IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 081738

SARE ZEKTAW

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee

BRIEF FOR THE COMMONWEALTH

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TABLE OF CONTENTS

TABLE OF AUTHORITY ii

STATEMENT OF THE CASE 1

ASSIGNMENT OF ERROR 2

QUESTION PRESENTED 2

STATEMENT OF FACTS 2

ARGUMENT 8

Standard of Review 8

Applicable Fifth Amendment Law 10

Analysis 12

Waiver 15

Harmless Error 17

CONCLUSION 19

CERTIFICATE OF COUNSEL 20

TABLE OF AUTHORITY

CASES

Arizona v. Roberson, 486 U.S. 675 (1988) 10

Bass v. Commonwealth, 259 Va. 470, 525 S.E.2d 921 (2000) 9

Bolden v. Commonwealth, 263 Va. 465, 561 S.E.2d 701 (2002) 9

Burket v. Commonwealth, 248 Va. 596, 450 S.E.2d 124 (1994) 14

Chapman v. California, 386 U.S. 18 (1967) 17

Combs v. Norfolk & Western Ry. Co., 256 Va. 490,
507 S.E.2d 355 (1998) 16

Commonwealth v. Hilliard, 270 Va. 42,
613 S.E.2d 579 (2005) 9, 10, 12

Commonwealth v. Redmond, 264 Va. 321,
568 S.E.2d 695 (2002) 10, 11, 17

Culbertson v. Commonwealth, 137 Va. 752, 119 S.E. 87 (1923) 16

Davis v. United States, 512 U.S. 452 (1994) 10, 11, 15

Drinkard-Nuckols v. Andrews, 269 Va. 93, 606 S.E.2d 813 (2004) .. 16

Eaton v. Commonwealth, 240 Va. 236, 397 S.E.2d 385 (1990) . 11, 12

Edwards v. Arizona, 451 U.S. 477 (1981) 10, 11, 15

Fore v. Commonwealth, 220 Va. 1007, 265 S.E.2d 729 (1980) 9

Harrison v. Commonwealth, 244 Va. 576, 423 S.E.2d 160 (1992) ... 12

Hubbard v. Commonwealth, 243 Va. 1, 413 S.E.2d 875 (1992) 16

Hutchinson v. Commonwealth, 133 Va. 710, 112 S.E. 624 (1922) .. 16

Jenkins v. Commonwealth, 244 Va. 445, 423 S.E.2d 360 (1992) 18

Jones v. Commonwealth, 277 Va. 171, 670 S.E.2d 727 (2009) 9

Lilly v. Commonwealth, 258 Va. 548, 523 S.E.2d 208 (1999). 17

McCain v. Commonwealth, 261 Va. 483, 545 S.E.2d 541 (2001) 9

McDonnough v. Commonwealth, 25 Va. App. 120,
486 S.E.2d 570 (1997) 18

McNeil v. Wisconsin, 501 U.S. 171 (1991) 10

Midkiff v. Commonwealth, 250 Va. 262, 462 S.E.2d 112 (1995) 12

Minnick v. Mississippi, 498 U.S. 146 (1990) 10

Mueller v. Commonwealth, 244 Va. 386, 422 S.E.2d 380 (1992) 12

Murphy v. Commonwealth, 264 Va. 568, 570 S.E.2d 836 (2002) 9

Oregon v. Bradshaw, 462 U.S. 1039 (1983) 11

Ornelas v. United States, 517 U.S. 690 (1996) 9

Patterson v. Illinois, 487 U.S. 285 (1988) 10

Pearson v. Commonwealth, 221 Va. 936, 275 S.E.2d 893 (1981) ... 17

Pettus v. Gottfried, 269 Va. 69, 606 S.E.2d 819 (2005) 16

Saunders v. Commonwealth, 211 Va. 399, 177 S.E.2d 637 (1970). 16

Scott v. Commonwealth, 25 Va. App. 36, 486 S.E.2d 120 (1997).... 18

Snarr v. Commonwealth, 131 Va. 814, 109 S.E. 590 (1921) 16

Snead v. Commonwealth, 138 Va. 787, 121 S.E. 82 (1924) 16

Whitten v. McClelland, 137 Va. 726, 120 S.E. 146 (1923) 16

Williams v. Commonwealth, 30 Va. App. 378,
517 S.E.2d 246 (1999) 18

Zektaw v. Commonwealth, 52 Va. App. 230, 663 S.E.2d 93 (2008) .. 2

OTHER AUTHORITIES

Section 18.2-47 of the Code of Virginia..... 1

Section 18.2-57 of the Code of Virginia..... 1

Section 18.2-61(A)(i) of the Code of Virginia..... 1

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Appellant

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BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

Sare Zektaw, the defendant, was tried by a jury in the Circuit Court for the City of Alexandria and convicted of rape in violation of Virginia Code § 18.2-61(A)(i), abduction in violation of Code § 18.2-47 and assault and battery in violation of Code § 18.2-57. He was sentenced to serve a total of

nine years and twelve months in prison, and final judgment was entered on April 16, 2007. (App. 50).

