

No. 24-

IN THE
Supreme Court of the United States

ROBERT LEE WEBB,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA**

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

1. The Trial Court's error in refusing to give the Virginia Model Jury Instruction on Circumstantial Evidence violated the Appellant's 6th and 14th Amendment rights to a jury trial by failing to allow the Appellant an opportunity to present a meaningful defense since the jury instruction was a Model Jury Instruction and was directly related to evidence and issues in the case and was a proper statement of the law, and the Virginia Court of Appeals and the Virginia Supreme Court also erred by their holding regarding each point that they cited in support of their decision to affirm the Trial Court's decision and deny the giving of the instruction.

II. RELATED PROCEEDINGS

Robert Lee Webb v. Commonwealth of Virginia, No. 240495, Supreme Court of Virginia. Denial of Appeal filed September 10, 2024.

Robert Lee Webb v. Commonwealth of Virginia, No. 0154-23-3, Court of Appeals of Virginia. Memorandum of Opinion filed May 7, 2024.

Robert Lee Webb v. Commonwealth of Virginia, No. CR22000243-00, Circuit Court of Pittsylvania County, Virginia. Sentencing Hearing January 24, 2023.

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III. PETITION FOR CERTIORARI FOR PETITIONER

Robert Lee Webb by and through Joseph A. Sanzone, Esq., his privately retained counsel, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia.

IV. OPINIONS BELOW

The Supreme Court of Virginia's order which denied the Petition for Appeal on September 10, 2024, without elaboration is unpublished (App. 1a). The Court of Appeals Opinion by Judge William G. Petty is unpublished but available at 24 Vap UNP 0154233 (2024) styled as *Webb v. Commonwealth* (App. 2a). The Trial Court's action upon a jury verdict with no written Trial Court opinion and sentencing transcripts is unpublished (App. 14a-17a).

V. JURSIDICTION

Mr. Webb's Petition for hearing to the Virginia Supreme Court was denied on September 10, 2024. Mr. Webb invokes this Court's jurisdiction under 28 U.S.C. § 1257 in that the Supreme Court of Virginia and all inferior Courts having ruled in such a way that the Petitioner, Robert Lee Webb's 6th and 14th Amendment rights under the United States Constitution were denied to him. The Appellant timely filed this Petition for a Writ of Certiorari within ninety days of the Virginia Supreme Court's judgment.

VII. RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth, Section 1. Provides, in pertinent part, that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

VIII. STATEMENT OF THE CASE

A. Statement of Facts

The Appellant lives near Danville, Virginia with his younger brothers and parents. A female relative visited his home on July 4th weekend, 2021, and there was an allegation that the Appellant touched that female relative. The Appellant denied that any touching took place, and the

female relative never made a contemporaneous complaint regarding the incident. The testimony of the accused was unimpeached and in direct conflict with the Complainant, with no witness corroborating the touching and with relatives who were present saying that they did not see any touching or suspicious behavior.

At the conclusion of the jury trial that took place on September 12, 2022, the court denied Model Jury Instruction 2.400, Circumstantial Evidence (R. at 677, L.22–R. at 682, L. 25). Appellant’s counsel stated that the instruction was a proper statement of the law, and it related to circumstantial evidence present in the case (R. at 677, L.22–R. at 682, L. 25). Counsel for the Appellant also argued that the Commonwealth relied on circumstantial evidence to support its case and that the Commonwealth even called witnesses to establish circumstantial issues, including the police officers leaving a message hanging on the door at the Appellant’s home (R. at 593, L. 14–R. at 613, L. 6). The Commonwealth argued that someone should have called the police back even though there was no direct evidence of the receipt of the message. The evidence of the door message was not the only circumstantial evidence. The reporting of the allegations by the Complainant to a relative four months after the event (R. at 293, L. 25–R. at 294, L. 1) was offered as circumstantial proof of their occurrence. The contention that a forensic interview conducted several months after the incident (R. at 392, L. 16–R. at 393, L. 3, R. at 430, L. 23–R. at 431, L. 11) showed the Complainant’s physical condition on the date of the incident was offered as further circumstantial proof of an offense being committed. After hearing arguments from both parties in the case, the Court denied including Model Jury Instruction 2.400, and no instruction on circumstantial evidence was given.

B. Statement of Material Proceedings

All references herein to the record in this case are made to the April 26, 2022, September 1, 2022, September 12, 2022, and January 24, 2023, trial transcripts filed as part of the digital record created by the Court of Appeals of Virginia. References to the record and transcripts of proceedings are designated as (R. at __, L. __), respectively.

On September 12, 2022, the Appellant was tried by a jury in Pittsylvania County Circuit Court. The Honorable Stacey W. Moreau presided, and the jury found the Appellant guilty of one count of Aggravated Sexual Battery. He was subsequently sentenced on January 24, 2023, to incarceration for eight (8) years with four (4) years and eight (8) months suspended, and a fine in the amount of \$1,631.00 to be paid at \$50.00 per month. Appellant was also ordered to be of good behavior for four (4) years and eight (8) months and to register with the Department of State Police for inclusion in the Sex Offender and Crimes Against Minors Registry.

The Circuit Court ruling was timely appealed to the Court of Appeals who affirmed the Circuit Court opinion by an unpublished opinion styled *Webb v. Commonwealth* Record Number 0154-23-3.

The decision of the Court of Appeals of Virginia was timely appealed to the Supreme Court of Virginia, who refused the Petition for Appeal on September 10, 2024.

IX. REASONS FOR GRANTING THE PETITION

The Circuit Court of the County of Pittsylvania, Virginia, the Court of Appeals of Virginia, and the Supreme Court of Virginia erred in each of their holdings in support of not giving the Circumstantial Jury Instruction. The 6th Amendment gives a Defendant the right to a fair trial, and such right would be meaningless without proper instruction. There are certain foundational instructions which are a noncontroversial framework of all trials in Virginia. The credibility of the witness is an instruction which is proper in every case. A finding instruction is needed in every case. Similarly, a jury needs to know how evidence should be viewed with respect to the findings that they must make. The jury needs to know, for instance, if they must accept the statement of a witness as true, or if they can consider evidence that impeaches witness testimony. They must also know the manner in which they can accept or reject testimony. The use of circumstantial evidence, when it is presented at all in a case, needs to be explained to a jury so that the jury can understand and properly use that type of evidence.

Circumstantial evidence attempts to introduce facts from which an inference may be drawn as to the truth of a disputed fact. *Munger v. Cox*, 146 Va. 574, 131 S.E. 841, (1926). In allowing evidence to be presented to a jury the better view is not how little, but how much evidence is admissible. *Hines v. Commonwealth*, 136 Va. 728, 117 S.E.843 (1923). The weight to be given circumstantial evidence is for the jury. *Rees v. Commonwealth*, 203 Va. 850, 127 S.E.2d 406 (1962). Since one can never know the value to the jury of a particular piece of circumstantial evidence, and since that evidence could tip the burden of

proof in favor of a party, an instruction regarding the use of circumstantial proof is a necessity.

