SCV: Submitted on 01-18-2018 14:17:34 EST for filing on 01-18-2018

IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 170518

ANTONIO RICARDO LEWIS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

MARK R. HERRING
Attorney General of Virginia

ELIZABETH KIERNAN FITZGERALD
Assistant Attorney General
Virginia Bar No. 82288

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 2

STATEMENT OF FACTS 3

MATERIAL PROCEEDINGS BELOW 5

ARGUMENT 8

I. The Trial Court Correctly Construed Virginia Code § 18.2-57.2 in Finding Lewis Guilty of Felony Assault and Battery of A Family Member, Third or Subsequent Offense. 8

A. Standard of Review 9

B. The recidivist aspect of Virginia Code § 18.2-57.2 does not require proof that Lewis was convicted of two prior offenses before he committed the third. 10

C. The two convictions relied upon by the trial court to convict Lewis were proper aggravating offenses pursuant to Code § 18.2-57.2. 15

CONCLUSION 20

CERTIFICATE OF TRANSMISSION AND SERVICE 21

TABLE OF AUTHORITIES

Cases

Ansell v. Commonwealth,
219 Va. 759, 250 S.E.2d 760 (1979)..... 16, 18, 19

Boone v. Commonwealth,
285 Va. 597, 740 S.E.2d 11 (2013).....14

Central Va. Obstetrics & Gynecology Assocs., P.C. v. Whitfield,
42 Va. App. 264, 590 S.E.2d 631 (2004).....12

Clinebell v. Commonwealth,
235 Va. 319, 368 S.E.2d 263 (1988).....14

Commonwealth v. Zamani,
256 Va. 391, 507 S.E.2d 608 (1998).....10

Courtney v. Commonwealth,
281 Va. 363, 706 S.E.2d 344 (2011).....9

Esteban v. Commonwealth,
266 Va. 605, 587 S.E.2d 523 (2003).....10

Flythe v. Commonwealth,
221 Va. 832, 275 S.E.2d 582 (1981).....16

Forest Lakes Cmty. Ass'n v. United Land Corp. of Am.,
293 Va. 113, 795 S.E.2d 875 (2017).....13

Gillespie v. Commonwealth,
272 Va. 753, 636 S.E.2d 430 (2006)..... 15, 17

Infant C. v. Boy Scouts of Am., Inc.,
239 Va. 572, 391 S.E.2d 322 (1990).....13

Jewel v. Commonwealth,
260 Va. 430, 536 S.E.2d 905 (2000).....16

Parker v. Warren,
273 Va. 20, 639 S.E.2d 179 (2007).....13

Ramdass v. Commonwealth,
248 Va. 518, 450 S.E.2d 360 (1994).....16

Rickman v. Commonwealth,
No. 161489, 2017 Va. LEXIS 199 (Dec. 28, 2017) 12

Sarafin v. Commonwealth,
288 Va. 320, 764 S.E.2d 71 (2014)..... 12, 18

Smith v. Commonwealth,
134 Va. 589, 113 S.E. 707 (1922).....16

Starrs v. Commonwealth,
287 Va. 1, 752 S.E.2d 812 (2014).....16

Thomas v. Commonwealth,
279 Va. 131, 688 S.E.2d 220 (2010).....9

Tvardek v. Powhatan Vill. Homeowners Ass'n, Inc.,
291 Va. 269, 784 S.E.2d 280 (2016).....11