The Court of Appeals affirmed the judgment in a published opinion issued July 8, 2008. Zektaw v. Commonwealth, 52 Va. App. 230, 663 S.E.2d 93 (2008). This Court granted Zektaw's petition for appeal by order entered January 5, 2009.

ASSIGNMENT OF ERROR

The Court of Appeals erred in upholding the denial of the Motion to Suppress by finding that the defendant's words were ambiguous and that he did not clearly invoke his right to counsel.

QUESTION PRESENTED

"DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS OBTAINED IN VIOLATON OF MIRANDA AND THE FIFTH AND FOURTEENTH AMENDMENTS WHEN THE INTERROGATING OFFICERS IGNORED AND CONTINUED TO QUESTION THE DEFENDANT AFTER HE HAD CLEARLY ASSERTED HIS RIGHT TO COUNSEL?"

STATEMENT OF FACTS

The Offense

In January 2006, 24-year-old Sara Gebrehana, an immigrant from Ethiopia, lived in an apartment in Alexandria. She had been living in the

United States for less than three years and she had been dating 36-year-old Sare Zektaw on and off for several months. (App. 245, 250). She characterized their relationship as “rocky;” they fought, sometimes physically, and made up a lot. (App. 251). Prior to the offense date, they had had consensual intercourse only twice. (App. 280, 337, 346).

On February 9, 2006, Zektaw came to Sara’s apartment. She served him lunch. She told him her cousin was sleeping in the bedroom because she did not want to have intercourse with him and in the past he had become physically abusive when she refused. (App. 255). Zektaw did not believe Sara. He opened the bedroom door and found there was nobody in the bedroom. (App. 256). Zektaw became enraged. He slapped Sara, grabbed her by the hand and took her to the kitchen where he opened a drawer and removed a rod shaped knife sharpener and threatened to kill her. (App. 257).

Zektaw dragged Sara into the living room and when she refused to sit next to him on the sofa, he hit her and grabbed her by the throat with one hand, lifting her completely off her feet. Sara weighed ninety-eight pounds. (App. 265). Invoking Zektaw’s mother’s name whom she knew Zektaw loved, Sara begged him to stop choking her. When he finally did, Zektaw wiped the foam coming from Sara’s mouth onto his pants. (App. 266-267).

Sara was bleeding from an injury to her hip. Zektaw took Sara into the bedroom purportedly to treat the wound. Instead, he ordered her to remove her clothes. (App. 268-269). Sara repeatedly told the defendant that she did not want to have intercourse with him, (App. 271), but she "didn't want to die" so she did as she was told. (App. 272). Zektaw removed his own clothing, and penetrated Sara's anus and vagina with his penis. (App. 274). After Zektaw ejaculated, he told Sara to take a shower. (App. 277). After dressing, Zektaw made Sara swear on a Bible that she would never tell anyone what had happened and that she would never leave him. (App. 281). He then drove Sara to another location where he got down on his knees and gave her an engagement ring. (App. 291-292).

Zektaw took Sara home and departed. When her cousin returned home later the same day Sara told her what happened. Sara never spent the night in her apartment again. She testified that she did not immediately contact the police because she feared for her life. After three days, however, Sara told the police. She did not want another woman to have to endure what she had gone through. (App. 307-309). Photographs depicting bruises and injuries Sara sustained were admitted into evidence. (App. 312-316). A sexual assault nurse also examined Sara and testified

that Sara had physical injuries that were abnormal for consensual intercourse and corroborated her allegations. (App. 635-639).

Messages left by Zektaw on Sara's telephone and taped telephone conversations between Zektaw and Sara were admitted into evidence and played for the jury. (App. 317). In those messages and conversations Zektaw made several apologies and admissions about the offenses. (App. 1020-1030).

