In The

Supreme Court of Virginia

RECORD NO. 170518

ANTONIO RICARDO LEWIS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

Joshua A. Goff (VSB No. 80401)
GOFF VOLTIN, PLLC
739 Thimble Shoals Boulevard, Suite 1004
Newport News, Virginia 23606
(757) 369-2415 (Telephone)
(757) 806-6920 (Facsimile)
josh@goffvoltin.com

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

SCV: Submitted on 12-28-2017 12:29:09 EST for filing on 12-28-2017

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND
MATERIAL PROCEEDINGS BELOW 2

STATEMENT OF FACTS 4

ASSIGNMENTS OF ERROR 6

AUTHORITIES AND ARGUMENT 7

I. 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 Va. Code Sec. 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 7

Standard of Review 7

Argument 7

II. 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 Va. Code Sec. 18.2-57.2(B) 11

Standard of Review 11

Argument 11

CONCLUSION 18

CERTIFICATE 19

TABLE OF AUTHORITIES

Page(s)

CASES

Alger v. Commonwealth,
267 Va. 255, 590 S.E.2d 563 (2004).....7

Appalachian Power Co. v. State Corp. Comm'n,
284 Va. 695, 733 S.E.2d 250 (2012).....8

Barr v. Town & Country Props., Inc.,
240 Va. 292, 396 S.E.2d 672 (1990).....7

BBF, Inc. v. Alstom Power, Inc.,
274 Va. 326, 645 S.E.2d 467 (2007).....8

Davenport v. Little-Bowser,
269 Va. 546, 611 S.E.2d 366 (2005).....7

Jackson v. Fidelity & Deposit Co.,
269 Va. 303, 608 S.E.2d 901 (2005).....7

Mason v. Commonwealth,
16 Va. App. 260, 430 S.E.2d 543 (1993) 16

McBride v. Commonwealth,
24 Va. App. 30, 480 S.E.2d 126 (1997) 13

Smith v. Commonwealth,
134 Va. 589, 113 S.E.707 (1922).....12

Va. Empl. Comm'n v. Cmty. Alternatives, Inc.,
57 Va. App. 700, 705 S.E.2d 530 (2011) 11

Webb v. Commonwealth,
524 S.E.2d 164, 31 Va. App. 466, (2000) 12, 13

Wright v. Commonwealth,
278 Va. 754, 685 S.E.2d 655 (2009) 7

STATUTES

Va. Code § 18.2-47 2

Va. Code § 18.2-51 2

Va. Code § 18.2-51.6 2

Va. Code § 18.2-53.1 ..... 14, 17

Va. Code § 18.2-57.2 ..... passim

Va. Code § 18.2-57.2(B) ..... passim

Va. Code § 18.2-248 ..... 15, 16

Va. Code § 18.2-248(C) 16

Va. Code § 18.2-270 15

Va. Code § 18.2-270(C) 15

Va. Code § 19.2-299 13

OPENING BRIEF OF APPELLANT

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA:

PRELIMINARY STATEMENT

The appellant, Antonio Ricardo Lewis, respectfully asserts he is aggrieved by a final judgment entered by the Court of Appeals of Virginia dated February 10, 2017 and November 28, 2017 in a criminal case originating in the Williamsburg-James City Circuit Court. The appellant will be referred herein as “Lewis” and the appellee as the “Commonwealth.” References to the record contained in the Appendix will be referred to as “A. __.”

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Antonio Ricardo Lewis (hereinafter "Lewis") was tried in a single day bench trial in the Williamsburg-James City Circuit Court on May 5, 2016 before the Honorable Michael E. McGinty. Lewis initially stood accused of one count of abduction in violation of Va. Code Sec. 18.2-47, one count of assault and battery of a family or household member in violation of Va. Code Sec. 18.2-57.2, one count of assault and battery of a family member, third or subsequent offense, in violation of Va. Code 18.2-57.2, one count of maiming in violation of Va. Code Sec. 18.2-51, and one count of strangulation in violation of Va. Code Sec. 18.2-51.6. The strangulation charge was dismissed on Commonwealth's motion by order of *nolle prosequi*. The misdemeanor assault and battery and abduction indictments referenced an October 9, 2015 incident, while the maiming and assault and battery of a family member, third or subsequent offense indictments alleged a December 24, 2015 offense date. The Court granted the Commonwealth's motion to have separate trials, on the same date, of the two sets of charges. A. 10.