W. Alexandria Prop., Inc. v. First Va. Mortg. and Real Estate Inv. Trust,
221 Va. 134, 267 S.E.2d 149 (1980).....15

Webb v. Commonwealth,
131 Va. App. 466 (2000) 17

Woods v. Mendez,
265 Va. 68, 574 S.E.2d 263 (2003).....11

Statutes

Section 18.2-248, Code of Virginia 11, 12, 18

Section 18.2-51, Code of Virginia 10

Section 18.2-51.2, Code of Virginia 10

Section 18.2-51.6, Code of Virginia 10

Section 18.2-52, Code of Virginia 10

Section 18.2-53.1, Code of Virginia 16, 19

Section 18.2-57, Code of Virginia 1

Section 18.2-57.2(A), Code of Virginia 1

Section 18.2-57.2(B), Code of Virginia..... passim

Section 19.2-231, Code of Virginia 14

Section 19.2-269, Code of Virginia 17

Section 19.2-295.1, Code of Virginia 15, 17

Section 19.2-297, Code of Virginia 17

Section 2705, Code of Virginia 16

Section 53.1-151(B1), Code of Virginia.....16

Section 8.01-680, Code of Virginia 9

Rules

Rule 5:17(c), Rules of the Supreme Court of Virginia.....13

Rule 5:21, Rules of the Supreme Court of Virginia 15

Rule 5:25, Rules of the Supreme Court of Virginia 15

IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 170518

ANTONIO RICARDO LEWIS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

STATEMENT OF THE CASE

On May 5, 2016, Antonio Lewis was convicted by the City of Williamsburg and James City County Circuit Court, sitting without a jury, of misdemeanor assault and battery of a family member, in violation of Virginia Code § 18.2-57.2(A). That same day, Lewis was also convicted in a separate trial of felony assault and battery of a family member, third or subsequent offense, in violation of Code § 18.2-57.2(B), and misdemeanor assault, in violation of Code § 18.2-57. (App. 135, 136). These convictions proceeded to a single sentencing hearing on July 13, 2016. By final order entered July 15, 2016, the trial court sentenced Lewis

to five years of incarceration, with two years suspended, for the felony conviction, and twelve months of incarceration, with nine months suspended, for each of the misdemeanor convictions, resulting in an active sentence of three years and six months of incarceration. (App. 136-39).

Lewis appealed his convictions to the Court of Appeals of Virginia, which refused his petition by a *per curiam* order dated February 10, 2017. (App. 140-43). A three-judge panel of the Court of Appeals likewise denied the petition for appeal on April 5, 2017. (App. 144).

ASSIGNMENTS OF ERROR

Lewis's assignments of error are:

1. **The Court of Appeals erred in affirming the trial court's ruling the evidence was sufficient to find Lewis guilty of assault and battery of a family or household member, third or subsequent offense, where Virginia Code § 18.2-57.2(B) requires two prior convictions at the time of the offense date alleged in the indictment, not two convictions by the date of trial.**

2. **The Court of Appeals erred in affirming the trial court's ruling the evidence was sufficient to find Lewis guilty of assault and battery of a family or household member, third or subsequent offense, where Lewis had only one prior conviction for a qualifying predicate offense under Virginia Code § 18.2-57.2(B).**

(App. 447).

STATEMENT OF FACTS

On October 9, 2015, Lewis engaged in an argument with his then-girlfriend P.M. (App. 19). The argument began with text messages and became a heated verbal and physical argument when Lewis returned to the hotel room where he and P.M. lived together. (App. 19-20). Lewis was highly agitated, "cursing and yelling" at P.M. and both were "in each other's face." (App. 20). Because she was afraid the argument would escalate and become physical – as it had before – P.M. closed herself in the bathroom. (App. 20). Lewis, however, continued to argue through the door. (App. 20). When P.M. emerged from the bathroom to try to leave the hotel room, Lewis pushed her to the ground and, when she got up, put her in a headlock. (App. 22, 21). Lewis and P.M. fell onto the bed, "scuffling back and forth" as P.M. struggled to get out of the headlock. (App. 21, 23).

When Lewis released her, P.M. noticed blood on her leg and went back to the bathroom where she observed her lip was "busted" and bleeding. (App. 21). P.M. again tried to leave the hotel room but Lewis blocked the door and informed her that she could not leave until they talked out their problem. (App. 22). P.M. pretended to acquiesce, but when Lewis moved she ran out the front door. (App. 22, 27). P.M. drove directly to the police station where police officers photographed the damage to her lip and the scratches on her neck. (App. 27).

On December 24, 2015, Lewis and P.M. had another fight. Although P.M. was no longer dating Lewis, they continued to live in the same hotel room together. (App. 61). P.M. was out celebrating her birthday with family members and returned to the hotel room that night to find Lewis drunk, high, and angry at her absence. (App. 65). To avoid arguing with Lewis, P.M. went to sleep. (App. 67). Lewis, however, was still upset and wanting to continue the earlier argument so he woke P.M. up. She again refused to argue with Lewis and decided to smoke a cigarette on the balcony. (App. 67). While she was smoking, Lewis slapped her face, sending the cigarette "flying." (App. 67). P.M. went to the bathroom and saw Lewis's handprint visible on her face. (App. 68). Her cheek was painful and she was "in shock" that Lewis had hit her so hard. (App. 67).

