IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 140081

MAUREEN ANNE BLAKE

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

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BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

The issue presented in this case is whether the defendant, Maureen Anne Blake, violated Virginia Code §§ 22.1-254 and 22.1-263 by failing repeatedly to ensure that her three daughters arrived at their elementary school on time.

A judge of the Loudoun County Circuit Court, sitting without a jury, convicted Blake of three counts of violating Virginia Code §§ 22.1-254 and 22.1-263 and fined her $500 in each case, suspended upon condition of

good behavior for twelve months and payment of court costs. (App. 13-15). The court entered the final judgment order on August 28, 2012, and Blake noted her appeal. (App. 16-18).

The defendant, by counsel, appealed the judgment to the Court of Appeals of Virginia. The Court issued an unpublished opinion on November 19, 2013, affirming the convictions. (Record No. 1751-12-4). (App. 27-42).

This Court initially refused Blake's petition for appeal for lack of jurisdiction pursuant to Virginia Code §§ 17.1-410(A)(1) and (B), but the Court vacated that order and awarded Blake an appeal on June 5, 2014. (App. 43-45).

ASSIGNMENTS OF ERROR

The defendant assigned the following errors:

I. The Court of Appeals erred by holding that the parent of a tardy child is criminally liable for failing to "send" his or her child to school, as used in Virginia Code § 22.1-254, where the child is enrolled and has zero unexcused absences.

II. The Court of Appeals erred by holding that knowledge and willfulness were not elements required to sustain [Blake's] conviction where the amended arrest warrant specifically alleged knowing and willful conduct.

III. The Court of Appeals erred by holding that the issues of notice and the constitutionality of Code § 22.1-254 were not included in the Assignments of Error.

(App. 46).

STATEMENT OF FACTS

The Offense

In September of 2011, the defendant's daughters, ages 10, 9, and 7, attended an elementary school in Loudoun County. (App. 99-100). The school day began at 7:50 a.m. (App. 84). From September 15, 2011 through January 19, 2012, Blake's children arrived at school late ten times without a valid excuse, such as a doctor's note or other documentation explaining their tardiness. (App. 82-83, 92). In September, October, and November, they were tardy five times, ranging from five to twenty minutes, and some of the excuses proffered for being late were that Blake or one of the girls had overslept, one of the girls had wanted to wear a particular item of clothing, or Blake had to clean up spilled food. (App. 90-91). The girls were tardy three times in December and two times in January. (App. 115-116). Each instance of tardiness occurred on a Thursday morning after the girls had spent the prior night with Blake. (App. 75, 100). The children lived with their father on the other days of the school week and came to school on time. (App. 75, 102, 109, 115).

Lori Melcher, a Loudoun County public school attendance officer, sent Blake a letter on November 3, 2011, and met with her in December of 2011, regarding her daughters' tardiness. (App. 94, 106, 109-110). Blake acknowledged her children had not come to school on time. (App. 92-93). She told Melcher she and one of her daughters had ADHD and another daughter was being tested for it.[1] (App. 93-94). However, the children were not enrolled in, or eligible for, special education classes. (App. 93).

Blake testified at trial she had difficulty with one or more of her daughters not being ready on time for school on Thursday mornings. (App. 100). She said "it was a bit of struggle" due to their ADHD to keep the children focused on getting to school and that they lacked emotional maturity. (App. 103, 105). As part of Blake's "personal parenting philosophy," she said she did not want to bring the girls to school until after they had "work[ed] through an anger issue" and were "ready to learn ... in a socially acceptable state." (App. 105).

Blake further testified her own ADHD manifested itself in "disorganization due to losing things." (App. 104). She said she drove the girls to school and sometimes they were tardy because she had lost her car

[1] At the trial on August 16, 2012, Blake said all three of her daughters had been diagnosed with ADHD and were being treated for that condition. (App. 101).

keys or misplaced her purse. (App. 100, 104). According to Blake, it was "ridiculous" for six instances of tardiness in a school year to be considered "criminal behavior" for an ADHD person and that the "best" she could do "would be being late a dozen times or less possibly." (App. 104). Blake also said she had tried to improve her own ADHD issues by obtaining a "life coach" and teaching a training course on time management at her workplace. (App. 107).

