

**[J-4A-2013, J-4B-2013 and J-4C-2013]  
IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT**

**CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.**

COMMONWEALTH OF PENNSYLVANIA, : No. 9 EAP 2012  
: :  
Appellant : Appeal from the Judgment of Superior  
: Court entered on 2/2/2011 at No. 3583  
: EDA 2009, vacating and affirming the  
v. : Judgment of Sentence entered on  
: 10/29/2009 in the Court of Common Pleas,  
: Philadelphia County, Criminal Division at  
NASHIR FISHER, : No. CP-51-CR-0007251-2008  
: :  
Appellee : ARGUED: March 5, 2013

COMMONWEALTH OF PENNSYLVANIA, : No. 10 EAP 2012  
: :  
Appellant : Appeal from the Judgment of Superior  
: Court entered on 2/2/2011 at No. 3497  
: EDA 2009 vacating and affirming the  
v. : Judgment of Sentence entered on  
: 10/29/2009 in the Court of Common Pleas,  
: Criminal Division, Philadelphia County at  
KINTA STANTON, : No. CP-51-CR-0007248-2008  
: :  
Appellee : ARGUED: March 5, 2013

COMMONWEALTH OF PENNSYLVANIA, : No. 11 EAP 2012  
: :  
Appellant : Appeal from the Judgment of Superior  
: Court entered on 2/2/2011 at No. 3273  
: EDA 2009 vacating and affirming the  
v. : Judgment of Sentence entered on  
: 10/29/2009 in the Court of Common Pleas,  
: Criminal Division, Philadelphia County at  
AMEER BEST, : No. CP-51-CR-0007253-2008  
: :  
Appellee : ARGUED: March 5, 2013

## OPINION

**MR. JUSTICE EAKIN**

**DECIDED: October 30, 2013**

In this appeal, we are asked to determine whether conspiracy to commit third degree murder is a cognizable offense under Pennsylvania law. Because we hold conspiracy to commit third degree murder is a cognizable offense, we reverse the order of the Superior Court and remand for reinstatement of the sentences.

Appellees Fisher, Stanton, and Best were teenagers at the time of the offense. They traveled to downtown Philadelphia with two other male cohorts to get one young man's cell phone fixed. When that plan fell through, the group decided to "jump" the next person they saw, so their trip downtown would not have been "for nothing." Trial Court Opinion (Best), 2/2/10, at 2. The young men saw the 36-year-old victim walking alone in a subway concourse and decided to attack him. At the goading of his four friends, one of the young men struck the victim from behind. The others promptly joined the attack; they punched, kicked, and stomped on the victim's head and chest. Two Southeastern Pennsylvania Transportation Authority (SEPTA) police officers heard the commotion and responded. One officer heard Best say, "You bitch," and saw him punch the victim in the head. Id. The other officer heard laughter from the group as they engaged in the attack. The group scattered when the officers approached. One officer tried to help the victim, who was holding onto a railing and gasping for air. The victim lost consciousness and was taken to the hospital, where an examination revealed he suffered numerous contusions, abrasions, blunt force trauma, and fractured ribs. As a result of the beating, the victim suffered a fatal asthma attack.

Appellees and their two cohorts were apprehended and charged with involuntary manslaughter, third degree murder, and conspiracy to commit third degree murder. During individual police interviews, appellees admitted to participating in the attack.

They were tried as adults in a joint jury trial, at which the Commonwealth introduced their police statements, the two SEPTA officers' testimony, and the testimony of one group member who pled guilty.<sup>1</sup> The jury convicted Fisher and Best of third degree murder and conspiracy to commit third degree murder, and convicted Stanton of involuntary manslaughter and conspiracy to commit third degree murder. Fisher and Best were each sentenced to 12½ to 25 years imprisonment for third degree murder, with a concurrent term of ten to 20 years imprisonment for conspiracy to commit third degree murder. Stanton received a sentence of 12½ to 25 years imprisonment for conspiracy to commit third degree murder, with a concurrent term of two and one-half to five years imprisonment for involuntary manslaughter.