The form and wording of the circumstantial evidence instruction that was offered in this case is not in question as it is a Virginia Model Jury Instruction that has been approved on many occasions by Courts throughout the Commonwealth. As such, the law is clearly stated in the instruction and the instruction covers all issues which the evidence in the present case fairly raised. *Cain v. Lee*, 290 Va.129, 134, 772 S.E.2d 894, 896 (2015).

In a criminal case when an instruction is offered on a principle of law that is vital to a Defendant, a Trial Court has an affirmative duty to instruct the jury on that matter. *Commonwealth v. Jimenez*, 241 Va. 244, 402 S.E.2d 678 (1991). In the present case, at a minimum, the Commonwealth relied on circumstantial evidence by asking questions about a card left on the door at the Appellant's parent's house, asking the jury to conclude that the Appellant received the card, and arguing that the Appellant's failure to call the Sheriff's Department thereafter was evidence of his desire to evade responsibility for his actions. The Commonwealth also asked the jury to consider the Complainant's report of the incident made well after the alleged incident as corroboration of the prior event. The Commonwealth further asked the jury to consider that the physical findings from the forensic test, taken after the alleged conduct, were present immediately after the alleged event and were caused by the event. The jury is entitled to weigh that report and its timely or untimely nature. The offering of this evidence, together with other circumstantial evidence in the case, demonstrates the need for the jury to

be instructed on the proper use of circumstantial evidence in their deliberations.

A Trial Court should instruct the jury on all principles of law applicable to the pleadings and the evidence. *Dowdy v. Commonwealth*, 220 Va. 114, 255 S.E.2d 506 (1979). The door handle note is circumstantial in two ways. The first circumstance is the jury must conclude that the message left on the door was still there when Appellant returned home, and the second circumstance is that Appellant chose not to act on the message upon seeing it.

The jury instructions must cover “all” the issues which the evidence fairly raises as acknowledged by the Court of Appeals to constitute a constitutionally proper trial guaranteed by the 6th and 14th Amendments. Because the Commonwealth relied upon circumstantial evidence in combination with direct evidence in this case, and because Virginia Law requires such an instruction, a jury instruction on circumstantial evidence should have been given to fully inform the jury of the law.

The right to a meaningful defense has routinely been founded upon constitutional protection found in the Amendments to the U.S. Constitution such as protections of the 6th and 14th Amendments which should be afforded in the present case *Gideon v. Wainwright*, 372 U.S. 335, 340-341 (1963), *Wolfe v. McDonnell*, 418 U.S. 539 (1974), *Coleman v. Alabama*, 399 U.S. 1, 12 (1970). The right to a fair trial is defined through the several provisions of the 6th Amendment. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). The Constitutional guarantee of a meaningful opportunity to present a complete defense manifestly applies to proper and fair instruction of the jury. *Crane*

v. Kentucky, 476 U.S. 685, 690 (1986), *Nevada v. Jackson*, 569 U.S. 505 (2013).

In Virginia the Circumstantial Evidence Model Jury Instruction is intended to show that the reliance on the inference allowed by circumstantial evidence is subject to rules that ensure that circumstantial evidence which requires other evidence to prove a point is recognized as being different from direct evidence which can simply be believed or disbelieved to establish a point. The Circumstantial Evidence Jury Instruction necessarily reinforces the caution that must be given when you rely on circumstantial evidence. A jury is not fully instructed and informed without this instruction.

The United States Courts have not rendered decisions which directly rule on issues such as are presented in *Dowdy*, which require instruction on all principles of law applicable to the evidence. Such decisions on instructions are viewed in the light most favorable to the proponent of the instructions in Virginia. *Cooper v. Commonwealth*, 277 Va. 377, 381 (2009). No reference in *Holland v. United States*, 348 U.C. 121, 139 (1954), which is cited by the Court of Appeals addresses Virginia Law, or the complete language included in the Virginia Model Instruction or Model Instructions in general. *Holland* apparently does not involve a detailed instruction like the Virginia Model Instruction with the offered instruction in *Holland* apparently only reciting comments upon reasonable doubt in a criminal case involving a purely Federal Statute. *Holland* does not appear to address the evidence as a whole, how circumstances must be consistent with guilt and inconsistent with innocence, or suspicion and probability of guilt. Such an incomplete instruction

cannot fairly be said to be the equal of the Virginia Model Instruction on Circumstantial Evidence, nor should an incomplete instruction be the basis for abandoning many years of Virginia Law and erasing a Circumstantial Instruction that is likely given in the vast majority of cases in Virginia. 6th Amendment fair trial rights are too important to be incompletely addressed with a jury when a Model Instruction exists to clarify a jury's decision.

The Virginia cases which were relied upon to support the refusal of the Circumstantial Instruction are *Stewart v. Commonwealth*, 10 Va. App. 563, 570 (1990), which held that the Circumstantial Instruction did not relate to the specific evidence in the case, *Johnson v. Commonwealth*, 2 Va. App. 598 (1986), where the jury, unlike the present case, was instructed on the requirement that all inferences which might be drawn from the circumstantial evidence must be consistent with guilt and inconsistent with innocence, *Johnson* p. 605, and *Pease v. Commonwealth*, 39 Va. App. 342 (2002) which involved a detailed discussion of the "reasonable hypothesis of innocence" but did not address whether a Circumstantial Evidence Instruction should be given. In the context of the discussion in *Pease* a Circumstantial Evidence Instruction was likely given.

In Virginia there is no legal precedent for refusing a statement which is a proper statement of the law, and which relates to evidence that has been presented in a case. Whether a jury instruction accurately reflects the relevant law is itself a question of law which Virginia Courts review de novo on appeal *Lawlor v. Commonwealth*, 285 Va. 187, 228 738 S.E.2d 847,870 (2013). A party is entitled to a jury instruction when that instruction is supported by the law and facts. *Price v. Taylor*, 251 Va. 82, 85, 466, S.E.2d

87, 88 (1996). The Commonwealth did not claim that the instruction was an improper statement of the law.

Virginia Code Section §8.01-379.2 states that in any case a proposed jury instruction which properly states the law shall not be withheld from the jury because it does not conform to the Virginia Model Jury Instructions. This concept should be doubly true in criminal cases because liberty is at stake. Most importantly the instruction in this case is a Virginia Model Jury Instruction which should never be treated with less care than the aforementioned proposed instruction.

In a civil trial a party is required to submit jury instructions which properly reflect the facts and law in a case and the court may accept or reject them as is appropriate. *Peele v. Bright*, 119 Va. 182, 184, 89 S.E. 238, 239 (1916). In a criminal case the Trial Court must correct or amend the proffered instruction rather than refusing to grant it. *Whaley v. Commonwealth*, 214 Va. 353, 355-356, 200S.E. 556, 558 (1973).

The present case boils down to directly contradictory testimony about touching between the Defendant and his accuser. A Court should not debate giving the Circumstantial Evidence Instruction by calculating the volume of circumstantial evidence which exists in a case, but by evaluating whether circumstantial proof affects important issues or the credibility of a witness. The Appellant and the Complainant are both unimpeached and could be considered in equipoise. *Feigley v. Commonwealth*, 16 Va. App. 717, 432, S.E.2d 520 (1993). The leaving of the note, the belated reporting of a touching, and the inference about the small irregularity in her vaginal

area all require the application of circumstantial proof. In a case where the evidentiary balance will be shifted one way or another by circumstantial evidence since the direct evidence is apparently deadlocked, a complete and thorough explanation is required. The Model Instruction is a correct statement of the law and required to effectuate a complete defense under the 6th and 14th Amendments, and the Appellant is entitled to such an instruction.

