TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA

HON. DOUGLAS L. FLEMING, JR., CHIEF JUDGE
HON. STEPHEN E. SINCAVAGE
HON. JAMES P. FISHER
HON. JAMES E. PLOWMAN, JR.
HON. MATTHEW P. SNOW
JUDGES

Loudoun, Fauquier and
Rappahannock Counties
Post Office Box 470
Leesburg, Virginia 20178

HON. W. SHORE ROBERTSON
HON. JAMES H. CHAMBLIN
HON. THOMAS D. HORNE
HON. BURKE F. MCCAHILL
HON. JEFFREY W. PARKER
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March 6, 2024

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Re: **Commonwealth v. Scott Ziegler**
Circuit Court of Loudoun County
Case No.: CR00037874-00

LETTER OPINION

Dear Counsel,

Counsel previously appeared and argued Defendant's Motion to Set Aside the Verdict (hereafter "Defendant's Motion" or "Motion"). After hearing argument, the court took the Defendant's Motion under advisement. This Letter Opinion follows.

Relevant Procedural Background

After a four-day trial, a Loudoun County jury convicted Defendant Scott Ziegler of retaliating against Loudoun County Public Schools teacher Erin Brooks. Thereafter, the Defendant filed his Motion seeking to set aside the jury's verdict and dismiss the indictment. The Defendant argues the jury was improperly instructed on the elements of misdemeanor retaliation and, as a result, the jury verdict should be set aside and the indictment dismissed. The Commonwealth, while not conceding the Defendant's argument, primarily argues that the Defendant agreed to the elements instruction and, by not timely objecting to the instruction, cannot subsequently complain.

Standard for Motion to Set Aside the Verdict

The standard for a motion to set aside the verdict is plain and straightforward. If the motion is timely made the trial court may set aside the jury's verdict "for error committed during the trial *or* if the evidence is insufficient as a matter of law to sustain a conviction." Rule 3A:15(b) [emphasis supplied].

The Commonwealth bears the burden of proving beyond a reasonable doubt every fact necessary to constitute the crime for which the defendant is charged. *Lindsey v. Commonwealth, 293 Va. 1, 5 (2017).* That being said, while proof beyond a reasonable doubt is required for each element of the crime, the Commonwealth is not required to prove its case beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence. *Virginia Model Jury Instruction ("VMJI") 2.100 and authorities cited therein.* Ultimately, a reasonable doubt is a doubt based on the fact finder's sound judgment after a full and impartial consideration of all the evidence in the case. *Id.*

Rule 3A:15(c) requires the trial court to enter a judgment of acquittal if it sets aside the verdict because the evidence is insufficient as a matter of law to sustain a conviction. But the trial court must grant a new trial "if it sets aside the verdict for any other reason."

Analysis

Using Rule 3A:15 as guide, the trial court faces four questions: (1) was error committed during the trial?; (2) if so, does Defendant's objection come too late?; (3) was the evidence insufficient as a matter of law to sustain a conviction?; and (4) after answering the first three questions, what does Rule 3A:15 require?

1. **Was Error Committed During the Trial?**

Virginia Code 2.2-3103(10), part of 2.2-3103 ("Prohibited Conduct") states "No officer or employee of a state or local government or advisory agency shall use his public position to retaliate or threaten to retaliate against any person for expressing views on matters of public concern or for exercising any right that is otherwise protected by law...."

The jury instruction in issue is Instruction No. 12. Counsel for both parties agreed to the instruction. *Tr. 9/29/23, p. 238.* The instruction articulated three elements of misdemeanor retaliation, namely (1) that the Defendant, on June 7, 2022; (2) unlawfully used his public position to retaliate or threaten to retaliate against Erin Brooks; (3) for expressing views on matters of public concern or for exercising any right that is otherwise protected by law.

Jury Instruction 12 covers the elements of prohibited conduct articulated in Va. Code 2.2-3103(10). But that doesn't end the inquiry. Section 2.2-3103(10) doesn't define a crime; it merely articulates prohibited conduct. Such conduct becomes a crime only when coupled with Va. Code 2.2-3120. Section 3120 states that any person who "knowingly violates" the provisions of [2.2-3103(10)] "shall be guilty of a Class 1 misdemeanor." Section 3120 goes on to state that "[a] knowing violation under this section is one in which the person ***engages in conduct***, performs an act or refuses to perform an act ***when he knows that the conduct is prohibited*** or required ***by this chapter***." (emphasis supplied)

Under the Commonwealth's theory of the case, the relevant prohibited conduct is retaliation. More specifically, retaliating against a person for expressing views on matters of public concern or for exercising a right otherwise protected by law. In enacting Va. Code 2.2-3120, the General Assembly recognized that conduct having the ***effect*** of retaliation as defined in 2.2-3103(10) may not always be intentional, and therefore knowing. Such conduct could, for example, be accidental, or unintended and incidental to other justifiable behavior.[1] Since such retaliation doesn't become a crime unless the person knows he is retaliating against someone for expressing views on matters of public concern, or for otherwise exercising a protected right, knowledge necessarily becomes an essential element of the crime.

