VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 1st day of February, 2024.

Present: All the Justices

RAYMOND TRAVIS SWINSON, SR., APPELLANT,

against Record No. 230173
Court of Appeals No. 0351-22-3

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 reversible error in the judgment of the Court of Appeals.

Raymond Travis Swinson, Sr., appeals his conviction for possession with the intent to distribute methamphetamine, in violation of Code § 18.2-248(C). Swinson asserts that the Court of Appeals erred in holding that any error committed by the trial court in modifying a jury instruction proposed by Swinson was harmless.

BACKGROUND

On July 23, 2019, Swinson was driving a vehicle with his adult son in the front passenger seat. Deputy Smith of the Augusta County Sheriff's Department noticed that Swinson's car had a defective front bumper. Before the deputy activated his lights or siren, Swinson pulled his vehicle over to the side of the road. Deputy Smith activated his lights and proceeded with the traffic stop. Swinson "jumped out" of his vehicle and was "very amped up, fidgety, nervous, [and] moving a lot." Deputy Smith called for a canine backup.

After the canine arrived, it alerted to the possible presence of drugs. Deputy Smith asked Swinson if he had anything illegal on him. Swinson removed a cigarette pack from his pocket and handed it to Deputy Smith. The pack contained "two small bags with a crystal-like substance in each." An analysis identified the substance in the bags as 4.35 grams of methamphetamine.

A subsequent police search of the vehicle found a pipe on the passenger-side floor. Deputy Smith testified that Swinson first claimed that he found the drugs but later admitted to Deputy Smith "that he had it [the drugs] sold already and was on the way to deliver it for $50," to someone at the Lee-Jackson Motor Lodge in Verona, Virginia.

Swinson was charged with possession with the intent to distribute methamphetamine, in violation of Code § 18.2-248(C).

At trial, Swinson admitted that he lied about finding the drugs because he had gotten the drugs from his son, and he was attempting to shield his son from liability. Swinson also testified that he was just joking with the deputy when he told Deputy Smith he had already sold the drugs and provided Deputy Smith the location where the transaction was to take place.

Virginia Criminal Model Jury Instruction 22.350 reads:

> **To possess with intent to distribute requires that the defendant have intent to distribute at the time of possession. In determining whether there is possession with intent to distribute, you may consider all facts and circumstances, including but not limited to:** [the quantity possessed; the manner of packaging; the presence of an unusual amount of cash; the denomination of the cash possessed; the presence of equipment related to drug distribution; the presence or absence of drug paraphernalia suggestive of personal use; the presence of a firearm; the presence of a pager or electronic communications device; the conduct and statements of the defendant; the location at which the drugs were possessed; use of the drug by persons other than the defendant at the time it was seized; and the possession of more than one type of drug.]
>
> [Where the defendant possesses a small quantity of drugs you may infer that the defendant intends to possess the drugs for personal use. However possession of a small quantity of drugs, combined with other facts and circumstances, may be sufficient to establish intent to distribute.]

1 Virginia Model Jury Instructions—Criminal, No. 22.350 (2023).

The practice commentary regarding the instruction states:

> This first paragraph of this instruction contains the different facts and circumstances that may be considered on the issue of intent to distribute. It may be necessary to delete the facts and circumstances that are not involved in a particular case.

> The second paragraph of the instruction should only be included when the defendant possesses a small quantity of drugs.

1 Virginia Model Jury Instructions—Criminal, No. 22.350, ¶¶1-2 (2023).

Swinson proffered the model jury instruction, in its entirety, without the bold print or brackets. The circuit court gave the instruction, but it removed some of the factors enumerated in the first paragraph of the instruction, based upon the absence of evidence actually presented at trial regarding those factors.[1] The circuit court excluded the following factors from the instruction: the presence of an unusual amount of cash, the denomination of the cash possessed, the presence of equipment related to drug distribution, the presence of a firearm, the presence of a pager or electronic communications device, and the possession of more than one type of drug. Swinson objected to most of the exclusions.[2]

The jury found Swinson guilty of possession with intent to distribute.

Swinson appealed to the Court of Appeals. The Court of Appeals assumed without deciding that the trial court erred by failing to give Swinson's proposed jury instruction in its entirety, but found that the error was harmless.

ANALYSIS

Assuming without deciding, as did the Court of Appeals, that it was error for the trial court to exclude certain factors from Swinson's proffered jury instruction, we agree with the Court of Appeals that any such error was harmless.