X. CONCLUSION

In the face of Virginia requiring instructions on proper statements of law and requiring a Trial Court to modify an instruction rather than reject it in a criminal case if it generally states the law properly, the Appellant was denied the right to present a complete defense to a jury trial as guaranteed by the 6th and 14th Amendments to the United States Constitution. The Appellant, Robert Lee Webb, prays that this Court grant his Petition for Writ of Certiorari and grant an appeal in this matter.

Respectfully submitted,

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**APPENDIX A — DENIAL OF APPEAL IN THE
SUPREME COURT OF VIRGINIA,
FILED SEPTEMBER 10, 2024**

VIRGINIA:

*In the Supreme Court of Virginia held at the
Supreme Court Building in the City of Richmond on
Tuesday the 10th day of September, 2024.*

FROM THE COURT OF APPEALS OF VIRGINIA

Record No. 240495
Court of Appeals No. 0154-23-3

ROBERT LEE WEBB,

Appellant,
against

COMMONWEALTH OF VIRGINIA,

Appellee.

Upon review of the record in this case and consideration
of the argument submitted in support of the granting of
an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

Muriel-Theresa Pitney, Clerk

By: /s/ _____
Deputy Clerk

**APPENDIX B — MEMORANDUM OPINION
OF THE COURT OF APPEALS OF VIRGINIA,
FILED MAY 7, 2024**

COURT OF APPEALS OF VIRGINIA

Record No. 0154-23-3

ROBERT LEE WEBB

v.

COMMONWEALTH OF VIRGINIA

Filed May 7, 2024

FROM THE CIRCUIT COURT
OF PITTSYLVANIA COUNTY
Stacey W. Moreau, Judge

**MEMORANDUM OPINION* BY
JUDGE WILLIAM G. PETTY**

A jury convicted Robert Lee Webb of aggravated sexual battery.¹ On appeal, Webb challenges the trial court's refusal of a jury instruction addressing circumstantial evidence. Finding no abuse of discretion, we affirm the trial court's judgment.

* This opinion is not designated for publication. See Code § 17.1-413(A).

1. The trial court dismissed a rape charge and an aggravated sexual battery charge, and the jury acquitted Webb of another rape charge.

*Appendix B***BACKGROUND**

On appeal, we review the evidence “in the ‘light most favorable’ to the Commonwealth, the prevailing party in the trial court.” *Hammer v. Commonwealth*, 74 Va. App. 225, 231, 867 S.E.2d 505 (2022) (quoting *Commonwealth v. Cady*, 300 Va. 325, 329, 863 S.E.2d 858 (2021)). Doing so requires us to “discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences to be drawn therefrom.” *Cady*, 300 Va. at 329 (quoting *Commonwealth v. Perkins*, 295 Va. 323, 324, 812 S.E.2d 212 (2018)).

During the summer of 2021, Webb lived in a residence with his mother and father, Rebecca and Ronnie, and his two brothers, Riley and Ryan. One evening, Webb’s 13-year-old niece, K.B., stayed overnight at the residence. While K.B. and Webb were alone in his bedroom playing video games, Webb forced K.B. onto his bed, reached his hand under her shirt, and touched her breasts. He then pulled K.B.’s pants and undergarments below her knees and “penetrate[d] [her] vagina” with his penis. When Webb withdrew his penis, he “put his arm around” K.B. and they fell asleep. A few minutes later, Ronnie entered Webb’s bedroom, wakened K.B., and escorted her to Rebecca’s bedroom to spend the night. K.B. urinated before going to bed and felt a “burning sensation.” K.B. did not report her abuse to Webb’s family.

When K.B.’s mother picked her up the next morning, she noticed that K.B. had a “bruise” on her “leg or her

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arm” that had not been there before K.B. visited Webb’s residence. K.B. immediately “covered herself up with a blanket” and refused to discuss the bruise. When they arrived home, K.B. withdrew to her bedroom. Later that day, she noticed that her “[v]aginal area” was “ripp[ed]” and “bleeding” but she did not disclose the injury or her abuse to her mother. In the following weeks, K.B. stopped interacting with Webb, which was unusual because they had been close friends. Several months later, K.B. disclosed her sexual abuse to her mother, who then reported it to police. At trial, K.B. testified that she did not report her sexual abuse immediately or seek treatment for her injury because she “felt ashamed.”

A forensic nurse examined K.B. and determined that she did not have any apparent injuries to her vaginal area, although the nurse opined that “acute” injuries from sexual assault typically heal within “two weeks.” There was also a “notch” in K.B.’s hymen that the nurse opined typically did not appear in 13 year olds “[w]ithout sexual activity,” although the notch may have been congenital. The nurse further opined that painful urination was a common symptom of vaginal tearing.

A few days later, Pittsylvania County Sheriff’s Investigator Kelly Hendrix went to Webb’s residence and posted her contact information on the front door. Neither Webb nor his family members contacted her to discuss the incident.

At trial, Webb denied that he had sexually abused K.B. Webb also called Riley, Ryan, Ronnie, and Rebecca, who

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generally testified that during K.B.'s visit, she, Webb, and Riley played video games in Webb's bedroom and watched a movie for "[a] couple hours" without incident. During that time, Ryan brought them pizza from the kitchen before retiring to his bedroom. Ronnie was in the living room watching television. Neither Riley, Ryan, nor Ronnie saw or heard anything unusual. Around 11:30 p.m., Rebecca arrived home from work and saw K.B. and Webb sitting together on his bed. Later that night, she passed Webb's bedroom again and saw that K.B. and Webb were "still together sitting on the bed." About "ten minutes" later, Riley notified Ronnie that K.B. and Webb were asleep in Webb's bedroom, so Ronnie wakened K.B. and escorted her to Rebecca's bedroom to spend the night.

Riley, Ryan, Ronnie, and Rebecca acknowledged that they did not speak to police about the incident. Moreover, Ronnie and Rebecca were unaware that Investigator Hendrix had posted her contact information on the door of their residence. In rebuttal, Investigator Hendrix testified that she left her contact information on the front door of the Webbs' residence in mid-December and had attempted to contact the family several times without success.

The trial court provided Jury Instruction 1, which stated:

The defendant is presumed to be innocent. You should not assume that the defendant is guilty because he has been indicted and is on trial. The presumption of innocence remains with the defendant throughout the trial and

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is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of each offense beyond a reasonable doubt.

This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However, suspicion or probability of guilt is not enough for a conviction.

A reasonable doubt is a doubt based on your sound judgement after a full and impartial consideration of all the evidence in the case.

There is no burden on the defendant to produce any evidence.

The trial court also provided Jury Instruction 2:

You are the judges of the facts, the credibility of the witnesses, and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case.

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You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.

