SCV: Submitted on 04-03-2017 09:08:28 EDT for filing on 04-03-2017

IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 160857

KIMBERLEE DIETZ,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

MARK R. HERRING
Attorney General of Virginia
LAUREN C. CAMPBELL
Assistant Attorney General
Virginia Bar No. 81935

OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071 phone
(804) 371-0151 fax
oagcriminallitigation@oag.state.va.us

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

ASSIGNMENTS OF ERROR 3

STATEMENT OF FACTS 3

COURT OF APPEALS HOLDING 6

ARGUMENT 7

THE COURT OF APPEALS AND THE TRIAL COURT PROPERLY FOUND THE EVIDENCE SHOWED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS USING A COMMUNICATIONS SYSTEM TO PROCURE OR PROMOTE THE USE OF A MINOR FOR ANY ACTIVITY IN VIOLATION OF § 18.2-370. 7

Standard of Review 8

Analysis 10

A. The plain language of Code § 18.2-374.3(B) does not require the defendant to communicate with a third party in order to promote or procure the use of a minor. 10

B. The Commonwealth did not need to prove a violation of Code § 18.2-370. 14

C. The images sent were sexual in nature when viewed in the context of the defendant's lascivious intent. 16

CONCLUSION 21

CERTIFICATE OF TRANSMISSION AND SERVICE 22

TABLE OF AUTHORITIES

Page

Cases

Ansell v. Commonwealth,
219 Va. 759, 250 S.E.2d 760 (1979) 9

Bakran v. Commonwealth,
57 Va. App. 197, 700 S.E.2d 471 (2010) 11

Boynton v. Kilgore,
271 Va. 220, 623 S.E.2d 922 (2006) 10

Burnette [v. Commonwealth,
194 Va. [785,] 75 S.E.2d [482,] [(1953)] 17

Campbell v. Commonwealth,
227 Va. 196, 313 S.E.2d 402 (1984) 19

Clark v. Commonwealth,
279 Va. 636, 691 S.E.2d 786 (2010) 8

Commonwealth v. Zamani,
256 Va. 391, 507 S.E.2d 608 (1998) 13

Corp. v. Keane Fed. Sys., Inc.,
265 Va. 38, 574 S.E.2d 253 (2003) 11

Esteban v. Commonwealth,
266 Va. 605, 587 S.E.2d 523 (2003) 13

Flanary v. Milton,
263 Va. 20, 556 S.E.2d 767 (2002) 11

Grafmuller v. Commonwealth,
57 Va. App. 58, 698 S.E.2d 276 (2010) 12, 14, 16

Hancock v. Commonwealth,
12 Va. App. 774, 407 S.E.2d 301 (1991) 8

Hines v. Commonwealth,
59 Va. App. 567, 721 S.E.2d 792 (2012) 18

Hix v. Commonwealth,
270 Va. 335, 619 S.E.2d 80 (2005) 11

Jackson v. Virginia,
443 U.S. 307 (1979) 9

Johnson v. Commonwealth,
53 Va. App. 608, 674 S.E.2d 541 (2009) 18

Kitts v. Florida,
766 So. 2d 1067 (Fla. App. 2000) 20

Klewer v. Commonwealth,
No. 0791-11-3,
2012 Va. App. LEXIS 315 (Oct. 9, 2012) 12

McKeon v. Commonwealth,
211 Va. 24, 175 S.E.2d 282 (1970) 19

Minnesota v. Oanes,
543 N.W.2d 658 (Minn. Ct. App. 1996) 20

Moyer v. Commonwealth,
33 Va. App. 8, 31 S.E.2d 580 (2000) (en banc) 16, 17, 18

Pederson v. City of Richmond,
219 Va. 1061, 254 S.E.2d 95 (1979) 19

Porter v. Virginia Electric & Power Co.,
183 Va. 108, 31 S.E.2d 337 (1944) 11

Shelor Motor Co. v. Miller,
261 Va. 473, 544 S.E.2d 345 (2001) 10

Stanley v. Tomlin,
143 Va. 187, 129 S.E. 379 (1925) 13

Vaughn, Inc. v. Beck,
262 Va. 673, 554 S.E.2d 88 (2001) 9

Williams v. Commonwealth,
278 Va. 190, 677 S.E.2d 280 (2009) 9

Woods v. Mendez,
265 Va. 68, 574 S.E.2d 263 (2003) 12

Wright v. Commonwealth,
278 Va. 754, 685 S.E.2d 655 (2009) 9

Statutes

Section 18.2-274.3(B), Code of Virginia..... 6, 11

Section 18.2-361, Code of Virginia..... 8

Section 18.2-370, Code of Virginia..... passim

Section 18.2-370.1, Code of Virginia..... 16, 17, 18

Section 18.2-374.1, Code of Virginia..... 7, 15

Section 18.2-374.3(B), Code of Virginia..... passim

Section 18.2-374.3(C), Code of Virginia..... 12, 14, 18

Section 18.2-374.3, Code of Virginia..... 14, 16

Section 18.2-390, Code of Virginia..... 2, 3

Section 18.2-67.10(2), Code of Virginia 17

Other Authorities

21A Michie's Jurisprudence, Words & Phrases Part 3 11