The Court ultimately found Lewis guilty of the October 9, 2015 assault and battery and used this conviction as a predicate conviction to thereafter find Lewis guilty of assault and battery of a family or household member,

third or subsequent offense relating to the December 24, 2015 incident. A. 112. Ultimately, Lewis was found guilty of two misdemeanor assault and battery on a family member charges (one with an October 9, 2015 offense date and the other reduced from maiming from December 24, 2015) and assault and battery, third or subsequent conviction from December 24, 2015. A. 137-139. Lewis received five years with two years suspended on the assault and battery of a family member, third or subsequent offense, and twelve months with nine months suspended on each of the misdemeanor assault and battery of a family member charges. A. 137-139. The trial court dismissed the abduction indictment. A. 137-139. Lewis thereafter noted a timely notice of appeal to the Court of Appeals of Virginia.

The Court of Appeals denied the petition for appeal in a per curiam opinion dated February 10, 2017. A. 140-142. A three-judge panel of the Court of Appeals likewise denied the petition for appeal for the reasons stated in the per curiam opinion in an order dated April 5, 2017. Lewis thereafter noted a timely notice of appeal to the Supreme Court of Virginia. A. 145-146.

STATEMENT OF FACTS

Pamela McDavid testified she and Lewis resided together as boyfriend and girlfriend at the Budget Inn on October 9, 2015. A. 19. On that date, she testified the two of them started to argue, initially by text message A. 19. McDavid said Lewis arrived back at the Budget Inn "banging on the door and cursing…" A. 20. They were arguing "in each other's face" before McDavid walked away to go into the bathroom. A. 20. When she came out of the bathroom, Lewis grabbed McDavid and put her in a headlock. A. 21. McDavid testified her lip was "busted." A. 21. McDavid testified her lip was "busted" during the scuffle when Lewis had her in a headlock. A. 23. Officer Powell of the Williamsburg Police Department testified he saw McDavid on October 9, 2015 and noted she had a split lip and upset demeanor. A. 38. Antonio Lewis testified on his own behalf and admitted to striking Ms. McDavid on October 9, 2015. A. 49. Lewis conceded he was guilty of assault and battery of a family member on October 9, 2015. A. 53. After the trial court pronounced Lewis guilty of the October 9th assault and battery, Lewis requested a presentence report. A. 54. The trial court did not sentence Lewis on the October 9, 2015 assault and battery on the trial date. A. 54.

McDavid again took the stand on May 5, 2016 to testify about an incident that occurred on December 24, 2015. A. 60. McDavid testified she went to her mother's house to celebrate her birthday. A. 61. After McDavid left, she testified Lewis began sending her text messages. A. 62. McDavid then heads back to the Budget Inn. A. 63. McDavid entered the hotel room, where she sees Lewis "pacing back and forth." A. 64. Lewis was drinking and using cocaine. A. 65. McDavid testified she went to sleep, as she didn't want a confrontation. A. 66. At some point, Lewis woke her up and initiated an argument. A. 67. McDavid began to smoke a cigarette on the back porch after she woke up. A. 67. After taking two puffs of the cigarette, McDavid testified Lewis slapped her. A. 67. McDavid then went into the bathroom and tended to her face. A. 68. When she emerged from the bathroom, Lewis grabbed her and they fell down. A. 68. McDavid then testified Lewis began biting her face. A. 68. Officer Hileman of the Williamsburg Police Department testified he responded to the scene and saw a bite mark on McDavid's face. A. 89.

ASSIGNMENTS OF ERROR

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 Va. Code Sec. 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. This assignment of error was preserved at A. 98-104; 113-114.

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 Va. Code Sec. 18.2-57.2(B). This assignment of error was preserved at A. 95-98.

AUTHORITIES AND ARGUMENT

I. 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 Va. Code Sec. 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.

Standard of Review

"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).