You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

Additionally, the court provided Jury Instruction 11, which specified that the Commonwealth was required to prove each element of aggravated sexual battery “beyond a reasonable doubt” and that the jury was required to acquit Webb if it failed to do so.

Webb proposed Jury Instruction A, which stated:

[I]t is not necessary that each element of the offense be proved by direct evidence, for an element may also be proved by circumstantial evidence. You may convict the defendant on circumstantial evidence alone, or on circumstantial evidence combined with other evidence, if you believe from all the evidence that the defendant is guilty beyond a reasonable doubt.

When the Commonwealth relies upon circumstantial evidence, the circumstances

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proved must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt, however strong, or even a probability of guilt.

The evidence as a whole must exclude every reasonable theory of innocence.

Webb argued that the instruction was necessary because the Commonwealth relied partially on circumstantial evidence to prove its case.

The trial court found that although the Commonwealth relied partially on circumstantial evidence to corroborate K.B.'s testimony and discredit Webb's account, the Commonwealth's case "focus[ed]" on K.B.'s "direct testimony." Thus, the court found that the Commonwealth's case relied primarily on direct evidence to prove the elements of the charged offenses. Accordingly, the court rejected the proffered instruction.

After argument by counsel, the jury convicted Webb of aggravated sexual battery. On appeal, Webb challenges the trial court's rejection of Jury Instruction A, arguing that the proffered instruction was necessary because the Commonwealth partially relied on circumstantial evidence to prove the elements of aggravated sexual battery. He asserts that if circumstantial evidence "is presented at all in a case," the trial court must instruct the jury on "the proper use of circumstantial evidence in their deliberations." Webb further argues that the proposed

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instruction was essential to inform the jury of its authority to weigh and draw inferences from circumstantial evidence and to ensure that it did not impermissibly shift “the burden of proof” to Webb.

ANALYSIS

“A reviewing court’s responsibility in reviewing jury instructions is ‘to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises.’” *Fahringer v. Commonwealth*, 70 Va. App. 208, 211, 827 S.E.2d 1 (2019) (quoting *Darnell v. Commonwealth*, 6 Va. App. 485, 488, 370 S.E.2d 717, 5 Va. Law Rep. 11 (1988)). At trial, the proponent must establish that a proposed instruction is a “correct statement of the law, applicable to the facts of the case on trial, and expressed in appropriate language.” *Miller v. Commonwealth*, 64 Va. App. 527, 547, 769 S.E.2d 706 (2015) (quoting *Shaikh v. Johnson*, 276 Va. 537, 546, 666 S.E.2d 325 (2008)). “We review a trial court’s decisions in giving and denying requested jury instructions for abuse of discretion.” *Holmes v. Commonwealth*, 76 Va. App. 34, 53, 880 S.E.2d 37 (2022) (quoting *Conley v. Commonwealth*, 74 Va. App. 658, 675, 871 S.E.2d 640 (2022)). “Whether a proffered jury instruction accurately states the law, however, is reviewed *de novo*.” *Id.* “[I]n deciding whether a particular instruction is appropriate, we view the facts in the light most favorable to the proponent of the instruction.” *Id.* (quoting *Cooper v. Commonwealth*, 277 Va. 377, 381, 673 S.E.2d 185 (2009)).

It is well settled that “where granted instructions ‘fully and fairly cover a principle of law, a trial court

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does not abuse its discretion in refusing another instruction relating to the same legal principle.” *Taylor v. Commonwealth*, 77 Va. App. 149, 168-69, 884 S.E.2d 822 (2023) (quoting *Huguely v. Commonwealth*, 63 Va. App. 92, 129, 754 S.E.2d 557 (2014)). Moreover, “[i]f the instruction is not applicable to the facts and circumstances of the case, it should not be given.” *Pena Pinedo v. Commonwealth*, 300 Va. 116, 122, 860 S.E.2d 53 (2021) (quoting *Commonwealth v. Sands*, 262 Va. 724, 729, 553 S.E.2d 733 (2001)). The trial court should also reject an instruction that “would be confusing or misleading to the jury.” *Graves v. Commonwealth*, 65 Va. App. 702, 708, 780 S.E.2d 904 (2016) (quoting *Mouberry v. Commonwealth*, 39 Va. App. 576, 582, 575 S.E.2d 567 (2003)).

The Supreme Court of the United States has held that, generally, “where the Government’s evidence is circumstantial,” a jury instruction stating that circumstantial evidence “must . . . exclude every reasonable hypothesis other than that of guilt” is unnecessary, provided that other instructions adequately inform the jury of the burden of proof and reasonable doubt. *Holland v. United States*, 348 U.S. 121, 139, 75 S. Ct. 127, 99 L. Ed. 150, 1954-2 C.B. 215 (1954). Moreover, in such a case, a circumstantial evidence instruction would be confusing or misleading because “[a]ttempts to explain the term ‘reasonable doubt’ do not usually result in making it any clearer to the minds of the jury.” *Id.* at 140 (quoting *Miles v. United States*, 103 U.S. 304, 312, 26 L. Ed. 481 (1880)). See also *Strawderman v. Commonwealth*, 200 Va. 855, 858, 108 S.E.2d 376 (1959) (observing that “instructions attempting to define reasonable doubt should

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be discouraged” because they may confuse or mislead the jury).

In addition, we have held that a circumstantial evidence jury instruction was “not warranted” even when the Commonwealth relied partially on circumstantial evidence to prove its case because the Commonwealth relied primarily on direct, eyewitness evidence to prove the elements of the charged offenses. *Stewart v. Commonwealth*, 10 Va. App. 563, 570, 394 S.E.2d 509, 7 Va. Law Rep. 38 (1990). Similarly, we have held that a trial court properly refused a cautionary instruction regarding circumstantial evidence where other instructions “fully and adequately” instructed the jury on “the burden of proof and reasonable doubt” and the jury’s authority to weigh and consider all the evidence. *Johnson v. Commonwealth*, 2 Va. App. 598, 605, 347 S.E.2d 163, 3 Va. Law Rep. 157 (1986); *see also Pease v. Commonwealth*, 39 Va. App. 342, 360, 573 S.E.2d 272 (2002) (en banc) (holding that “[t]he statement that circumstantial evidence must exclude every reasonable hypothesis of guilt is an alternative way of stating the fundamental precept that the Commonwealth has the burden to prove each element of an offense beyond a reasonable doubt”).

Although the Commonwealth partially relied on circumstantial evidence to corroborate K.B.’s account and discredit Webb’s alternative version of events,² the

2. For example, a forensic nurse examined K.B. after the alleged abuse and determined that she had a “notch” on her hymen, which the expert opined typically did not occur in 13 year olds without “sexual activity.” In addition, K.B.’s unusual behavior after the incident, including the fact that she stopped

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crux of the Commonwealth's case was K.B.'s testimony, which provided direct evidence of her sexual abuse. Thus, the Commonwealth's case was not wholly or substantially circumstantial and the proffered jury instruction was not warranted. *See Stewart*, 10 Va. App. at 570.

