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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 181684

JERMICA SHONDAL TAYLOR,

***Appellant*,**
v.

COMMONWEALTH OF VIRGINIA,

***Appellee*.**

BRIEF FOR THE COMMONWEALTH

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BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

A City of Hampton grand jury indicted Jermica Shondal Taylor for one count of attempted identity theft. (App. 2).[1] Subsequently, she was

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[1] The indictment incorrectly states that Taylor attempted to obtain "goods and services," when in fact she was attempting to obtain "money." But she has not raised a "fatal variance" issue at trial or in this Court, so that issue is not before this Court. *See Commonwealth v. Bass*, 292 Va. 19, 26-34, 786 S.E.2d 165, 169-73 (2016) (holding that fatal variance claim may be waived).

convicted of the charge in a bench trial and sentenced to serve a three-year suspended sentence. (App.144-47).[2]

A judge of the Court of Appeals of Virginia granted Taylor's petition for appeal in part on July 27, 2018. The sole issue presented in that appeal was whether Taylor committed attempted identity theft by forging and uttering a check she had recently stolen from the victim's house and attempting to cash it at a local bank. In an unpublished opinion issued on December 4, 2018, the Court of Appeals of Virginia affirmed Taylor's conviction and held that when she presented the check containing the victim's name, account number, and forged signature to attempt to obtain money, she "used" this identifying information within the meaning of Code § 18.2-186.3. (App. 150-54). *See Taylor v. Commonwealth*, No. 1855-17-1, 2018 Va. App. LEXIS 333 (Dec. 4, 2018). The Court of Appeals of Virginia also remanded this case for correction of a clerical error in the sentencing order, which incorrectly recorded that Taylor was convicted of identity theft instead of attempted identity theft.

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[2] The circuit court also convicted Taylor of one count each of grand larceny, attempted uttering, breaking and entering, forgery, and attempted larceny by false pretenses. (App. 146-47). Those convictions are not challenged in this appeal.

This Court, by Order dated May 9, 2019, granted Taylor's petition for appeal.

ASSIGNMENT OF ERROR

> The Court of Appeals erred in affirming the trial court's denial of Taylor's motion to strike the charge of identity theft under Va. Code § 18.2-186.3, where the Commonwealth's evidence was insufficient as a matter of law to prove the elements of identity theft, where Jermica Taylor endorsed her own name on the back side of the check and never misrepresented her identity to the bank teller while attempting to cash the check.

STATEMENT OF FACTS

On November 5, 2015, Sandra Clements returned to her home after approximately two hours away and found that her home had been broken into. (App. 11-12). She discovered that cash, jewelry, a cell phone, and checkbooks were missing. (App. 13-14). Clements called the police shortly after she realized these items were missing. (App. 17).

A few hours after the burglary at Clement's residence, Taylor attempted to cash a $375 check associated with Clement's bank account at the Old Point National Bank in the City of Hampton. (App. 11-12, 15-16, 26-37, 142-43). The bank teller to whom she presented the check, Mary Grace Lovemore, grew suspicious and called Clements. (App. 26-

27). While she was doing so, Taylor fled the bank without waiting for the proceeds. (App. 26-27).

Lovemore testified that she was concerned about the check because the "handwriting didn't match." (App. 27). Taylor provided the teller with her own driver's license and the check was made payable to "Jermica Taylor," but the signature block for the account holder contained a signature purporting to be the victim's, Sandra Clements.[3] (App. 28, 42, 95, 142).

ARGUMENT

I. The evidence was sufficient to prove that Taylor committed attempted identity theft when she forged and uttered the victim's check.

Standard of Review

Taylor argues on appeal that the evidence was legally insufficient to convict her of attempted identity theft. Her claim presents an issue of statutory construction which this Court reviews *de novo*. *See Turner v. Commonwealth*, 295 Va. 104, 108, 809 S.E.2d 679, 681 (2018).

"When the language of the statute is unambiguous, [the courts] are bound by the plain meaning of that language." *Turner v.*

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[3] The handwriting depicting the payee and that purporting to be the victim's signature appear to be different. (App. 142).

