VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 16th day of May, 2019.

Present: Chief Justice Lemons, Justice Goodwyn, Justice Mims, Justice Powell, Justice Kelsey, Justice McCullough, and Senior Justice Lacy

Juan Amarndo Candelaria, Appellant,

against Record No. 180759
Court of Appeals No. 0470-17-4

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is no error in the judgment of the Court of Appeals.

Juan Amarndo Candelaria appeals from a judgment of the Court of Appeals affirming his convictions of arson of personal property and conspiracy to commit arson in violation of Code §§ 18.2-81 and 18.2-22. *Candelaria v. Commonwealth*, Record No. 0470-17-4, 2018 WL 2204480 (Va. Ct. App. May 15, 2018) (unpublished). In its judgment, the Court of Appeals assumed without deciding that the circuit court erred in admitting certain hearsay evidence but held that any errors constituted harmless error. Candelaria asserts here that without the hearsay evidence, the evidence of his guilt was not overwhelming and, therefore, the Court of Appeals erred in finding the admission of such hearsay evidence was harmless error.

Harmless Error Standard

Code § 8.01-678 addresses non-constitutional harmless error:

> When it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached, no judgment shall be . . . reversed . . . [f]or any . . . defect, imperfection, or omission in the record, or for any other error committed on the trial.

The talisman of this provision is that the error or omission occurring in the trial did not affect or had only "slight effect" on the jury's decision. *Clay v. Commonwealth,* 262 Va. 253, 259-60 (2001) (quoting *Kotteakos v. United States,* 328 U.S. 750, 764-65 (1946)). The potential effect of the error must be considered in light of the entire record. *Commonwealth v. Proffitt,* 292 Va. 626, 642 (2016) (citation omitted). Thus, if one can conclude "with fair assurance," after considering the entire record without the erroneous action, that the judgment was not "substantially swayed by the error," the error was harmless.* *Clay,* 262 Va. at 259-60 (citation omitted).

Evidence

The undisputed evidence established that Joseph Vaught, a Marine stationed in Quantico, Virginia, owned a Hummer vehicle that he wanted to trade in for another vehicle but could not because the trade in value was less than the $12,000 he owed on the Hummer. Vaught reported the vehicle stolen on the morning of February 6, 2016. The Stafford County Sheriff's Department recovered the vehicle on February 7, on a secluded area of Raven Road in Stafford County. The vehicle had sustained substantial fire damage.

The county's fire marshal investigated and concluded the fire was purposely set in the passenger area of the vehicle. Expert testimony revealed that although certain wires in the vehicle were cut, it could not be started by "hot-wiring" and, instead, required use of the key. Other evidence demonstrated that, subsequent to the fire, Vaught possessed the only key to the vehicle and that he submitted a claim to his insurance company and received $14,000 on the claim.

Cameron Benson, a Marine junior in rank to Candelaria and Vaught, testified that he unknowingly participated in the arson, explaining that he rode with Candelaria and Vaught to Raven Road on February 6. Later that evening at approximately 8:00 or 8:30 p.m., Candelaria asked Benson to drive Candelaria's car and take Candelaria to a restaurant. At the restaurant, Candelaria got out of the car and told Benson to drive to a "clay building" near Raven Road and

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* Candelaria's argument that the Court of Appeals' use of the phrase "substantial" evidence rather than "overwhelming" evidence constituted misapplication of the harmless error standard misconstrues the harmless error statute. The test for non-constitutional harmless error does not rest on the characterization of the level of evidence offered, but rather the level of impact the trial error had on the decision.

wait for him. Benson said Candelaria arrived at the clay building driving Vaught's Hummer and that Candelaria told Benson to follow him to Raven Road. Once at Raven Road, Benson saw Candelaria retrieve something from the trunk of his own car. Benson then heard a window break and saw flames coming from the Hummer. Candelaria got into the car with Benson and they went to a church where they met Vaught, who was waiting in a van. Benson saw Candelaria give Vaught a key. Vaught then offered Benson $50 for his help, which Benson declined. At the time, Benson did not report the fire to the police. Benson said Vaught and Candelaria put pressure on him to not "rat us out" about the fire. Benson testified that he later came forward and provided a written statement to the fire marshal after his superior officers told him he could be punished if he knew something about the arson and failed to report it. Benson said that his statement to the fire marshal was consistent with his trial testimony.