Moreover, the granted instructions "fully and fairly" covered the principles of law contained in the proposed instruction. *Taylor*, 77 Va. App. at 168 (quoting *Huguely*, 63 Va. App. at 129). Jury Instruction 11 defined the elements of aggravated sexual battery, and Jury Instruction 1 specified that Webb was "presumed to be innocent," the Commonwealth was required to prove each element "beyond a reasonable doubt," and Webb had no obligation "to produce any evidence." Instruction 1 also defined "reasonable doubt" as "a doubt based on [the jury's] sound judgement after a full and impartial consideration of all the evidence" and explained that mere "suspicion or probability of guilt" was insufficient to convict. (Emphasis added). Jury Instruction 2 further informed the jurors that they were the "judges of the facts, the credibility of the witnesses, and the weight of the evidence" and that they could "accept or discard" witness testimony after considering "all the evidence . . . and . . . circumstances

interacting with Webb despite their previous friendship, suggested that Webb had sexually abused her. Similarly, the Commonwealth introduced evidence that Webb's family members did not respond to Investigator Hendrix's repeated requests to discuss her investigation into K.B.'s sexual abuse, which tended to discredit their testimony and negate Webb's proffered hypothesis of innocence that K.B. spent the night in his bedroom without incident.

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of the case.” (Emphases added). Those instructions fully and adequately informed the jury of its authority to weigh and draw inferences from *all* the evidence—including circumstantial evidence—and instructed the jury on the burden of proof and reasonable doubt. *See Holland*, 348 U.S. at 140; *Johnson*, 2 Va. App. at 604-05.

CONCLUSION

In sum, the trial court did not abuse its discretion by refusing Jury Instruction A because the Commonwealth did not rely exclusively or substantially on circumstantial evidence to prove the charged offense and the granted jury instructions fully and fairly covered the same principles of law as the proffered jury instruction. Accordingly, we affirm the trial court’s judgment.

Affirmed.

**APPENDIX C — EXCERPTS OF TRANSCRIPT
IN THE CIRCUIT COURT OF PITTSYLVANIA
COUNTY, VIRGINIA, OF THE SENTENCING
HEARING, FILED JANUARY 24, 2023**

VIRGINIA:

IN THE CIRCUIT COURT OF
PITTSYLVANIA COUNTY

CR22-243

COMMONWEALTH OF VIRGINIA

V.

ROBERT LEE WEBB

TRANSCRIPT

The following constitutes a complete transcript of all of the oral testimony and other incidents in the above styled case, before the HONORABLE STACEY W. MOREAU, Judge of the Circuit Court of Pittsylvania County, Virginia, of the SENTENCING HEARING on January 24, 2023, in which defendant was sentenced on the following: Aggravated Sexual Battery, all of which were duly electronically recorded.

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* * *

[12]then. Well, she's blocked him. She won't go around him. Of course he's not a problem. But he's living his life and she was the one living in a cage of her, of her own emotions. And it's time for him to, to, to enter that punishment phase and we would urge the Court to, to sentence him at the high end of the guidelines, and we'll submit it.

THE COURT: You can stand. Before you're sentenced, you have a right to make what's called a allocution, a statement on your own behalf. You do not have to make one but if you'd like to, you can at this time, if you want to say anything. Just let the bailiff know and he'll hold the mic.

ROBERT LEE WEBB, THE DEFENDANT: No, I'm fine.

THE COURT: All right. All right, Court has reviewed the evidence, the presentence report and the evidence submitted and the argument considered today. And in consideration the Court, on CR22-243, aggravated sexual battery, will [13]sentence you to eight years, suspend all but three years, four months, finding that the guidelines are appropriate, doing the midrange with regard to it. I'm going to place you on supervised probation for a period of three years. While on probation, you'll have special conditions. It will be the sex offender probation. You are to submit to out-patient treatment for sex offender treatment. You are to be supervised again under the sex offender treatment program. You're prohibited from being unsupervised by any minors, that's anyone under

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the age of eighteen, and you are to register as a sex offender. You'll sign a notice today acknowledging you've been advised that you need to register with the Virginia State Police sex offender for minors registry. You will submit to DNA. That's just like a Q-tip on the inside of your mouth. That's because of the felony conviction. You'll no longer be able to possess firearms, ammunition, or explosives. If you do, it could lead to a new conviction which [14]carries minimum, or mandatory time. If you have any questions on that, do talk to your attorney. You have court costs associated with the matter. You can do community service even while incarcerated so if you volunteer in the laundry just submit the hours to the clerk. You just have to certify you haven't turned them in to any other court and you can get credit, come out without owing anything. And you have a right to note an appeal within thirty days of entry of any final order, and we normally do have our orders entered on the day of sentencing. And then you are prohibited from any contact whatsoever with the victim in the case, directly or indirectly. And that is a condition of your suspended sentence. And good behavior is the statutory fixed maximum. Anything else on behalf of the Commonwealth?

MR. HASKINS: No, Judge.

THE COURT: Any—

MR. HASKINS: No.

THE COURT: Anything else on [15]behalf of the defendant?

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MR. SANZONE: Yes, Your Honor. He's told me he would like to appeal the conviction, and would the Court allow him a bond of a similar nature? He's not been a problem on bond, or—

THE COURT: Not at—

MR. SANZONE:—during the—

THE COURT:—this time.

MR. SANZONE:—course. Do you need me to, do you need me to note the appeal?

THE COURT: You need to note the appeal and then we'll set a hearing with regard to it.

MR. SANZONE: Can he have a delayed report date then so that we can have that hearing?

THE COURT: Not at this time. No, I, I'm going to have him report. You can file the appeal and then file a notice that you're, or file a motion for an appeal bond.

MR. SANZONE: Yes, ma'am. I understand. Thank you, Your Honor.

[16]THE COURT: Uh-huh (affirmative).

WHEREUPON, the Sentencing Hearing was concluded at this time.

**APPENDIX D — EXCERPTS OF TRANSCRIPT
IN THE CIRCUIT COURT OF PITTSYLVANIA
COUNTY, VIRGINIA, OF THE SENTENCING
HEARING, FILED SEPTEMBER 12, 2022**

VIRGINIA:

IN THE CIRCUIT COURT OF
PITTSYLVANIA COUNTY

CR22-243

COMMONWEALTH OF VIRGINIA

V.

ROBERT LEE WEBB

TRANSCRIPT

The following constitutes a complete transcript of all of the oral testimony and other incidents in the above styled case, before the HONORABLE STACEY W. MOREAU, Judge of the Circuit Court of Pittsylvania County, Virginia, of the JURY TRIAL on September 12, 2022, in which defendant was tried on the following: Rape (Two Charges) and Aggravated Sexual Battery (Two Charges), and convicted of the following: Aggravated Sexual Battery (One Charge), all of which were duly electronically recorded.

