. Commonwealth, 59 Va. App. 496, 500, 720 S.E.2d 157, 159-60 (2012) (alteration in original) (quoting Lucy v. Cnty. of Albemarle, 258 Va. 118, 129-30, 516 S.E.2d 480, 485 (1999)). Furthermore, “[w]e . . . presume that the legislature chose, with care, the words it used when it enacted the relevant statute.” Seabolt v. Cnty. of Albemarle, 283 Va. 717, 720, 724 S.E.2d 715, 717 (2012) (alteration in original) (quoting Addison v. Jurgelsky, 281 Va. 205, 208, 704 S.E.2d 402, 404 (2011)).

Fitzgerald v. Commonwealth, 61 Va. App. 279, 284-285, 734 S.E.2d 708, ___ (2012)

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EJUSDEM GENERIS

Turning now to the applicable canons of statutory construction, we note that,

[u]nder the rule of ejusdem generis, when a particular class of persons or things is enumerated in a statute and general words follow, the general words are to be restricted in their [Page 165] meaning to a sense analogous to the less general, particular words. Likewise, according to the maxim noscitur a sociis . . . [,] when general and specific words are grouped, the general words are limited by the specific and will be construed to embrace only objects similar in nature to those things identified by the specific words.

Wood by & Through Wood v. Henry County Pub. Schs., 255 Va. 85, 94-95, 495 S.E.2d 255, 260-61 (1998) (internal quotations and citations omitted); see also Kappa Sigma Fraternity, Inc. v. Kappa Sigma Fraternity, 266 Va. 455, 470, 587 S.E.2d 701, 710 (2003).

Surles v. Mayer, 48 Va. App. 146, 164-165, 628 S.E.2d 563, ___ (2006)

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Under this doctrine, when items with a specific meaning are listed together in a statute, and are followed by words of general import, the general words will not be construed to include matters within their broadest scope but only those matters of the same import as that of the specific items listed. Turner v. Reed, 258 Va. 406, 410, 518 S.E.2d 832, 834 (1999); Wood v. Henry County Pub. Schs., 255 Va. 85, 94, 495 S.E.2d 255, 260 (1998).

Kappa Sigma Frat. Inc. v. Kappa Sigma Fraternity, 266 Va. 455, 470, 587 S.E.2d 701, ____ (2003)

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The Supreme Court of Virginia has held that, when determining whether an object falls within the definition of a “weapon” as it is used in Code § 18.2-308(A), the statutory construction rules of ejusdem generis and noscitur a sociis should be applied. See *Wood v. Henry County Public Schools*, 255 Va. 85, 94, 495 S.E.2d 255, 260-61 (1998). According to the rule of ejusdem generis, “when a particular class of persons or things is enumerated in a statute and general words follow, the general words are to be restricted in their meaning to a sense analogous to the less general, particular words.” *Id.* at 94, 495 S.E.2d at 260 (quoting *Martin v. Commonwealth*, 224 Va. 298, 301-02, 295 S.E.2d 890, 892-93 (1982)). The rule of noscitur a sociis dictates “when general and specific words are grouped, the general words are limited by the specific and will be construed to embrace only objects similar in nature to those things identified by the specific [Page 59] words.” *Id.* at 94, 495 S.E.2d at 260-61 (quoting *Martin*, 224 Va. at 301-02, 295 S.E.2d at 892-93 (holding that a pocket-knife is neither a dirk, bowie knife, switchblade knife, ballistic knife, nor a weapon of like kind within the meaning of Code § 18.2-308(A))).

O'Banion v. Commonwealth, 33 Va. App. 47, 58-59, 531 S.E.2d 599, ____ (2000) (decision overturned on other grounds: *Harris v. Commonwealth*, 274 Va. 409, 650 S.E.2d 89 (2007))

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As we define that doctrine, in the construction of legal instruments, when the listing of an item with a specific meaning is followed by a word of general import, the general word will not be construed to include things in its widest scope but only those things of the same import as that of the specific item listed. See *Cape Henry Towers, Inc v. National Gypsum Co.*, 229 Va. 596, 603, 331 S.E.2d 476, 481 (1985); *Martin v. Commonwealth*, 224 Va. 298, 301, 295 S.E.2d 890, 892 (1982); *East Coast Freight Lines v. City of Richmond*, 194 Va. 517, 525, 74 S.E.2d 283, 288 (1953); *Rockingham Bureau v. Harrisonburg*, 171 Va. 339, 344, 198 S.E. 908, 911 (1938).