The American Heritage Dictionary of the English Language 1654 (3d ed. 1992)..... 17

IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 160857

KIMBERLEE DIETZ,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

STATEMENT OF THE CASE

The defendant, Kimberlee Dietz, was tried in the Circuit Court for the City of Hampton on January 9, 2015, and found guilty of use of a communications system to facilitate certain offenses involving children in violation of Virginia Code § 18.2-374.3(B). The trial court sentenced Dietz to two years and six

months' imprisonment, with one year and six months suspended, on May 5, 2015. (App. 6-7).

Dietz filed a petition for appeal in the Court of Appeals of Virginia and assigned the following errors:

> I. The trial court erred in finding the evidence 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."
>
> II. The trial court erred in finding the evidence 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.

On November 30, 2015, the Court of Appeals granted Dietz an appeal. By unpublished opinion dated May 3, 2016, a panel of the Court of Appeals affirmed her conviction. (App. 8-17).

Dietz appealed to this Court, which granted her appeal on January 26, 2017.

ASSIGNMENTS OF ERROR

Dietz assigned the following errors:

1. **The Court of Appeals 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."**

2. **The Court of Appeals erred when it affirmed the trial court's finding 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.**

STATEMENT OF FACTS

In 2014, the defendant, Kimberlee Dietz, was a teacher at Francis Asbury Elementary School in the City of Hampton. (App. 86). A young boy, G.S., was one of Dietz's students. (App. 86). G.S. was eleven years old at the time of the offense. (App. 86).

Prior to March 2, 2014, Dietz asked G.S. for his telephone number. (App. 86). Dietz told G.S. that a female student wanted his number. (App. 86). G.S. gave his phone number to Dietz. (App. 86). Sometime after, G.S. received text

messages from an unknown number, which turned out to belong to Dietz. (App. 86).

Ronald Simon, G.S.'s father, became concerned about the text messages his son was receiving. (App. 33, 86). G.S. told his father that his teacher was texting him. (App. 22, 87). Mr. Simon took control of his son's cell phone and he, together with Sarah Collins, G.S.'s mother, reported the matter to the police. (App. 87). The telephone was turned over to Detective Randy Mayer, of the Hampton Police Division, who commenced an investigation. (App. 87).

Detective Mayer continued the text-message conversation with Dietz on G.S.'s phone. (App. 34). Karyn Buhrman, of the police's crime-scene unit, assisted Detective Mayer with texting with Dietz. (App. 34). Detective Mayer and Ms. Buhrman created a transcript of the text-message conversation with Dietz, which was five pages long and introduced at trial. (App. 38, 89-93). Dietz also sent multiple pictures to G.S.'s cell phone, believing she was still texting with G.S. The Commonwealth introduced photographs that Dietz sent, which included photographs of her legs in a bathtub, her face, her lips, and her breasts. (App. 42-44, 52-53, 94-98).

The conversation ended because G.S.'s cellphone was losing power. (App. 48). Detective Mayer obtained a search warrant and went to Dietz's residence. (App. 48-49). Detective Mayer identified himself to Dietz, and explained to her

that she had been speaking with him for the last several hours via text messaging. (App. 49). Dietz began to cry, and indicated that she thought something was wrong because G.S. never talked to her like that, and that she was going through a divorce and had been feeling lonely. (App. 49). Dietz admitted that she sent the photographs. (App. 50).