The Proceedings

Blake was charged initially with three counts of contributing to the delinquency of a minor in violation of Virginia Code § 18.2-371 (one count for each daughter), but the warrants were amended in juvenile court to charge violations of Virginia Code §§ 22.1-254 and 22.1-263. (App. 1, 3, 5, 50).

On appeal to the circuit court, Blake moved to dismiss the charges against her, alleging Code § 22.1-254 mandated enrollment of children in school and did not address truancy. (App. 10-12). She also asserted in the trial court that the statute was unconstitutionally vague as applied to her because it failed to give notice to a person of ordinary intelligence that tardiness is prohibited criminal conduct. (App. 11).

The trial court heard the motion prior to the beginning of trial. (App. 51-53). Blake argued the requirement in Code § 22.1-254 that parents "send" their children to school did not encompass tardiness, created "a zero tolerance policy" that did not allow for absences due to inadvertence or circumstances outside a parent's control, and took away parental discretion. (App. 53-61). The court denied the motion, concluding that Code § 22.1-254 applied to tardiness and also was not "facially invalid." (App. 72-73).

The court then determined Blake would be tried for a Class 3 misdemeanor because no prior conviction for the same offense had been alleged, as required for a Class 2 misdemeanor under Code § 22.1-263. (App. 52, 74, 79). The defendant did not object to the court's ruling.[2] (App. 51-52, 76).

After hearing all the evidence, the court found Blake had failed on five Thursdays between December 1, 2011 and January 19, 2012, to have her children at school on time. (App. 120-121). The court relied in part on an

[2] In fact, in her Motion to Dismiss, Blake stated she was charged with a Class 3 misdemeanor. (App. 10).

opinion of the Attorney General of Virginia issued on January 31, 2005, that concluded Code § 22.1-254 applied to tardiness.[3] (App. 72-73).

ARGUMENT

I. THIS APPEAL WAS IMPROVIDENTLY GRANTED AND SHOULD BE DISMISSED FOR LACK OF JURISDICTION PURSUANT TO VIRGINIA CODE §§ 17.1-410(A)(1) AND (B).

The defendant was convicted of three Class 3 misdemeanors and fined $500 in each case. Code § 17.1-410(A)(1) provides there is no right to appeal from the Court of Appeals to this Court in "misdemeanor cases where no incarceration is imposed." However, an appeal is permitted if "the decision of the Court of Appeals involves a substantial constitutional question as a determinative issue or matters of significant precedential value." Code § 17.2-410(B).

The defendant asserted in her petition for appeal to this Court that her case has "significant precedential value" because "it is the first and only opinion applying Virginia Code § 22.1-254 in a criminal context, as well as the only case to interpret 'send' as used in that statute." (Pet. 2). She also

[3] 2005 Op. Va. Att'y Gen. 91, 94 ("A parent's awareness and support of his child's absence from school does not, of itself, allow repeated absenteeism, tardiness, or early departures.").

contended the Court of Appeals' "ruling significantly expand[ed] the scope of prosecution and is contrary to the General Assembly's intent." (Pet. 2).

What the defendant actually seeks, however, is a second chance to overturn her convictions. The fact that the issue is one of first impression and interprets a word in a statute does not mean it has "significant precedential value." Certainly, the Court of Appeals may determine an issue of first impression or statutory construction, and when it does so, the decision does not require the imprimatur of this Court to be binding.[4]

Thus, Blake's appeal should be dismissed as improvidently granted. *See Schuman v. Schuman*, 282 Va. 443, 444 n.1, 717 S.E.2d 410, 410 n.1 (2011) (dismissing two of appellant's assigned errors because they did not comply with Code § 17.1-410(B)).

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[4] This Court refused the petitions for appeal in the following cases, all of which concerned issues of first impression or statutory construction: *Spiker v. Commonwealth*, 58 Va. App. 466, 467, 469, 711 S.E.2d 228, 228-29 (2011) (holding venue was proper in county where undercover police officer posing as 13-year-old girl received electronic communications from defendant, who was located in another jurisdiction), pet. refused Oct. 25, 2011 (Record No. 111392); *LeMond v. Commonwealth*, 19 Va. App. 687, 690-92, 454 S.E.2d 31, 33-34 (1995) (defining "chemical analysis" as performed by certain breathalyzer machine), pet. refused Aug. 8, 1995 (Record No. 950824); *Rogers v. Commonwealth*, 14 Va. App. 774, 776-78, 418 S.E.2d 727, 728-29 (1992) (defining sawed-off shotgun pursuant to Code § 18.2-299), pet. refused Oct. 6, 1992 (Record No. 921169).