When she left the bathroom, Lewis grabbed P.M. and she fell to the floor with Lewis on top of her. (App. 69). Lewis then bit P.M.'s face. (App. 68). At trial, P.M. described the biting as the worst pain that she had ever felt. P.M. testified,

> He just kept biting me, and it seemed like a lifetime, he wouldn't let go. I tried to pry my hands in his mouth to let me go, because I felt like the rigid parts of his teeth in my face, and the more I tried to pull his mouth off me, the harder he bit down on my face to where I couldn't even move my mouth or nothing. I couldn't describe that pain if I wanted to . . . .

(App. 68-69).

When Lewis released her, P.M. jumped off the second-story balcony to escape him. (App. 70). She immediately called the police from her car in the parking lot. (App. 70). Because of Lewis's attack, P.M.'s face was swollen for four days. She had visible bite marks on her face as well as significant bruising. (App. 72-74, 91). Because of the bleeding, bruising, and swelling, P.M. could not immediately return to work. (App. 72). The mark on her face lingered for over a month. (App. 74).

MATERIAL PROCEEDINGS BELOW

As a result of his actions on October 9, 2015, Lewis was charged with assault and battery of a family member and abduction.[1] On May 5, 2017, he was arraigned on these charges, pled not guilty, and proceeded to trial. At trial, P.M. testified that Lewis had attacked her and prevented her from leaving their hotel room. (App. 20-29). The Commonwealth also introduced photographs of P.M.'s "busted" lip and scratched neck. (App. 129). Lewis, testifying in his own defense, admitted hitting P.M. and putting her in a headlock. (App. 49). The trial court found the "evidence was clear" and convicted Lewis of assault and battery. (App.

[1] The indictment concerning the October 9, 2015 offense initially charged an assault and battery of a family member, third or subsequent offense. The indictment, however, was amended to a misdemeanor prior to trial, removing the recidivist element. (App. 1, 8, 133).

53). The court found facts sufficient to convict Lewis of abduction but withheld a finding of guilt on that charge. (App. 54).

Immediately following his conviction for the October 9, 2015 assault, Lewis was separately arraigned on indictments for third or subsequent offense assault and battery of a family member and malicious wounding for his actions of December 24, 2015. (App. 55). Lewis pled not guilty and the matter proceeded to trial. In the second trial, P.M. testified that on December 24, 2015 Lewis slapped her face and that his biting her "was like a pit bull locking onto somebody." (App. 72). She testified about the severity of the bite wound, as did a police officer who responded to her 911 call. (App. 81). P.M. also testified that Lewis had written her from jail asking her not to testify against him, or to pretend she was pregnant with his child and ask for leniency for him. (App. 77). The Commonwealth introduced, without objection, a certified copy of a prior conviction for domestic assault and battery from Newport News. (App. 95, 131-32). The Commonwealth then requested that the court make "findings of fact" regarding Lewis's conviction for the October 9, 2015 assault from earlier that day. (App. 95-96).

Lewis objected, arguing that his conviction for the October 9, 2015 assault could not be considered for purposes of adjudicating the separate charges arising from the December 24, 2015 assault because it did become a "conviction" within

the meaning of the statute until a sentence was imposed. (App. 96). Defense counsel admitted he did not have any authority for that argument, and further asserted that there was no authority on point to support either his or the Commonwealth's position. (App. 97). The trial court agreed with the Commonwealth, holding that the issue was "whether or not he's been convicted" and determined that it could take judicial notice of the fact that the court had previously found him guilty of assault and battery of a family member in violation of Code § 18.2-57.2. (App. 97). After this finding, the Commonwealth rested. (App. 98).

Lewis moved to strike, arguing, as relevant to this appeal, that the Commonwealth had not met its burden with respect to the recidivist aspect of Code § 18.2-57.2. Quoting from the language of the indictment, Lewis argued that the Commonwealth was statutorily required to prove that he had two convictions for assault and battery on a family member at the time he committed the third offense on December 24, 2015. (App. 99-100). He asserted that the Commonwealth had not met this burden with respect to Lewis's second conviction, which was only obtained that morning. (App. 99). The trial court overruled the motion.

