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IN THE

Supreme Court of Virginia

RECORD NO. 160414

MARK THOMAS HOWSARE,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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REPLY ARGUMENT

I. The defect in jury instruction seven is not cured by jury instructions twenty and six.

The Commonwealth concedes in its brief that "an instruction informing the jury that it could infer Howsare's intent from his conduct or his statements would have been a correct statement of law." Comm. Br. 16. Therefore, the Commonwealth implicitly concedes that instruction number

seven, by itself, although an accurate statement of law, was an incomplete statement of law because it only referred to conduct and not statements.

But, the Commonwealth argues that, because instructions number twenty and six were given, the instructions as a whole fairly stated the law applicable to the issues in this case, and, therefore, there is no reversible error. (Comm. Br. 16-17, 17 n.6, 21-22). Howsare responds that instructions twenty and six do not cure the defect in instruction seven. When the instructions are read together, it cannot be said that the jury could not have been misled by the defective instruction seven. *See Washington S. R.R. Co. v. Lacey*, 94 Va. 460, 466, 26 S.E.834, 836 (1897) ("The defects in one instruction may be cured by a correct statement of the law in another *if* when the two are read and considered together the court can see that the jury could not have been mislead [sic] by the defective instruction." (emphasis added)) and Comm. Br. 16 n.5.

Instruction Twenty

Instruction twenty states: "The statements presented to you as having been made by the defendant are submitted for your consideration along with all the other evidence. The weight, value, credibility and reliability of those statements are questions for your determination."

Instruction twenty is Virginia Model Jury Instruction No. 2.550, titled "Statement of the Defendant."

Instruction twenty instructs the jury how to ***assess*** the defendant's statements. Instruction twenty does not instruct the jury on how to ***use*** the defendant's statements—this is what instruction seven should do. Instruction twenty tells the jury that they must decide whether or not the defendant actually made the statements. *See* Va. Model Jury Instr.—Crim., 2.550 (using language such as "[t]he statements *presented to you as having been made by the defendant* are submitted for your consideration" and "credibility"). Instruction twenty further tells the jury that, if they believe the defendant made the statement, then the jury must measure to what extent they believe the statements. *See Id.* (using such words as "weight, value, credibility, and reliability"). Instruction seven, by contrast, should instruct the jury on what to ***do*** with those statements. Instruction seven, as advanced by the defense, goes to what purpose the jury could use a defendant's statements.

Appellant's argument that instruction twenty is about how to assess, rather than how to use, the defendant's statements is supported by case law providing the sources and authorities for Virginia Model Jury Instruction

No. 2.550. The case law supporting the instruction shows the context is assisting the jury with determining whether the defendant confessed to police (or if the police were lying that a defendant made the confession) and whether, if made, the confession (or parts of it) was voluntary or false.

In *Cherrix v. Commonwealth*, the principle case authority for the instruction, this Honorable Court held that the trial court properly rejected appellant's proffered instruction stating: "If you believe that [defendant] did not freely and voluntarily give a statement to law enforcement officers concerning his alleged involvement in [the crimes charged], then you may give any such statement as much or as little credibility as you deem appropriate." 257 Va. 292, 306, 513 S.E.2d 642, 651 (1999). The Court reasoned, in part, that the trial court granted appellant's proffered instruction apprising the jury of its role relating to "the weight and credibility of statements 'having been made by the defendant.'" 257 Va. at 306-07, 513 S.E.2d at 651-52. *Cherrix* demonstrates that the model instruction implicitly encompasses the context of the voluntariness of a defendant's statements. *See id.* at 307, 513 S.E.2d at 651-52 (recognizing that "the trial court's pre-trial determination that a defendant's statements are

admissible in evidence does not preclude the defendant from proving at trial that those statements were made involuntarily"[1]).

Upshur v. Commonwealth, 170 Va. 649 (1938), *Jackson v. Commonwealth*, 193 Va. 664, 70 S.E.2d 322 (1952), and *Pritchett v. Commonwealth*, 263 Va. 182, 557 S.E.2d 205 (2002), are other relevant decisions to Va. Model Jury Instr.—Crim., 2.550. In *Upshur*, the Court found that the trial court properly admitted before the jury the evidence of confession. 170 Va. at 655. With its admission the trial court "does not vouch for the confession" but rather the jury decides "whether or not the confession was made." *Id.* at 655-56. The *Upshur* Court reasoned that the statements' "weight, its value and its sufficiency" are jury questions, for "[t]he jury are to weigh confessions like other evidence and believe or disbelieve them, in whole or in part." *Id.* at 655 (citations omitted).