Zektaw's Statement to Police

Zektaw voluntarily went to police headquarters on February 24, 2006 after learning the police had visited his workplace looking for him. (App. 89) The officer assigned to the case was on vacation, but Detectives Sandy Hein and Robert Hickman ultimately determined the warrant for the defendant charged him with rape. (App. 91-92). The officers finally located and reviewed the police report. (App. 91). Zektaw then spoke with police for an hour and a half. (App. 102).

The interview was videotaped, but the videotape was not introduced or admitted into evidence at the suppression hearing or at trial. The defendant initially indicated an intent to offer the tape into evidence at trial but then specifically declined to do so. (App. 569, 587, 590). During the first ten minutes of the interview the defendant provided the police with

background information such as his age, address, height, and weight, whether he could read and write and what he did for a living. (App. 90, 560-562). Zektaw was offered water and coffee. He was free to walk around the interview room and he retained his personal property including his cell phone on which he talked during the interview. During one call he purportedly spoke with Sara. (App. 87-88). The interview was conversational and the defendant was "very talkative," he asked many questions, and rephrased or re-characterized statements made by the officers. (App. 100-101).

At the beginning of the interview Zektaw was advised that the charge was the rape of Sara Gebrehana. Detective Hind impressed on Zektaw that if he had a version of the story, that he should tell it. (App. 97). Zektaw responded, "Right, and I'd really like to talk to a lawyer because this—oh my God, oh, my Jesus, ***why?***" (App. 100, 112), to which Detective Hein responded, "Well, what did she tell you on the phone?" (App. 8).

There were no pauses between Zektaw's various phrases; it was one long sentence, (App. 115), and afterward the conversation between Detective Hind and Zektaw continued. (App. 100). The defendant made no further mention of having an attorney present. He continued asking questions and his level of talkativeness never varied. (App. 100, 115).

During the interview, Zektaw admitted that he hit and choked Sara because he was mad she had lied to him about her cousin being in the bedroom. He claimed they made up, had consensual intercourse and he then gave her an engagement ring. (App. 87, 565-568).

The trial court held that Zektaw knowingly and voluntarily waived his constitutional rights, he voluntarily spoke to the police and his statement about an attorney ending with "oh, my God, oh my Jesus--- **why**?" was not a clear and unequivocal request for counsel. The trial judge denied the defendant's motion to suppress his statement to police. (App. 137-139).

During trial defense counsel referred to Zektaw's statement to police to show that he never told the police that he had sex with Sara against her will. (App. 579). The statement was used to show the defendant told the officers in the statement that he and Sara went into the bedroom and had consensual sex. He also never told the officers during the interview that he attempted to have anal sex with Sara. (App. 580-582). In closing argument to the jury defense counsel argued, "According to the statements that Detective Hickman says that Mr. Zektaw gave" he admitted he pushed Sara and she fell; she was injured, but this is "a case of consensual sex." (App. 823-824). Counsel also referred to the fact that Zektaw continued

talking to the officers after requesting an attorney, in essence, because he had nothing to hide. (App. 842).

ARGUMENT

THE TRIAL COURT CORRECTLY DETERMINED THAT THE DEFENDANT MADE NO UNEQUIVOCAL REQUEST FOR COUNSEL; FURTHER, THE DEFENDANT CANNOT COMPLAIN BECAUSE HE USED THE STATEMENT TO HIS ADVANTAGE AT TRIAL; AND FINALLY, IF THE STATEMENT WAS IMPROPERLY ADMITTED, THAT ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

The defendant claims that the police continued to question him after he invoked his right to have an attorney present during questioning. This claim should be rejected. The interviewing officers were under no obligation to cease speaking with the defendant because he never made a clear and unequivocal request for an attorney. Moreover, Zektaw waived any claim concerning his statement because he relied upon it at trial to show that intercourse was consensual. Finally, any error in the admission of the statement was harmless beyond a reasonable doubt.

Standard of Review

This Court recently stated when reviewing a trial court's decision to deny a motion to suppress:

> A defendant's claim that evidence was [obtained by police] in violation of the F[ifth] Amendment presents a mixed question of law and fact that we review de novo on appeal. Murphy v.