When reviewing non-constitutional error, the Court applies Code § 8.01-678, which states in relevant part:

> 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 arrested or reversed . . . for any error committed on the trial.

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[1] The circuit court found that the lack of evidence at trial, regarding the factors eliminated from the proffered jury instruction, would confuse the jury. Because we need not do so to resolve this appeal, the Court takes no position regarding the correctness of the circuit court's finding, the Virginia Model Jury Instructions' (VMJI) practice commentary, or the substance and structure of VMJI Instruction No. 22.350.

[2] Swinson did not object to the trial court's exclusion of the factor regarding "the presence of a pager or electronic communications device" from his proposed jury instruction, and does not appeal the exclusion of those particular factors.

Code § 8.01-678.

> We have applied Code § 8.01-678 in criminal as well as civil cases. *See, e.g.*, *Greenway v. Commonwealth*, 245 Va. 147, 154, 487 S.E.2d 224, 228 (1997). In a criminal case, it is implicit that, in order to determine whether there has been "a fair trial on the merits" and whether "substantial justice has been reached," a reviewing court must decide whether the alleged error substantially influenced the jury. If it did not, the error is harmless.

Clay v. Commonwealth, 262 Va. 253, 259 (2001).

"Applying this standard, a non-constitutional error [committed in a jury trial] is harmless 'if, when all is said and done, the error did not influence the jury, or had but slight effect.'" *Spruill v. Garcia*, 298 Va. 120, 127-28 (2019) (quoting *Commonwealth v. Swann*, 290 Va. 194, 201 (2015)).

This Court has found that "a jury verdict based on an erroneous instruction need not be set aside if it is clear that the jury was not misled" by the instruction. *Riverside Hosp., Inc. v. Johnson*, 272 Va. 518, 537 (2006) (citing cases). "Instructions must be read in the light of the evidence applicable to the issues raised." *Tolston v. Reeves*, 200 Va. 179, 183 (1958). "They must be read as a whole, and a defect in one may be cured by a correct statement of the law in another if it plainly appears that the jury could not have been misled by the defective instruction." *Id.*; *see also Tri-State Coach Corp. v. Walsh*, 188 Va. 299, 310 (1948).

Swinson has not identified any positive misstatement of law in the subject instruction given by the circuit court; the alleged error in the instruction is that it left out some factors, mentioned in the model jury instruction as nonexclusive examples. The factors listed in the first paragraph of the model jury instruction are not intended to be elements of the crime or to be weighed against each other; the exclusion of some of those factors from an instruction does not result in a misstatement regarding how intent to distribute can be proven. *See, e.g.*, *Wright v. Commonwealth*, 278 Va. 754, 760 (2009). The instruction given by the circuit court, even if inadequate, does not include any misstatement of the law which is not cured by other language in the instructions given by the circuit court.

Although some of the factors and circumstances listed in the instruction proffered by Swinson were excluded, the given instruction clearly states that it was not providing an exhaustive list of facts and circumstances to be considered by the jury, and affirmatively stated

that the jury could consider all facts and circumstances placed in evidence by the parties. Specifically, the instruction given by the circuit court told the jury that it "may consider all facts and circumstances, including but not limited to" the factors and circumstances listed. Thus, any possibility that the jury was misled to believe that it could only consider the factors and circumstances listed was cured by this catchall phrase. Even viewing the evidence in the light most favorable to Swinson, the instruction given by the circuit court allowed the jurors to consider the factors and circumstances deleted from the proffered instruction in determining Swinson's intent.

A non-constitutional error is found harmless when "the evidence of guilt [is] so overwhelming that it renders the error insignificant by comparison such that the error could not have affected the verdict." *Commonwealth v. Kilpatrick*, 301 Va. 214, 217 (2022). In this instance, any error in the jury instruction given by the circuit court is insignificant in its influence on the jury when compared to the overwhelming evidence of guilt.

The jury was not misled as to the elements of the offense by the objected to instruction. When viewed holistically, the weight of the evidence strongly supports the conclusion that the jury's verdict would have been the same even if the model jury instruction had been given in its entirety. As noted by the Court of Appeals, given Swinson's statements and actions affirming his knowledge of the drugs, his admission that he had already sold them, and his declaration regarding his intent to deliver the drugs, it plainly appears, from the record and the evidence given at the trial, that Swinson had a fair trial on the merits and substantial justice has been reached. Therefore, we conclude that any error in excluding some factors from the proffered jury instruction was harmless under the facts of this case.

The Court affirms the Court of Appeal's decision in this case. This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of Augusta County.

JUSTICE MANN, dissenting.

