SCV: Submitted on 03-07-2017 16:20:15 EST for filing on 03-07-2017

IN THE

Supreme Court of Virginia

RECORD NO. 160857

KIMBERLEE DIETZ,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

Timothy G. Clancy, Esq. (VSB 25117)
CLANCY & WALTER, P.L.L.C.
544 Settlers Landing Road
Hampton, Virginia 23669
(757) 826-5000
(757) 826-5936 (Fax)
tclancy@clancywalterlaw.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ASSIGNMENTS OF ERROR	2
STATEMENT OF FACTS	2
AUTHORITIES AND ARGUMENT	6
CONCLUSION	17
SIGNATURE	17
CERTIFICATE	18

TABLE OF AUTHORITIES

Case Law

PAGE

Carter v. Commonwealth, 223 Va. 528, 290 S.E.2d 865 (1982) . . . 7

Edwards v. Commonwealth, 218 Va. 994,
243 S.E.2d 834 (1978) 10

Farhoumand v. Commonwealth, 288 Va. 338,
764 S.E.2d 95 (2014) 15

Higginbotham v. Commonwealth, 216 Va. 349,
218 S.E.2d 534 (1975) 7

Jordan v. Commonwealth, 273 Va. 639,
643 S.E.2d 166 (2007) 7

Molina v. Commonwealth, 47 Va. App. 338, 624 S.E.2d 83,
aff'd, 272 Va. 666, 636 S.E.2d 470 (2006) 7

Moyer v. Commonwealth, 33 Va. App. 8, 531 S.E.2d 580
(2000) (*en banc)*. 8, 13, 14, 15

Myers v. Commonwealth, 43 Va. App. 113,
596 S.E.2d 536 (2004). 7

Tarpley v. Commonwealth, 261 Va. 251,
542 S.E.2d 761(2001) 7

Statutes

Va. Code Ann. §18.2-356 (Michie 2014) 9, 10

Va. Code Ann. §18.2-370 (Michie 2014) 8, 11, 12, 13, 15, 16

Va. Code Ann. §18.2-370.1 (Michie 2014) 14

Va. Code Ann. §18.2-374.1 (Michie 2014) 8, 11, 12, 16

Va. Code Ann. §18.2-374.3 (Michie 2014) 6, 8, 9, 12

Va. Code Ann. §18.2-390 (Michie 2014) 12, 15, 16

Other

2 Wharton, Criminal Law and Procedure § 768,
at 598 (R. Anderson ed. 1957) 10

Webster's New World College Dictionary (5th ed. 2014) 8, 9

STATEMENT OF THE NATURE OF THE CASE

The Appellant, KIMBERLEE DIETZ (hereinafter "Dietz" or "Defendant"), was indicted by the Grand Jury in and for the City of Hampton on one (1) indictment. The indictment charged Dietz with a violation of Virginia Code §18.2-374.3(B). Specifically, the indictment charged that on or about March 2, 2014, the Defendant used a communications system or other electronic means for the purpose of procuring or promoting the use of a minor for lascivious intent or for some other illegal activity in violation of Virginia Code § 18.2-370 or § 18.2-374.1. To the said indictment, Dietz pleaded not guilty.

On January 9, 2015, a bench trial on the aforementioned indictment was held in the Circuit Court for the City of Hampton before the Honorable Wilford Taylor, Jr. After presentation of Commonwealth's evidence, argument upon appropriate defense motions, and final argument of counsel, the court found Dietz guilty.

On May 5, 2015, after benefit of a pre-sentence report, submission of multiple character letters on Defendant's behalf and argument of counsel, the court imposed a penitentiary term of two years and six months. Thereafter, the Court suspended one year and six months of that time conditioned upon good behavior, supervised probation, payment of court costs and registration

under the sex offender registry.

Appellant, KIMBERLEE DIETZ, now seeks an appeal of said judgment.

ASSIGNMENTS OF ERROR

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". (J.A. 2-5, 60-61, 68-69).

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. (J.A. 60-63, 68-70, 76-85).

STATEMENT OF FACTS

In September 2014 and continuing through March 2, 2014, Dietz was employed by the Hampton City Schools as a teacher who was assigned to Francis Asbury Elementary School in Hampton, Virginia. (J.A. 86). At the time of the offense, G.S., an eleven (11) year old male, was one of Dietz's students at the school. (J.A. 86).

