VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 3rd day of June, 2021.

Present: All the Justices

Eric Fitzgerald Jones, Appellant,

against Record No. 200243
Court of Appeals No. 1359-18-4

Commonwealth of Virginia, Appellee.

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

A jury found Eric Fitzgerald Jones guilty of possessing a firearm after having been convicted of a violent felony in violation of Code § 18.2-308.2. Jones appealed this conviction to the Court of Appeals on the grounds that the trial court had erred in denying his motion to suppress evidence based on a violation of the Fifth Amendment and had erred in denying his motion to strike the evidence as insufficient. The Court of Appeals affirmed, holding that the trial court had not violated Jones's Fifth Amendment rights and that the evidence had been sufficient to support Jones's conviction. Jones now appeals to us, and we affirm the judgment of the Court of Appeals.

I.

On the night of December 31, 2017, Jonathan Tracy was viewing fireworks from his fifth-floor apartment when, shortly after midnight, he heard several gunshots from the street below. He saw three individuals below turning from Colonial Avenue onto First Street and moving in the direction of North Patrick Street. As he watched, one of the individuals held a firearm in the air and fired several more rounds. He jumped away from the window and told his wife to call the police.

Another witness who lived nearby, John Metcalf, also heard several gunshots around midnight. Metcalf provided the police with a time-stamped surveillance video from the front door of his residence, which is across the street from the back entrance of 935 North Patrick

Street. The video depicted three individuals walking from the corner of Colonial Avenue and First Street to the back entrance of 935 North Patrick Street at 12:05 a.m. One man entered the building while the other two remained outside.

There was a surveillance camera inside the vestibule of the back entrance of 935 North Patrick Street that directly faced the doorway. The time-stamped, high-resolution video showed a clear image of a man in a festive winter sweater opening the door for another man who entered at approximately 12:05 a.m. and was gripping a black object in his right hand next to his right thigh. The surveillance footage provided an unobstructed, clear view of the man's face as he walked into the vestibule and turned into the elevator.

Police arrived on the scene and found nine cartridge casings on the sidewalk at the intersection of Colonial Avenue and First Street. Jennifer Owens, a firearms examiner for the Bureau of Alcohol, Tobacco, Firearms and Explosives Forensic Science Laboratory, testified at trial that the cartridge casings had all come from the same firearm. Owens identified three likely firearms based on the caliber and class characteristics of the casings as well as the markings on the casings, including the firing pin shape and aperture, and the jury saw photographs of these types of firearms.

On January 18, officers arrested Jones for possessing a firearm after having been convicted of a violent felony and transported him to the police station. When Officer Ryan Clinch brought Jones into the interrogation room, Jones stated, "Hey, can you call my wife to tell her to call my lawyer for me?" Commonwealth's Prelim. Hr'g Ex. 1 at 00:26 to 00:30. Officer Clinch responded, "Do you know the number?" *Id.* at 00:31 to 00:32. Jones responded that he could give the number to Officer Clinch. Shortly thereafter, as Officer Clinch left the room, Jones asked if Officer Clinch was "going to make the phone call." *Id.* at 2:53 to 2:55. Officer Clinch responded, "Yeah, yeah, when I get a chance." *Id.* at 2:55 to 2:58. Approximately ten minutes later, Officer Bikeramjit Gill entered the room, and thereafter, he advised Jones of his *Miranda* rights. Jones stated that he understood each right, and he waived each. During questioning, he acknowledged that he was the man in the surveillance video who had entered 935 North Patrick Street just after midnight, but he denied that the object in his hand had been a firearm and claimed that it had been a cell phone. He also acknowledged that he had been in the area at the time of the incident. Officers recovered a cell phone from Jones when they arrested him.

Jones moved in limine to exclude from evidence his statements from Officer Gill's interrogation, arguing that his request asking Officer Clinch to call his wife and tell her to call his lawyer before the interrogation had constituted an unambiguous invocation of his right to have counsel present during questioning. The interaction with Jones was recorded in a video, which the trial court admitted into evidence for the preliminary hearing. During arguments on the motion to suppress, the trial court asked the Commonwealth about a different statement that Jones had made almost an hour after the interrogation had begun in which Jones had mentioned a lawyer. *See* J.A. at 74. The Commonwealth replied that Jones's motion to suppress had "not raised any issue with respect to . . . whether those statements are invocations," and thus, those statements were not before the court. *Id*. at 74-75. The trial court agreed and informed Jones that the later statements "may be an issue, but it's not what was before the Court today." *Id*. at 76. The trial court added that Jones was not prejudiced by not having raised the issue regarding the later statements and could raise it later. *Id.* at 76-77. Jones acknowledged the trial court's ruling and stated that "the other *Miranda* issues . . . can be left addressed [in] a separate motion." *Id*. at 81. The trial court denied Jones's motion to suppress. Jones never raised a separate motion and never asserted that the later statements had been an invocation of his right to counsel.[1]