> Commonwealth, 264 Va. 568, 573, 570 S.E.2d 836, 838 (2002); see Bolden v. Commonwealth, 263 Va. 465, 470, 561 S.E.2d 701, 704 (2002); McCain v. Commonwealth, 261 Va. 483, 489, 545 S.E.2d 541, 545 (2001); see also Ornelas v. United States, 517 U.S. 690, 691, 699 (1996). In making such a determination, we give deference to the factual findings of the circuit court, but we independently determine whether the manner in which the evidence was obtained meets the requirements of the Fourth Amendment. Bolden, 263 Va. at 470, 561 S.E.2d at 704; McCain, 261 Va. at 490, 545 S.E.2d at 545; Bass v. Commonwealth, 259 Va. 470, 475, 525 S.E.2d 921, 924 (2000). The defendant has the burden to show that, considering the evidence in the light most favorable to the Commonwealth, the trial court's denial of his suppression motion was reversible error. Bolden, 263 Va. at 470, 561 S.E.2d at 704; McCain, 261 Va. at 490, 545 S.E.2d at 545; Fore v. Commonwealth, 220 Va. 1007, 1010, 265 S.E.2d 729, 731 (1980).

Jones v. Commonwealth, 277 Va. 171, 177-178, 670 S.E.2d 727, 732 (2009), citing McCain v. Commonwealth, 275 Va. 546, 551-52, 659 S.E.2d 512, 515 (2008); See also Commonwealth v. Hilliard, 270 Va. 42, 50-50, 613 S.E.2d 579, 584 (2005).

However, where no dispute exists regarding the content of the defendant's statement to the police, consideration of the trial court's denial of the motion to suppress “is restricted to a de novo review of the legal issue whether [appellant's] words, taken in context, were sufficient to invoke his right to counsel.” Hilliard, 270 Va. at 50, 613 S.E.2d at 584.

Applicable Fifth Amendment Law

This Court has stated:

> The Supreme Court held in Miranda . . . that the police must inform a suspect, who is subject to a custodial interrogation, of his right to an attorney and his right to have that attorney present during the interrogation. The police must explain these rights to the suspect before the interrogation begins. If a suspect waives his right to counsel after he has received Miranda warnings, the police officers are free to interrogate him, but if the suspect requests counsel at any time during the interrogation, the interrogation must cease until an attorney has been made available to the suspect or the suspect reinitiates the interrogation. Edwards v. Arizona, 451 U.S. 477, 484-85 (1981); accord Davis v. United States, 512 U.S. 452, 458 (1994); McNeil v. Wisconsin, 501 U.S. 171, 176-77 (1991); Minnick v. Mississippi, 498 U.S. 146, 150 (1990); Patterson v. Illinois, 487 U.S. 285, 291 (1988); Arizona v. Roberson, 486 U.S. 675, 680-81 (1988).

Commonwealth v. Redmond, 264 Va. 321, 328, 568 S.E.2d 695, 698 (2002).

> The question whether a suspect actually invoked his right to counsel involves an objective inquiry. To invoke this right, a suspect must state his desire to have counsel present with sufficient clarity that a reasonable police officer under the circumstances would understand the statement to be a request for counsel. If, however, a suspect's reference to an attorney is either ambiguous or equivocal, such that a reasonable officer under the circumstances would only have understood that the suspect might be invoking his right to counsel, the officer is not required to stop questioning the suspect.

Hilliard, 270 Va. at 49, 613 S.E.2d at 584 (citations omitted).

The rule in Edwards "serves the prophylactic purpose of preventing officers from badgering a suspect into waiving his previously asserted Miranda rights. . . . While it will often be good police practice for officers to

clarify whether a suspect making an ambiguous statement really wants an attorney, they are not required to ask clarifying questions." Davis v. United States, 512 U.S. 452, 452-453 (1994). Thus, to invoke this right, a suspect must state his desire to have counsel present with sufficient clarity that a reasonable police officer under the circumstances would understand the statement to be a request for counsel. Davis, 512 U.S. at 459; Redmond, 264 Va. at 328-29, 568 S.E.2d at 699; Eaton v. Commonwealth, 240 Va. 236, 253-54, 397 S.E.2d 385, 395-96 (1990). The rule in "Edwards focuses on the state of mind of the suspect and not of the police." Roberson, 486 U.S. at 687.

Further, a reinitiating remark by a suspect need not itself be an express waiver of the suspect's rights. It is enough that the remark evinces "a willingness and a desire for a generalized discussion" about the investigation. Oregon v. Bradshaw, 462 U.S. 1039, 1045-46 (1983).

Under this standard, "a request for a drink of water or a request to use a telephone" would not qualify as a reinitiating remark. Bradshaw, 462 U.S. at 1045. But a suspect's mere inquiry into "what was going to happen to him" would be enough to reinitiate a dialogue with police officers. Harrison v. Commonwealth, 244 Va. 576, 582-83, 423 S.E.2d 160, 164 (1992).