Turner v. Reed, 258 Va. 406, 410, 518 S.E.2d 832, ____ (1999)

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NOSCITUR A SOCIIS

Under the canon of noscitur a sociis, the precise meaning intended by the legislature of a word susceptible to multiple meanings is ascertained “by reference to [its] association with related words and phrases” in the statute. *Cuccinelli*, 283 Va. at 432, 722 S.E.2d at 633 (quoting *Andrews v. Ring*, 266 Va. 311, 319, 585 S.E.2d 780, 784 (2003)). Where general words and specific words occur together, “the general words are limited and qualified by the specific words

and will be construed to embrace only objects similar in nature to those objects identified by the specific words.” Id. (quoting *Andrews*, 266 Va. at 319, 585 S.E.2d at 784).

Newberry Station HOA v. Board of Supervisors, 285 Va. 604, 628, 740 S.E.2d 548, ___ (2013) (footnote 9)

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The maxim of *noscitur a sociis* provides that the meaning of doubtful words in a statute may be determined by reference to their association with related words and phrases. When general words and specific words are grouped together, the general words are limited and qualified by the specific words and will be construed to embrace only objects similar in nature to those objects identified by the specific words. *Commonwealth v. United Airlines, Inc.*, 219 Va. 374, 389, 248 S.E.2d 124, 132-33 (1978).

Andrews v. Ring, 266 Va. 311, 319, 585 S.E.2d 780, ___ (2003)

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We cannot, however, consider statutory language out of context, which would be the only basis upon which the words in question could be given the “limitless” effect for which Cape Henry contends. We are guided by two familiar and related principles of statutory construction. “Under the rule of *eiusdem generis*, when a particular class of persons or things is enumerated in a statute and general words follow, the general words are to be restricted in their meaning to a sense analogous to the less general, particular words.” *Martin v. Commonwealth*, 224 Va. 298, 301, 295 S.E.2d 890, 892 (1982). “Likewise, according to the maxim *noscitur a sociis* . . . when general and specific words are grouped, the general words are limited by the specific and will be construed to embrace only objects similar in nature to those things identified by the specific words.” Id. at 302, 295 S.E.2d at 893.

Cape Henry v. Natl. Gypsum, 229 Va. 596, 603, 331 S.E.2d 476, ___ (1985)

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The first involves an interpretive canon we think is out of place here. The canon, *noscitur a sociis*, reminds us that “a word is known by the company it keeps,” *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995), and is invoked when a string of statutory terms raises the implication that the “words grouped in a list should be given related meaning,” *Dole v. Steelworkers*, 494 U.S. 26, 36 (1990) (internal quotation marks omitted); see also *Beecham v. United States*, 511 U.S. 368, 371 (1994) (“That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well”).

S. D. Warren Co. v. Maine Bd. of Environmental Protection, 547 U.S. 370, 378 (2006)

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Code § 18.2-325(3) (emphasis added). Significantly, the Commonwealth does not contend that Turner financed, managed, supervised, directed, or owned all or part of the numbers operation the investigation disclosed. Instead, the Commonwealth's entire case against Turner is based on the contention that the evidence showed he conducted in part the business of the numbers operation. In essence, the Commonwealth reads the word "conducts" to mean "engages in" or "participates in." We think the Commonwealth's position is at odds with the readily discernible legislative intent.

There are at least three ways to ascertain the legislative intent concerning this statute: (1) by adopting the usual meaning of the word "conduct," (2) by applying the meaning of the word "conduct" as it relates to the other words listed in Code § 18.2-325 and italicized above, and (3) by analyzing Code § 18.2-328 along with other statutory provisions with which it is in *pari materia*. By every approach, the evidence adduced against Turner is insufficient to convict him of the violation with which he was charged.

