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IN THE

Supreme Court of Virginia

RECORD NO. 160857

KIMBERLEE DIETZ,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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AUTHORITIES AND ARGUMENT

I. The Court of Appeals of Virginia erred when it affirmed the trial court's finding that the evidence was sufficient as a matter of law to prove the required element of procuring or promoting the use of a minor under Virginia Code § 18.2-374.3(B) where the evidence showed only that the Defendant/Appellant engaged in inappropriate texting directly with the "minor".

It is axiomatic that Virginia Code § 18.2-374.3(B) proscribes conduct other than direct communications with a minor. The phrase at issue is "procuring or promoting the use of a minor." Virginia Code § 18.2-374.3(B). The Court of Appeals has provided that "'procure' means to take care of, bring about, obtain: achieve." Fine v. Commonwealth, 31 Va. App. 636, 525 S.E.2d 69 (2000) (quoting Webster's Third New International Dictionary 1809 (1981)). The legislature has defined "promotes" as meaning "inducing one or more other persons to become a participant." Virginia Code § 18.2-239. "It is a common canon of statutory construction that when the legislature uses the same term in separate statutes, that term has the same meaning in each unless the General Assembly indicates to the contrary." Barson v. Commonwealth, 284 Va. 67, 726 S.E.2d 292 (2012).

The Commonwealth argues "[i]t is clear that, under the plain meaning of the words 'procure' and 'promote,' a defendant could violate Code §

18.2-274.3(B) [sic] simply by directly communicating with and instigating, encouraging, persuading, **or inducing a minor**." (Page 11, Brief of Comm.) (Emphasis added). The problem with the Commonwealth's argument is that it omits the language "use of." If a defendant is communicating with a minor directly, the defendant is encouraging, persuading, or inducing the minor. The defendant is not encouraging, persuading or inducing the **use of the** minor. It is Defendant's position that the Commonwealth's argument fails because what the Commonwealth describes in its brief is solicitation. Virginia Code § 18.2-29 defines criminal solicitation as "[a]ny person who **commands, entreats, or otherwise attempts to persuade another person** to commit a felony. . . ." (Emphasis added).

As indicated in the Appellant's Opening Brief and for the reasons set forth above, it is respectfully submitted that the evidence in this case, even when viewed in the light most favorable to the Commonwealth, does not prove beyond a reasonable doubt that Dietz used a communications system to procure or promote the use of a minor for any activity in violation of § 18.2-370 or § 18.2-374.1. With the element of procuring and promoting the use of a minor lacking, the evidence in this case is insufficient to support the

conviction.

II. The Court of Appeals of Virginia erred when it affirmed the trial court's finding that the evidence was sufficient as a matter of law to prove the photograph(s) the Defendant/Appellant sent to the "minor" exposed her sexual or genital parts sufficient to constitute an activity in violation of Virginia Code § 18.2-370 which was a required element under Virginia Code § 18.2-374.3(B) where none of the photographs depicted sexual or genital parts or constituted nudity under Virginia Code § 18.2-390.

The Commonwealth's argument overlooks the fact that the Defendant's breasts were not exposed. In her Opening Brief, Appellant specifically pointed out that the defendant in Moyer was paddling the minor's **bare** buttocks. (i.e., not partially covered.). Moyer v. Commonwealth, 33 Va. App. 8, 30, 531 S.E.2d 580, 590 (2000) (*en banc).* This Defendant/Appellant's breasts were partially covered to the extent that the only part visible was the flesh well above the areola. (J.A. 96, 98).

Further, it is Defendant/Appellant's position that it is not possible to find the Defendant acted with lascivious intent when she sent the messages to the minor. The parties stipulated "[i]t should be noted that none of the messages sent to [G.S] were sexually explicit nor did they contain anything that would rise to the level of explicit or lascivious intent." (J.A. 86, ¶ 10). The best indicator of the Defendant's intent was the messages she sent. If there was nothing lascivious or sexually explicit in those messages, it is impossible for

the court to find she acted with lascivious intent.

As indicated in the Appellant's Opening Brief and for the reasons set forth above, it is respectfully submitted that the evidence in this case, even when viewed in the light most favorable to the Commonwealth, does not prove beyond a reasonable doubt that Dietz used a communications system to procure or promote the use of a minor for any activity in violation of § 18.2-370 or §18.2-374.1. With no evidence to suggest the photographs violated Virginia Code § 18.2-370 or § 18.2-374.1, the evidence in this case is insufficient to support the conviction.

CONCLUSION

For the reasons stated above, and those set forth in the Appellant's Opening Brief, the Appellant, Kimberlee Dietz, asks this Honorable Court to reverse the judgment of the Court of Appeals of Virginia and dismiss the indictment.

Respectfully submitted,
KIMBERLEE DIETZ

By: /s/ Timothy G. Clancy
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CERTIFICATE

I, Timothy G. Clancy, do hereby certify that Rule 5:26(e) of the Rules of the Supreme Court of Virginia has been complied with this 17th day of April, 2017 and pursuant to said Rule, a PDF version of this brief has been filed through VACES and ten (10) paper copies delivered to the Clerk's Office of the Supreme Court of Virginia. Further, on this 17th day of April, 2017, an electronic version has also been delivered to opposing counsel via email to the following address:

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