II. THE COURT OF APPEALS DID NOT ERR IN HOLDING THE DEFENDANT VIOLATED VIRGINIA CODE §§ 22.1-254 AND 22.1-263 WHEN SHE REPEATEDLY FAILED TO ENSURE HER THREE DAUGHTERS TIMELY ARRIVED AT THEIR ELEMENTARY SCHOOL ON THE DAYS THE DEFENDANT HAD CUSTODY OF THE CHILDREN.

Standard of Review

The essence of the defendant's appeal is that the evidence was insufficient to sustain her convictions. A challenge to the sufficiency of the evidence addresses "whether the record contains evidence from which any 'rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Young v. Commonwealth*, 275 Va. 587, 591, 659 S.E.2d 308, 310 (2008) (citation omitted). The appellate court reviews the evidence in the light most favorable to the Commonwealth, the party prevailing below. *See Perry v. Commonwealth*, 280 Va. 572, 578, 701 S.E.2d 431, 435 (2010). This deferential standard also applies "to any reasonable and justified inferences the fact-finder may have drawn from the facts proved." *Sullivan v. Commonwealth*, 280 Va. 672, 676, 701 S.E.2d 61, 63-64 (2010). The appellate court will affirm the judgment unless it is plainly wrong or lacks supporting evidence. *Bolden v. Commonwealth*, 275 Va. 144, 147, 654 S.E.2d 584, 586 (2008). The appellate court is "not permitted to reweigh the evidence," *Nusbaum v. Berlin*, 273 Va. 385, 408,

641 S.E.2d 494, 507 (2007), and may not substitute its judgment for the fact finder's, even if its conclusions of facts differ from those reached by the fact finder at trial. *See Commonwealth v. McNeal*, 282 Va. 16, 20, 710 S.E.2d 733, 735 (2011). Additionally, this Court's examination of the record "is not limited to the evidence mentioned by a party in trial argument or by the trial court in its ruling." *Bolden*, 275 Va. at 147, 654 S.E.2d at 586.

To the extent, however, that the case presents a question of statutory construction regarding the definition of "send" as used in Virginia Code § 22.1-254, this Court conducts a *de novo* review on appeal. *See, e.g., Giles v. Commonwealth*, 277 Va. 369, 373, 672 S.E.2d 879, 882 (2009). The facts, however, are considered in the light most favorable to the Commonwealth, the party that prevailed below. *See Giles*, 277 Va. at 373, 672 S.E.2d at 882.

The basic rules of statutory construction require a court to determine the legislature's intent. *See*, *e.g.*, *Tucker v. Commonwealth*, 268 Va. 490, 493, 604 S.E.2d 66, 68 (2004); *Williams v. Commonwealth*, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003). "[A] statute should be read to give reasonable effect to the words used and to promote the ability of the enactment to remedy the mischief at which it is directed." *Mayhew v. Commonwealth*, 20 Va. App. 484, 489, 458 S.E.2d 305, 307 (1995). "The

wisdom and propriety of the statute come within the province of the legislature." *City of Newport News v. Elizabeth City County,* 189 Va. 825, 831, 55 S.E.2d 56, 60 (1949). "[C]ourts are concerned only as to whether the determination of the legislature has been reached according to, and within, constitutional requirements." *Id.*

In interpreting a statute, its "plain, obvious, and rational meaning . . . is to be preferred over any curious, narrow, or strained construction, . . . and a statute should never be construed in a way that leads to absurd results." *Meeks v. Commonwealth*, 274 Va. 798, 802, 651 S.E.2d 637, 639 (2007) (citations omitted). The context in which a term is used is also a factor in determining its meaning, as words and phrases in a statute should be given their ordinary and usually accepted meaning unless a different intention is apparent. *See id*. Even though penal statutes are strictly construed against the Commonwealth, a criminal defendant is not "entitled to benefit from an 'unreasonably restrictive interpretation' of [a] statute." *Holloman v. Commonwealth*, 221 Va. 196, 198, 269 S.E.2d 356, 357 (1980) (citation omitted).