Appellees filed individual appeals with the Superior Court. In a trio of memorandum decisions, the court affirmed the third degree murder and involuntary manslaughter convictions, but vacated the conspiracy to commit third degree murder conviction, concluding this offense was a legal nullity. See Commonwealth v. Fisher, No. 3583 EDA 2009, unpublished memorandum at 6 (Pa. Super. filed February 2, 2011); Commonwealth v. Stanton, No. 3497 EDA 2009, unpublished memorandum at 9 (Pa. Super. filed February 2, 2011); Commonwealth v. Best, No. 3273 EDA 2009, unpublished memorandum at 7 (Pa. Super. filed February 2, 2011). The court based its holdings on this Court's interpretation of Commonwealth v. Clinger, 833 A.2d 792 (Pa. Super. 2003), contained in a parenthetical in Commonwealth v. Weimer, 977 A.2d 1103, 1105 (Pa. 2009).

Weimer involved the same issue as the present case: whether conspiracy to commit third degree murder is a cognizable offense. However, this Court did not reach

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<sup>1</sup> The other two members of the group entered guilty pleas to third degree murder.

the issue because the defendant was charged with and convicted of conspiracy to commit homicide generally; there was no gradation of homicide, as in the instant case. Accordingly, we concluded the conspiracy to commit homicide conviction was valid. We further noted the Superior Court dealt with various cases involving conspiracy and third degree murder, most of which held conspiracy to commit third degree murder was a cognizable offense. See id. (collecting cases). However, we also cited the Superior Court's decision in Clinger as a contrary holding, noting it stood for the proposition that "because it is impossible for one to intend to commit an unintentional act, it is impossible to commit [the] crime of conspiracy to commit third degree murder." Id. (citing Clinger, at 795-96).<sup>2</sup>

In the instant matter, the Superior Court concluded, "In light of our Supreme Court's reading of Clinger, we are compelled to conclude that the offense of conspiracy to commit third-degree murder is a legal nullity." Fisher, at 6 (footnote omitted); Stanton, at 9; Best, at 6-7. Accordingly, the court vacated appellees' convictions for conspiracy to commit third degree murder. In Fisher and Best's cases, the court held remand for resentencing was unnecessary because their conspiracy sentences ran concurrently with their third degree murder sentences, which were longer; therefore, the length of the aggregate sentences was unaffected. In Stanton's case, the court concluded remand for resentencing was necessary because Stanton's aggregate sentence was significantly reduced by vacation of the conspiracy conviction from 12½ to 25 years to two and one-half to five years.

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<sup>2</sup> Justice Todd, joined by Justice Saylor, dissented in Weimer, concluding the defendant had been convicted of conspiracy to commit third degree murder; accordingly, she would have ruled on the merits of the issue, holding conspiracy to commit third degree murder is not a cognizable offense, as one cannot intend to commit an unintentional killing. See Weimer, at 1109-12 (Todd, J., dissenting).

Judge Olson filed identical dissenting memoranda in all three cases, opining since neither Clinger nor Weimer directly addressed whether conspiracy to commit third degree murder is a cognizable offense, any reference those cases made regarding the issue was dicta. The dissent noted Commonwealth v. Johnson, 719 A.2d 778 (Pa. Super. 1998) (en banc), “expressly held that a defendant can be charged with conspiracy to commit third-degree murder, reasoning that if murder is the natural and probable consequence of actions of a conspiracy done with malice, murder is not beyond the conspiracy.” Fisher, at 1-2 (Olson, J., dissenting); Stanton, at 1-2 (Olson, J., dissenting); Best, at 1-2 (Olson, J., dissenting). Accordingly, the dissent would have held Johnson controlled, and would have affirmed appellees’ convictions for conspiracy to commit third degree murder.

The Commonwealth appealed, and we consolidated the cases for argument on the following issues:

1. Is conspiracy to commit third[ ]degree murder a cognizable offense under Pennsylvania law?
2. In the alternative, if conspiracy to commit third[ ]degree murder is not a cognizable offense under Pennsylvania’s law, did the Superior Court contradict this Court’s precedent by failing to modify the judgment to a cognizable offense, i.e., conspiracy to commit aggravated assault?

Commonwealth v. Fisher, 38 A.3d 767 (Pa. 2012) (per curiam). As these are questions of law, our scope of review is plenary, and our standard of review is de novo. Commonwealth v. Crawley, 924 A.2d 612, 614 (Pa. 2007) (citation omitted).

The Commonwealth claims the Superior Court essentially adopted the Weimer dissent’s view, which noted “a key element of third[ ]degree murder is the absence of a specific intent to kill.” Weimer, at 1111 (Todd, J., dissenting). According to the dissent, because “the essence of third[ ]degree murder is a homicide that occurs in the absence of a specific intent to kill[,] ... to be guilty of conspiracy to commit third[ ]degree murder, an individual would have to intend to commit an unintentional killing, a logical impossibility.”