At trial Dietz moved to strike the evidence based on a memorandum of law she had previously filed with the trial court. (App. 2-3, 60). Dietz argued that the use of the words "procure" and "promote" in Code § 18.2-374.3(B) necessarily involved solicitation of a third party. (App. 61). Dietz also argued that there was no sexual or genital part exposed in the photographs as required under Code § 18.2-370. (App. 69-70). The trial court overruled the motion, finding that the Commonwealth's evidence was sufficient and that the photographs were of Dietz's sexual parts. (App. 70).

COURT OF APPEALS HOLDING

A panel of the Court of Appeals rejected Dietz's arguments on appeal, and found the evidence sufficient to support her conviction under Code § 18.2-274.3(B). (App. 8-9). First, the Court of Appeals found that the plain language of Code § 18.2-374.3(B), including the terms "procure" and "promote," does not require that the person with whom the defendant communicates be someone other than the minor he or she seeks to involve in the illicit activity. (App. 13). The Court of Appeals declined to inject into the statute a requirement that a third party be involved. (App. 13).

Second, the Court of Appeals found that the evidence—both the photographic images and the context in which Dietz transmitted them—clearly demonstrated that Dietz had acted with lascivious intent and exposed a sexual part to a child as prohibited by Code § 18.2-370. (App. 16-17). The Court of Appeals found that the only reasonable conclusion to be drawn from Dietz's conduct was that she was attempting to sexually entice an eleven-year-old boy when she sent a photograph of her breasts. (App. 17). Therefore, the Court of Appeals found the evidence was sufficient to prove beyond a reasonable doubt that Dietz was guilty of violating Code § 18.2-374.3(B). (App. 17).

ARGUMENT

THE COURT OF APPEALS AND THE TRIAL COURT PROPERLY FOUND THE EVIDENCE SHOWED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS USING A COMMUNICATIONS SYSTEM TO PROCURE OR PROMOTE THE USE OF A MINOR FOR ANY ACTIVITY IN VIOLATION OF § 18.2-370.

The trial court, sitting as the fact finder, properly found the evidence sufficient to convict Dietz under Code § 18.2-374.3(B).[1] The evidence showed that Dietz was using a cellphone to send electronic messages to someone whom she believed was a minor. While Dietz's text messages themselves were not sexually explicit, taken in totality they demonstrated that she intended to procure the use of the minor, G.S., for an act prohibited by Code § 18.2-370.[2] Specifically,

---

[1] Code § 18.2-374.3(B) reads: "It 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."

[2] The relevant portion of Code § 18.2-370 is:

> Taking indecent liberties with children; penalties.
>
> A. Any person 18 years of age or over, who, with lascivious intent, knowingly and intentionally commits any of the following acts with any child under the age of 15 years is guilty of a Class 5 felony:
>
> (1) Expose his or her sexual or genital parts to any child to whom such person is not legally married or propose that any such child expose his or her sexual or genital parts to such person; or
>
> (2) [Repealed.]

she was procuring the use of the minor in order to expose herself to him, or for another act within the indecent-exposure statute, Code § 18.2-370. Therefore, the trial court properly found her guilty of violating Code § 18.2-374.3(B), and the Court of Appeals should be affirmed.

Standard of Review

When the sufficiency of evidence is challenged on appeal, the Court views the evidence in the light most favorable to the Commonwealth, the prevailing party at trial, drawing all reasonable inferences in the Commonwealth's favor from the facts proved. See Clark v. Commonwealth, 279 Va. 636, 640-41, 691 S.E.2d 786, 788 (2010). The Court must affirm the judgment of the trial court unless that judgment is "plainly wrong or without evidence to support it." Id. Such deference applies not only to the historical facts, but to the inferences from those facts as well. "The inferences to be drawn from proven facts, so long as they are reasonable, are within the province of the trier of fact." Hancock v. Commonwealth, 12 Va. App. 774, 782, 407 S.E.2d 301, 306 (1991).

> (3) Propose that any such child feel or fondle the sexual or genital parts of such person or propose that such person feel or fondle the sexual or genital parts of any such child; or
>
> (4) Propose to such child the performance of an act of sexual intercourse or any act constituting an offense under 18.2-361; or
>
> (5) Entice, allure, persuade, or invite any such child to enter any vehicle, room, house, or other place, for any of the purposes set forth in the preceding subdivisions of this section.