<u>Statutory Provisions</u>

Virginia Code § 22.1-254 addresses school enrollment and school attendance. Subsection (A) provides, as pertinent to Blake's case:

> Except as otherwise provided in this article, every parent, guardian, or other person in the Commonwealth having control or charge of any child who will have reached the fifth birthday on or before September 30 of any school year and who has not passed the eighteenth birthday shall, during the period of each year the public schools are in session and for the same number of days and hours per day as the public schools, send such child to a public school . . . .

Subsections (B) and (C) of § 22.1-254 address excusing students who may be absent for religious reasons or illness; subsection (D) allows a pupil to be excused from attending if the school or juvenile court has determined the child "cannot benefit from education at such school." Additionally, subsection (H) of the statute requires that the parents or guardians of each student enrolled in a school district receive a copy of the compulsory school attendance law and the enforcement policies and procedures established by the school board.

Virginia Code § 22.1-258 concerns situations in which a student does not attend school and the parent is not aware of and does not support the absence. The statute provides that when a pupil has missed five days of school, a school official or attendance officer must initiate contact with the parent. After the sixth such absence, a conference between the school officials and the parent may be scheduled. Upon the next absence, the school authorities may file a petition in juvenile court alleging the child is in

need of supervision, charge the parent with contributing to the delinquency of a minor, or proceed against the parent in juvenile court for failure to comply with the law.[5]

Virginia Code § 22.1-263 provides:

> Any person violating the provisions of either § 22.1-254, except for clause (ii) of subsection A, §§ 22.1-255, 22.1-258, 22.1-267, or the parental responsibility provisions relating to compulsory school attendance included in § 22.1-279.3, shall be guilty of a Class 3 misdemeanor. Upon a finding that a person knowingly and willfully violated any provision of § 22.1-254, except for clause (ii) of subsection A, or any provision of §§ 22.1-255, 22.1-258, or § 22.1-267 and that such person has been convicted previously of a violation of any provision of § 22.1-254, except for clause (ii) of subsection A, or any provision of §§ 22.1-255, 22.1-258, such person shall be guilty of a Class 2 misdemeanor.[6]

Virginia Code § 22.1-279.3(A) states "[e]ach parent of a student enrolled in a public school has a duty to assist the school in enforcing the standards of student conduct and compulsory school attendance in order that education may be conducted in an atmosphere free of disruption. . . ."

Analysis

Code § 22.1-254 Applies to Tardiness

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[5] *See* Va. Code § 22.1-262.

[6] Code § 22.1-254(A)(ii) is not applicable to Blake's case.

Blake's interpretation that § 22.1-254(A) addresses only a parent's duty to ***enroll*** her child in school, but not ensure that the child arrives in a timely manner and actually attends class, belies common sense. The statute provides that a child shall attend school "for the same number of days *and hours per day* as the public schools." Va. Code § 22.1-254(A) (emphasis added). A parent is responsible for complying with the compulsory school attendance law. *See* Va. Code § 22.1-279.3(A). Local school boards have authority under Code § 22.1-254 to enforce the law. *See* 2005 Op. Va. Att'y Gen. at 94.[7] "A parent's awareness and support of his child's absence from school does not, of itself, allow repeated absenteeism, tardiness, or early departures." *Id*.

As the panel majority of the Court of Appeals held, "[t]he clear intent of the compulsory attendance law is to ensure that children attend school in order to receive the benefits of an education. Common sense therefore dictates that children should be in school from the beginning of the school day until dismissal." (App. 36). The majority noted this Court "already

[7] An opinion of the Attorney General is "entitled to due consideration," but is "not binding on this Court." *Twietmeyer v. City of Hampton*, 255 Va. 387, 393, 497 S.E.2d 858, 861 (1998) (citation omitted). However, the deference given to the opinion is "particularly so when the General Assembly has known of the Attorney General's Opinion, . . . and has done nothing to change it." *Beck v. Shelton*, 267 Va. 482, 492, 593 S.E.2d 195, 200 (2004).

addressed the scope of Code § 22.1-254 in *Johnson v. Prince William City School Board*, 241 Va. 383, 385, 404 S.E.2d 209, 210 (1991), holding that 'Code § 22.1-254 provides that all children between the ages of five and seventeen shall attend school.'"[8] (App. 37). The majority then defined "attend" as "'to be present at.'" (App. 37).

