

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 12th day of August, 2021.

PRESENT: All the Justices

Samuel Leon Burgess,

Appellant,

against Record No. 200825
Court of Appeals No. 1270-19-1

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 reversible error in the judgment of the Court of Appeals of Virginia.

I.

Samuel Leon Burgess (“Burgess”) was arrested for several theft and false pretenses offenses alleged to have occurred in the City of Virginia Beach between August 1, 2017, and August 31, 2017. The general district court scheduled a preliminary hearing for April 6, 2018. Although Burgess was present in the courthouse on the day of the hearing, “when the case was called, [Burgess] was nowhere to be found.”

On April 16, 2018, a grand jury issued direct indictments of Burgess. First, the grand jury indicted Burgess for failure to appear on April 6, 2018, in violation of Code § 19.2-128(B). Second, Burgess was indicted for the underlying offenses of grand larceny, larceny with intent to sell or distribute stolen property, felony obtaining money by false pretenses, and misdemeanor obtaining money by false pretenses. Burgess’ trial was scheduled for June 12, 2018, in the Circuit Court of the City of Virginia Beach (“trial court”). On June 12, 2018, the trial court granted Burgess’ motion for a continuance and moved the trial date to August 6, 2018.

Burgess did not appear in court for the trial date on August 6, 2018. On August 20, 2018, a grand jury indicted Burgess for failure to appear on August 6, 2018, in violation of Code § 19.2-128(B).

The trial court held a bench trial on all charges on February 6, 2019. The Commonwealth introduced evidence related to Burgess' absences on April 6, 2018, and August 6, 2018. First, Detective Benjamin Rivera ("Detective Rivera") testified that Burgess was initially present in the courtroom on April 6, 2018, but the court was "unable to locate [him]" when his case was called. Next, Detective Rivera testified that Burgess "was not" present on the day of his August 6, 2018 trial. The Commonwealth did not present any other evidence of Burgess' failure to appear on August 6, 2018. At the close of the Commonwealth's evidence, Burgess moved to strike the evidence of the several theft and false pretenses offenses as insufficient. The trial court overruled his motion to strike. Burgess then did not present any evidence. He proceeded with his closing argument in which he renewed his motion to strike the evidence as insufficient. Regarding the failure to appear on August 6, 2018, Burgess raised the following issue:

I think we are at the trial on the failures to appear . . . We haven't had any evidence with regard to the August 6th, 2018 charge that Mr. Burgess was provided notice to be in court that particular day, so I'd ask the court to dismiss the charges on those bases.

The Commonwealth responded:

[W]e know that we were all here for trial and he was not on August 6th, 2018 and the defendant had – his own attorney had requested a continuance for his own reasons. The court can look at its own file and see that, that the trial date was set. Everybody was here present, ready to go.

In response, Burgess asserted that although the information "may be in the court's record . . . it's not evidence for today's purposes," because it was not submitted at trial as evidence of Burgess' failure to appear on August 6, 2018. The Commonwealth asserted the trial court could "reopen and look at its own file and take judicial notice of its own . . ." At that time, the trial court interrupted, telling the parties to "move along." The trial court found "the evidence sufficient to convict [] Burgess of all the charges," including the failure to appear on August 6, 2018. The trial court did not state the bases for its ruling.

Burgess appealed his convictions to the Court of Appeals. His appeal was granted on an assignment of error that there was insufficient evidence to prove that Burgess “willfully” failed to appear after receiving proper notice of the August 6, 2018 court date.¹

In an unpublished opinion, the Court of Appeals affirmed Burgess’ conviction for failure to appear on August 6, 2018. *Burgess v. Commonwealth*, Record No. 1270-19-1, 2020 WL 2630944 (May 26, 2020). The Court of Appeals held Burgess “waived the right under Rule 5A:18 to challenge the sufficiency of the evidence to prove willfulness in any way other than by notice to him because he did not object *with specificity* on any other basis in the trial court.” *Id.* at *3 (emphasis in original). “[B]ecause the evidence *may* have been sufficient to prove willfulness under some other theory regarding which [Burgess] did not preserve an objection or present an appellate challenge, he has failed to establish that the trial court erred by convicting him.” *Id.* (emphasis in original). The Court of Appeals did not reach the merits of Burgess’ insufficiency argument or determine whether the evidence was sufficient to prove willfulness by alternate means. *Id.* We granted Burgess’ appeal on the following assignments of error:

I. The Court of Appeals erred by affirming appellant’s felony failure to appear conviction on waiver principles.

A. The Court of Appeals erred by finding that Rule 5A:18 barred appellant’s ability to challenge the sufficiency of the evidence to prove willfulness in any way other than by notice to him.