In reviewing a sufficiency challenge, "[a]n appellate court does not 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' Rather, the relevant question is whether '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Williams v. Commonwealth, 278 Va. 190, 193, 677 S.E.2d 280, 282 (2009) (quoting Jackson v. Virginia, 443 U.S. 307, 318-19 (1979)). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson, 443 U.S. at 318-19.

"Statutory interpretation is a question of law which we review *de novo*, and we determine the legislative intent from the words used in the statute, applying the plain meaning of the words unless they are ambiguous or would lead to an absurd result." Wright v. Commonwealth, 278 Va. 754, 759, 685 S.E.2d 655, 657 (2009). In addition, this Court should avoid interpretations that "would negate the legislative intent and would require an unreasonably restrictive interpretation of the statute." Ansell v. Commonwealth, 219 Va. 759, 763, 250 S.E.2d 760, 763 (1979). "When the language of a statute is clear and unambiguous, we are bound by the plain meaning of that language." Vaughn, Inc. v. Beck, 262 Va. 673, 677, 554 S.E.2d 88, 90 (2001). To determine whether there is any ambiguity in a statute, the Court reads the statute in its entirety, rather than isolating particular words or

phrases. Shelor Motor Co. v. Miller, 261 Va. 473, 479, 544 S.E.2d 345, 348 (2001). When the language of a statute is ambiguous or appears to be inconsistent with other portions of the statute, courts are required to harmonize any ambiguity or inconsistency in the statute to give effect to the General Assembly's intent without usurping "the legislature's right to write statutes." Boynton v. Kilgore, 271 Va. 220, 229-30, 623 S.E.2d 922, 927 (2006).

Analysis

A. The plain language of Code § 18.2-374.3(B) does not require the defendant to communicate with a third party in order to promote or procure the use of a minor.

Dietz asserts that Code § 18.2-374.3(B) requires that a defendant's use of a communications system be with a third party – not directly with a minor. Dietz then reasons she could not have been convicted under Code § 18.2-374.3(B) because she was directly communicating with a minor rather than a third party. The Court of Appeals and the trial court properly rejected Dietz's argument because the plain language of the statute simply contains no requirement that a third party be involved. The statute reads, in relevant part:

> [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 purpose of procuring or promoting the use of a minor for any activity in violation of § 18.2-370.

Va. Code Ann. § 18.2-374.3(B).

The statute makes no mention of a third party. Nor do the words used by the statutory imply the involvement of a third party. The word "procure" is defined as "to initiate a proceeding; to cause a thing to be done; to instigate; to contrive, bring about, effect, or cause; to persuade, induce, prevail upon, or cause." 21A Michie's Jurisprudence, Words & Phrases Part 3. See also Bakran v. Commonwealth, 57 Va. App. 197, 204, 700 S.E.2d 471, 474 (2010) ("'procure' means 'to take care of, bring about, obtain: achieve.'") (citation omitted). The word "promote" is defined as: "to contribute to the growth, enlarge or prosperity of; further, encourage." 21A Michie's Jurisprudence, Words & Phrases Part 3. It is clear that, under the plain meaning of the words "procure" and "promote," a defendant could violate Code § 18.2-274.3(B) simply by directly communicating with and instigating, encouraging, persuading, or inducing a minor. The statute is violated when a perpetrator unknowingly communicates with an undercover police officer posing as a child, rather than an actual child. See, e.g., Hix v. Commonwealth, 270 Va. 335, 345, 619 S.E.2d 80, 86 (2005).

"Courts are not allowed to write new words into a statute plain on its face." Flanary v. Milton, 263 Va. 20, 23, 556 S.E.2d 767, 769 (2002) (citing Porter v. Virginia Electric & Power Co., 183 Va. 108, 113, 31 S.E.2d 337, 339 (1944); see also Corp. v. Keane Fed. Sys., Inc., 265 Va. 38, 46, 574 S.E.2d 253, 257 (2003)

(courts are "not free to add language" to statutes under the guise of interpretation); Woods v. Mendez, 265 Va. 68, 75, 574 S.E.2d 263, 267 (2003) (courts cannot "add words to the statute").