The Court of Appeals majority further opined that while none of the statutes dealing with compulsory school attendance "mentions tardiness, it is clear that tardiness is contemplated within the term 'absent' or 'fails to report to school.' Tardiness is a partial absence from school. 'Absent is defined in The American Heritage Dictionary 69 (2d College ed. 1985) as 'missing or not present.'' (App. 37). The majority concluded that a student who arrives at school late "is not present between the time school begins and the time he arrives and thus does not benefit from the educational experience." (App. 37).

In support of her argument that tardiness is not included in § 22.1-254, Blake referenced legislation proposed in 2006 to amend the statute by requiring that a parent "send [her] child *promptly*" to school. (App. 11, 60-61). The bill did not pass. (App. 61). Defense counsel noted at trial that

[8] The statute was amended effective July 1, 1990, to require school attendance until a child's eighteenth birthday. Acts 1989, ch. 515.

"the fiscal impact was not positive" and that the court could "draw its own conclusions from that." (App. 61). The trial court, however, referring to "the application of the *Browning-Ferris* doctrin[e]"[9] posited the General Assembly saw no need to amend the statute because it agreed with the 2005 opinion of the Attorney General of Virginia that had determined the existing language of Code § 22.1-254 applied to repeated absenteeism, tardiness, or early departures. (App. 72-73). *See* 2005 Op. Va. Att'y Gen. 91.

Under principles of statutory construction, "a presumption normally arises that a change in law was intended when new provisions are added to prior legislation by an amendatory act." *Boyd v. Commonwealth*, 216 Va. 16, 20, 215 S.E.2d 915, 918 (1975); *see Horner v. Dept. of Mental Health*, 268 Va. 187, 193, 597 S.E.2d 202, 206 (2004). However, the fact that an amendment is rejected is not "a significant aid" in interpreting a statute passed years earlier. *United States v. Capital Blue Cross*, 992 F.2d 1270, 1277 (3d Cir. 1993) (citing 2A N. Singer, *Sutherland on Statutory Construction* § 48.18 (5th ed. 1992)); *see Tahoe Regional Planning Agency*

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[9] *See Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161-62, 300 S.E.2d 603, 605-06 (1983) ("The legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view.").

v. McKay, 769 F.2d 534, 538 (9th Cir. 1985) ("caution must be exercised in using the rejection by a legislature of proposed amendments as an aid in interpreting measures actually adopted"). There could be any number of reasons why the General Assembly chose not to amend § 22.1-254 in 2006. The fact that the legislature did not amend the statute does not mean it intended that the statute apply only to absenteeism and not also to tardiness.

In sum, the Court of Appeals did not err in holding that the word "send," as used in Code § 22.1-254, applies to both enrolling a child in school and ensuring that the child arrives on time each day for class.

Knowing and Willful Conduct

The defendant also argues the Court of Appeals erred in holding the Commonwealth was not required to prove her conduct was knowing and willful, as alleged in the indictments. The Court did not err in its ruling, however, because Blake was arraigned, tried and convicted of a Class 3 misdemeanor, for which proof of knowing and willful conduct was not a required element, as the defendant acknowledges in her brief. (Def. Br. 17).

The defendant was charged initially with contributing to the delinquency of a minor in violation of Code § 18.2-371. (App. 1, 3, 5). In

juvenile court the applicable statute listed on the warrants was changed to "22.1-254/263," but the language describing the offense was not amended. (App. 1, 3, 5, 50, 76). On appeal to the circuit court there was some discussion before the trial began regarding whether the offense was a Class 2 or Class 3 misdemeanor. (App. 51-52). The court determined the offense was charged as a Class 3 misdemeanor because there was no allegation of a prior violation.[10] (App. 52, 74, 79). The warrants were then amended to conform the language of the charge to the enumerated Code sections.[11] (App. 1-6, 76-79).