A few weeks before March 2, 2014, Dietz approached G.S. and

asked him for his telephone number. (J.A. 86). Dietz told G.S. the reason she was asking for his telephone number was because a female student wanted it. (J.A. 86). G.S. gave his phone number to Dietz. (J.A. 86). Subsequently, G.S. received a text message from an unknown number which turned out to belong to Dietz. (J.A. 86). Dietz sent G.S. text messages indicating she wished he was 18 years old so that they could be together and other text messages indicating he was cute. (J.A. 86). It is important to note that the parties stipulated 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). There were other text messages that Dietz sent to G.S. that he deleted upon Dietz's request to do so. (J.A. 87).

One evening when G.S. was watching a movie with his father and his stepbrother, G.S. received text messages from Dietz. (J.A. 86). G.S.'s father was concerned about the text messages he was receiving and asked G.S. who was texting him. (J.A. 86). When G.S. responded that it was his teacher, Dietz, his father took control of his cell phone. (J.A. 86-87). The matter was subsequently reported to the Hampton Police Division, and the telephone was turned over to Detective Randy Mayer

(hereinafter "Det. Mayer") who began an investigation. (J.A. 87).

Det. Mayer obtained G.S.'s cell phone from his parents and continued a texting conversation that had been previously started with Dietz. (J.A. 34). Det. Mayer was having difficulty texting on the phone because it was an older, flip-style phone. (J.A. 35, 56, 88). Therefore, he had Karyn Buhrman, a master forensic specialist with the Hampton Police Division, assist him with the actual texting. (J.A. 35-37, 55-56). Det. Mayer made a transcript of the text messages sent between him acting as G.S. and Dietz. (J.A. 38, 89-93). Det. Mayer confirmed that these messages were sent between him and Dietz only and that there was no third party involved. (J.A. 54-55). These messages detail the conversation during the time that Dietz sent photographs of herself to "G.S." (J.A. 40-42, 45, 89-93).

The Commonwealth introduced a total of four (4) photographs that Dietz sent to "G.S." (J.A. 42, 44, 47, 50-51). A fifth photograph was introduced as Commonwealth's Exhibit 8 which is an enlargement of Commonwealth's Exhibit 6. (J.A. 58-59). All of the photographs were taken while Dietz was in a bath tub. (J.A. 52, 94-98). Commonwealth's Exhibit 4 depicts Dietz's legs which are raised above the water level as she sits in a

bath tub with soap suds surrounding her. (J.A. 42, 52, 94). It also depicts the cover of G.S.'s phone showing the photograph was sent from Dietz on March 2, 2014 at 8:16. (J.A. 42-43, 52, 94). Commonwealth's Exhibit 5 depicts Dietz's face as she sits in the tub as well as the cover of G.S.'s phone showing the photograph was sent from Dietz on March 2, 2014 at 8:20. (J.A. 52, 95). Commonwealth's Exhibit 6 depicts the upper portion of Dietz's breasts as well as the cover of G.S.'s phone showing the photograph was sent from Dietz on March 2, 2014 at 8:26. (J.A. 96). Commonwealth's Exhibit 7 depicts Dietz's lips as well as the cover of G.S.'s phone showing the photograph was sent from Dietz on March 2, 2014 at 8:43. (J.A. 53, 97).

The transcript of the text messages between "G.S." and Dietz show that Det. Mayer, acting as G.S., advised he wanted to see Dietz's boobs. (J.A. 90, Lines 32-35). After he received the photograph marked as Commonwealth's Exhibit 6, "G.S." complained he could not see anything. (J.A. 53, 91). Specifically, "G.S." said "I lik [sic] those hard 2 c." (J.A. 91, Line 6). In response to questioning from Dietz, "G.S." then advised "ur [sic] arm in the way." (J.A. 91, Line 8). Dietz stated, "I didn't want to give you a nipple shot . . . then you would have seen it all!!!!" (J.A. 91, Lines 13-14).