Both counsel agreed to an elements instruction that permitted the jury to find the Defendant guilty without a finding that the Defendant acted knowingly. The instruction, missing a vital element, was inaccurate. It logically follows that error was committed during the trial.

2. Does Defendant's Objection to Instruction 12 Come Too Late?

The Commonwealth argues that the Defendant waived his objection to Instruction 12 by not contemporaneously objecting at trial. Generally, the trial court is not required to amend or correct an erroneous instruction, but the rule is not unlimited. Omitting an essential element of the offense charged fundamentally affects the jury's determination of guilt. In such cases, the trial court should correct the error to attain the ends of justice. That the attorneys agreed to the instruction is of no moment. See *Jimenez v. Commonwealth, 241 Va. 244, 25-251 (1991)* and authorities cited therein.

Since Instruction 12 omitted an essential element, and one necessary to constitute a crime, the Defendant's Motion does not come too late.

3. Was the Evidence Sufficient as a Matter of Law to Sustain a Conviction?

Whether the Defendant engaged in conduct that he knew was prohibited is a question of fact. *See Suffolk City School Board, et. al. v. Wahlstrom ___Va.___, Record No. 220116 (2023)*

[1] By way of example, the Defendant's theory of the case was that he did not knowingly retaliate because he was merely taking disciplinary action against a teacher for failing to follow school policies and procedures. The court permitted the Defendant to argue this theory by granting, over the Commonwealth's objection, Instruction 11.

(whether a public official's violation of FOIA was "willfully and knowingly made" is a question of fact). And it is not necessary that each element of an offense be proved by direct evidence. A defendant may be convicted on circumstantial evidence alone, or on circumstantial evidence combined with other evidence, provided the fact finder believes from all the evidence that the defendant is guilty beyond a reasonable doubt. *VMJI 2.400 and authorities cited therein.* The fact finder also determines the credibility of witnesses testifying in the case and, after considering all the evidence in the case, "may accept or discard all or part of the testimony of a witness as [he/she] thinks proper." *VMJI 2.500 and authorities cited therein.* And perhaps most importantly, the fact finder is "entitled to use [his/her] common sense in judging any testimony." *Id.*

Under the Commonwealth's theory of the case, was there sufficient factual evidence, either directly, circumstantially, or in combination to sustain the defendant's conviction? In a word: yes. The record contains ample evidence to support a jury's conclusion that the Defendant knowingly retaliated against Erin Brooks for expressing views on matters of public concern or for exercising a right that was otherwise protected by law.

Erin Brooks received a glowing annual performance review as a Loudoun County Public School teacher in 2020-2021. She was described as a "dedicated, joyful, supportive, compassionate, collaborative, knowledgeable and valued member of our school community." *CW Ex. 18.* In fact, on May 28, 2021 she received the "Outstanding Special Education Teacher Award" for the 2020-2021 school year. *CW Ex. 1.* During the next school year, in the Fall of 2021, Ms. Brooks received another performance evaluation concluding that she "is a knowledgeable, positive, loving, collaborative and supportive member of the special education team...." *CW Ex. 19.* The following Spring, on March 22, 2022, school principal Diane Mackey authored another sterling review – consistent with Ms. Brooks' previous reviews. *CW Ex. 5.* Ms. Mackey's "Overall Evaluation Summary" of Erin Brooks: "Ms. Brooks has proven herself to be a valued asset to this community. She is a caring teacher who has fostered a positive relationship with the students in her class. The learning environment that Ms. Brooks has created for her students is structured and fun. Ms. Brooks is communicative with the parents of her students. Ms. Brooks is consistently well-prepared for class and executes solid lessons on a daily basis." *Id.*

Ironically, later in the evening of March 22, 2022, the Loudoun County School Board was told one of its teachers had complained of repeated, inappropriate touching by a student, and that a Title IX complaint had been filed. *CW Ex. 11.* The Defendant and his human resources ("HR") director, Lisa Boland, attended the school board meeting. *Tr. 9/26/23, pp. 332-333.* Ms. Boland and LCPS Division Counsel Robert Falconi left the school board meeting before adjournment and checked emails to identify Erin Brooks as the teacher making the allegations. *Tr. 9/26/23, pp. 335-336.*

After Ms. Brooks was identified on the evening of March 22, she quickly found herself in the crosshairs of the Loudoun County Public Schools' administration. The Defendant and his human

resources director, Lisa Boland (who was also a member of the superintendent's cabinet) [*Tr. 9/26/23, p.331*] had numerous conversations about Ms. Brooks. *Tr. 9/26/23, p. 347.* Ms. Boland admitted that "on occasion" LCPS Division Counsel Robert Falconi was present for her discussions with the Defendant about Ms. Brooks. *Id.* The Defendant emailed Ms. Boland, inquiring about Ms. Brooks' job status, asking whether she was a probationary teacher. *CW Ex. 13.*