Id., at 1112. The Commonwealth contends this logic misses the mark because lack of specific intent is not an element of third degree murder; the offense requires malice, which means the defendant recklessly, knowingly, or intentionally caused the victim's death. See Commonwealth's Brief, at 9-10 (citing 18 Pa.C.S. § 2502(c) (homicide statute does not specify requisite mental state for third degree murder); id., § 302(c) (where statute does not prescribe culpability sufficient to establish material element of offense, such element is established if defendant acted intentionally, knowingly, or recklessly)). Therefore, the Commonwealth argues, as long as a defendant intended to facilitate a crime involving reckless or knowing behavior, he can be convicted of conspiracy to commit third degree murder.

The Commonwealth further posits where, as here, the evidence shows appellees possessed the highest mental state mentioned in § 302(c) — intentional conduct — when they agreed to attack the victim, the third degree murder conviction merely represents an act of mercy by the fact-finder, as the evidence was sufficient to support a first degree murder conviction. Therefore, a conviction for conspiracy to commit third degree murder is appropriate, as specific intent was shown. The Commonwealth criticizes the Weimer dissent's reliance on the American Law Institute's commentary to the Model Penal Code for the view that there cannot be a conspiracy to commit a crime for which the minimum required mens rea is negligence or recklessness; the Commonwealth notes although § 903 of the Crimes Code is derived from the Model Penal Code, the General Assembly has never adopted the commentary thereon. See id., at 15 (citing Commonwealth v. Brown, 375 A.2d 331, 334 n.4 (Pa. 1977) (while comments to Model Penal Code may be helpful in interpreting statutes, they were not specifically adopted by legislature and therefore are not binding)).

In the alternative, the Commonwealth argues even if conspiracy to commit third degree murder is not a cognizable offense, the Superior Court erred in completely vacating the sentences for conspiracy to commit third degree murder; rather, the proper course would have been to modify the sentences to be for the lesser-included offense of conspiracy to commit aggravated assault. The Commonwealth contends this course is consistent with an appellate court's statutory authority to modify an appealable order, as well as with precedent holding when an error affects only a discrete element of an offense, the proper remedy is to modify the judgment to a lesser-included offense not containing that element. See id., at 18-19 (citing 42 Pa.C.S. § 706; collecting cases).

Appellees' arguments mirror the rationale of the Weimer dissent:<sup>3</sup> because conspiracy is a specific intent crime, and a key element of third degree murder is the absence of specific intent, it is a logical impossibility to agree to commit an unintended killing. Appellees also rely on cases holding attempted third degree murder is not a cognizable offense, analogizing these decisions' reasoning that because attempt is a specific intent crime, one cannot attempt to do something unintentionally. See Fisher's Brief, at 11 (citing Commonwealth v. Williams, 730 A.2d 507, 511-12 (Pa. Super. 1999); Commonwealth v. Griffin, 456 A.2d 171, 177 (Pa. Super. 1983)).

Appellees further argue the Superior Court properly vacated their sentences for conspiracy to commit third degree murder. Appellees contend modifying their sentences to ones for conspiracy to commit aggravated assault would require the court to guess at what the jury believed; as the jury charge fused the elements of aggravated assault and

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<sup>3</sup> The majority of the argument in appellee Stanton's brief is a verbatim quotation of the Weimer dissent. See Stanton's Brief, at 11-16.

third degree murder,<sup>4</sup> it is impossible to tell what the jury found concerning aggravated assault.

In determining whether conspiracy to commit third degree murder is a cognizable offense, we look first to the pertinent statutes. The Crimes Code defines conspiracy as follows:

(a) Definition of conspiracy.—A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

(1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

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(e) Overt act.—No person may be convicted of conspiracy to commit a crime unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

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<sup>4</sup> Although the bills of information charged appellees with third degree murder and conspiracy, and did not specify the criminal object of the conspiracy, see Bill of Information, 6/25/08, the trial court apparently permitted the Commonwealth to amend the information to include the criminal object and overt act. See N.T. Hearing, 7/20/09, at 10-11; N.T. Trial, 8/25/09, at 28. It is unclear, however, whether the criminal object was supposed to be aggravated assault or third degree murder. At trial, the court initially stated it would not charge the jury on aggravated assault, see N.T. Trial, 8/24/09, at 5; however, in its charge, the court stated the information alleged aggravated assault was the object of the conspiracy, and charged the jury on aggravated assault. See id., at 243-44; N.T. Trial, 8/25/09, at 25. The court further instructed the jury it could find appellees guilty of conspiracy to commit third degree murder if it found they shared the intent to commit aggravated assault on the victim and he was killed as a result of the assault. N.T. Trial, 8/24/09, at 244-45; N.T. Trial, 8/25/09, at 26-27. The verdict sheets only listed third degree murder as the object of the conspiracy.



