

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 25th day of March, 2021.*

Present: All the Justices

Dominic Morales Desoto, Appellant,

against Record No. 200446  
Court of Appeals No. 1340-19-4

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 opinion that there is no reversible error in the judgment of the Court of Appeals.

Dominic Morales Desoto was indicted on one count each of strangulation, in violation of Code § 18.2-51.6; child abuse or neglect, in violation of Code § 18.2-371.1; and child cruelty, in violation of Code § 40.1-103. Trial was scheduled to commence on June 12, 2018.

On June 7, the Commonwealth filed a notice that it would move for the admission of a videotaped forensic interview with K.B., the four-year-old son of Desoto's fiancé and the alleged victim of the charges. At a hearing on the motion, Desoto objected that Code § 19.2-268.3(C) required at least 14 days' written notice.<sup>1</sup> The Commonwealth asserted that the statutory requirement was satisfied by an electronic mail it had sent Desoto's counsel and the circuit court

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<sup>1</sup> The statute provides that

[a]t least 14 days prior to the commencement of the proceeding in which a statement will be offered as evidence, the party intending to offer the statement shall notify the opposing party, in writing, of the intent to offer the statement and shall provide or make available copies of the statement to be introduced.

Code § 19.2-268.3(C).

clerk's office on May 17. The circuit court ruled that the electronic mail was sent before the 14-day deadline and that it also satisfied the statutory requirement. It thereafter granted the Commonwealth's motion. At the conclusion of trial, a jury convicted Desoto of one count of assault and battery, one count of child neglect, and one count of child cruelty.

Desoto appealed to the Court of Appeals asserting among other things that the circuit court had erred by ruling that the Commonwealth complied with Code § 19.2-268.3(C). The Court of Appeals affirmed the circuit court's judgment by per curiam opinion. Desoto appeals.

Assuming without deciding that the Court of Appeals erred by affirming the circuit court's ruling that the electronic mail satisfied the statute's requirement, this Court holds that any such error was harmless.

When reviewing a decision for non-constitutional harmless error provided in Code § 8.01-678, the Court "determine[s] whether there has been a fair trial on the merits and whether substantial justice has been reached [by] decid[ing] whether the alleged error substantially influenced the jury. If it did not, the error is harmless." *Clay v. Commonwealth*, 262 Va. 253, 259 (2001).

On appeal to this Court, Desoto argues that the only notice the Commonwealth provided before the 14-day deadline was the electronic mail, in which the assistant Commonwealth's attorney stated she was "working on" a motion to admit the child forensic interview video into evidence at trial. However, he continues, that electronic mail was not filed with the circuit court, did not cite Code § 19.2-268.3, and did not formally notify Desoto that the Commonwealth intended to introduce the evidence. Rather, it was a request to the court clerk for a hearing date for a possible motion, for which defense counsel was included as an additional addressee. Therefore, he concludes, the electronic mail was inadequate to satisfy the statute's requirement.

Desoto has consistently agreed that he had timely access to the video and the statements it recorded. Counsel also agreed at oral argument that the "in writing" requirement could be satisfied by electronic mail. The only dispute is whether *this* electronic mail was clothed with sufficient attributes of formality or definiteness to satisfy the statute. However, it and the ongoing communications between counsel to set the hearing date on that issue were adequate to inform Desoto of the Commonwealth's intent to introduce the video at trial and to allow him to prepare accordingly. Counsel candidly acknowledged at oral argument that he could not "characterize how things would have turned out differently" if he had been notified in some

other form, or even “whether or not things would have turned out differently had this [video] been ruled inadmissible” on the ground that the electronic mail was inadequate to satisfy the statute.

Consequently, the Court cannot conclude that Desoto did not receive a fair trial on the merits or that the Commonwealth’s electronic mail set in motion a chain of events that led the jury to be improperly influenced, thereby denying him substantial justice. Any error therefore is harmless.

For these reasons, the Court affirms the judgment of the Court of Appeals.<sup>2</sup> This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of Stafford County.

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Teste:

Clerk

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<sup>2</sup> The Court remands this case to the Court of Appeals with instructions to remand it to the trial court solely for the purposes of correcting the following errors under Code § 8.01-428(B). First, as noted by the Court of Appeals, the sentencing order erroneously imposes a three-year sentence for the strangulation offense, but the jury in fact convicted Desoto of only assault and battery on that charge. The jury recommended a twelve-month sentence on that conviction and a three-year sentence on the child cruelty conviction, but the court imposed a three-year sentence on the strangulation charge, on which the jury found Desoto guilty only of assault and battery, and a one-year sentence on the child cruelty conviction.

At sentencing, the trial court indicated its intent to impose sentences in accordance with the jury’s recommendation. Accordingly, the sentencing order must be corrected to reflect the offense of conviction—i.e., assault and battery rather than strangulation—and to cure the transposition of the sentences for it and the child cruelty conviction.

Second, the sentencing order erroneously reflects a conviction for aggravated malicious wounding of K.B.’s mother, which is not the subject of appeal in this case. The jury in fact convicted Desoto of only malicious wounding. The sentence imposed on that charge conforms to the jury’s recommendation of nine years’ incarceration, so only the offense of conviction need be corrected.