At a two-day trial, the jury heard the testimony of Tracy and Metcalf, the officers who had investigated at the scene, the forensic expert, and Detective Gill. The jury also watched the video surveillance footage from Metcalf's front door and from inside the vestibule for the back entrance to 935 North Patrick Street. The Commonwealth presented photographic evidence from

[1] Jones asserts on appeal that these later statements (made after the interrogation had begun) were invocations of his right to counsel. *See* Appellant's Br. at 11-12. The Commonwealth, however, did not submit any evidence from Officer Gill's interrogation that had been elicited after Jones had made these alleged requests for counsel, *see* J.A. at 381, and thus there was no evidence to suppress based on these alleged requests. Consequently, the question whether these statements were invocations of the right to counsel was an issue that was never presented to nor ruled upon by the trial court. *See id.* at 2-7, 76-77, 81. The Court of Appeals also did not rule on this issue. *See Jones v. Commonwealth*, Record No. 1359-18-4, 2020 WL 200772, at *4 (Va. Ct. App. Jan. 14, 2020) (unpublished). Nor did Jones assign error to the decision of the Court of Appeals that addressed only the pre-interrogation statement. *See Forest Lakes Cmty. Ass'n v. United Land Corp. of Am.*, 293 Va. 113, 122-23 (2017) ("An assignment of error is not a mere procedural hurdle an appellant must clear in order to proceed with the merits of an appeal. Assignments of error are the *core* of the appeal." (emphasis in original)).

the scene as well as still photos taken from the surveillance footage at 935 North Patrick Street. The Commonwealth attempted to admit a photo of Jones from the day he had been arrested, but Jones objected on the ground of relevance. The Commonwealth argued that the photo was relevant for the jury "to have something to review in the jury room that shows the Defendant, to determine whether they believe he is that individual in the video." *Id.* at 404. Jones argued that the photo was not necessary because "the jury can see him" and because he admitted it was him, so identification is "not an issue." *Id.* at 403-04. The trial court sustained the objection.

At the close of the Commonwealth's case-in-chief, Jones moved to strike the Commonwealth's evidence. He argued that the evidence was insufficient as a matter of law to establish that Jones had possessed a firearm. The trial court denied the motion. Jones presented no evidence but renewed his motion to strike, which the trial court again denied.

The jury found Jones guilty of possessing a firearm after having been convicted of a violent felony. Jones appealed, in relevant part, on the ground that the trial court had erred in denying his motion to exclude the evidence obtained during Officer Gill's interrogation because his question to Officer Clinch — "Hey, can you call my wife to tell her to call my lawyer for me?" — was an unambiguous invocation of his right to counsel. He also argued that the trial court had erred in denying his motion to strike the evidence as insufficient. In an unpublished opinion, the Court of Appeals affirmed the trial court, holding that Jones's question had not clearly indicated that he wanted his attorney to be present for the interrogation and holding that the evidence was sufficient to support his conviction.

II.

Jones appeals the decision of the Court of Appeals, arguing that the trial court should have excluded the evidence obtained during Officer Gill's interrogation and that the evidence was insufficient to demonstrate that he had possessed a firearm.

A.

In the context of a custodial interrogation, "[t]he constitutional standards we apply are well-established." *Stevens v. Commonwealth*, 283 Va. 296, 302 (2012). "The right of a criminal suspect to have an attorney present during custodial interrogation was first articulated by the Supreme Court in *Miranda v. Arizona*." *Commonwealth v. Hilliard*, 270 Va. 42, 49 (2005). Under *Edwards v. Arizona*, officers must suspend questioning if a suspect has clearly asserted his right to counsel. *See* 451 U.S. 477, 484-85 (1981). "[O]nce an accused expresses a desire to

exercise his right to counsel, authorities may not further interrogate the accused until counsel is present unless the accused initiates further conversation or exchanges with the authorities." *Midkiff v. Commonwealth*, 250 Va. 262, 266 (1995).