Lewis again testified in his own defense. He testified that he was drunk and high and that he did not remember biting P.M. (App. 110). Defense counsel

renewed his motion to strike and the trial court overruled it with respect to the recidivist aspect of Code § 18.2-57.2, and convicted Lewis of third offense assault and battery of a family member for slapping P.M. (App. 114). The trial court granted the defense motion with regard to the malicious wounding charge for the biting attack, reducing it to assault and battery. (App. 114)

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONSTRUED VIRGINIA CODE § 18.2-57.2 IN FINDING LEWIS GUILTY OF FELONY ASSAULT AND BATTERY OF A FAMILY MEMBER, THIRD OR SUBSEQUENT OFFENSE.

The evidence was sufficient to convict Lewis of a third or subsequent offense assault and battery of a family member. Code § 18.2-57.2, by its plain language, does not require that a defendant have two prior convictions at the time he commits the third offense to be found guilty under that statute. Lewis's interpretation to the contrary is also not supported by a comparison to other recidivist statutes. When the General Assembly intends that a defendant be convicted of two prior offenses before committing a third offense, it has expressly provided as much. Code § 18.2-57.2 is devoid of such language and, pursuant to well-established cannons of statutory construction, this Court should not read language into the statute that the General Assembly did not see fit to include.

Further, in determining that the Commonwealth had met its burden, the trial court correctly construed the term "convicted" to encompass the prior adjudication of guilt by the trial court. Lewis's contrary argument takes too narrow a view of the manner in which the term "convicted" has been construed elsewhere in the Virginia Code and does not take into account the specific legislative history of Code § 18.2-57.2. The trial court's judgment should be affirmed.

A. Standard of Review

"When examining a challenge to the sufficiency of the evidence, an appellate court must review the evidence in the light most favorable to the prevailing party at trial and consider any reasonable inferences from the facts proved." Thomas v. Commonwealth, 279 Va. 131, 155-56, 688 S.E.2d 220, 234 (2010). The judgment of the trial court is presumed to be correct and will be reversed only upon a showing that it is plainly wrong or without evidence to support it." Id. at 156, 688 S.E.2d at 234; Va. Code § 8.01-680.

To the extent this Court must construe Code § 18.2-57.2 in considering this appeal, the Court applies a "*de novo* standard of review when addressing a question of statutory construction." Courtney v. Commonwealth, 281 Va. 363, 366, 706 S.E.2d 344, 345 (2011) (citation omitted). "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). Thus, this Court construes a statute "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." Esteban v. Commonwealth, 266 Va. 605, 609, 587 S.E.2d 523, 526 (2003)

B. The recidivist aspect of Virginia Code § 18.2-57.2 does not require proof that Lewis was convicted of two prior offenses before he committed the third.

Lewis was charged and convicted of third offense assault and battery against a family or household member, in violation of Code § 18.2-57.2(B). That statute provides:

> Upon a conviction for assault and battery against a family or household member, where it is alleged in the warrant, petition, information, or indictment on which a person is convicted, that such person has been previously convicted of two offenses against a family or household member of (i) assault and battery against a family or household member in violation of this section, (ii) malicious wounding or unlawful wounding in violation of § 18.2-51, (iii) aggravated malicious wounding in violation of § 18.2-51.2, (iv) malicious bodily injury by means of a substance in violation of § 18.2-52, (v) strangulation in violation of § 18.2-51.6, or (vi) an offense under the law of any other jurisdiction which has the same elements of any of the above offenses, in any combination, all of which occurred within a period of 20 years, and each of which occurred on a different date, such person is guilty of a Class 6 felony.

This Court must "presume that the legislature chose, with care, the words it used when it enacted the relevant statute." Tvardek v. Powhatan Vill. Homeowners Ass'n, Inc., 291 Va. 269, 277, 784 S.E.2d 280, 284 (2016). Likewise, "when the General Assembly has used words of a plain and definite import, courts cannot assign to them a construction that effectively would add words to the statute and vary the plain meaning of the language used." Woods v. Mendez, 265 Va. 68, 75, 574 S.E.2d 263, 267 (2003) (citation omitted).

By its terms, Code § 18.2-57.2(B) requires that "upon a conviction" the defendant "has been previously convicted of" two or more of the enumerated offenses, on different offense dates, within the past twenty years. Va. Code § 18.2-57.2(B). There is no language in Code § 18.2-57.2(B) that requires the Commonwealth to prove that Lewis had two prior convictions at the time of the alleged ***offense date***. That absence alone is fatal to Lewis's argument.