Dietz attempts to bolster her argument that conviction under subsection (B) requires involvement of a third party by arguing that the reason § 18.2-374.3(C)[3] carries a more serious penalty is because it involves direct contact with a minor. The sections, however, have numerous differences. Subsection (C) involves actual "solicitation," which is a more direct or completed act than "procuring or promoting the use of a minor." See, e.g., Grafmuller v. Commonwealth, 57 Va. App. 58, 61, 698 S.E.2d 276, 278 (2010) ("[A] defendant is guilty of illegally using a communication system if he contacts 'any person he knows or has reason to believe is a child less than 15 years of age' with lascivious intent for the purpose of soliciting that person's involvement in any of several sexual encounters.") (quoting Code § 18.2-374.3(C)); see also Klewer v. Commonwealth, No. 0791-11-3, 2012 Va. App. LEXIS 315 (Oct. 9, 2012). Furthermore, subsection (C) has an additional element of "lascivious intent" that is not in subsection (B). Therefore,

[3] Code § 18.2-374.3(C), in pertinent part: "It is unlawful for any person 18 years of age or older 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 soliciting, with lascivious intent, any person he knows or has reason to believe is a child younger than 15 years of age to knowingly and intentionally."

the plain language of the statute does not support Dietz's argument that the subsections have different penalties because one involves third parties rather than direct contact.

"The primary objective of statutory construction is to ascertain and give effect to legislative intent." Commonwealth v. Zamani, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998). It is clear that the facts of this case support a conviction under § 18.2-374.3(B). Dietz was directly contacting someone she thought was a minor via text messages in order to procure him for an activity in violation of § 18.2-370. The purpose of this statute is to outlaw the use of communication devices, such as computers and cell phones, to facilitate crimes against children. The Court would usurp the legislature's role if it were to add an unwritten element to this statute or carve out an exception such that no crime occurs when an adult directly contacts children in order to procure or promote them for use of an activity in violation of § 18.2-370. See Esteban v. Commonwealth, 266 Va. 605, 609, 587 S.E.2d 523, 526 (2003) ("[A] statute must be construed with reference to its subject matter, the object sought to be attained, and the legislative purpose in enacting it; the provisions should receive a construction that will render it harmonious with that purpose rather than one which will defeat it.") (citing Stanley v. Tomlin, 143 Va. 187, 195, 129 S.E. 379, 382 (1925)). It is absolutely clear from the language of the text messages that Dietz sent to G.S.'s cell phone that she was

trying to obtain (procure) and encourage (promote) viewing of her sexual and genital parts.

By enacting Code § 18.2-374.3, "the General Assembly . . . clearly intended to protect children from people who would take advantage of them *before* the perpetrator could commit a sexual assault on an actual child." Grafmuller, 57 Va. App. at 65, 698 S.E.2d at 280 (interpreting Code § 18.2-374.3(C)). Therefore, the Court of Appeals was correct that "finding no requirement of the involvement of a third party is consistent with the statute's purpose of protecting minors from predators who use electronic means to involve children in harmful conduct." (App. 13).

B. The Commonwealth did not need to prove a violation of Code § 18.2-370.

In her second assignment of error, Dietz argues that the Commonwealth failed to prove a violation of § 18.2-370 because the photographs entered into evidence did not depict sexual or genital parts. As discussed further below, the trial court and Court of Appeals were correct to find the photographs did portray sexual parts. But, in any event, Dietz's argument is misplaced because the Commonwealth did not need to prove an ***actual violation*** of § 18.2-370. The

Commonwealth only needed to prove the defendant ***intended to promote or procure the use of the child*** in order to violate § 18.2-370.[4]

Dietz was convicted under § 18.2-374.3(B), not § 18.2-370, which sets forth additional elements the Commonwealth must prove for a conviction of indecent liberties. The pertinent statute, § 18.2-374.3(B), prohibits the use of communications systems to facilitate crimes against minors. The statute does not require that crimes against minors actually have been committed; instead, § 18.2-374.3(B) provides that it is unlawful to use communication systems "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." Thus, the statute criminalizes acts taken with the intention to engage in acts prohibited by § 18.2-370. Under this statute, the "procuring or promoting" by way of communications system is the primary unlawful activity— not the activity in § 18.2-370. Therefore, the Commonwealth was not required to prove beyond a reasonable doubt that the defendant violated Code § 18.2-370.

[4] The Court of Appeals found the evidence sufficient to demonstrate Dietz acted with lascivious intent and that she exposed a sexual part to a child as prohibited by Code § 18.2-370. Therefore, the Court of Appeals stated in a footnote it did not need to consider the Commonwealth's alternative argument. (App. 17).