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* * *

[531] THE COURT: Thank you, Mr. Sanzone. Court did deny it. Taking a look with regard to the case law, you have the Commonwealth versus Hudson, 265 Virginia at 505 that goes through what direct and circumstantial evidence is. They do cite the Patler case versus Commonwealth, 211 4 [sic] Virginia 448 and then also the Webb case, 204 Virginia 24. And that is the one where it, as the Patler case would state, where the proof relied on by the Commonwealth is largely circumstantial, then to establish guilt beyond a reasonable doubt, all necessary circumstances must be consistent with guilt and inconsistent with innocence. And that is the model jury that was offered, 2.400. Here Commonwealth is relying upon direct evidence. They do submit corroborating evidence which is circumstantial as defined in the Hudson [532] case. The door knocker with regard, that was more with credibility issues that were asserted by the Commonwealth on the defense witnesses, and when cross-examining them, and then put a rebuttal witness on. It wasn't as to circumstantial to put forth proof of a series of facts that establish a fact at issue. That dealt with credibility. The case boils down with the focus on direct testimony from the alleged victim in the case, and that is what we're looking at. If it were largely a circumstantial, you can have circumstantial with direct evidence and then you get the 2.400 instruction that was tendered by the defendant. But here it is largely direct evidence with some circumstantial. But that is not the large portion of what was put forth by the Commonwealth. Then also the defendant objected to model instruction number 10 as

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written, didn't object to it but wanted to add onto it, that's model jury instruction number 44.2, or 620. Mr. Sanzone.

* * *

[534] THE COURT: All right. In taking a look at, also on the model, it is a model jury instruction but it also takes a look with regard to how the statute's set forth as an alert, but you at Clifton versus Commonwealth, 22 Virginia App. 178 and it focuses to ensure that the

* * *

**APPENDIX E — PETITION FOR APPEAL,
IN THE COURT OF APPEAL OF VIRGINIA,
AT RICHMOND**

**IN THE COURT OF APPEAL OF VIRGINIA
AT RICHMOND**

RECORD NO.: 0154-23-3

ROBERT LEE WEBB

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

PETITION FOR APPEAL

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[TABLES INTENTIONALLY OMITTED]

Appendix E

[1]IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. 0154-23-3

ROBERT LEE WEBB

Appellant

vs.

COMMONWEALTH OF VIRGINIA,

Appellee

PETITION FOR APPEAL

TO THE HONORABLE CHIEF JUSTICE
AND THE JUSTICES OF THE
SUPREME COURT OF VIRGINIA

This Appeal is taken from Appellant Webb's conviction in the Circuit Court for the County of Pittsylvania, Virginia, for one count of Aggravated Sexual Battery. Webb timely noted his Appeal to the Court of Appeals pursuant to the Rules of the Virginia Supreme Court. The Court of Appeals issued an unpublished opinion affirming the Circuit Court's ruling which was also appealed.

All references herein to the record in this case are made to the April 26, 2022, September 1, 2022, September 12, 2022, and January 24, 2023, trial transcripts filed

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as part of the record. References to the record and transcripts of proceedings are designated as (R. at __, L. __), respectively.

**[2]NATURE OF THE CASE AND
MATERIAL PROCEEDINGS**

On September 12, 2022, the Appellant was tried by a jury in Pittsylvania County Circuit Court. The Honorable Stacey W. Moreau presided, and the jury found the Appellant guilty of one count of Aggravated Sexual Battery. He was subsequently sentenced on January 24, 2023, to incarceration for eight (8) years with four (4) years and eight (8) months suspended, and a fine in the amount of \$1,631.00 to be paid at \$50.00 per month. Appellant was also ordered to be of good behavior for four (4) years and eight (8) months and to register with the Department of State Police for inclusion in the Sex Offender and Crimes Against Minors Registry.

The Circuit Court ruling was appealed to the Court of Appeals who affirmed the Circuit Court opinion by an unpublished opinion styled Webb v. Commonwealth Record Number 0154-23-3.

STATEMENT OF FACTS

The Appellant lives near Danville, Virginia with his younger brothers and parents. A female relative visited his home for the evening, and there was an allegation that the Appellant touched that female relative. The Appellant denied that any touching took place, and she never made

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a contemporaneous complaint regarding the incident. The testimony of these unimpeached witnesses, which was in direct conflict, was all the direct evidence of an offense having taken place.

At the conclusion of the jury trial that took place on September 12, 2022, the [3]court denied model jury instruction 2.400, circumstantial evidence (R. at 677, L.22 – R. at 682, L. 25). Appellant's counsel stated that the instruction was a proper statement of the law and it related to evidence in the case (R. at 677, L.22 – R. at 682, L. 25). Counsel for the Appellant also argued that the Commonwealth relied on circumstantial evidence to support its case and that the Commonwealth even called witnesses to establish circumstantial issues, including the police officers leaving a message hanging from the door at the Appellant's home (R. at 593, L. 14 – R. at 613, L. 6). With no evidence of the receipt of the message, the Commonwealth argued that someone should have called the police back. The evidence of the door message was not the only circumstantial evidence. The reporting of the allegations by the Complainant to a relative four months after the event (R. at 293, L. 25 – R. at 294, L. 1) was offered as circumstantial proof of their occurrence. The contention that a forensic conducted several months after the incident (R. at 392, L. 16 – R. at 393, L. 3, R. at 430, L. 23 – R. at 431, L. 11) after the incident showed the Complainant's physical condition on the date of the incident was offered as further circumstantial proof of an offense being committed. After hearing arguments from both parties in the case, the Court denied including model jury instruction 2.400.

*Appendix E***[4]ASSIGNMENT OF ERROR**

- I. The trial court erred by refusing the Circumstantial Evidence instruction when it is a model jury instruction and when it directly related to evidence and issues in the case and is a proper statement of the law, the Court of Appeals erred by affirming the decision of the Circuit Court and by their holding on each point that they cited in support of their decision to affirm.**

(Objection preserved on R. at 678, L. 9-25, R. at 679, L. 1-5, R. at 677, L.22 – R. at 682, L. 25).

STANDARD OF REVIEW

When reviewing a Trial Court's refusal to give a proffered jury instruction, the court views the evidence in the light most favorable to the proponent of the instruction. *Commonwealth v. Vaughn*, 263 Va. 31, 33, 557 S.E.2d 220, 221 (2002), *Edwards v. Commonwealth*, 65 Va. App. 655, 659 (Va. Ct. App. 2015), while considering the Trial Court's ruling with an abuse of discretion standard of review. *Gaines v. Commonwealth*, 39 Va. App. 562, 567, 574 S.E.2d 775, 778 (2003) (*en banc*).

ARGUMENT

The Circuit Court and the Court of Appeals erred in each of their holdings in support of not giving the circumstantial jury instruction. There are certain foundational instructions which are a part of nearly every

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jury trial in Virginia. The credibility of the witness is an instruction which is proper in every case. A finding [5]instruction is needed in every case. Similarly, a jury needs to know how evidence should be viewed with respect to the findings that they must make. The jury needs to know, for instance, if they must accept the statement of a witness as true, or if they can consider evidence that impeaches witness testimony. They must also know the manner in which they can accept or reject testimony. The use of circumstantial evidence, when it is presented at all in a case, needs to be explained to a jury so that the jury can understand and properly use that type of evidence.

Circumstantial evidence attempts to introduce facts from which an inference may be drawn as to the truth of a disputed fact. *Munger v. Cox*, 146 Va. 574, 131 S.E. 841, (1926). In allowing evidence to be presented to a jury the better view is not how little, but how much evidence is admissible. *Hines v. Commonwealth*, 136 Va. 728, 117 S.E.843 (1923). The weight to be given circumstantial evidence is for the jury. *Rees v. Commonwealth*, 203 Va. 850, 127 S.E. 2d 406 (1962). Since one can never know the value to the jury of a particular piece of circumstantial evidence, and since that evidence could tip the burden of proof in favor of a party, an instruction regarding the use of circumstantial proof is a necessity.