The defendant objected to amending the warrants because "the difference between the code section and the language that's been included fails to put the defendant on notice as to the violation that is being prosecuted today. We believe it's a due process violation. . . ." (App. 78).

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[10] At the penalty phase of the trial, the Commonwealth proffered evidence of "prior convictions under a similar section." (App. 122).

[11] Two of the warrants stated the accused violated "22.1-254/263 . . . while being the parent of a child being between the ages of 5 and 18, . . . did fail to send said child to school during the period of each year the public schools are in session and for the same number of days and hours per day as the public schools, the failure being knowing and willfull." (App. 1, 3). The third warrant stated the accused violated "22.1-254/263 . . . while being the parent of a child between the ages of 5 and 18, . . . did knowingly and willfully fail to send said child to school during the period of each year the public schools are in session and for the same number of days and hours per day as the public schools." (App. 5).

The trial court disagreed, but advised the defendant she could have a continuance if she was caught by surprise. (App. 78-79). Blake did not request a continuance and raised no other objection to the amended language. (App. 79). She agreed with the court that the maximum fine for a Class 3 misdemeanor was a fine of $500. (App. 79).

As the panel majority of the Court of Appeals held, Blake "cannot agree to proceed as a Class 3 misdemeanor and now challenge her convictions based on a Class 2 misdemeanor conviction." (App. 35).

> "Under settled principles, a criminal defendant cannot 'approbate and reprobate by taking successive positions in the course of litigation that are either inconsistent with each other or mutually contradictory. Nor may a party invite error and then attempt to take advantage of the situation created by his own wrong.'" *Alford v. Commonwealth*, 56 Va. App. 706, 709, 696 S.E.2d 266, 267 (2010) (quoting *Rowe v. Commonwealth*, 277 Va. 495, 502, 675 S.E.2d 161, 164 (2009).

(App. 35). *See also Commonwealth v. Beavers*, 150 Va. 33, 142 S.E. 402 (1928) (rejecting defendant's argument that conviction was void because he had been indicted for misdemeanor but tried and convicted for felony, as record showed court, prosecutor and defense counsel all proceeded upon theory that charge and trial were for felony).

The defendant argues, however, that because the warrants alleged her failure to get her daughters to school on time was "knowing and willful," the Commonwealth was required to prove those elements. (Def. Br. 18).

Blake further contends she has not taken inconsistent positions "by agreeing to a higher burden of proof and then arguing that the burden has not been met." (Def. Br. 18).

Blake's reliance on *Exxon Mobil Corp. v. Minton*, 285 Va. 115, 737 S.E.2d 16 (2013), is misplaced. In that case, the question before the jury was whether the evidence sufficiently showed Minton's exposure to asbestos on Exxon's vessels was a substantial contributing factor to Minton's injury. *See id*. at 128, 737 S.E.2d at 26. No objection was made to a jury instruction defining "substantial," and under this definition, the evidence established causation. *Id*. at 128-129 and n.1, 737 S.E.2d at 26 and n.1. This Court declined to address on appeal whether the theory of causation was appropriate because the jury instruction was the law of the case and was binding on both parties, even though in another case decided on the same day, the Court rejected the causation analysis used in *Exxon*. *See id*. at 128 n.1, 737 S.E.2d at 26 n.1. Here, because Blake did not contest that she was on trial for a Class 3 misdemeanor she cannot argue on appeal the Commonwealth failed to establish the elements of the Class 2 misdemeanor.

In any event, even though the Commonwealth was not required to establish knowing and willful conduct to convict Blake of a Class 3

misdemeanor, the evidence at trial showed Blake knowingly and willfully violated Code § 22.1-254.

Blake admitted her daughters were repeatedly tardy on Thursday mornings. (App. 85-86, 92-93, 100, 103). She acknowledged she had received a letter in November 2011 from a school attendance officer, Lori Melcher, and she met with Melcher in December 2011 to discuss her children's tardiness. (App. 94, 106, 109-110). Certainly, at that time, Blake had notice of the compulsory school attendance law, but her daughters continued to be tardy.

The defendant argued in her motion to strike that she had not been given notice of the school board's compulsory attendance policy, as required by Code § 22.1-254(H), and thus, she had not knowingly violated the law. (App. 95-96, 98-99, 117-118).