18 Pa.C.S. § 903(a), (e). Thus, “[t]o sustain a conviction for criminal conspiracy, the Commonwealth must establish that the defendant (1) entered into an agreement to commit or aid in an unlawful act with another person or persons, (2) with a shared criminal intent and, (3) an overt act was done in furtherance of the conspiracy.” Commonwealth v. Rios, 684 A.2d 1025, 1030 (Pa. 1996) (citations omitted).

Section 2502 of the Crimes Code defines the three degrees of murder. This section sets forth the mens rea for first degree murder, see 18 Pa.C.S. § 2502(a) (an intentional killing), and defines second degree murder as that occurring during the perpetration of a felony. See id., § 2502(b). Regarding third degree murder, however, the statute simply states, “All other kinds of murder shall be murder of the third degree.” Id., § 2502(c). Importantly, § 2502(c) does not set forth the requisite mens rea for third degree murder; however, § 302(c) of the Crimes Code provides, “When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly or recklessly with respect thereto.” Id., § 302(c) (emphasis added).

Case law has further defined the elements of third degree murder, holding:

[T]o convict a defendant of the offense of third[ ]degree murder, the Commonwealth need only prove that the defendant killed another person with malice aforethought. This Court has long held that malice comprehends not only a particular ill-will, but ... [also a] wickedness of disposition, hardness of heart, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured.

Commonwealth v. Santos, 876 A.2d 360, 363 (Pa. 2005) (alteration in original) (internal citation, quotation, and emphasis omitted); see also Commonwealth v. Drum, 58 Pa. 9, 15 (1868) (defining malice as quoted above). This Court has further noted:

[T]hird degree murder is not a homicide that the Commonwealth must prove was committed with malice and without a specific intent to kill. Instead, it is

a homicide that the Commonwealth must prove was committed with malice, but one with respect to which the Commonwealth need not prove, nor even address, the presence or absence of a specific intent to kill. Indeed, to convict a defendant for third degree murder, the jury need not consider whether the defendant had a specific intent to kill, nor make any finding with respect thereto.

Commonwealth v. Meadows, 787 A.2d 312, 317 (Pa. 2001) (quoting Commonwealth v. Young, 748 A.2d 166, 174-75 (Pa. 1999)).

Accordingly, the Commonwealth is correct that absence of specific intent to kill is not an element of third degree murder; rather, such crime is an intentional act, characterized by malice, that results in death, intended or not. Appellees and the Superior Court beg the question — in stating an element of the crime of third degree murder is an unintentional killing, and one cannot intend an unintentional act, they misstate the elements of third degree murder. True, the intent to kill is a defined element of first degree murder — this does not mean an element of third degree murder is the polar opposite of intent to kill, such that the Commonwealth must prove a lack of intent to kill to convict of third degree murder. The Commonwealth has no such obligation; evidence of intent to kill is simply irrelevant to third degree murder. The elements of third degree murder absolutely include an intentional act, but not an act defined by the statute as intentional murder. The act sufficient for third degree is still a purposeful one, committed with malice, which results in death — clearly, one can conspire to such an intentional act.

Our review of Pennsylvania case law regarding conspiracy to commit third degree murder reveals convictions for this crime have long been recognized as valid. In Commonwealth v. Eiland, 301 A.2d 651 (Pa. 1973), this Court addressed whether the evidence was sufficient to convict the defendant of conspiracy to commit a homicide classified, at that time, as second degree murder. The defendant, a gang member, was aware one of his fellow members threatened to shoot a rival gang member; the

defendant's fellow gangster showed him a gun as they were walking to find the rival gang. En route, the defendant was separated from his group for a brief time. When he rejoined them, he was told a member of the rival gang had been shot. In rejecting the defendant's claim there was no evidence showing any actual agreement to commit murder or that he acquiesced in such plan, we stated:

Where the existence of a conspiracy is established, the law imposes upon a conspirator full responsibility for the natural and probable consequences of acts committed by his fellow conspirator or conspirators if such acts are done in pursuance of the common design or purpose of the conspiracy. Such responsibility attaches even though such conspirator was not physically present when the acts were committed by his fellow conspirator or conspirators and extends even to a homicide which is a contingency of the natural and probable execution of the conspiracy, even though such homicide is not specifically contemplated by the parties[.]