The conversation between "G.S." and Dietz was terminated because G.S.'s phone was "dying." (J.A. 48). Subsequently, Det. Mayer obtained and executed a search warrant for Dietz's home. (J.A. 48-49). During the execution of the warrant Det. Mayer talked to Dietz. (J.A. 49). Det. Mayer advised Dietz that it was actually him she had been texting with, not G.S. (J.A. 49). Dietz immediately began crying. (J.A. 49). She advised that she was going through a divorce and had been feeling lonely. (J.A. 49). She further advised that she knew she should not have sent the photographs. (J.A. 49-50). Dietz was emotional during the interview and kept apologizing. (J.A. 50).

AUTHORITIES AND ARGUMENT

I. The Court of Appeals erred in affirming 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) because the evidence showed only that the Defendant/Appellant engaged in inappropriate texting directly with the "minor".

A. Standard of Review.

It is conceded that in passing upon the sufficiency of the evidence in support of a conviction, an appellate court is guided by certain well-established principles. Since the fact finder had the opportunity of hearing and observing the witnesses, its findings are entitled to great weight. The

evidence and all just and reasonable inferences therefrom must be viewed on appeal in the light most favorable to appellee. In addition, the verdicts of the trial court will not be disturbed unless plainly wrong or without evidence to support them. See Carter v. Commonwealth, 223 Va. 528, 532, 290 S.E.2d 865, 867 (1982); Higginbotham v. Commonwealth, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975). "However, the appellate court is equally obligated to set aside the trial court's judgment when it is contrary to the law and the evidence and, therefore, the judgment is plainly wrong." Tarpley v. Commonwealth, 261 Va. 251, 256, 542 S.E.2d 761, 763 (2001); see also, Jordan v. Commonwealth, 273 Va. 639, 645, 643 S.E.2d 166, 170 (2007). Moreover, "[w]hile great deference is paid to the fact finder, appellate courts do not capitulate to every factual finding of the lower courts." Myers v. Commonwealth, 43 Va. App. 113, 121, 596 S.E.2d 536, 539 (2004). Finally, "[t]o justify conviction of a crime, it is insufficient to create a suspicion or probability of guilt. Rather, the burden is upon the Commonwealth to prove every essential element of the offense beyond a reasonable doubt." Molina v. Commonwealth, 47 Va. App. 338, 369, 624 S.E.2d 83, 98, aff'd, 272 Va. 666, 636 S.E.2d 470 (2006) (citations omitted).

B. Argument.

The Defendant was indicted for a violation of Virginia Code § 18.2-374.3(B) which provides as follows:

> [i]t is unlawful for any person to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means for the purposes of procuring or promoting the use of a minor for any activity in violation of § 18.2-370 or 18.2-374.1. A violation of this subsection is a Class 6 felony.

It is Defendant's position that subsection B addresses a defendant's use of a communications system with a third-party (*i.e.*, someone other than the minor/victim). Hence, the use of the language "procuring or promoting the use of a minor." The Code section does not contain a definition of "procure" or "promote". "Ordinarily, when a particular word in a statute is not defined therein, a court must give it its ordinary meaning." Moyer v. Commonwealth, 33 Va. App. 8, 34-36, 531 S.E.2d 580,593 (2000) (*en banc)*. Further, "[i]n interpreting a statute, the Code of Virginia constitutes a single body of law, and other sections can be looked to where the same phraseology is employed." Id. (internal brackets, quotation marks and citations omitted). "Procure" is defined as "(1) to get or bring about by some effort; obtain; secure; (2) to obtain (persons, esp. women) for the purpose of prostitution." Webster's New World College Dictionary 1161 (5th

ed. 2014). "Promote" is defined as " . . . (2) to help bring about or further the growth or establishment of . . . (3) to further the popularity, sales, etc. of, as by publicizing and advertising . . . (4) [slang] to acquire (something) by devious or cunning means. . . ." Webster's New World College Dictionary 1164 (5th ed. 2014). It is respectfully submitted that this subsection is intended to cover individuals who are "trolling" to obtain a minor or those who are making a minor available (*i.e.,* "pimping").

In contrast, subsection C of Virginia Code § 18.2-374.3 is the Code section applicable to individuals who communicate directly with a minor to entice the child to engage in certain sexual activity. Because this subsection directly involves a minor, it has a more serious penalty (e.g., a Class 5 felony versus Class 6 for subsection B) and includes an even greater penalty (5 to 30 years with a mandatory 5 year minimum) if the individual is more than seven (7) years older than the child who is younger than 15 years old.