The trial court ruled that the letter to Blake from the school attendance officer was "notice ... sent pursuant to the statute," and that it was not necessary to show the school board had complied with § 22.1-254(H). (App. 120-121). The trial court found Blake guilty of the five tardy offenses that occurred after December 1, 2011.[12] (App. 115-116, 120).

[12] Between December 1, 2011, and January 19, 2012, there were only six school days on which Blake was responsible for getting her daughters to school – December 1, 8, and 15, and January 5, 12, and 19. There was no

The court did not find her guilty of the five offenses that occurred before the November letter was sent to her. (App. 120).

The evidence also demonstrated that Blake's conduct was willful. Blake contends on appeal, as she did at trial, that her daughters were tardy due to inadvertence related to her own and their ADHD, and that she was exercising parental discretion in allowing them to be late. However, Blake's personal parenting philosophy did not provide a valid excuse. *See Johnson*, 241 Va. at 392, 404 S.E.2d at 214 (upholding denial of parents' request for religious exemption from compulsory school attendance, as parents' opposition to sending children to school was not based on bona fide religious belief, but on their "political, sociological or philosophical views or a merely personal moral code"); *Grigg v. Commonwealth*, 224 Va. 356, 367, 297 S.E.2d 799, 805 (1982) (parents' belief that children received "equal or better" instruction at home than in public school, "though obviously sincere, was legally insufficient" to excuse children from attending school).

In the instant case, the girls were tardy only on the mornings Blake was responsible for getting them to school (App. 75, 100, 102, 109), which

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school on December 22 and 29. Blake's children were tardy on all three days in December and two days in January, arriving at school on time only on January 5. Thus, the children were tardy five out of six days, or 83%, during this time period.

showed a pattern of willful action. The fact that Blake did not intend to commit a crime is no defense, as the commission of the act, which was prohibited by statute, was sufficient to support a verdict of guilty. *See Rice v. Commonwealth*, 188 Va. 224, 234, 49 S.E.2d 342, 347 (1948) (affirming conviction for violation of predecessor statute to § 22.1-254, where defendants instructed their children at home in accordance with their religious views).

III. THE COURT OF APPEALS DID NOT ERR IN HOLDING THE DEFENDANT'S FIRST ASSIGNMENT OF ERROR IN THAT COURT DID NOT INCLUDE A CHALLENGE TO THE CONSTITUTIONALITY OF CODE § 22.1-254.

Standard of Review

An interpretation of the Rules of the Supreme Court is a question of law that this Court reviews de novo. *See Woodard v. Commonwealth*, 287 Va. 276, 280, 754 S.E.2d 309, 311 (2014).

Analysis

Blake presented the following assignment of error in the Court of Appeals:

> THE TRIAL COURT ERRED IN RULING THAT VIRGINIA CODE § 22.1-254 PROHIBITS A PARENT FROM OCCASIONALLY ALLOWING HIS/HER CHILD TO BE TARDY

TO SCHOOL WHERE THE CHILD IS OTHERWISE VALIDLY ENROLLED AND REGULARLY ATTENDING.

She then argued in her opening brief in that Court, as she had at trial, that Code § 22.1-254 was unconstitutional because it was void for vagueness, did not give proper notice of prohibited conduct, and led to arbitrary and discriminatory enforcement.

The Court of Appeals held the defendant's challenge to the constitutionality of the statute was waived because the assignment of error did not include that alleged error.[13] (App. 31, 38). Blake asks this Court to reverse that ruling and to "remand the case to the Court of Appeals to address the merits of [her] constitutional challenge to [§ 22.1-254]," if this Court does not dismiss the case on the other grounds raised.[14] (Def. Br. 26-27). The Court of Appeals did not err in its ruling, however.

Rule 5A:12(c)(1) requires that a petition for appeal "list clearly and concisely . . . the specific errors in the ruling below upon which the party intends to rely." The appellant must "'lay his finger on the error.'" *Carroll v.*

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[13] The Court of Appeals denied Blake leave to amend her assignments of error. (App. 21-26).

[14] Because the defendant has not addressed in her brief the substantive merits of the statute's constitutionality, the Commonwealth also has not addressed the merits of the issue. The Commonwealth notes generally, however, this Court upheld the statute's constitutionality in *Grigg*, 224 Va. at 361, 297 S.E.2d at 801.