Id., at 653 (emphasis added) (internal quotations and citation omitted) (quoting Commonwealth v. Thomas, 189 A.2d 255, 258 (Pa. 1963)). Accordingly, we concluded the evidence was sufficient to support the defendant's conspiracy to commit second degree murder conviction. Id.

In Commonwealth v. Mobley, 359 A.2d 367 (Pa. 1976), this Court affirmed the defendant's conspiracy to commit third degree murder conviction where he engaged in a gang fight culminating in the stabbing death of the victim by another gang member. We stated:

"Here [the defendant], armed with a knife, admitted voluntarily joining the other members of his gang in an attack upon their rivals, a venture which necessarily involved the risk of serious injury. This element of shared criminal intent provides the nexus which renders all members of a criminal conspiracy responsible for the acts of any of its members."

Id., at 369 (citations omitted).

The Superior Court subsequently rendered several decisions which likewise upheld convictions for conspiracy to commit third degree murder. See Johnson, at 785

(affirming conviction for conspiracy to commit third degree murder, based on fact “[defendant] possessed and shared an intent to act intentionally and with malice, i.e., hardness of heart, cruelty, wantonness, or with a conscious disregard of an unjustified and extremely high risk that his actions might cause death or serious bodily harm. ... [The defendant’s] conduct on the night in question demonstrated a tacit agreement to commit such intentional and malicious acts.”); Commonwealth v. La, 640 A.2d 1336, 1345-46 (Pa. Super. 1994) (affirming conviction for conspiracy to commit third degree murder and rejecting defendant’s argument jury should have been instructed there must be shared intent to kill before conspiratorial liability for murder will attach; trial court’s instruction — that defendant was criminally responsible if he shared intent with his co-conspirators to commit aggravated assault on victims and one of victims was killed — was proper); Commonwealth v. Bigelow, 611 A.2d 301, 304 (Pa. Super. 1992) (citation omitted) (defendant’s undisputed participation in attack leading to victim’s death supported third degree murder conviction; court noted, “Despite the fact that an individual co-conspirator did not contemplate a killing, where such is a natural and probable consequence of a co-conspirator’s conduct, killing is not beyond the scope of the conspiracy.”); Commonwealth v. Wanamaker, 444 A.2d 1176, 1178 (Pa. Super. 1982) (affirming conspiracy to commit third degree murder conviction because “[the defendant’s] conduct reveals a conscious disregard of a great risk that he might have inflicted death or serious bodily harm upon [the victim]. Accordingly, [the defendant’s] conspiracy with his brother to engage in activity that manifests such malice constitutes a criminal conspiracy to commit murder.”).

The Superior Court abruptly changed course in Clinger. There, the court observed “the essence of third degree murder is a homicide which occurs as the

unintended consequence of a malicious act.” Id., at 796 (citations omitted). In vacating the defendant’s conspiracy to commit third degree murder sentence, the court reasoned:

Since a conviction for conspiracy requires an intention to promote or facilitate the commission of a crime, the crime that is the object of the conspiracy must either be intended to be accomplished, or have been accomplished. In the present case, since the crime of third degree murder was not accomplished, [the defendant] could only be guilty of conspiracy to commit a crime if he intended that crime to be accomplished. Logic dictates, however, and this Court has recognized, that it is impossible for one to intend to commit an unintentional act.

Id. (citation omitted). Subsequently, however, the court retreated from this reasoning and again recognized the offense of conspiracy to commit third degree murder. See Commonwealth v. Geiger, 944 A.2d 85, 92 (Pa. Super. 2008) (citations omitted) (finding “evidence was sufficient in quantity and quality to sustain [the defendant’s] convictions for third degree murder and criminal conspiracy, which manifested itself in the hardness of heart, cruelty, and recklessness of consequences associated with the manner and method of [the victim’s] death.”).

In Commonwealth v. Barnes, 924 A.2d 1202 (Pa. 2007) (per curiam), the Commonwealth asked this Court to consider the viability of a conspiracy to commit third degree murder charge in light of Clinger’s rationale; however, this issue was collateral to the main issue, which the Commonwealth failed to properly preserve. Accordingly, we declined to review either issue. See id., at 1203 n.1.