Counsel was unable to locate any cases interpreting subsection B of Virginia Code § 18.2-374.3. However, counsel would suggest that this subsection is similar to Virginia Code § 18.2-356 which criminalizes pandering. Virginia Code § 18.2-356 provides the following:

> Any person who receives any money or other valuable thing for or on account of (i) **procuring** for or placing in a house of prostitution or elsewhere any person for the purpose of causing such person to engage in unlawful sexual intercourse . . . is guilty of a Class 4 felony. (Emphasis added).

In discussing this Code section along with the other Code sections enacted to prohibit illicit prostitution and procurement, the Virginia Supreme Court stated the statutes were

> designed to prohibit any act of exploiting the prostitution of a female. It is immaterial whether the act be called pandering or pimping. Pander means 'to pimp, to cater to the gratification of the lust of another." Black's Law Dictionary 1265 (4th ed., rev. 1968). It includes the procuring of one person by another for illicit sexual intercourse. The pandering can consist of either procuring a female for a place of prostitution or procuring a place of prostitution where the female can ply her trade.

Edwards v. Commonwealth, 218 Va. 994, 243 S.E.2d 834 (1978). The Court also noted that "[i]n general terms, any act of exploiting the prostitution of a female is known as pandering or pimping and as such is commonly prohibited by statute. It includes any act of procuring of one person by another for illicit sexual intercourse for a consideration to the procurer, for share in the receipts of the prostitute." Edwards, 218 Va. at 1001-1002, 243 S.E.2d at 838-39 (1978) (quoting 2 Wharton, Criminal Law and Procedure § 768, at 598 (R. Anderson ed. 1957)).

It is respectfully submitted that subsection B does not apply to the

facts of this case, even when viewed in the light most favorable to the Commonwealth, as the only alleged communications were directly between the Defendant and the "minor." (J.A. 54-55). There were no communications between the Defendant and a third party or a posting in a place accessible to third parties in an attempt to obtain a child or promote a child for the prohibited enumerated sexual offenses.

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 erred in affirming 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), because none of the photographs depicted sexual or genital parts nor did any of them constitute nudity as defined in Virginia Code § 18.2-390.

A. Standard of Review.

The standard of review applicable to this Assignment of Error is the same as the standard of review set forth above under Assignment of Error I, and said content is incorporated herein by reference as if fully set forth herein.

B. Argument.

As indicated above, the Defendant was indicted for a violation of Virginia Code § 18.2-374.3(B) which provides as follows:

> [i]t is unlawful for any person to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means for the purposes of procuring or promoting the use of a minor for any activity in violation of § 18.2-370 or 18.2-374.1. A violation of this subsection is a Class 6 felony.

Under the facts of this case, the only photographs admitted into evidence are the ones that depict the Defendant. (J.A. 94-98). Accordingly, the Defendant's conduct could not have violated Virginia Code § 18.2-374.1 which criminalizes production, publication, sale financing, etc., of child

pornography. The trial court acknowledged this fact just prior to sentencing when counsel made a post-trial motion to set aside the finding of guilt. (J.A. 83-84). Thus, the Defendant's conduct must be examined to determine if it constituted a violation of Virginia Code § 18.2-370. The parties stipulated that there were no text messages that could be construed as sexually explicit or containing anything that would rise to the level of explicit or lascivious intent. (J.A. 86, ¶ 10). Thus, the only subsection at issue herein is 18.2-370(A)(1) which prohibits a person from "expos[ing] his or her sexual or genital parts to any child to whom such person is not legally married . . . ." In this case, the only photograph at issue is Commonwealth's Exhibit 6 and the blown up version of it depicted in Commonwealth's Exhibit 8. (J.A. 96, 98). The trial court conceded as much just prior to sentencing when counsel made the post-trial motion to set aside the court's finding of guilt. (J.A. 83-85).

The Code does not contain a definition of "sexual parts" or "genital parts". As noted previously herein "[o]rdinarily, when a particular word in a statute is not defined therein, a court must give it its ordinary meaning." Moyer, 33 Va. App. at 34-36, 531 S.E.2d at 593. Further, "[i]n interpreting a statute, the Code of Virginia constitutes a single body of law, and other sections can be looked to where the same phraseology is employed." Id.

(internal brackets, quotation marks and citations omitted).