Commonwealth, 280 Va. 641, 649, 701 S.E.2d 414, 418 (2010) (quoting *First Nat'l Bank of Richmond v. William R. Trigg Co.*, 106 Va. 327, 342, 56 S.E. 158, 163 (1907)). The failure to identify the alleged errors with specificity asks an appellate court "to delve into the record and winnow the chaff from the wheat." *Loughran v. Kincheloe*, 160 Va. 292, 298, 168 S.E.2d 362, 364 (1933). Except for judgments that are void *ab initio*, an appellate court "may refuse to consider an assignment of error that is not raised in a timely manner or not properly included in the petition for appeal." *Amin v. County of Henrico*, 286 Va. 231, 235, 749 S.E.2d 169, 170 (2013).

The defendant, relying on *Findlay v. Commonwealth*, 287 Va. 111, 752 S.E.2d 868 (2014), argues her assignment of error in the Court of Appeals was sufficient because she was not required to explain why the trial court was wrong. Blake contends that because the trial court ruled the statute was not facially invalid, and she addressed the constitutionality of the statute in the argument section of her brief and the Commonwealth responded to it, the issue was clearly before the Court of Appeals. (Def. Br. 26).

However, Blake raised the constitutionality of the statute in a motion to dismiss that was heard before the trial began. The trial court denied the

motion, holding that § 22.1-254 applied to tardiness. (App. 72-74). After discussing at length the 2005 opinion of the Attorney General and the role of the General Assembly regarding any amendment to the statute, the court said, "So the Court will – and I do not believe that the statute is facially invalid. I'll deny your motion." (App. 73-74).

The court then heard evidence pertaining to the charges and found Blake guilty of violating the statute. Blake's assignment of error addresses only the court's specific finding of guilt and does not also encompass her constitutional challenge. *See Carroll*, 280 Va. at 648-49, 701 S.E.2d at 417-18 (rejecting defendant's argument that reference to his *Alford* plea in his "Question Presented" to Court of Appeals also raised separate issue regarding alleged breach of his plea agreement).

Blake's case is distinguished from *Findlay* because the only issue in *Findlay* was whether the trial court had erred in denying the defendant's motion to suppress evidence seized from his computer. *See* 287 Va. at 113, 752 S.E.2d at 870. Findlay asserted his consent to the search had been involuntary. *See id*. More specificity was not needed because the assignment of error addressed the trial court's discrete ruling denying the suppression motion. *See id*. at 116, 752 S.E.2d at 871.

Blake's case is akin to *Yeatts v. Murray*, 249 Va. 285, 290-91, 455 S.E.2d 18, 21-22 (1995). In *Yeatts*, the assignment of error "merely state[d] that the habeas court erred by dismissing the petition 'without ordering an evidentiary hearing as to his allegations of ineffective assistance of counsel.'" *Id*. at 290-91, 455 S.E.2d at 21-22. This Court held that the assignment of error "only challenge[d] the alleged procedural failure to order an evidentiary hearing; it [did] not challenge, with reasonable certainty, the habeas court's substantive ruling on the merits of the ineffective claims." *Id*. at 291, 455 S.E.2d at 22. This Court declined to address Yeatts' separate claims that his attorneys had been ineffective, even though Yeatts had "devote[d] a substantial portion of his brief" to the argument." *Id.* at 290, 455 S.E.2d at 21.

Similarly, in Blake's case, the Court of Appeals did not err in holding the assignment of error did not include a constitutional challenge to Code § 22.1-254.

CONCLUSION

For these reasons, the judgments of the Court of Appeals of Virginia and the Loudoun County Circuit Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF TRANSMISSION AND SERVICE

On August 11, 2014, the required copies of this brief were hand-delivered to the Clerk's Office of this Court for filing and and one electronic PDF copy was submitted to this Court by email. Three copies of the brief

were mailed to Alexis M. Downing, Assistant Public Defender, Office of the Public Defender, 3 East Market Street, Leesburg, VA 20176, counsel for appellant, and one electronic PDF copy was emailed to **adowning@lee.idc.virginia.gov**.

The undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities and certificate, contains 6,036 words.

The Commonwealth desires to present oral argument in this case.

_____
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