The next time this Court considered the issue of whether conspiracy to commit third degree murder is a cognizable offense was in Weimer. However, as previously noted, we did not reach the issue because the defendant was convicted of conspiracy to commit homicide generally; the sentencing transcript and order incorrectly referenced the defendant’s conspiracy conviction as being for third degree murder. Although the defendant was convicted of third degree murder, we noted “the ultimate gradation of the

crime accomplished does not in and of itself delimit the degree of crime originally planned — the crime ultimately accomplished does not retroactively limit the scope of the original conspiracy.” Weimer, at 1105. Therefore, as the conspiracy conviction for homicide in general was proper, we did not address the issue pertaining to conspiracy to commit third degree murder. The dissent, believing the record supported the defendant’s assertion that she was convicted of conspiracy to commit third degree murder, would have reached the merits of that issue and concluded it was an illegal sentence for a non-cognizable offense. See id., at 1107 (Todd, J., dissenting).

In Commonwealth v. Roebuck, 32 A.3d 613 (Pa. 2011), this Court addressed a similar issue: whether it is possible to be convicted as an accomplice to third degree murder. The defendant’s argument was based on the same syllogism as in the present case:

[A]ccomplice liability attaches only where the defendant intends to facilitate or promote an underlying offense; third[ ]degree murder is an unintentional killing committed with malice; therefore, to adjudge a criminal defendant guilty of third[ ]degree murder as an accomplice would be to accept that the accused intended to aid an unintentional act, which is a logical impossibility.

Id., at 614 (emphasis omitted). We concluded because the culpability required for accomplice liability is not tied to the result, but instead focuses on the act or the conduct, it is possible to be an accomplice to third degree murder. See id., at 619-20 (citations omitted) (noting commentary to Model Penal Code, upon which Pennsylvania’s accomplice liability statute is based, explains requirement that accomplice promote or facilitate “the commission of the offense” focuses on conduct, not result, thus diffusing any impression accomplice must always intend results essential to completed crime).

Two Justices concurred in the result, recognizing the flaw in the defendant’s syllogism, which posited third degree murder is an unintentional killing committed with malice:

Third degree murder is not by definition an unintentional killing; it is a malicious killing without proof that the specific result intended from the actions of the killer was the death of the victim. A conviction for third degree murder only means the Commonwealth did not prove the defendant acted with a specific intent to kill.

As [the defendant's] syllogism is based on a false premise, his argument fails. Indeed, an accomplice to third degree murder does not intend to aid an unintentional murder; he intends to aid a malicious act which results in a killing. Suppose an accomplice hands a gun to the principal and says "shoot that victim — I don't care if he dies or not, but shoot him." The principal shoots the victim in the leg, but the victim dies — it is classic third degree murder, there being no proof of specific intent to kill, but a clearly malicious act regardless of the consequences. The same logic that enables a murder charge against the principal binds the accomplice as well — both committed an intentional malicious act that resulted in the death of another, and both are guilty of the murder charge that follows.

Id., at 624-25 (Eakin, J., concurring) (internal citation omitted).

Based upon Clinger and the dissent in Weimer, the Superior Court in the instant case deemed conspiracy to commit third degree murder a logical impossibility. The court's reasoning and the crux of appellees' position is that third degree murder is an unintentional killing, and one cannot intentionally conspire to commit an unintentional act. This logic is based on the reasoning in Weimer's dissent, which noted Pennsylvania's conspiracy statute is derived from § 5.03 of the Model Penal Code. See Weimer, at 1112 (Todd, J., dissenting) (citing 18 Pa.C.S. § 903, Official Comment — 1972). "Under the Model Penal Code, where the object crime of a conspiracy is defined in terms of a result of conduct, such as homicide, the actor's purpose must be to promote or facilitate that result." Id. (citing Model Penal Code § 5.03 cmt. 2(c)(i) at 407 (Official Draft and Revised Comments 1985)). Thus, appellees contend the language of Pennsylvania's conspiracy statute focuses on the actor's intent to promote or facilitate the commission of a "crime,"

not an “act”; unless the actor intended to commit the underlying crime, he cannot be guilty of conspiracy for such crime.