C. The images sent were sexual in nature when viewed in the context of the defendant's lascivious intent.

Nevertheless, the Court of Appeals and the trial court were correct to find that Dietz sent sexual photographs and exposed a sexual part to a child as prohibited by Code § 18.2-370. In enacting Code § 18.2-374.3, the General Assembly intended to protect children from sexual predators. See Grafmuller, 57 Va. App. at 65, 698 S.E.2d at 280. Holding here that a female breast is not a "sexual part" would defeat the purpose of Code § 18.2-374.3. See Moyer v. Commonwealth, 33 Va. App. 8, 34-36, 531 S.E.2d 580, 593-94 (2000) (en banc).

Exposed breasts or buttocks are properly considered "sexual parts" in certain circumstances. In Moyer, a case relied on by the Court of Appeals here, the defendant was an eighth-grade science teacher who was convicted of multiple counts of taking indecent liberties with two students pursuant to Code § 18.2-370.1. See id. at 13, 531 S.E.2d at 582. The evidence presented at trial established that on numerous occasions the defendant had paddled the bare buttocks of the students. See id. at 29-32, 531 S.E.2d at 590-91. Moyer argued on appeal that "'bare buttocks'" were not "'sexual parts'" within the meaning of Code § 18.2-370.1 and should not be construed "as being coextensive with 'genital parts.'" Id. at 33-34, 531 S.E.2d at 592-93.

But the Court of Appeals held that "under established rules of statutory construction, the term 'sexual parts' as used in Code § 18.2-370.1 necessarily includes buttocks." Id. at 34, 531 S.E.2d at 593. The Court explained:

> The 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. *See Burnette [v. Commonwealth*, 194 Va. [785,] 788-89, 75 S.E.2d [482,] 484-85 [(1953)].
>
> In determining whether that separate meaning includes buttocks, both the dictionary definition and the definitions of similar terms in other code sections are instructive. Under the second quoted definition of sexual, the term "sexual parts" would also include those parts which "impl[y] or symboliz[e] erotic desires or activity." Such a definition is not limited to reproductive parts. Similarly, in Code § 18.2-67.10(2) which defines terms used in the article proscribing various types of criminal sexual assault, "intimate parts" include not only the genitalia but also the "anus, groin, breast or buttocks."

Id. at 35-36, 531 S.E.2d at 593-94.

The Court of Appeals relied on Moyer in resolving this case, finding that "the female breast may be considered a 'sexual part' for purposes of Code § 18.2-

370 if the exposure was accompanied by lascivious intent." (App. 15). Because Dietz acted with lascivious intent[5] when she sent G.S. the photograph of her breasts, she exposed a sexual part in violation of Code § 18.2-370. See Moyer, at 35-36, 531 S.E.2d at 593-94 (because evidence supported trial court's finding that defendant acted with lascivious intent, it also supported finding that bare buttocks were "sexual parts" within the meaning of Code § 18.2-370.1). While the totality of the evidence demonstrates that Dietz had a lascivious intent when communicating with the victim, it is noteworthy that the General Assembly chose to require "lascivious intent" in both §§ 18.2-370 and 18.2-374.3(C), but not § 18.2-374.3(B). This language demonstrates that the General Assembly intended not to include a lascivious-intent requirement in subsection (B). See Hines v. Commonwealth, 59 Va. App. 567, 573, 721 S.E.2d 792, 795 (2012) (internal citations and quotations omitted) ("The primary objective of statutory construction is to ascertain and give effect to legislative intent."); Johnson v. Commonwealth,

[5] The parties at trial stipulated: "It 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." (App. 86). This stipulation discusses the context of the text messages themselves, but does not address Dietz's intent. The Court of Appeals found that the text of the messages provided background and context for the photographic images, and the trial court, sitting as factfinder, reasonably found that the images, coupled with other evidence, demonstrated Dietz's lascivious intent. (App. 17).

53 Va. App. 608, 613, 674 S.E.2d 541, 544 (2009) ("when different words are used in a statute, each must be given its own meaning if possible").