"To invoke the protections provided by *Miranda* and *Edwards* an accused must clearly and unambiguously assert his right to counsel." *Stevens*, 283 Va. at 303. As we have repeatedly affirmed, "the invocation of the right to counsel must be clear, unambiguous, and unequivocal." *Zektaw v. Commonwealth*, 278 Va. 127, 136 (2009). Law enforcement officers are not required to guess whether a statement is an invocation of the right to counsel. *See Davis v. United States*, 512 U.S. 452, 460-61 (1994). Thus, "[i]f the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." *Id.* at 461-62. It is not enough for a suspect to make "a statement that *might* be a request for an attorney." *Id.* at 461 (emphasis in original). A statement that is "merely an inquiry requesting a clarification or affirmation" of rights or that expresses "an uncertainty about the wisdom of continuing the interrogation without consulting another person" is not an invocation of the right to counsel. *Hilliard*, 270 Va. at 51-52; *see also Zektaw*, 278 Va. at 136-37 (collecting cases).[2]

This case presents the question whether Jones's statement — "Hey, can you call my wife to tell her to call my lawyer for me?" — is an unequivocal and unambiguous invocation of his right to have an attorney present during questioning. We find that we do not need to answer this

[2] *See, e.g.*, *Davis*, 512 U.S. at 462 (holding that "[m]aybe I should talk to a lawyer" was not a request for counsel); *Hilliard*, 270 Va. at 51 (holding that "[c]an I have someone else present too, I mean just for my safety, like a lawyer like y'all just said?" was not an unambiguous request for counsel); *Commonwealth v. Redmond*, 264 Va. 321, 330 (2002) (holding that "[c]an I speak to my lawyer? I can't even talk to [a] lawyer before I make any kinds of comments or anything?" was not a request for counsel (second alteration in original)); *Midkiff*, 250 Va. at 265, 267 (holding that "I'll be honest with you, I'm scared to say anything without talking to a lawyer" was not an unambiguous invocation of the right to counsel); *Mueller v. Commonwealth*, 244 Va. 386, 396 (1992) (holding that "[d]o you think I need an attorney here?" was not a request for counsel), *overruled on other grounds by Morrisette v. Warden of Sussex I State Prison*, 270 Va. 188, 202 (2005); *Eaton v. Commonwealth*, 240 Va. 236, 250, 253-54 (1990) (holding that "[y]ou did say I could have an attorney if I wanted one?" was not a request for counsel); *Poyner v. Commonwealth*, 229 Va. 401, 410 (1985) (holding that "[d]idn't you say I have the right to an attorney?" was not a request for counsel); *Bunch v. Commonwealth*, 225 Va. 423, 430, 433 (1983) (holding that a statement by a suspect that "he felt like he might want to talk to a lawyer" was not a request for counsel).

question because even if the trial court erred in admitting the evidence obtained during Jones's custodial interrogation, such error was harmless.

The trial court's holding here is subject to harmless-error analysis because "Code § 8.01-678 makes 'harmless-error review required in *all* cases.'" *Commonwealth v. White*, 293 Va. 411, 420 (2017) (emphasis in original) (citation omitted). Under Code § 8.01-678, "no judgment shall be arrested or reversed" if "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."

"The harmless-error concept is no mere prudential, judge-made doctrine of appellate review," but rather, it "is a legislative mandate, which has been part of our statutory law since the early 1900s, and limits the adjudicatory power of Virginia appellate courts." *White*, 293 Va. at 419. "The harmless-error check on judicial power has never been a begrudged limitation, but rather one 'favored' by Virginia courts," *id.* at 420 (citation omitted), because it stems from the "imperative demands of common sense," *Oliver v. Commonwealth*, 151 Va. 533, 541 (1928). The harmless-error statute "puts a limitation on the powers of this court to reverse the judgment of the trial court — a limitation which we must consider on every application for an appeal and on the hearing of every case submitted to our judgment." *Walker v. Commonwealth*, 144 Va. 648, 652 (1926) (construing predecessor harmless-error statute). The harmless-error doctrine "preserve[s] the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.'" *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991) (citation omitted).

Even errors "arising from the denial of a constitutional right are subject to a harmless error analysis." *Angel v. Commonwealth*, 281 Va. 248, 264 (2011). A criminal defendant "'is entitled to a fair trial but not a perfect one,' for there are no perfect trials." *Brown v. United States*, 411 U.S. 223, 231-32 (1973) (citation omitted). "[I]t is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations," lest such courts "retreat from their responsibility, becoming instead 'impregnable citadels of technicality.'" *United States v. Hasting*, 461 U.S. 499, 509 (1983) (alteration and citation omitted). A constitutional error is harmless if it appears "beyond a

reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967).

Here, Jones sought to suppress evidence from the interrogation, during which he had acknowledged that he was the man in the surveillance video from 935 North Patrick Street and had placed himself in the area at the time of the incident. The surveillance video showed a high-resolution image of the man's face as he walked through the door at 935 North Patrick Street. The vestibule in the video was well-lit, and the surveillance camera was located at a close range and directly faced the man entering the vestibule. The jury saw a clear view of the man's face as he entered the building and of his profile as he turned into the elevator, and they watched this video in the courtroom in Jones's presence. Given the clarity of the video, we find that any error in admitting Officer Gill's testimony was harmless. The jury could have easily identified Jones as the man in the surveillance video without Officer Gill's testimony. Indeed, the key contention at trial was not the identity of the man in the video, which provided a clear image of the man's face, but rather whether the dark object in the man's hand was a handgun. *See, e.g.*, J.A. at 218. Officer Gill's testimony did not contribute to this key factual question, and thus the exclusion of his testimony would not have changed the jury's conclusion that the object was a firearm.