Our review of the foregoing precedent, combined with the relevant statutory provisions, leads us to conclude the absence of intent to kill does not preclude a defendant from being convicted of conspiracy to commit third degree murder. Absence of specific intent is not an element of third degree murder; the third degree murder statute does not list elements or specify a requisite mens rea, but rather categorizes this degree of homicide as “[a]ll other kinds of murder” not falling within the definition of first or second degree murder. 18 Pa.C.S. § 2502(c). The Crimes Code further provides where a statute, such as § 2502(c), does not prescribe the culpability sufficient to establish a material element of the offense, such element is established if the defendant acted “intentionally, knowingly or recklessly[.]” Id., § 302(c). Thus, a defendant who acts intentionally in attacking his victim may still be convicted of third degree murder. See Meadows, at 317 (reaffirming Young’s holding there is no inconsistency in convicting defendant of both first and third degree murder); see also Young, at 174-75.

As noted in Roebuck’s concurrence, “[t]hird degree murder is not by definition an unintentional killing; it is a malicious killing without proof that the specific result intended from the actions of the killer was the death of the victim.” Roebuck, at 624-25 (Eakin, J., concurring). Although Roebuck dealt with accomplice liability, as opposed to conspiracy, it is instructive.<sup>5</sup> If a defendant acts with his co-conspirators in brutally attacking the victim with the intention of killing him, he conspires to commit first degree murder; if the defendant performs the same action but does not care whether the victim

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<sup>5</sup> The majority in Roebuck acknowledged the culpability requirements for accomplice liability differ from those for conspiracy, id., at 622-23, noting “accomplice liability does not require the defendant to have the conscious objective to cause a particular result when such an outcome is an element of the offense.” Id., at 623.



dies or not, he conspires to commit third degree murder. In the latter example, the defendant did not, as appellees argue, intend to aid an unintentional murder; rather, he intended to aid a malicious act resulting in a killing. Malice is not the absence of any intent, just the specific intent to kill. Where, as here, the defendant intends the underlying act (the beating) which results in death, the evidence supports the charge of conspiracy to commit third degree murder.

The language of Pennsylvania's conspiracy statute, modeled after the MPC, states the defendant must have "the intent of promoting or facilitating" a crime and must "engage in conduct which constitutes such crime[.]" 18 Pa.C.S. § 903(a), (a)(1). Thus, one does not conspire to commit a denominated offense; one conspires to engage in certain conduct. The fact the actors do not mention which crime such conduct will constitute does not make conspiracy to commit the offense non-cognizable. The conspiracy is to commit the beating, which, being carried out with the mental state of malice, supports a charge of third degree murder. Accordingly, we hold conspiracy to commit third degree murder is a cognizable offense.

Precedent of this Court and the Superior Court, in affirming convictions for conspiracy to commit third degree murder, lends support for our holding. In Eiland, this Court reasoned a conspirator's "responsibility for the natural and probable consequences of acts committed by his fellow conspirator[s] ... extends even to a homicide which is a contingency of the natural and probable execution of the conspiracy, even though such homicide is not specifically contemplated by the parties." Eiland, at 653 (internal quotations and citation omitted); see also Mobley, at 369 (citations omitted) (element of shared criminal intent to attack victim, which involved risk of serious injury, provided nexus rendering all members of conspiracy responsible for acts of any of its members). Similarly, in Wanamaker, Bigelow, La, and Johnson, the Superior Court based its holding

on the defendant's shared intent to engage in an intentional activity with malice, resulting in a killing that was a natural, probable consequence of the activity. As discussed above, the defendants in these cases conspired to commit certain acts, which were intentional, regardless of whether the consequences of such acts were intended.

Here, appellees agreed to engage in the intentional, malicious attack of the victim, without regard to the consequences of that act. As their actions resulted in the victim's death, their conspiracy to commit third degree murder convictions were appropriate, and we reverse and remand for reinstatement of their sentences.<sup>6</sup>

Order reversed; remanded for reinstatement of sentences. Jurisdiction relinquished.

Former Justice Orié Melvin did not participate in the consideration or decision of this case.

Mr. Chief Justice Castille and Messrs. Justice Baer and McCaffery join the opinion.

Madame Justice Todd files a dissenting opinion in which Mr. Justice Saylor joins.

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<sup>6</sup> Because we hold conspiracy to commit third degree murder is a cognizable offense, we do not reach the Commonwealth's alternative argument pertaining to modification of the conspiracy to commit third degree murder sentences to conspiracy to commit aggravated assault sentences.