The General Assembly, moreover, has included such language in another recidivist statute – Code § 18.2-248 – criminalizing recidivist drug distribution. Code § 18.2-248 provides:

> Upon a second conviction of such a violation, and it is alleged in the warrant, indictment, or information that the person has been before convicted of such an offense or of a substantially similar offense in any other jurisdiction, which offense would be a felony if committed in the Commonwealth, ***and such prior conviction occurred before the date of the offense alleged in the warrant, indictment, or***

> ***information***, any such person may, in the discretion of the court or jury imposing the sentence, be sentenced to imprisonment for life or for any period not less than five years, three years of which shall be a mandatory minimum term of imprisonment.

The language "and such prior conviction occurred before the date of the offense alleged in the warrant, indictment, or information," is conspicuously absent from the statute at issue here. "[W]hen the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, we must presume that the difference in the choice of language was intentional." Sarafin v. Commonwealth, 288 Va. 320, 328, 764 S.E.2d 71, 76 (2014). Indeed, "[t]he act of choosing carefully some words necessarily implies others are omitted with equal care." Rickman v. Commonwealth, No. 161489, 2017 Va. LEXIS 199, at *10 n.3 (Dec. 28, 2017) (quoting Central Va. Obstetrics & Gynecology Assocs., P.C. v. Whitfield, 42 Va. App. 264, 280, 590 S.E.2d 631, 640 (2004)).

Had the General Assembly wished to include this limitation in Code § 18.2-57.2(B), it certainly could have done so. By omitting this language, however, the General Assembly indicated its intention that no additional temporal restriction apply to Code § 18.2-57.2(B). This Court should not judicially rewrite Code § 18.2-57.2(B) in the image of Code § 18.2-248. Rather, the power to make such an alteration is reserved to the General Assembly. See Parker v. Warren, 273 Va.

20, 23, 639 S.E.2d 179, 181 (2007) ("Courts are required to apply the plain language of a statute when possible and may not rewrite it.").

Lewis also argues that "it is indisputable that on December 24, 2015, [he] had not twice previously been convicted of assault and battery of a family member." (Def. Br. 9). To the extent Lewis is arguing that the proof at trial differed from the allegation in the indictment, he is asserting a fatal variance. This argument is not encompassed by his assignment of error and should not be considered by this Court. See Infant C. v. Boy Scouts of Am., Inc., 239 Va. 572, 579 n.1, 391 S.E.2d 322, 326 (1990) (citing Rule 5:17(c)) (refusing to reach issue beyond the scope of the assignment of error). As this Court recently noted, "assignments of error set analytical boundaries for the arguments on appeal." Forest Lakes Cmty. Ass'n v. United Land Corp. of Am., 293 Va. 113, 123, 795 S.E.2d 875, 880 (2017). Lewis's assignment of error clearly challenges the sufficiency of the evidence to convict him of third offense assault and battery of a family member. The validity of the indictment and the conformance of the Commonwealth's proof to the indictment at trial are not before this Court.

In any event, contrary to Lewis's argument, the indictment was accurate when issued. The presentence report in this case notes that Lewis was convicted of assault and battery of a family member in Newport News Juvenile and Domestic

Relations Court on October 17, 2002 and June 9, 2011. Both of these convictions occurred prior to his December 24, 2015 assault of P.M. At trial, however, the Commonwealth elected to rely on a more recent offense as one of the predicate convictions. Doing so was entirely permissible. "The Commonwealth . . . is entitled to prove its case by evidence that is relevant, competent and material. [A]n accused cannot . . . require the Commonwealth to pick and choose among its proofs, to elect which to present and which to forego." Boone v. Commonwealth, 285 Va. 597, 600, 740 S.E.2d 11, 12 (2013) (citation omitted) (ellipses in original).

The use of the conviction for the October 9, 2015 assault was statutorily appropriate and, because the timing of the prior conviction was not significant, it did not change the nature or character of the offense. Cf. Clinebell v. Commonwealth, 235 Va. 319, 321, 368 S.E.2d 263, 264 (1988) (failing to specify exact dates in indictment does not invalidate indictment when time is not of the essence). Thus, if the issue of variance had been argued below, amendment would have been appropriate and Lewis's remedy would have been continuance. Va. Code § 19.2-231. Under these circumstances, Lewis's variance argument is not a basis for reversal on appeal.

C. The two convictions relied upon by the trial court to convict Lewis were proper aggravating offenses pursuant to Code § 18.2-57.2.