One of a trial court's most important responsibilities is to ensure that a jury is properly instructed. Here, the trial court failed to do so. Because I find that the error in the present case was not harmless, I respectfully dissent.

I agree with the majority that "a non-constitutional error [committed in a jury trial] is harmless 'if, when all is said and done, the error did not influence the jury, or had but slight

effect.'" *Spruill v. Garcia*, 298 Va. 120, 127-28 (2019) (quoting *Commonwealth v. Swann*, 290 Va. 194, 201 (2015)). The majority asserts that Swinson had a fair trial on the merits and that substantial justice has been reached. This is where I disagree.

The hallmark of a good jury instruction is one that is "simple, *impartial*, clear, [and] concise." *See, e.g., Bryant v. Commonwealth*, 216 Va. 390, 392 (1975) (emphasis added); *Gottlieb v. Commonwealth*, 126 Va. 807, 813 (1920). It is not the function of the trial court to suggest to the jury what conclusion it should draw from the facts in evidence. *Velasquez v. Commonwealth*, 276 Va. 326, 330 (2008) (citing *Tyler v. C & O R.R. Co*., 88 Va. 389, 394-95 (1891)). We have emphasized that where "the evidence relevant to the determination of a factual issue essential to the disposition of the dispute is in conflict, trial courts should not grant instructions that appear to place a judicial imprimatur on selective evidence." *Nelms v. Nelms*, 236 Va. 281, 286 (1988). In particular, instructions should not be "worded as to emphasize portions of the evidence," possibly misleading a jury to the detriment of a party. *Whitmer v. Marcum*, 214 Va. 64, 67 (1973).

When a trial judge instructs the jury in the law, he may not "single out for emphasis a part of the evidence tending to establish a particular fact." *Woods v. Commonwealth*, 171 Va. 543, 548 (1938). The danger of emphasizing particular facts and "ignoring the residue of the evidence and the facts it may tend to prove" is that it gives undue prominence to the highlighted evidence and misleads the jury. *New York, Philadelphia, & Norfolk R. Co. v. Thomas*, 92 Va. 606, 609 (1896). Here, by removing certain factors relating to intent from the jury instruction favoring Swinson, the trial court emphasized only the limited factors favoring the Commonwealth in Swinson's case which may have led the jury down an inexorable path to conviction. Accordingly, I cannot say that the error here did not affect the verdict.

The catchall phrase "including but not limited to" does not mean that the jury could have considered the factors deleted from the proffered instruction (or any other factors which would tend to negate distribution) in determining Swinson's intent. This is so because we cannot expect jurors to weigh the evidence of unspecified or unfamiliar factors. In other words, jurors do not know what they do not know.

It is a cornerstone of our justice system that the trial court instructs the jury as to questions of law, and the jury is to determine questions of fact. *Whitelaw's Ex'r v. Whitelaw*, 83 Va. 40, 43 (1887). Without informing the jury of the wide array of factors that tend to show the

indicia of intent to distribute, jurors will remain uninformed of the law. A catchall phrase cannot cure my concern that jurors are left to speculate as to the law applicable to the facts before them. Accordingly, I believe that the error substantially influenced the jury and was not harmless.

In viewing the facts in the light most favorable to Swinson, as we must where a trial court refuses to give a proffered instruction, substantial justice has not been reached. *Avent v. Commonwealth*, 279 Va. 175, 202 (2010). The evidence viewed most favorably to Swinson indicates that he may not have intended to distribute the narcotics. Swinson did not possess a large quantity of narcotics. Indeed, the Commonwealth's expert testified that the amount could have been for personal use. Swinson did not possess other items indicative of intent to distribute, such as scales, packaging materials, or large amounts of cash. Reviewing the inculpatory statement in Swinson's favor, his acknowledgement that he had only been joking with the officer tends to negate intent to distribute. The strength of any evidence against Swinson is outweighed by the error in the instruction because, reviewing the evidence in the light most favorable to Swinson, I believe a reasonable jury was misled by the erroneous instruction.

In sum, the instruction's catchall phrase "included but not limited to" suggests a non-exhaustive list of factors. The very elimination of factors which may have been favorable to Swinson and the retention of only those consistent with the Commonwealth's evidence turns the non-restrictive language of the instruction upside down. Selectively furnishing factors is antithetical to the open-ended nature of the instruction and therefore achieves the opposite effect. The resulting inversion was not harmless.

For the above reasons, I respectfully dissent as I would reverse the judgment of the Court of Appeals.

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Teste:

Clerk