Argument

In resolving questions of statutory interpretation, [this court] adheres to the principle "that courts will give statutory language its plain meaning." Davenport v. Little-Bowser, 269 Va. 546, 555, 611 S.E.2d 366, 371 (2005) (citing Jackson v. Fidelity & Deposit Co., 269 Va. 303, 313, 608 S.E.2d 901, 904 (2005)). Furthermore, "[w]e 'assume that the legislature chose, with care, the words it used when it enacted the relevant statute.'" Alger v. Commonwealth, 267 Va. 255, 261, 590 S.E.2d 563, 566 (2004) (quoting Barr v. Town & Country Props., Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)). The court cannot "[add] language to or [delete]

language from a statute . . .” in the guise of interpreting that statute. Appalachian Power Co. v. State Corp. Comm’n, 284 Va. 695, 706, 733 S.E.2d 250, 256 (2012) (citing BBF, Inc. v. Alstom Power, Inc., 274 Va. 326, 331, 645 S.E.2d 467, 469 (2007)).

The statutory language at issue is plain and unambiguous. Va. Code Sec. 18.2-57.2(B) states, in relevant part:

> Upon conviction for assault and battery against a family or household member, where it is alleged in the…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….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…

Lewis noted in his motion to strike the indictment at issue alleged “on or about December 24, 2015, Antonio Lewis did assault and batter [Pamela] McDavid, and he has twice previously been convicted of assault and battery [of a family or household member].” A. 99. The Commonwealth introduced a certified prior conviction from the Newport News Juvenile and Domestic Relations District Court finding Lewis guilty of assault and battery of a family or household member on June 9, 2011. A. 95. Over Lewis’s objection, the trial court took notice of its ruling finding Lewis guilty of assault and battery of a family or household member in a

separate trial immediately preceding the trial of the assault and battery of a family member, third or subsequent offense. A. 104. In doing so, it adopted the argument of the Commonwealth that it was sufficient for Lewis to have been twice previously found guilty of a qualifying predicate offense listed in Va. Code Sec. 18.2-57.2(B) at the time of arraignment, rather than at the time of the offense in question.

The plain language of the indictment in question alleged that on or about December 24, 2015, Lewis had twice previously been convicted of predicate offenses listed in Va. Code Sec. 18.2-57(B). It is indisputable that <u>on December 24, 2015</u>, Lewis had not twice previously been convicted of assault and battery of a family member or any other predicate offense listed in Va. Code Sec. 18.2-57.2(B). The Commonwealth may not preemptively add enhancement language to a charging instrument on the hope, or even expectation, that an accused will incur a predicate conviction prior to the trial date on the enhanced charge. This interpretation goes squarely against the General Assembly's plain language in Va. Code Sec. 18.2-57.2 requiring two prior convictions before enhancement language can be added to a charging instrument.

In sum, the Commonwealth brought an indictment alleging Lewis was guilty of a third or subsequent offense of assault and battery of a family or

household member at a time when Lewis had not been so convicted. The Commonwealth was not entitled to use a pending *charge* to elevate another pending charge of assault and battery of a family or household member. Va. Code Sec. 18.2-57.2(B) clearly states that only *convictions* can be used to enhance the penalty for assault and battery of a family or household member, and those convictions must exist at the time of the offense triggering the issuance of the charging instrument alleging the new offense is a class six felony and not a class one misdemeanor. Lewis's conviction under Va. Code Sec. 18.2-57.2(B) should therefore be reversed and the matter remanded to the trial court for resentencing on misdemeanor assault and battery on a family or household member.

II. 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 Va. Code Sec. 18.2-57.2(B).

Standard of Review

Questions of statutory interpretation are reviewed *de novo*. See, Va. Empl. Comm'n v. Cmty. Alternatives, Inc., 57 Va. App. 700, 708, 705 S.E.2d 530, 534 (2011).

Argument

Va. Code Sec. 18.2-57.2(B) requires two prior convictions before an assault and battery of a family or household member may be elevated from a class one misdemeanor to a class six felony. In the instant case, Lewis was brought to trial on the same date on two sets of offenses, with one set of offenses alleging conduct occurring October 9, 2015 and one set alleging conduct on December 24, 2015. Though all offenses involved the same complaining witness, the Commonwealth requested two separate trials so that it could use a possible assault and battery on a family or household member conviction relating to the October 9th incident as a predicate conviction in the trial of another assault and battery of a family or household member that occurred on December 24th. A. 10. Lewis was found guilty of assault and battery of a family or household member in the

first trial, and the trial court subsequently adopted the Commonwealth's argument that the finding of guilt from the first trial was sufficient to enhance the December 24th assault and battery of a family or household member to a class six felony.