Two other Marines testified about the arson of the Hummer. Kyriakos Savidis testified that before the arson, Candelaria told him that "Vaught wanted to pay [Candelaria] to burn his Hummer." Savidis thought Candelaria was joking. Savidis further testified that on the morning of February 7, Candelaria told him "it's done" and clarified that Candelaria was talking about Vaught's Hummer. Savidis testified that Candelaria explained that he asked Benson for a ride to the restaurant where Vaught had left the Hummer and the key to the vehicle. Candelaria then told Savidis that he drove the Hummer to a location where he "burned [the Hummer], torched it, and left."

Thomas Bonome testified that Candelaria told him that he burned Vaught's vehicle, that he "used gasoline to set the fire," and that he cut the ignition wires "to make it look like [the Hummer] was stolen," and that he smashed the vehicle's window. Bonome also testified, over Candelaria's objection, that Vaught told him he was going to pay Candelaria "a hundred and fifty dollars and give him a flak jacket" in exchange for burning the Hummer, that he had reported the vehicle as stolen, and that he planned to get insurance money to buy a new vehicle.

In his case in chief, Candelaria recalled Benson. Benson repeated his prior testimony describing the events surrounding the arson. During cross-examination by the Commonwealth, Benson again confirmed that his trial testimony was consistent with the written statement that he had provided to the fire marshal. Over Candelaria's hearsay objection, Benson's written statement to the fire marshal was admitted into evidence.

Candelaria presented Vaught's wife, who testified that Vaught was with her babysitting for a friend from approximately 8:00 or 8:30 p.m. on February 6 until about midnight, but she could not verify Vaught's whereabouts before that time. Candelaria also presented the testimony of Torian Ramirez, another Marine, who testified that eight months after the fire he heard Benson thank Savidis for helping him "set up'' Candelaria. Candelaria testified in his own defense, denying that he had any involvement with the arson of the Hummer vehicle or that he received a flak jacket or money from Vaught.

Discussion

Candelaria asserts first that the admission of Benson's written statement was not harmless error. We disagree.

Benson testified twice during the trial concerning the events surrounding the burning of the Hummer and stated that his written statement was consistent with this trial testimony. Furthermore, testimony from both Savidis and Bonome regarding the arson corroborated Benson's recitation of the arson events. Benson's testimony was also consistent with the undisputed evidence that the Hummer could not have been "hot-wired" and could have been operated only by its key, which Vaught possessed after the fire, and that the fire in the Hummer was purposely set.

Evidence contradicting Benson's recitation of the events associated with the arson was limited to Candelaria's testimony denying participation in the arson scheme and Ramirez's testimony implying a different chain of events but not offering any details as to the arson. Candelaria argues here that admission of Benson's written statement was not harmless error because its admission gave that testimony more emphasis than other testimony. Candelaria did not raise this argument in the circuit court as a basis for his objection to the admission of the written statement. Nevertheless, after consideration of all the evidence, it is clear that Benson's written statement was cumulative of his testimony at trial, that Benson's description of the events surrounding the arson was corroborated by Bonome and Savidis and was consistent with the undisputed evidence.

Accordingly, we conclude that, after consideration of the record without Benson's written statement, we can say with fair assurance that the verdict was not substantially swayed, if swayed at all, by the complained of error and, therefore, the Court of Appeals did not err in holding that the error was harmless.

Candelaria also asserts that the admission of Bonome's hearsay testimony reciting that Vaught told Bonome he gave Candelaria $150 and a flak jacket to burn the Hummer was not harmless error. Again, we disagree.

In addition to Bonome's testimony on payment for the arson, the jury heard Benson's testimony that he saw Candelaria give a key to Vaught and that Vaught offered to pay Benson for driving Candelaria's car the night of the arson. The jury also heard that Candelaria admitted to Savidis that Vaught wanted to pay Candelaria to burn the vehicle and that Candelaria described to Bonome how he had used gasoline to start the fire and that he smashed the Hummer's window and cut the ignition wires to make it appear stolen. Considering the entire record without the evidence at issue, we can say with fair assurance that the jury verdict was not substantially swayed, if swayed at all, by virtue of the asserted error.

Accordingly, the Court of Appeals did not err in concluding that the errors, if any, were harmless. For the foregoing reasons the judgment of the Court of Appeals is affirmed.

This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of Stafford County.

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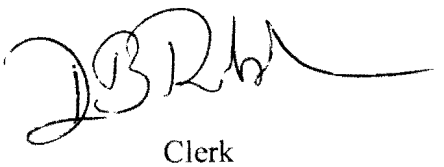

Clerk