Commonwealth, ___ Va. ___, ___, 826 S.E.2d 307, 309 (2019). Courts "must presume that the General Assembly chose, with care, the words that appear in a statute, and must apply the statute in a manner faithful to that choice." *Johnson v. Commonwealth*, 292 Va. 738, 742, 793 S.E.2d 321, 323 (2016). Thus, this Court must give each word of a statute its "ordinary and plain meaning, considering the context in which it is used." *Hilton v. Commonwealth*, 293 Va. 293, 299, 797 S.E.2d 781, 784-85 (2017). This Court is "not permitted, under the guise of judicial construction, to rewrite the plain language of a statute." *Desai v. A. R. Design Group*, 293 Va. 426, 438, 799 S.E.2d 506, 512 (2017) (citations omitted).

"When reviewing a defendant's challenge to the sufficiency of the evidence to sustain a conviction, this Court reviews the evidence in the light most favorable to the Commonwealth, as the prevailing party at trial, and considers all inferences fairly deducible from that evidence." *Commonwealth v. Herring*, 288 Va. 59, 66, 758 S.E.2d 225, 229 (2014).

Analysis

The identity theft statute under which Taylor was convicted, Code § 18.2-186.3, provides in pertinent part:

A. It shall be unlawful for any person, without the authorization or permission of the person or persons who are the subjects of the identifying information, with the intent to defraud, for his own use or the use of a third person, to:

1. Obtain, record, or access identifying information which is not available to the general public that would assist in accessing financial resources, obtaining identification documents, or obtaining benefits of such other person;

2. **Obtain money, credit, loans, goods, or services through the use of identifying information of such other person**;

3. Obtain identification documents in such other person's name; or

4. Obtain, record, or access identifying information while impersonating a law-enforcement officer or an official of the government of the Commonwealth.

C. As used in this section, "identifying information" shall include but not be limited to: (i) name; (ii) date of birth; (iii) social security number; (iv) driver's license number; (v) bank account numbers; (vi) credit or debit card numbers; (vii) personal identification numbers (PIN); (viii) electronic identification codes; (ix) automated or electronic signatures; (x) biometric data; (xi) fingerprints; (xii) passwords; or (xiii) any other numbers or information that can be used to access a person's financial resources, obtain

> **identification, act as identification, or obtain money, credit, loans, goods, or services.**[4]

Code § 18.2-186.3 (emphases and footnote added).

Taylor argues that the evidence was insufficient to convict her because she "never misidentified herself as [the victim] or any other person." (Def. Br. 16). She notes that she gave Lovemore her own driver's license and provided her own name. (Def. Br. 16-19). This Court should reject this claim.

This statute plainly states that it is a felony to "use" a person's identifying information without that person's authorization or permission to obtain money with the intent to defraud. Code § 18.2-186.3(A)(2); *see Boynton v. Kilgore*, 271 Va. 220, 227, 623 S.E.2d 922, 925-26 (2006) ("Courts apply the *plain language* of a statute unless the terms are ambiguous or applying the plain language would lead to an absurd result.") (emphasis added). "Use" simply means "a method or manner of employing or applying something." *Use*, WEBSTER'S THIRD

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[4] Although the trial court's written orders do not cite to a specific subsection (App. 144-47), the prosecutor argued that Taylor should be convicted of attempted identity theft because she "used" the victim's "information" to "attempt to obtain money or goods" and the trial judge found the evidence sufficient because "this is [the victim's] check and that [identifying] information was used to try to convince the bank the check was legitimate." (App. 140).

NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED (1993). *See Moyer v. Commonwealth*, 33 Va. App. 8, 35, 531 S.E.2d 580, 593 (2000) (en banc) (using the ordinary meaning of a word not defined in the statute for statutory constructive). Under a plain language reading of Code § 18.2-186.3, "use" is a broad term that encompasses Taylor's criminal behavior in using the victim's name to serve as a fraudulent payor for Taylor's financial gain.