The form and wording of the circumstantial evidence instruction that was offered in this case is not in question as it is a Virginia Model Jury Instruction that has been approved on many occasions by Courts throughout the Commonwealth. As such the law is clearly stated in the

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instruction and the instruction covers all [6]issues which the evidence in the present case fairly raised. *Cain v. Lee*, 290 Va. 129, 134, 772 S.E. 2d 894, 896 (2015).

In a criminal case when an instruction is offered on a principle of law that is vital to a defendant, a Trial Court has an affirmative duty to instruct the jury on that matter. *Commonwealth v. Jimenez*, 241 Va. 244, 402 S.E. 2d 678 (1991). In the present case, at a minimum, the Commonwealth relied on circumstantial evidence by asking questions about a card left on the door at the Appellant's parent's house, asked the jury to conclude that he received the card, and argued that his failure to call the Sheriff's Department thereafter was evidence of his desire to evade responsibility for his actions. The Commonwealth also asked the jury to consider the Complainant's report of the incident made well after the alleged incident as corroboration of the prior event. The Commonwealth further asked the jury to consider that the physical findings from the forensic test, taken after the alleged conduct, were present immediately after the alleged event and were caused by the event. The jury is entitled to weigh that report and its timely or untimely nature. The offering of this evidence, together with other circumstantial evidence in the case, demonstrates the need for the jury to be instructed on the proper use of circumstantial evidence in their deliberations. A Trial Court should instruct the jury on all principles of law applicable to the pleadings and the evidence. *Dowdy v. Commonwealth*, 220 Va. 114, 255 S.E. 2d 506 (1979). The [7]door handle note is circumstantial in two ways. The first circumstance is the jury must conclude that the message

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left on the door was still there when Appellant returned home, and the second circumstance is that Appellant chose not to act on the message upon seeing it.

The jury instructions must cover “all” the issues which the evidence fairly raises as acknowledged by the Court of Appeals. Because the Commonwealth relied upon circumstantial evidence in combination with direct evidence in this case, and because Virginia Law requires such an instruction, a jury instruction on circumstantial evidence should have been given to fully inform the jury of the law.

Each State and the Federal government have their own concept of what constitutes a fully and fairly informed jury. In Virginia the circumstantial evidence model jury instruction is intended to show that the reliance on the inference allowed by circumstantial evidence is subject to rules that ensure that circumstantial evidence which requires other evidence to prove a point is recognized as being different from direct evidence which can simply be believed or disbelieved to establish a point. The circumstantial jury instruction necessarily reinforces the caution that must be given when you rely on circumstantial evidence and a jury is not fully instructed and informed without this instruction.

The United States courts do not have the same relevant holdings from prior courts such as *Dowdy v. Commonwealth*, 220 Va. 114, 255 S.E. 2d 506 (1979), [8]which require instruction on all principles of law applicable to the evidence. Such decisions on instructions

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are viewed in the light most favorable to the proponent of the instructions in Virginia. *Cooper v. Commonwealth*, 277 Va. 377, 381 (2009). No reference in *Holland v. United States*, 348 U.C. 121, 139 (1954) which is cited by the Court of Appeals addresses Virginia Law, or the complete language included in the Virginia model instruction or model instructions in general. *Holland* apparently does not involve a detailed instruction like the Virginia Model Instruction with the offered instruction in *Holland* merely stating that where the government offers circumstantial evidence it must be such as to exclude every reasonable hypothesis other than that of guilt. *Holland* did not address the evidence as a whole, how circumstances must be consistent with guilt and inconsistent with innocence, or suspicion and probability of guilt. Such an incomplete instruction cannot fairly be said to be the equal of the Virginia Model Instruction on circumstantial evidence. Nor should an incomplete instruction be the basis for abandoning many years of Virginia Law and erasing a circumstantial instruction that is likely given in the majority of cases in Virginia.

The Virginia cases which were relied upon to support the refusal of the circumstantial instruction are *Stewart v. Commonwealth*, 10 Va. App. 563, 570 (1990) which held that the circumstantial instruction did not relate to the specific evidence in the case, *Johnson v. Commonwealth*, 2 Va. App. 598 (1986) where the [9]jury, unlike the present case, was instructed on the requirement that all inferences which might be drawn from the circumstantial evidence must be consistent with guilt and inconsistent with innocence, *Johnson* p. 605, and *Pease v. Commonwealth*,

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39 Va. App. 342 (2002) which involved a detailed discussion of the “reasonable hypothesis of innocence” but did not address whether a circumstantial evidence instruction should be given. In the context of the discussion in *Pease* a circumstantial evidence instruction was likely given.

The present case boils down to directly contradictory testimony about touching between the Defendant and his accuser. A Court should not debate giving the circumstantial evidence instruction by calculating the volume of circumstantial evidence which exists in a case, but by evaluating whether circumstantial proof affects important issues or the credibility of a witness. The Appellant and the Complainant are both unimpeached and could be considered in equipoise. *Feigley v. Commonwealth*, 16 Va. App. 717, 432, S.E. 2d 520 (1993). The leaving of the note, the belated reporting of a touching, and the inference about the small irregularity in her vaginal area all require the application of circumstantial proof. In a case where the evidentiary balance will be shifted one way or another by circumstantial evidence since the direct evidence is apparently deadlocked, a complete and thorough explanation is required. The model instruction is a correct statement of the law, and the Appellant is entitled to such an instruction.

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[10]CONCLUSION

Years of Virginia trial practice have supported the Virginia circumstantial evidence instruction. When a jury must consider circumstantial evidence in a case on vital elements of proof, a circumstantial evidence instruction should be given.

For the reasons stated herein the Appellant, Robert Lee Webb, respectfully submits that the Trial Court erred and respectfully requests that the court grant his Petition for Appeal and that the Appellant be awarded a new trial or in the alternative dismiss the case.

The Appellant wishes to appear in person and orally state his position in this matter.

Respectfully submitted,
ROBERT LEE WEBB

By /s/
Counsel

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Appendix E

[11]CERTIFICATE

I, Joseph A. Sanzone, counsel for Appellant, Robert Lee Webb, wish to state orally the reasons his conviction should be reversed and certify that a true copy of the foregoing Petition for Appeal is in compliance with Rule 5A: 19(f); that electronic copies of the Petition for Appeal has been filed, via VACES and sent to counsel for the Appellee. This foregoing brief has a count of 2,363 words.

/s/
Joseph A. Sanzone
Counsel for Appellant

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**APPENDIX F — OPENING BRIEF OF APPELLANT,
IN THE COURT OF APPEAL OF VIRGINIA,
AT RICHMOND**

**IN THE COURT OF APPEAL OF VIRGINIA
AT RICHMOND**

RECORD NO.: 0154-23-3

ROBERT LEE WEBB

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

OPENING BRIEF OF APPELLANT

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[TABLES INTENTIONALLY OMITTED]

Appendix F

[1]IN THE COURT OF APPEALS OF VIRGINIA
AT RICHMOND

RECORD NO. 0154-23-3

ROBERT LEE WEBB

Appellant

vs.