Pursuant to Code § 18.2-57.2, the Commonwealth was required to prove that Lewis had been "previously convicted" of two enumerated offenses under the statute. In determining that the Commonwealth had met its burden, the trial court correctly construed the term "convicted" to encompass the prior adjudication of guilt by the trial court. Lewis's argument to the contrary takes too narrow a view of the manner in which the term "convicted" has been construed elsewhere in the Virginia Code and does not take into account the specific legislative history of Code § 18.2-57.2.

This Court has previously had occasion to construe the word "conviction" or "convicted" in the context of a variety of statutes.[2] In doing so, the Court has recognized that the word is ambiguous in that it is susceptible to more than one interpretation. Gillespie v. Commonwealth, 272 Va. 753, 758, 636 S.E.2d 430, 432 (2006), superseded by statute, Va. Code § 19.2-295.1 (2007). See also Starrs

[2] The multiple cases discussed in this section stand in stark contrast to Lewis's position at trial that there was no authority to support either his reading or the Commonwealth's. To the extent the Court finds that Lewis failed to fully present the issue below, Rule 5:25 bars his argument on appeal. See W. Alexandria Prop., Inc. v. First Va. Mortg. and Real Estate Inv. Trust, 221 Va. 134, 138, 267 S.E.2d 149, 151 (1980) (interpreting former Rule 5:21) ("On appeal, though taking the same general position as in the trial court, an appellant may not rely on reasons which could have been but were not raised for the benefit of the lower court.").

v. Commonwealth, 287 Va. 1, 12 n.4, 752 S.E.2d 812, 819 n.4 (2014) (collecting cases interpreting term "conviction" in "several different contexts"). In Smith v. Commonwealth, 134 Va. 589, 113 S.E. 707 (1922), this Court construed former Code § 2705, which permitted removal of an elected or appointed official convicted of a crime of moral turpitude. There, the Court held that "convicted" meant "convicted by judgment" requiring "a judgment of conviction, in addition to the verdict of the jury." 134 Va. at 592, 113 S.E. at 708. Relying on Smith, in Ramdass v. Commonwealth, 248 Va. 518, 450 S.E.2d 360 (1994), this Court held that, in the context of parole eligibility, where "[j]udgment had not been entered on [the] verdict . . . it cannot be considered as a conviction under Code § 53.1-151(B1)." Id. at 518, 450 S.E.2d at 361.

By contrast, in Ansell v. Commonwealth, 219 Va. 759, 250 S.E.2d 760 (1979), and Flythe v. Commonwealth, 221 Va. 832, 835, 275 S.E.2d 582, 584 (1981), the Court found that first and second offense use or display of a firearm charges were appropriately tried in a single proceeding, and sentenced according to the recidivist provisions of Code § 18.2-53.1. Necessarily then, in the context of Code § 18.2-53.1, the Commonwealth is not required to prove the aggravating "conviction" through reliance on a final judgment. Similarly, in Jewel v. Commonwealth, 260 Va. 430, 536 S.E.2d 905 (2000), the Court interpreted Code §

19.2-269 as not requiring an order memorializing a finding of guilt or final judgment before the Commonwealth could impeach a witness's credibility with a past "conviction." See id. at 433, 536 S.E.2d at 906. Most recently, in Gillespie, this Court construed the phrases "the defendant's prior criminal convictions" and "record of conviction" in Code § 19.2-295.1 "to mean exactly what they say, and no more." 272 Va. at 759, 636 S.E.2d at 433.[3]

In short, the rule to be gleaned from this precedent is that the term "conviction" or "convicted" is indeed susceptible to more than one meaning and must be construed in the context of the particular statute at issue. Here, Code § 18.2-57.2 was first enacted on March 15, 1991. At that time, Code § 18.2-57.2(B) mirrored language found in Code § 19.2-297, prescribing the punishment for third or subsequent offense petty larceny. In 1991, Code § 19.2-297 provided:

> When a person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted, or found by the jury or judge before whom he is tried, that he has been before sentenced in the United States for any larceny or any offense deemed to be larceny by the law of the sentencing jurisdiction, he shall be confined in jail not less than thirty days nor more than twelve months; and for a third, or any subsequent offense, he shall be guilty of a Class 6 felony.

---

[3] In construing Code § 19.2-295.1, Gillespie rejected the Court of Appeals' previous interpretation of the phrase "record of conviction" in the context of that statute. Lewis's reliance on Webb v. Commonwealth, 131 Va. App. 466, 468 (2000), is therefore misplaced, as the statutory interpretation espoused in that case was subsequently rejected by this Court.