This plain language reading is supported by the General Assembly's enactment of a broad and comprehensive statute to combat the significant harm caused by identity theft.[5] Consequently, the Court

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[5] In addition to subsection A of the statute which is at issue in this case, the statute also proscribes the following acts:

> B. It shall be unlawful for any person without the authorization or permission of the person who is the subject of the identifying information, with the intent to sell or distribute the information to another to:
>
> 1. Fraudulently obtain, record, or access identifying information that is not available to the general public that would assist in accessing financial resources, obtaining identification documents, or obtaining benefits of such other person;
>
> 2. Obtain money, credit, loans, goods, or services through the use of identifying information of such other person;

should construe the term "use" broadly. *Cf. Rose v. Commonwealth*, 53 Va. App. 505, 510-13, 673 S.E.2d 489, 491-92 (2009) (finding the term "use" in the statute prohibiting use of a firearm should be "broadly construed" to include using a gun to pistol whip someone).

For Taylor to prevail on appeal, this Court must adopt Taylor's interpretation of Code § 18.2-186.3 which requires this Court to add an additional element to the identity theft statute. *Desai*, 293 Va. at 438, 799 S.E.2d at 512 (noting the court cannot rewrite the plain language of the statute). Code § 18.2-186.3 does not require that the defendant identify herself as the account holder to be convicted of identity theft. Misidentification of an account holder is not an element of the offense.

> 3. Obtain identification documents in such other person's name; or
>
> 4. Obtain, record, or access identifying information while impersonating a law-enforcement officer or an official of the Commonwealth.
>
> B1. It shall be unlawful for any person to use identification documents or identifying information of another person, whether that person is dead or alive, or of a false or fictitious person, to avoid summons, arrest, prosecution, or to impede a criminal investigation.

Taylor also appears to argue that she could not be convicted under the statute unless she had "obtain[ed] or access[ed]" the victim's identifying information in some fashion prior to using it. (Def. Br. 17). Even assuming *arguendo* that the evidence does not establish these facts, the statute does not require the Commonwealth to prove these elements under Subsection (A)(2). Instead, those elements appear in subsection (A)(1) of the statute. This Court presumes that the General Assembly's omission of the terms "obtain or access" in Subsection (A)(2) was "intentional" and demonstrates that it did not intend to require the Commonwealth to prove these elements to obtain a conviction under that subsection. *See Brown v. Commonwealth*, 284 Va. 538, 545, 733 S.E.2d 638, 641 (2012) (explaining that the omission of language in one statute and not another "represents an unambiguous manifestation of a contrary intention") (citation omitted).

Thus, the plain language of the statute demonstrates that the General Assembly intended for an attempt to procure money by presenting a check containing a victim's account number and using that victim's name in the signature line of a check as a fraudulent payor to be a violation of Code § 18.2-186.3(C). This is exactly what Taylor did.

She violated Code § 18.2-186.3 when she forged the check by signing the victim's name to it and attempted to present it as a legitimate check to the bank. This alone constituted "use" of the victim's name in an attempt to obtain money. Code § 18.2-186.3(C)(i). Moreover, Taylor presented a check containing the victim's account number to the bank in her effort to obtain money. These acts are proscribed under Code §§ 18.2-186.3(C)(v) and (C)(xiii). Therefore, the evidence was sufficient to convict Taylor.[6]

CONCLUSION

The Commonwealth asks that the Court affirm the judgment of the Circuit Court of the City of Hampton and the Court of Appeals of Virginia. The Court should remand this case to the trial court to correct the sentencing order which states that Taylor was convicted of identity theft, when in fact, the trial court clearly intended to convict her of attempted identity theft.

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[6] In its December 4, 2018 opinion, the Court of Appeals of Virginia adopted the Commonwealth's reasoning. *See Taylor*, 2018 Va. App. LEXIS 333, at *3-5.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
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CERTIFICATE OF TRANSMISSION AND SERVICE

On June 28, 2019, the required copies of this brief were filed electronically with this Court and hand delivered to the Clerk's Office in compliance with Rule 5:26(e). A copy was emailed to Charles E. Haden, Esquire, counsel for appellant, at cehaden@mindspring.com. In accordance with Rule 5:26(h), I certify that this document contains 2,167 words, in compliance with Rules 5:26(b) and 5:26(e).

The Commonwealth desires to present oral argument in this case.

By: /s/ _____
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