The Court of Appeals in Moyer had to determine whether buttocks were either a sexual or genital part. In reaching its decision, the Court held that

> [t]he ordinary dictionary definition of "sexual" is "1. Of, relating to, involving, or characteristic of sex, sexuality, the sexes, or the sex organs and their functions. 2. Implying or symbolizing erotic desires or activity. 3. Of, relating to, or involving the union of male and female gametes: *sexual reproduction*." *The American Heritage Dictionary of the English Language* 1654 (3d ed. 1992). "Genital," in relevant part, is defined as "1. Of or relating to biological reproduction [or] 2. . . . [the reproductive organs, especially the external sex organs]." Id. at 756. Giving these words their plain meaning, the term "sexual parts" clearly encompasses certain genital parts, as well. However, to interpret the term "sexual parts" as including *only* genital parts or vice versa would violate rules of statutory construction. Instead, as set out above, we must presume the legislature intended to give separate meaning to the term "sexual parts" and did not intend merely to use superfluous language.

Moyer, 33 Va. App. at 36, 531 S.E.2d at 593 (citation omitted). The Court found that the term "sexual parts" was not limited to reproductive parts and that buttocks were "sexual parts" under Code § 18.2-370.1 if the accused, acting with the requisite lascivious intent, exposed his buttocks to a juvenile or proposed that a juvenile expose the juvenile's buttocks to the accused. The Moyer Court held that the buttocks exposed in that case were "sexual parts" within the meaning of the statute because the evidence supported the trial

court's finding that appellant acted with lascivious intent. Moyer, 33 Va. App. at 36, 531 S.E.2d at 594. It is important to note that in Moyer there was no issue that the defendant was paddling the minor's **bare** buttocks. (i.e., not partially covered.). Moyer, 33 Va. App. at 30, 531 S.E.2d at 590.

In this case, the photograph at issue depicted only the upper portion of the Defendant's breasts. (J.A. 96, 98). Breasts are clearly not genitalia and pursuant to Moyer they will be considered sexual parts only if the Defendant acted with lascivious intent. In this case there can be no such finding because the parties stipulated 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).

Furthermore, in Farhoumand v. Commonwealth, 288 Va. 338, 764 S.E.2d 95 (2014) the Virginia Supreme Court held that under Virginia Code § 18.2-370(A)(1) "exposure is limited to a visual display where the child saw, or could have seen, the uncovered genitalia." In this case, the Defendant's breasts were covered so that only the upper portion was showing. (J.A. 96, 98). It is respectfully submitted that in order for the Defendant's breasts to be "exposed" and "uncovered", the breasts would have to meet the definition of "nudity" as set forth in Virginia Code § 18.2-

390. Virginia Code § 18.2-390 defines "nudity as

> a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

Virginia Code § 18.2-390. No nipple is visible in Commonwealth's Exhibits 6 and 8. (J.A. 96, 98).

It is respectfully submitted that under the facts of this case, even when viewed in the light most favorable to the Commonwealth, the breasts depicted in Commonwealth's Exhibits 6 and 8 are not sexual or genital parts nor are they exposed. 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, the Appellant, Kimberlee Dietz, asks this Honorable Court to conclude as follows:

That the Court of Appeals of Virginia erred in affirming the trial court's finding that Dietz was guilty beyond a reasonable doubt as the evidence was insufficient as a matter of law to prove the Defendant/Appellant 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 because (1) there was only inappropriate texting directly with the "minor"; and (2) the photographs the Defendant sent the "minor" did not expose sexual or genital parts.

The Appellant respectfully requests the judgment of the Court of Appeals of Virginia be reversed and the indictment dismissed.

Respectfully submitted,
KIMBERLEE DIETZ

By: /s/ Timothy G. Clancy
Of Counsel

Timothy G. Clancy (V.S.B. # 25117)
CLANCY & WALTER, P.L.L.C.
544 Settlers Landing Road
Hampton, Virginia 23669
(757) 826-5000
(757) 826-5936 (FAX)
tclancy@clancywalterlaw.com

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 7th day of March, 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 7th day of March, 2017, an electronic version has also been delivered to opposing counsel via email to the following address:

Lauren C. Campbell, Esquire
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
oagcriminallitigation@oag.state.va.us

/s/ Timothy G. Clancy
Timothy G. Clancy