By law, a school superintendent must consider teacher performance evaluations before recommending non-renewal (i.e. firing) of a probationary teacher. *CW Ex. 12.* This legal requirement presented a problem for the Defendant because all of Ms. Brooks' evaluations were entirely complimentary of her classroom skills and contributions to the school system. And a jury could infer that the Defendant knew about the problem because, on April 6, 2022, his HR director and cabinet member Lisa Boland received an email from LCPS Supervisor of Performance Management Justin Martin forwarding Ms. Brooks' previous year's evaluation. *CW. Ex. 14.* And the evidence at trial also established that, within less than two days after the March 22 school board meeting, LCPS Division Counsel Robert Falconi had spoken with Ms. Brooks' school principal, Diane Mackey, "regarding Erin Brooks". *CW Ex. 12.* Diane Mackey then emailed Lisa Boland about her conversation with Falconi, entitling her email "Concern about teacher" and asking "[d]o you have a moment to speak with me about this?" *Id.*

On May 19, 2022, less than two months since Ms. Brooks' most recent glowing evaluation, Diane Mackey forwarded Ms. Brooks' year-end evaluation to the Defendant. *CW Ex. 5.* Despite a history of consistent outstanding evaluations through March 22, 2022, the May evaluation was, in one word, terrible. In just 51 days Ms. Brooks moved from being a "valued asset" to being so "unacceptable" that she deserved to be fired. *Id.* After denying to the grand jury she spoke with the Defendant about Ms. Brooks, Ms. Mackey admitted at trial that she had spoken to the Defendant. *Tr. 9/27/23 pp. 266-267.* These circumstances support a fact finder's conclusion that the May 19 evaluation was false – procured by the Defendant in discussions with Diane Mackey to give the appearance of a negative performance evaluation arguably required by Va. Code 22.1-305.

On June 7, 2022, Ms. Brooks was fired; the Defendant had placed her name on the school board's consent agenda for non-renewal. *CW Ex. 9.* Of the Loudoun County Public Schools' approximately 10,000 teachers (*Tr., 9/26/23, p. 362*), Ms. Brooks was the only teacher the Defendant placed on the consent agenda for non-renewal, and the first non-renewal in 1 ½ years. *Tr., 9/26/24, p. 367.* The evidence was unrebutted that only the Defendant had final authority to place a teacher on the consent agenda for non-renewal. *Tr., 9/26/23, pp. 351, 365-366.* Neither Ms. Brooks' previous outstanding evaluations nor her teacher award was mentioned in the school board packet. *Tr., 9/26/24, pp. 367-369.* This omission is particularly troubling because the Defendant's HR director, Lisa Boland, testified that"[b]efore we would allow a recommendation for a non-renewal to move forward....we always look at previous performance evaluations for pattern." *Tr. 9/26/23, p. 354.* Even counting the May 19 evaluation – which the jury could

conclude was demonstrably false – there was no evidence in Ms. Brooks' file of a "pattern" of negative evaluations.

After the school board approved the consent agenda, effectively firing Ms. Brooks, one school board member testified the Defendant was "excited" to be done with Erin Brooks. *Tr. 9/26/24, p. 373.* The school board member asked the Defendant why Ms. Brooks was being terminated. The Defendant replied it was because Ms. Brooks had given information to the special grand jury investigating the Loudoun County Public Schools. *Tr., 9/26/24, pp. 372-373.* This statement alone - admitted without objection and constituting a statement against penal interest – is sufficient direct evidence to justify a jury's conclusion that the Defendant knowingly retaliated against Erin Brooks for testifying to the special grand jury. And combined with the abrupt and inexplicable about-face in Ms. Brooks' May 19 performance evaluation, coupled with the Defendant's demeanor at the June 7, 2022 school board meeting, is more than enough evidence to justify a finding that the Defendant knowingly retaliated against Erin Brooks for exercising her right to speak on a matter of public concern.

4. After Answering the First Three Questions Above, What Does Rule 3A:15 Require?

Error was committed during the trial, namely, Instruction 12 omitted an essential element to make the prohibited conduct a crime. Defendant's objection did not come too late because the error – the omission of a essential element of the crime charged – is fundamental and should be corrected to attain the ends of justice. Evidence presented at trial was not insufficient as a matter at law to sustain a conviction for the misdemeanor of knowing retaliation as charged in Va. Code 2.2-3103(10) and 2.2-3120.

Accordingly, and for the reasons stated in this Letter Opinion, the Defendant's Motion to Set Aside the Verdict is granted. The Defendant's motion to dismiss the indictment is denied. Instead, the court grants a new trial as prescribed in Rule 3A:15(c).

The court will enter an order incorporating this Letter Opinion.

Cordially,

Douglas L. Fleming, Jr.
Chief Judge, 20th Judicial Circuit of Virginia