To the extent that reasonable doubt could exist as to the identity of the man in the surveillance video, Jones eliminated that doubt at trial. When the Commonwealth sought to admit a photo of Jones so that the jury could "determine whether they believe he is that individual in the video," Jones argued that identification was "not an issue" because Jones had already admitted that it was him. *Id*. at 403-04. This admission was consistent with the opening statement by Jones's counsel to the jury that the Commonwealth's only evidence was "two seconds of a video that depicts *Mr. Jones* holding a dark object in *his* hand." *Id*. at 218 (emphases added). These statements to the trial court and the jury undermine any claim that Jones might have concerning the court's earlier ruling on the suppression motion.

As we have often said, "It is well settled and obviously a sound general rule that objection to evidence cannot be availed of by a party who has, at some other time during the trial, voluntarily elicited the same evidence, or has permitted it to be brought out by his adversary without objection." *Carter v. Pickering*, 191 Va. 801, 808 (1951) (citation omitted). This principle applies to the specific evidence previously challenged as well as other "evidence of the same character." *Pettus v. Gottfried*, 269 Va. 69, 79 (2005). This principle has been "explained

in different ways," but "the practical effect of the principle remains clear: 'Some courts so hold because the error is harmless, and others because the subsequent introduction of the same evidence is a waiver of the objection. Whether it be placed upon one ground or the other, the result is the same.'" *Isaac v. Commonwealth*, 58 Va. App. 255, 260-61 (2011) (citation omitted). For these reasons, Jones's arguments regarding the motion to suppress must fail.

B.

Finally, Jones argues that the trial court erred in denying his motion to strike because the evidence was insufficient as a matter of law to demonstrate that he had possessed a firearm. We disagree.

In our review of the sufficiency of the evidence, the trial court's "judgment is presumed correct and will not be disturbed unless it is 'plainly wrong or without evidence to support it.'" *Commonwealth v. Moseley*, 293 Va. 455, 463 (2017) (quoting Code § 8.01-680; *Viney v. Commonwealth*, 269 Va. 296, 299 (2005)). In light of this presumption, this Court "does not 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.'" *Williams v. Commonwealth*, 278 Va. 190, 193 (2009) (emphasis added) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). Instead, the only "relevant question is, after reviewing the evidence in the light most favorable to the prosecution, whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Sullivan v. Commonwealth*, 280 Va. 672, 676 (2010) (emphasis added). Thus, "it is not for this [C]ourt to say that the evidence does or does not establish his guilt beyond a reasonable doubt because as an original proposition it might have reached a different conclusion." *Cobb v. Commonwealth*, 152 Va. 941, 953 (1929).

The Commonwealth presented eyewitness testimony that three individuals had been walking from Colonial Avenue onto First Street just after midnight when one of the individuals shot a firearm into the air. Reinforcing this evidence, investigators found nine cartridge casings on the sidewalk at Colonial Avenue and First Street that had all been fired from the same firearm. Further, a time-stamped surveillance video showed three individuals walking from the corner of Colonial Avenue and First Street toward 935 North Patrick Street, where one individual walked in at 12:05 a.m. The video at 935 North Patrick Street showed that individual walking in while gripping a black object in his right hand. The jury saw both time-stamped

surveillance videos as well as still images from the second video showing the size and shape of the object and the way in which Jones was holding it.

In light of this evidence, we cannot say that the jury's verdict was plainly wrong. A rational factfinder could review the totality of the evidence and determine that Jones had possessed a firearm after having been convicted of a violent felony. We thus reject Jones's argument that the evidence was insufficient to support his conviction.

III.

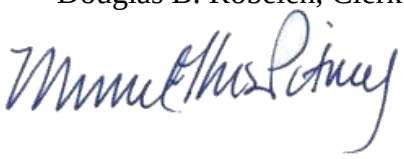
In sum, we do not address the question whether the trial court erred when it denied Jones's motion to suppress. The alleged error, even if it had occurred, was harmless beyond a reasonable doubt and did not contribute to the verdict obtained, given the incriminating evidence against Jones and his counsel's statements to the trial court and the jury. We also hold that the evidence was sufficient to sustain Jones's conviction for possession of a firearm after having been convicted of a violent felony. For these reasons, we affirm the judgment of the Court of Appeals.

This order shall be certified to the Court of Appeals of Virginia and to the Circuit Court of the City of Alexandria.

A Copy,

Teste:

Douglas B. Robelen, Clerk



By:

Deputy Clerk