The trial court's finding of guilt in the first trial was not a "conviction" under Va. Code Sec. 18.2-57.2(B). "It is, therefore, now well established in our jurisprudence that a "conviction" ordinarily embraces both an adjudication of guilt and a related sentence, thus concluding a prosecution by final order." Webb v. Commonwealth, 524 S.E.2d 164, 166, 31 Va. App. 466, 468 (2000). "Where the reference is to the ascertainment of guilt in another proceeding, in its bearings upon the status or rights of the individual in a subsequent case, ... a broader meaning attaches to the expressions [conviction or convicted], and a `conviction' is not established, or a person deemed to have been `convicted' unless it is shown that a judgment has been pronounced upon the verdict." Smith v. Commonwealth, 134 Va. 589, 598, 113 S.E.707, 709 (1922).

The Court in Webb cited several prior decisions in holding that findings of guilt, without a final sentencing order, were not "convictions."

> In Ramdass v. Commonwealth, 248 Va. 518, 450 S.E.2d 360 (1994), the Court revisited the term and, citing Smith with approval, concluded that a jury verdict "cannot be considered as a conviction," absent "[j]udgment ... entered on [the] verdict." Id.

> at 520, 450 S.E.2d at 361 (guilty verdict was not a conviction rendering defendant ineligible for parole). Guided by Ramdass, we concluded in Batts v. Commonwealth, 30 Va.App. 1, 515 S.E.2d 307 (1999), that a "jury's verdict ... was not a final conviction without the entry of the sentencing order[.]" Id. at 12, 515 S.E.2d at 313.

Webb at 166. It is axiomatic that a trial court speaks only through its orders. See, e.g., McBride v. Commonwealth, 24 Va. App. 30, 35, 480 S.E.2d 126, 128 (1997). Here, there was neither an order relating to the trial court's findings from the trial involving the October 9th incident, nor had a final sentence been pronounced. Lewis therefore was not "convicted" of assault and battery of a family or household member relating to the October 9th incident until the trial court pronounced a sentence and entered a sentencing order several months later. Indeed, the trial court could not have pronounced a sentence on the October 9th assault and battery even had it desired to, as Lewis made a timely request for a presentence report as was his right pursuant to Va. Code Sec. 19.2-299. A. 54.

The Court of Appeals incorrectly reasoned that the plain language of the statute did not require two separate convictions prior to enhancement. The General Assembly presumably chose with care the words it used in drafting Va. Code Sec. 18.2-57.2. There is no indication the legislature intended to allow prosecutors to preemptively, and incorrectly, seek an

indictment alleging a third offense domestic assault and battery when there have not been the requisite two prior convictions. Further, the Court of Appeals's reliance on case law interpreting Va. Code Sec. 18.2-53.1 is misplaced. That code section, which criminalizes the use of firearms in the commission of certain violent felonies, states:

> Violation of this section shall constitute a separate and distinct felony and any person found guilty thereof shall be sentenced to a mandatory minimum term of imprisonment of three years for a first conviction, and to a mandatory minimum term of five years for a second or subsequent conviction under the provisions of this section.

Va. Code Sec. 18.2-53.1. By the plain language of Va. Code Sec. 18.2-53.1, it matters not whether an individual receives two convictions at the same time or whether they occur on separate dates, as the statute simply prescribes the punishment for a first and second conviction, regardless of when they occur.

The differences between Va. Code Sec. 18.2-57.2 and Va. Code Sec. 18.2-53.1 are clear. Va. Code Sec. 18.2-57.2 requires prior convictions before the enhanced penalty kicks in ("such person has been previously convicted of two offenses against a family or household member") as opposed to the use of a firearm statute, which simply states the penalties for a first and second conviction, without a requirement that one precede the other.

The language of Va. Code Sec. 18.2-57.2 also differs from the driving under the influence recidivist statute. The felony portion of that statute states:

> Any person convicted of three offenses of Va. Code Sec. 18.2-266 committed within a 10-year period shall upon conviction of the third offense be guilty of a Class 6 felony. The sentence of any person convicted of three offenses of Va. Code Sec. 18.2-266 committed within a 10-year period shall include a mandatory minimum sentence of 90 days, unless the three offenses were committed within a five-year period, in which case the sentence shall include a mandatory minimum sentence of confinement for six months…

Va. Code Sec. 18.2-270(C). The General Assembly specifically elected to prescribe the penalties for three convictions of driving under the influence without creating a requirement that each conviction precede the other. Under the plain language of Va. Code Sec. 18.2-270, a person may engage in three separate acts of driving under the influence on a single day and receive two misdemeanor convictions and a felony conviction for that conduct. The same is not true for three acts of assault and battery on a family or household member, as the General Assembly specifically inserted a requirement that such acts occur on different dates and that convictions for each offense occur before an enhancement could occur.