COMMONWEALTH OF VIRGINIA,

Appellee

OPENING BRIEF OF APPELLANT

TO THE HONORABLE CHIEF JUSTICE
AND THE JUSTICES OF THE
COURT OF APPEALS OF VIRGINIA

This appeal is taken from Appellant Webb's conviction in the Circuit Court for the County of Pittsylvania, Virginia, for one count of Aggravated Sexual Battery. Webb timely noted his appeal to this Court pursuant to the Rules of the Virginia Supreme Court.

All references herein to the record in this case are made to the April 26, 2022, September 1, 2022, September 12, 2022, and January 24, 2023, trial transcripts filed as part of the record. References to the transcripts of proceedings are designated as (T1. p. __), (T2. p. __), (T3. p. __), (T4. p. __), respectively.

*Appendix F***NATURE OF THE CASE AND
MATERIAL PROCEEDINGS**

On September 12, 2022, the Appellant was tried by a jury in Pittsylvania County Circuit Court. The Honorable Stacey W. Moreau presided, and the jury found the [2] Appellant guilty of one count Aggravated Sexual Battery. He was subsequently sentenced on January 24, 2023, to incarceration for eight (8) years with four (4) years and eight (8) months suspended, and a fine in the amount of \$1,631.00 to be paid at \$50.00 per month. Appellant was also ordered to be of good behavior for four (4) years and eight (8) months and to register with the Department of State Police for inclusion in the Sex Offender and Crimes Against Minors Registry.

STATEMENT OF FACTS

The appellant lives near Danville, Virginia with his younger brothers and parents. While a female relative visited his home for the evening, there was an allegation that the appellant touched his female relative. The Appellant denied that any touching took place, and she never made a contemporaneous complaint regarding the incident. At the conclusion of the jury trial that took place on September 12, 2022, the court denied model jury instruction 2.400, circumstantial evidence (T3. p. 527). Appellant's counsel stated that the instruction was a proper statement of the law and it related to evidence in the case (T3. p. 527). Counsel for the Appellant also argued that the Commonwealth called witnesses to establish circumstantial issues, including the police

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officers leaving a message hanging from the door at the Appellant's home. With no evidence of the receipt of the message, the Commonwealth argued that someone should have called the police back. (T3. p. 527). The evidence of the door message was not the only circumstantial evidence and is circumstantial in two ways. The first being that the message left on the door was still there when Appellant returned home and the second being that Appellant chose not to act on the message upon seeing it. After hearing [3] argument from both parties in the case, the Court denied including the model jury instruction 2.400 (T3. p. 531).

ASSIGNMENT OF ERROR

- 1. The trial court erred by refusing the Circumstantial Evidence instruction when it is a model jury instruction and when it directly related to evidence and issues in the case, and is a proper statement of the law.**

(Objection preserved on pg. 527, lines 9-25, pg. 528, lines 1-5 of the September 12, 2022 transcript.)

STANDARD OF REVIEW

When reviewing a trial court's refusal to give a proffered jury instruction, the court views the evidence in the light most favorable to the proponent of the instruction. *Commonwealth v. Vaughn*, 263 Va. 31, 33, 557 S.E.2d 220, 221 (2002). *Edwards v. Commonwealth*, 65 Va. App. 655, 659 (Va. Ct. App. 2015), while considering the trial court's ruling with an abuse of discretion standard of

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review. *Gaines v. Commonwealth*, 39 Va.App. 562, 567, 574 S.E.2d 775, 778 (2003) (*en banc*).

AUTHORITIES AND ARGUMENT

There are certain foundational instructions which are a part of nearly every jury trial. The credibility of the witness is an instruction which is proper in every case. A finding instruction is needed in every case. Similarly, a jury needs to know how [4]evidence should be viewed with respect to the findings that they must make. The jury needs to know, for instance, if they must accept the statement of a witness as true, or if they can consider evidence that impeaches witness testimony and the manner in which they can accept or reject such testimony. The use of circumstantial evidence, when it is presented at all in a case, needs to be explained to a jury so that the jury can understand and properly use that type of evidence.

Circumstantial evidence attempts to introduce facts from which an inference may be drawn as to the truth of a disputed fact. *Munger v. Cox*, 146 Va. 574, 131 S.E. 841, (1926). In allowing evidence to be presented to a jury the better view is not how little, but how much evidence is admissible. *Hines v. Commonwealth*, 136 Va. 728, 117 S.E.843 (1923). The weight to be given circumstantial evidence is for the jury. *Rees v. Commonwealth*, 203 Va. 850, 127 S.E. 2d 406 (1962). Since one can never know the value of a particular piece of circumstantial evidence, and since that evidence could tip the burden of proof in favor of a party, an instruction regarding the use of circumstantial proof is a necessity.

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The form and wording of the circumstantial evidence instruction that was offered in this case is not in question as it is a Virginia Model Jury Instruction that has been approved on many occasions by Circuit Courts throughout the Commonwealth. As such the law is clearly stated in the instruction and the instruction covers all issues which the evidence in the present case fairly raised. *Cain v. Lee*, 290 Va. 129, 134 772 S.E.2d 894, 896 (2015).

In a criminal case when an instruction is offered on a principle of law that is vital to a defendant, a trial court has an affirmative duty to instruct the jury on that matter.

[5] *Commonwealth v. Jimenez*, 241 Va. 244, 402 S.E.2d 678 (1991). In the present case, at a minimum, the Commonwealth asked questions about a card left on the door at the defendant's parent's house, asked the jury to conclude that he received the card, and argued that his failure to call the Sheriff's Department thereafter was evidence of his desire to evade responsibility for his actions. The offering of this evidence, together with other circumstantial evidence in the case, demonstrates the need for the jury to be instructed on the proper use of circumstantial evidence in their deliberations. A Trial Court should instruct the jury on all principles of law applicable to the pleadings and the evidence. *Dowdy v. Commonwealth*, 220 Va. 114, 255 S.E. 2d 506 (1979).

Because the Commonwealth relied upon circumstantial evidence in combination with direct evidence in this case a jury instruction on circumstantial evidence should have been given.

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CONCLUSION

For the reasons stated herein the Appellant, Robert Lee Webb, respectfully submits that the trial court erred and respectfully requests that the court grant his petition for appeal and that the Appellant be awarded a new trial or in the alternative dismiss the case.

The appellant wishes to appear in person and orally state his position in this matter.

Respectfully submitted,

ROBERT LEE WEBB

By /s/
Counsel

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CERTIFICATE

I, Joseph A. Sanzone, counsel for Appellant, Robert Lee Webb, wish to state orally the reasons his conviction should be reversed and certify that a true copy of the foregoing Opening Brief is in compliance with Rule 5A:19(f); that electronic copies of the Brief of Appellant has been filed, via VACES and sent to counsel for the Appellee. This foregoing brief has a count of 1,241 words.

/s/

Joseph A. Sanzone
Counsel for Appellant