Webster's Third New International Dictionary, Unabridged (1981) defines "conduct" as meaning to lead as a commander, to have the direction of. Its synonyms are manage, control, and direct. Manifestly, the word "conduct" connotes leadership and control. It contemplates the person in charge. It in no way suggests the role of a mere employee, participant, or helper. Thus, the Commonwealth's reliance upon the word "conduct" as the basis of Turner's conviction is misplaced. There was no proof that Turner was in command of the operation or that he led the operation or controlled it.

Nor can any of the other words listed in Code § 18.2-325 serve as the basis for Turner's conviction. This is so because the maxim *noscitur a sociis*, which translates "it is known from its associates," provides that the meaning of a word takes color and expression from the purport of the entire phrase of which it is a part, and it must be read in harmony with its context. We already have seen that the word "conduct," standing alone, connotes command. [Page 461] The other words in the series are to the same effect.² To "finance" is to raise or provide funds or capital for, to provide with necessary funds in order to achieve a desired end. To "manage" is to control and direct. Its synonyms are conduct and administer. To "supervise" is to coordinate, direct, and inspect; to oversee with the powers of direction and decision. To "direct" is to regulate the activities or course of; to guide and supervise. Its synonyms are administer and conduct. To own is to have or hold as property, to possess. When considered together, the verbs listed in Code § 18.2-325 make crystal clear that the statute is aimed at the puppeteer, the person in charge, or, in the words of the Commonwealth in oral argument, "Mr. Big." The evidence failed to show that Turner was in charge. If anything, the evidence showed that Turner was a bagman and that bagmen are not always essential to an illegal gambling operation.

Turner v. Commonwealth, 226 Va. 456, 460-461, 309 S.E.2d 337, ___ (1983)

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Those courts authorizing the discovery of similar internal policies often utilize an analysis that combines the principles of *eiusdem generis* and *noscitur a sociis*. See, eg., *Day v. Medical Facilities of America, Inc.*, 23 Cir. CL023, 59 Va. Cir. 378, 379 (Salem 2002); *Owens v. Children's Hosp. of the King's Daughters, Inc.*, 4 Cir. L971380, 45 Va. Cir. 97, 99 (Norfolk 1997) (internal citations omitted); *Stevens v. Lemmie*, 11 Cir. CL95405, 40 Va. Cir. 499, 508 (Petersberg 1996). Under the doctrine of *noscitur a sociis*, if both general and specific words are grouped together in a statute, the specific words limit the scope of the objects described by the general words to those objects specifically enumerated. *Cape Henry Towers, Inc v. National Gypsum Co.*, 229 Va. 596, 603, 331 S.E.2d 476 (1985). The *eiusdem generis* approach provides that, if the legislature would have used a more general phrasing if they intended the “general” words in a statute to apply, rather than using specific words in the statutory language. *Gates & Sons v. Richmond*, 103 Va. 702, 706, 49 S.E. 965, 966 (1905). Applying this combined analysis to § 8.01-581.17, these courts hold that the term “all communications” is limited by the terms “proceedings, minutes, records, and reports”. See, eg., *Day*, 59 Va. Cir. at 379. Following this logic, these courts then infer that, since the legislature only specifically enumerated a particular subset of communications, namely “procedures, minutes, records, and reports”, an organization's internal policies, procedures, or protocol do not fall under the scope of the privilege, as they are not particularly specified in the statute. *Id.*

Mejia-Arevalo v. INOVA Health Care Services, 19 Cir. CL200715529, 77 Va. Cir. 43 (2008)

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The maxim *noscitur a sociis* “instructs that ‘the meaning of a word takes color and expression from the purport of the entire phrase of which it is a part, and it must be read in harmony with its context.’” *Andrews v. American Health & Life Ins. Co.*, 236 Va. 221, 225, [Page 664] 372 S.E.2d 399, 401 (1988) (quoting *Turner v. Commonwealth*, 226 Va. 456, 460, 309 S.E.2d 337, 339 (1983)).

Halifax Corporation v. Wachovia Bank, 268 Va. 641, 663-664, 604 S.E.2d 403, ____ (2004)

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