Lewis's argument is bolstered by the similarity in the language of another recidivist statute, Va. Code Sec. 18.2-248, and Va. Code Sec.

18.2-57.2. In Mason v. Commonwealth, 16 Va. App. 260, 430 S.E.2d 543 (1993), the Court of Appeals interpreted Va. Code Sec. 18.2-248 as it then existed. The statute at that time stated:

> Any person who violates this section with respect to a controlled substance classified in Schedule I or II shall upon conviction be imprisoned for not less than five nor more than forty years and fined not more than $500,00. Upon a second or subsequent conviction of such a violation, 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 and be fined not more than $500,000.

Va. Code Sec. 18.2-248. That statute was later changed several times to its current form, which reads:

> Except as provided in subsection C1, any person who violates this section with respect to a controlled substance classified in Schedule I or II shall upon conviction be imprisoned for not less than five nor more than 40 years and fined not more than $500,000. 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 then five years, three years of which shall be a mandatory minimum term of imprisonment to be served consecutively with any other sentence, and he shall be fined not more than $500,000.

Va. Code Sec. 18.2-248(C).

This language is nearly identical to the enhancement language contained in Va. Code Sec. 18.2-57.2. The General Assembly intentionally chose the word “conviction” rather than “offense” when crafting the statute. Moreover, the legislature chose to impose additional requirements in the statutes criminalizing assault and battery of a family or household member and distribution of a controlled substance that it did not elect to impose in the statutes criminalizing the use of a firearm in the commission of a violent felony or of driving under the influence. The Court of Appeals erred in equating the language of Va. Code Sec. 18.2-57.2 with the language in Va. Code 18.2-53.1, and in supporting its rationale with holdings in cases interpreting that statute.

Va. Code Sec. 18.2-57.2 requires two prior convictions, on different offense dates, before an assault and battery on a family member is enhanced to a Class 6 felony. Judgment was not “pronounced upon the verdict” of the October 9, 2015 assault and battery, as Lewis had not received a sentence when the Court took judicial notice of its finding in that case to enhance the December 24, 2015 assault and battery. Because Lewis had not been twice previously convicted of assault and battery of a family or household member at the time the Court found the evidence sufficient for a finding of guilt of the Class 6 felony, Lewis could not be

found guilty of a Class 6 felony for that offense. The judgment of the Court of Appeals of Virginia affirming the Circuit Court of the City of Williamsburg and County of James City should therefore be reversed, and the case remanded back to the trial court for sentencing on misdemeanor assault and battery of a family or household member, or, in the alternative, remanded to the trial court for further proceedings.

CONCLUSION

For the reasons stated herein, Lewis requests that this Court grant the petition for appeal and reverse the judgments of the Court of Appeals of Virginia and the trial court.

Respectfully Submitted,

Joshua A. Goff
GOFF VOLTIN, PLLC
739 Thimble Shoals Boulevardm,
Suite 1004
Newport News, Virginia 23606
(757) 369-2415 (Telephone)
(757) 806-6920 (Facsimile)
josh@goffvoltin.com

CERTIFICATE

Pursuant to VA. Sup. Ct. R. 5:26(e), I certify that, on the 28th day of December, 2017, one electronic copy of the Opening Brief of Appellant and Appendix were filed, via VACES, and three paper copies of the Opening Brief of Appellant and Appendix have been hand-filed with the Clerk of this Court. I further certify that one electronic copy of the Brief of Appellant was served, via email, and electronic copies on CD of the Brief of Appellant and Appendix were delivered, via UPS Ground Transportation, upon:

Elizabeth K. Fitzgerald, Esquire
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
Telephone: (804)786-2071
Facsimile: (804)786-1991
Email: oagcriminallitgation@oag.state.va.us
Counsel for Appellee

Pursuant to VA. Sup. Ct. R. 5:26(b), this Opening Brief of Appellant contains 3,743 words and thus complies with the applicable word limitation. Counsel for appellant respectfully requests oral argument.

By:_____
Joshua A. Goff