Analysis

The defendant's statement, examined with reference to the holdings in other cases demonstrates that it was not unequivocal. This Court has found the following statements *were not* clear and unambiguous invocations of a suspect's right to counsel: "I'm scared to say anything without talking to a lawyer," Midkiff v. Commonwealth, 250 Va. 262, 265, 462 S.E.2d 112, 114 (1995); "Do you think I need an attorney here?," Mueller v. Commonwealth, 244 Va. 386, 396, 422 S.E.2d 380, 387 (1992); and "You did say I could have an attorney if I wanted one?," Eaton, 240 Va. 236, 254, 397 S.E.2d 385, 393 (1990).

In Hilliard, this Court considered whether the defendant's statements, "Can I have someone else present too, I mean just for my safety, like a lawyer like y'all just said?" and "like I said, I would like to have somebody else in here because I may say something I don't even know what I am saying, and it might f[] me up, might jam me up in some incidents, and I don't want that to happen, man," *were* sufficient to invoke his right to counsel. Hilliard, 270 Va. at 46-53, 613 S.E.2d at 582-86. The Court found that these statements merely requested clarification of the rights that had been explained to the defendant and expressed his reservation about continuing interrogation without the benefit of counsel present. Id. at 51-52,

613 S.E.2d at 585-86. Therefore, not until the defendant in Hilliard stated, "Can I get a lawyer in here?" did the Court find that an unequivocal request for counsel had been made. Id. at 52, 613 S.E.2d at 586.

In this case, at the beginning of the interview after being advised his girlfriend was charging Zektaw raped her and in response to the officer's statement that Zektaw should tell his side of the story so the officers would know who to believe, the defendant responded, "Right, and I'd really like to talk to a lawyer because this—oh my God, oh, my Jesus, ***why?***" (App. 100, 112), to which Detective Hein responded, "Well, what did she tell you on the phone?" (App. 8).

There were no pauses between Zektaw's various phrases; it was one long sentence, (App. 115), and afterward the conversation between Detective Hind and Zektaw continued. (App. 100). The defendant made no further mention of having an attorney present. He continued asking questions and his level of talkativeness never varied. (App. 100, 115).

Thus, the record shows Zektaw stated he understood his constitutional rights and placed his initials beside each written recitation of the rights contained in the Miranda waiver form, including his right to have an attorney present during the police interrogation. He then signed the form, indicating his election to waive his rights and talk to the police without

an attorney present. His reference to a lawyer during the initial stage of his discussion with the police officers may be interpreted as an exclamation of disbelief, or of his awareness, regarding the situation in which he found himself. Whether appellant was requesting an attorney be present during the interrogation or was simply registering disbelief or awareness under the circumstances is not clear. His statement, open to more than one interpretation, was ambiguous. Tellingly, during the conversation that followed his statement, Zektaw did not again make a reference to an attorney, nor did he state he wished to consult with one during the ensuing interview. Moreover, he was very talkative, continually engaging the detectives in conversation and asking them several questions. Certainly, these are not the statements or behavior of a man that could reasonably be considered an invocation of the right to counsel. As such the defendant's statement was equivocal; it failed to communicate that the defendant did not want to continue the interrogation without consulting another person. See id.; Burket v. Commonwealth, 248 Va. 596, 610, 450 S.E.2d 124, 132 (1994).

The Supreme Court's statement in Davis bears repeating:

> We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who…will not clearly articulate their right to counsel although they actually want to have a lawyer present. But the primary protection

> afforded suspects subject to custodial interrogation is the Miranda warnings themselves. Full comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process. A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted. Although Edwards provides an additional protection—if a suspect subsequently requests an attorney, questioning must cease—it is one that must be affirmatively invoked by the suspect.

Davis, at 460-61.

In this case, the defendant was read his Miranda rights and signaled that he understood each right. He signed the rights waiver form, indicating that he was willing to speak with the detectives. It was up to him to clearly request an attorney if he wanted one. However, he never made a clear request for counsel. Any statement indicating a desire for an attorney was of a passing nature, which no reasonable police officer would take to be a clear invocation of his rights.