In *Jackson*, the Court found that appellant's confession was properly admitted as a voluntary confession, and, therefore, its weight and value were jury questions. 193 Va. at 673-74, 70 S.E.2d at 327-28. The Court

[1] Citing *Jackson v. Commonwealth*, 193 Va. 664, 674, 70 S.E.2d 322, 328 (1952) ("Admissibility of confession is for the trial court but its weight and value are for the jury."). Appellant discusses *Jackson infra.*

noted that the "full circumstances of [the confession's] *making* were given to the jury." *Id.* at 673, 70 S.E.2d at 327 (emphasis added).

The *Pritchett* Court found that, as it is a jury determination of whether a defendant's confession to police was reliable, the trial court's refusal to allow expert testimony on the defendant's mental retardation and the hypothetical effect of that disorder in the defendant's situation was reversible error. 263 Va. at 186-87, 557 S.E.2d at 208. The Court reasoned that appellant was entitled to introduce admissible evidence to assist the jury in determining whether the confession was reliable, which includes the physical and psychological environment that yielded the confession. *Id.* at 186, 557 S.E.2d at 208 (citations omitted).

Thus, *Cherrix*, *Upshur*, *Jackson*, and *Pritchett* provide support that instruction twenty tells the jury its role in assessing Howsare's statements. The instruction allowed the jury to determine whether Howsare said all that was attributed to him and whether they believed that Howsare meant what he said. Instruction twenty does not tell the jury what to *do* with the statements that they believe Howsare made. There is nothing in instruction twenty that says if the jury believes Howsare made certain statements then those statements can be used in inferring intent. There is nothing in

instruction twenty that links belief in Howsare's statements to any element of the charges, i.e. intent. Therefore, instruction twenty does not cure instruction seven's failure to inform the jury that intent can be inferred from Howsare's statements in addition to acts and conduct.

Instruction Six

The Commonwealth also argues that instruction number six, instructing the jury that it could "infer that every person intends the natural and probable consequences of his acts" further shows that "the trial court's instructions, considered as a whole, stated the law clearly and 'cover[ed] all issues which the evidence fairly raise[d].'" Comm. Br. 17, 17 n.6. In direct contrast to the Commonwealth's argument, instruction six, rather than curing the defect in instruction seven, actually serves to further mislead and confuse the jury when considered with instruction seven. The emphasis in instruction six is that intent can be inferred from the natural and probable consequences of ***acts***. This compounds the damage done with instruction seven's emphasis on acts. There are no instructions with the correct statement of law, which the Commonwealth recognizes as correct, that intent can also be inferred from statements.

II. As intent was the dispositive issue and it was the jury's fact finding function to determine Howsare's intent, the error in instruction seven, regarding intent, was not harmless.

The Commonwealth argues that any error with the omission of the word "statements" in jury instruction seven was harmless. Comm. Br. 19-24. The Commonwealth is correct that it bears the burden to prove harmless error. *See* Comm. Br. 12. The Commonwealth asserts that the standard of review that applies in determining whether error was harmless in this case is the non-constitutional standard of review as articulated in *Clay v. Commonwealth*, 262 Va. 253, 546 S.E.2d 728 (2001). Comm. Br. 13. Even assuming that this is the appropriate standard,[2] the Commonwealth has not, and cannot, prove that instruction seven's failure to inform the jury that they may infer state of mind from statements, in addition to acts and conduct, was harmless error.

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[2] The Commonwealth correctly reads *Turman v. Commonwealth*, 276 Va. 558, 567-68, 667 S.E.2d 767, 771-72 (2008). *See also Velasquez v. Commonwealth*, 276 Va. 326, 331 n.5, 661 S.E.2d 454, 457 n.5 (2008). *But see Le Vasseur v. Commonwealth,* 225 Va. 564, 592, 304 S.E.2d 644, 659 (1983) (determining that "even if the refusal of a second-degree murder instruction were deemed to be error, it would . . . be harmless beyond a reasonable doubt")*; Kil v. Commonwealth*, 12 Va. App. 802, 812-13, 407 S.E.2d 647, 680 (1991) (finding that the trial court's erroneous instruction to the jury regarding knowledge for a felony hit-and-run charge was "harmless beyond a reasonable doubt").

As intent was the dispositive issue during trial, this Honorable Court cannot say that Howsare's convictions were "not substantially swayed" by the erroneous jury instruction. *See Turman*, 276 Va. at 567-568, 667 S.E.2d at 772 (where erroneous jury instruction involved the dispositive issue during trial such was not harmless error). If the jury was instructed that it could infer intent from Howsare's statements and did so, the jury could have reasonably concluded that Howsare was not guilty of murder, aggravated malicious wounding, and use of a firearm.