Nevertheless, the terms "lewd," "lascivious," and "indecent" are synonyms meaning "a state of mind that is eager for sexual indulgence, desirous of inciting to lust or of inciting sexual desire and appetite." Pederson v. City of Richmond, 219 Va. 1061, 1065, 254 S.E.2d 95, 98 (1979) (citing McKeon v. Commonwealth, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970)). "'[T]he word 'lascivious' describes a state of mind that is eager for sexual indulgence, desirous of inciting to lust or of inciting sexual desire and appetite.'" Campbell v. Commonwealth, 227 Va. 196, 199, 313 S.E.2d 402, 404 (1984) (quoting McKeon, 211 Va. at 27, 175 S.E.2d at 284). The facts here, taken in their totality, clearly show that Dietz acted with lascivious intent when she engaged in a lengthy conversation with her minor student, in which she made sexual references and sent pictures of her breasts while she was in the bathtub. (App. 89-98).[6]

---

[6] Throughout the conversation Dietz made several suggestive statements, including statements demonstrating that she had a guilty conscience and knew what she was doing was inappropriate, such as: "If I get fired and go to jail you have to come visit me!!"; "I'm gonna say something inappropriate but I've been so inappropriate already tonight here goes. I want to kiss you…."; "Did you save my number in your phone? You should save it as Kim….less obvious."; "Well I'll send you a pic any time you wanna see me!"; "So this guy wants me to come over…. He just texted me that he wants to have sex. Is it weird that I'd rather stay here talking to [u]." (App. 91); "OK so if I could just close off the rest of the world, I'd kiss you. But when and where would I possibly do that?" (App. 92). While no individual text message is explicit or lascivious, the conversation as a whole, her guilty

A holding that a female breast is not a sexual part also would defy common sense. See Kitts v. Florida, 766 So. 2d 1067, 1068 (Fla. App. 2000) (noting "the female breast is, as a matter of common sense, a sexual object (as evidenced by the fact that women in most societies clothe their upper bodies in public)"); Minnesota v. Oanes, 543 N.W.2d 658, 661 (Minn. Ct. App. 1996) (holding that because "[a] woman's breasts are commonly considered a sexual and intimate part of her body[,] . . . sex crimes, including prostitution, encompass acts of touching another person's breasts under certain conditions"). Therefore, although the Commonwealth does not need to prove a violation of § 18.2-370, clearly Dietz acted with lascivious intent when she texted her minor student for her own sexual gratification.

The Court of Appeals correctly found that the "only reasonable conclusion to be drawn from appellant's course of conduct was that she was attempting to entice sexually an eleven-year-old boy when she sent the photograph of her breasts." (App. 17). Therefore, the trial court did not err in finding that Dietz acted with lascivious intent and that she exposed a sexual part to a child as prohibited by Code § 18.2-370. The Court of Appeals and the trial court were not

---

conscience, and her student-teacher relationship clearly demonstrated she acted with a lascivious intent. She was also clearly enticing G.S. by sending him a "kiss" (App. 91), and saying he had to "wait" and what he had seen tonight "is all you get right now." (App. 92).

plainly wrong when they found the evidence sufficient to convict Dietz for violating § 18.2-374.3(B).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of Virginia and the Circuit Court for the City of Hampton should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein

By:
Counsel

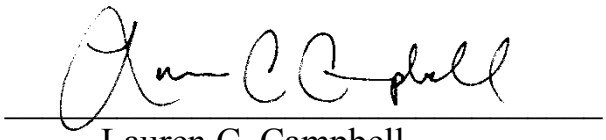
Mark R. Herring
Attorney General of Virginia

Lauren C. Campbell
Assistant Attorney General
Virginia State Bar No. 81935
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
Phone (804) 786-2071
FAX (804) 371-0151
oagcriminallitigation@oag.state.va.us

CERTIFICATE OF TRANSMISSION AND SERVICE

On April 3, 2017, an electronic version of this brief was filed electronically with this Court, and the required copies were subsequently hand-delivered to the clerk's office in compliance with Rule 5:26(e). A copy was emailed to by Timothy G. Clancy, Esq., counsel for the appellant, at tclancy@mcwlawyers.com. In accordance with Rule 5:26(h), the undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities, and certificate contains 4,850 words and is within the required page limit under Rule 5:26(b).

The Commonwealth desires to present oral argument in this case.



Lauren C. Campbell
Assistant Attorney General

Courtesy Copies: Hon. Wilford Taylor, Jr.
Adrienne Mauney, Assistant Commonwealth's Attorney