Waiver

Furthermore, Zektaw cannot complain about the admission of the statement because he used the statement in support of his defense. As most recently stated by this Court in Pettus v. Gottfried, 269 Va. 69, 79, 606 S.E.2d 819 (2005):

> The general rule is that when a party unsuccessfully objects to evidence that he considers improper but introduces on his own

> behalf evidence of the same character, he waives his objection to the other party's use of that evidence. Drinkard-Nuckols v. Andrews, 269 Va. 93, 101-02, 606 S.E.2d 813, 817-18, (2004) (decided today); Combs v. Norfolk & Western Ry. Co., 256 Va. 490, 499, 507 S.E.2d 355, 360 (1998); Hubbard v. Commonwealth, 243 Va. 1, 9, 413 S.E.2d 875, 879 (1992). Although the rule is most often applied in cases when the party making the objection later introduces the same evidence, "it is properly and logically applicable in any case, regardless of the order of introduction, if the party who has brought out the evidence in question, or who has permitted it to be brought out, can be fairly held responsible for its presence in the case." Whitten v. McClelland, 137 Va. 726, 741, 120 S.E. 146, 150 (1923).

In other words, "where an accused unsuccessfully objects to evidence which he considers improper and then on his own behalf introduces evidence of the same character, he thereby waives his objection, and we cannot reverse for the alleged error." Saunders v. Commonwealth, 211 Va. 399, 401, 177 S.E.2d 637, 638 (1970); see also Snead v. Commonwealth, 138 Va. 787, 801-02, 121 S.E. 82, 86 (1924); Culbertson v. Commonwealth, 137 Va. 752, 757, 119 S.E. 87, 88 (1923); Hutchinson v. Commonwealth, 133 Va. 710, 716-17, 112 S.E. 624, 626 (1922); Snarr v. Commonwealth, 131 Va. 814, 818, 109 S.E. 590, 592 (1921).

Here the record shows that the defendant did not testify and he repeatedly relied upon his statement to the police to support his claim that the intercourse was consensual. He thus waived his earlier objection that the statement was not admissible.

Harmless Error

Finally, as acknowledged by this Court in the concurring opinion in the Redmond decision:

> We have applied the harmless error doctrine in a case involving a confession admitted in violation of the Fifth and Sixth Amendments in Pearson v. Commonwealth, 221 Va. 936, 945, 275 S.E.2d 893, 899 (1981). Where constitutional error occurs, we are required to assess whether that error was harmless beyond a reasonable doubt. Thus, we must determine "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Chapman v. California, 386 U.S. 18, 23 (1967). "In making that determination, the reviewing court is to consider a host of factors, including the importance of the tainted evidence in the prosecution's case, whether that evidence was cumulative, the presence or absence of evidence corroborating or contradicting the tainted evidence on material points, and the overall strength of the prosecution's case." Lilly v. Commonwealth, 258 Va. 548, 551, 523 S.E.2d 208, 209 (1999).

Redmond, 264 Va. at 334-335, 568 S.E.2d at 704.

Preliminarily, it is important to bear in mind that, unlike Redmond, the defendant's statement in this case was not a *confession* to rape. To the contrary, the defendant relied upon the statement to support his defense that he and his girlfriend had consensual intercourse. At the trial in this case, the Commonwealth presented substantial incriminating evidence independent of the defendant's statement to show this was not the case. Sara's testimony that she did not consent to sex with the defendant is corroborated by the photographs of her injuries, the testimony of the sexual

assault nurse and the transcripts of the telephone messages and conversations admitted into evidence. The erroneous admission of the statement was harmless beyond a reasonable doubt when the "record contains overwhelming evidence of guilt." Scott v. Commonwealth, 25 Va. App. 36, 42, 486 S.E.2d 120, 123 (1997). See Jenkins v. Commonwealth, 244 Va. 445, 454, 423 S.E.2d 360, 366 (1992) (concluding that the admission of a defendant's confession was harmless error based on the Commonwealth's presentation of overwhelming evidence of guilt, which consisted of other confessions to close friends, fellow jail inmates, and investigators); Williams v. Commonwealth, 30 Va. App. 378, 517 S.E.2d 246 (1999) (concluding the admission of a non-testifying co-defendant's statement was harmless error); McDonnough v. Commonwealth, 25 Va. App. 120, 132-33, 486 S.E.2d 570, 576 (1997) (concluding that the admission of a statement in violation of the Confrontation Clause was harmless based on the sum of other testimonial and physical evidence of the defendant's guilt).

CONCLUSION

The judgments of the Court of Appeals and the Circuit Court for the City of Alexandria should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

Appellee herein.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On March 5, 2009, the required copies of this brief were hand-delivered to the Clerk of this Court, and three copies were mailed to Paul E. Pepper, Deputy Public Defender, 132 North Royal Street, Suite 200, Alexandria, VA 22314, counsel for appellant.

An electronic copy of this brief has been provided to the Court.

_____

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