Howsare's theory of the case at trial was that he shot the firearm with the intent to scare Connor off his property. During closing argument, Howsare's counsel argued that "[h]e just wants to scare him" (J.A. Vol. 2, 733); "[h]e just wants [Connor] to go away and leave him alone" (J.A. Vol. 2, 735); he "never intended to hurt [Connor]" (J.A. Vol. 2, 736); he "was trying to scare [Connor] away, a man who was bigger than him, younger than him, stronger than him" (J.A. Vol. 2, 744); and "[a]ll the evidence points to he intended to scare [Connor] away" (J.A. Vol. 2, 749).

The Commonwealth correctly notes that the record shows that Howsare told Connor that he was "going to hurt him," that he had a gun and that it was loaded; and that he was "going to shoot" him. *See* Comm.

Br. 20. But, these statements are still consistent with the defense theory that Howsare fired the gun intending to scare Connor away. As defense counsel relays in closing argument, Howsare "never said [that he] aimed at [Connor]." (J.A. Vol. 2, 735). The statement that Howsare would shoot Connor can be reasonably interpreted as escalating language to scare him away as other statements by Howsare up to that point did not result in Howsare's goal for Connor to leave the property.

In its argument for harmless error, the Commonwealth focuses on the statements made by Howsare during the incident and minimizes the statements made to police afterwards. *See* Comm. Br. 19, 21-24. However, a harmless error analysis looks at "*all* that happened without stripping the erroneous action from the *whole*." *Clay*, 262 Va. at 260-61, 546 S.E.2d at 731-32 (emphasis added). Here, the jury could consider *all* the statements made by Howsare to determine intent. The jury could further infer that Howsare had an intent to scare Connor away from Howsare's statement that "[t]here was no intent to maim, to hurt, just go away." (J.A. Vol. 2, 863, 893). A jury can also infer from this statement that there was no intent to maim, disfigure, disable or kill. A lack of malice can be inferred from statements from Howsare that "he wasn't looking to get beaten to a . . . pulp that night," that he was "scared" of Connor that

night, and that he opened the door in "rage." (J.A. Vol. 1, 373, 375, 395, 397, 415 J.A. Vol. 2, 881-82, 895).

Given that there were two competing theories of the case presented by the Commonwealth and Howsare, it was the jury's fact-finding function to determine Howsare's intent. *See Taylor v. Commonwealth*, 207 Va. 326, 334, 150 S.E.2d 135, 141 (1966) ("[I]ntent is as necessary to be proved as the act itself, and it is necessary for the intent to be established as a matter of fact before a conviction can be had."). In order for a non-constitutional error to be harmless it cannot affect the verdict. *Lavinder v. Commonwealth*, 12 Va. App. 1003, 1006, 407 S.E.2d 910, 911 (1991) (en banc). "An error does not affect a verdict if a reviewing court can conclude, *without usurping the jury's fact finding function*, that, had the error not occurred, the verdict would have been the same." *Id.* (emphasis added). It would only be by usurping the jury's fact finding function regarding Howsare's intent that one can conclude the verdict in the instant case would have been the same. Therefore, the error in instruction seven is not harmless.

The Commonwealth did not meet its burden in proving the error in instruction seven harmless. It cannot be said "with fair assurance, after

pondering all that happened without stripping the erroneous action from the whole," that it plainly appears that Howsare has had a fair trial and the verdict and the judgment were not substantially affected by the failure to instruct the jury that intent can be inferred by statements. *See Clay*, 262 Va. at 261, 546 S.E.2d at 732 (2001).

CONCLUSION

For the reasons stated herein and in his Opening Brief, Howsare requests that the Court of Appeals' judgment and his convictions be reversed.

Respectfully submitted,
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CERTIFICATE

Counsel for the Appellant certifies as true the following information:

a. The Appellant is Mark Thomas Howsare. Counsel for the Appellant is Catherine French, Senior Appellate Coordinator, Virginia Indigent Defense Commission. The Appellee is the Commonwealth of Virginia.

b. Counsel for the Appellant was appointed by Order of the Circuit Court of the County of Stafford; and

c. Counsel submits Appellant's case on his Opening Brief and Reply Brief with a request for oral presentation.

d. In compliance with Rule 5:26, I hereby certify that on December 22, 2016, the correct number of true and accurate copies of this Reply Brief were hand-filed with the Supreme Court of Virginia and an electronic copy filed via VACES in PDF format, and an electronic copy via email in PDF format and also by first-class mail was served upon counsel for the appellee:

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