This statute is significant in two respects. First, it contains the language requiring the recidivist element to be alleged in the charging document, which language is mirrored in Code § 18.2-57.2(B). Second, it does not use the term "conviction," but rather requires that the defendant have been "before sentenced." Therefore, in 1991, when Code § 18.2-57.2(B) was enacted, the General Assembly had before it a similar statute criminalizing recidivist behavior that required the use of a final judgment as an aggravating offense. This language was ***not*** used in the newly-enacted Code § 18.2-57.2(B), which required instead only that the defendant be "previously convicted." The General Assembly's determination to use "convicted" instead of "sentenced" in drafting this recidivist statute is presumed to be intentional. See Sarafin, 288 Va. at 328, 764 S.E.2d at 76.

The decision by the General Assembly to require a conviction instead of final judgment is in keeping with the purpose of a recidivist statute like Code § 18.2-57.2(B). As this Court reasoned in Ansell, the purpose of recidivist statutes can be either to reform or to deter. Statutes that aim to reform or rehabilitate offenders provide that aggravating convictions must have occurred *before* the charged offense. See, e.g., Va. Code § 18.2-248 (criminalizing recidivist drug distribution where the "prior conviction occurred before the date of the offense alleged"). Recidivist statutes lacking this language aim "to deter violent criminal

conduct." Ansell, 219 Va. at 763, 250 S.E.2d at 762. Code § 18.2-57.2 falls into the latter category. Thus, to effectuate the deterrent purpose of this recidivist statute, the term "convicted" should be given a narrow construction, and should not be read to encompass conviction *and* final judgment.

In Ansell, the Court explained:

> To give the statute the construction sought by Ansell would enable an offender who used a firearm in the commission of a series of serious felonies over an extended period of time prior to his apprehension to enjoy the status of a first offender as to each violation of § 18.2-53.1. We believe that this result would negate the legislative intent and would require an unreasonably restrictive interpretation of the statute.

Id. at 763, 250 S.E.2d at 763.

This rationale applies with no less force in the instant case. Indeed, as noted by the prosecutor, Lewis was indicted at the same time for his October and December assaults of P.M. because he was not arrested until after the second assault. (App. 11). During that time, his dangerous behavior escalated, leading to the vicious biting attack on P.M. on December 24, 2015. As in Ansell, Lewis should not enjoy the status of a first offender as to each assault on P.M. because he was able to avoid apprehension in the interim. Such an outcome "would negate the legislative intent and would require an unreasonably restrictive interpretation of the statute." Id. at 763, 250 S.E.2d at 763. The trial court correctly concluded that the Commonwealth was only required to prove two prior convictions, not two final

judgments. The Commonwealth's evidence was sufficient to convict Lewis of assault and battery of a family member, third or subsequent offense.

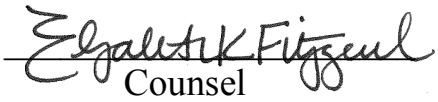
CONCLUSION

The trial court correctly concluded both that Code § 18.2-57.2 contained no requirement that the defendant be twice convicted at the time of his third offense and that the term "convicted" should not be interpreted to mean "convicted and sentenced." The judgment of the Court of Appeals and of the Circuit Court for the City of Williamsburg and James City County should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

Appellee herein.

By: 
Counsel

Mark R. Herring
Attorney General of Virginia

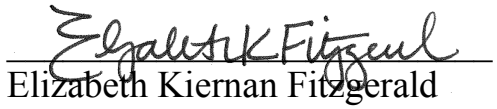
Elizabeth Kiernan Fitzgerald
Assistant Attorney General
Virginia State Bar No. 82288

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
phone (804) 786-2071
fax (804) 371-0151
email oagcriminallitigation@oag.state.va.us

CERTIFICATE OF TRANSMISSION AND SERVICE

On January 18, 2018, a copy of this Brief was filed electronically with this Court and the required paper copies were hand-delivered to the Clerk's Office in compliance with Rule 5:26. A copy the document was mailed and emailed to Joshua A. Goff, Esq., 739 Thimble Shoals Boulevard, Suite 1004, Newport News, VA 23606, josh@goffvoltin.com. A courtesy copy has been sent to the trial judge and the Commonwealth's Attorney. This brief complies with Rule 5:26(b).

The Commonwealth desires to present oral argument in this case.



Elizabeth Kiernan Fitzgerald
Assistant Attorney General