B. The Court of Appeals erred by finding that appellant failed to challenge other grounds besides notice sufficient to prove willfulness.

II. The Court of Appeals erred by failing to rule on the merits of the case where there was insufficient evidence to prove that appellant willfully failed to appear.

II.

“The Court of Appeals’ interpretation of the Rules of this Court . . . presents a question of law that we review *de novo*.” *Maxwell v. Commonwealth*, 287 Va. 258, 264 (2014) (internal quotations omitted). “No ruling of the trial court . . . will be considered as a basis for reversal

¹ Burgess also challenged the sufficiency of the evidence to prove the value of several stolen items and to prove he was the perpetrator of one of the larceny-related offenses. The Court of Appeals denied the appeal as to those assignments of error.

unless an objection was stated with reasonable certainty at the time of the ruling.” Rule 5A:18, *see also* Rule 5:25. This Rule “afford[s] the trial judge an opportunity to rule intelligently on objections.” *Maxwell*, 287 Va. at 264-65. When making an objection, “the parties must inform the [trial] court of the precise points of objection in the minds of counsel,” and make the objection “at a point in the proceeding when the trial court is in a position . . . to consider the asserted error . . . and rectify the effect of the asserted error.” *Id.* at 265 (internal quotation omitted). “A challenge to the sufficiency of the evidence may be preserved for appeal when made in closing argument” in a bench trial. *Commonwealth v. Herring*, 288 Va. 59, 67-68 (2014).

Code § 19.2-128 provides that any person who is charged with a felony offense “who willfully fails to appear before any court as required shall be guilty of a Class 6 felony.” Failure to appear after notice of an appearance date may serve as prima facie evidence of willfulness. *See, e.g., Chavez v. Commonwealth*, 69 Va. App. 149, 159-60 (2018).

During Burgess’ closing argument, he asserted that the Commonwealth had failed to prove that he had received notice of the August 6, 2018 trial date. At trial on February 6, 2019, the Commonwealth only introduced Detective Rivera’s testimony that Burgess was not present on August 6, 2018. The Commonwealth did not otherwise introduce evidence or testimony relating to Burgess’ failure to appear on August 6, 2018. Particularly, the Commonwealth did not adduce any evidence of Burgess’ notice of the August 6, 2018 trial date. Only after Burgess raised the issue did the Commonwealth attempt to secure judicial notice of Burgess’ notice of the August 6, 2018 trial date. Notice is one method by which to prove willfulness. By challenging the sufficiency of the evidence of notice, Burgess challenged the sufficiency of the evidence to prove he willfully failed to appear on August 6, 2018.

In its order, the Court of Appeals noted that there are other means of proving willfulness:

Establishing that a defendant received “timely notice” of a hearing date “is but one mechanism for proving willfulness.” *Id.* at 159-60. Our prior case decisions outline the various ways in which the Commonwealth can prove that a defendant’s failure to appear was willful. *Id.* at 162-63. In addition to actual notice to a defendant combined with his failure to appear, willfulness can be proved “by showing that a defendant purposefully engaged in a course of conduct designed to prevent him from receiving notice to appear.” *Id.* at 162 (citing *Hunter v. Commonwealth*, 15 Va. App. 717, 723 (1993) (*en banc*)). Also, “where a defendant has been given notice

on an original appearance date, [he] ‘is charged with notice of those dates to which his . . . case is expressly continued when such action is duly recorded in [an] order of the court.’” *Id.* (quoting *Hunter*, 15 Va. App. at 722). Further, “if the [defendant’s] attorney had actual notice of the . . . [court] date, the fact finder may infer from that evidence that the [defendant] also had actual notice of the [court] date.” *Id.* at 162-63 (alterations in original) (emphasis added) (quoting *Hunter*, 15 Va. App. at 722). This inference flows from the fact that the “attorney-client relationship presumes that attorney and client, as servant and master, will communicate about all the important stages of the client’s upcoming [court proceedings].” *Id.* at 163 (alteration in original) (quoting *Hunter*, 15 Va. App. at 722).

Burgess, Record No. 1270-19-1, 2020 WL 2630944 at *2. Although notice is not the only means by which the Commonwealth may prove willfulness, the Commonwealth failed to argue any other means of proof at trial. The Commonwealth only presented evidence of Burgess’ absence on August 6, 2018 to prove his failure to appear. The trial court then issued a general verdict without stating the bases of its ruling. Consequently, Burgess’ failure to assign error to each possible basis for the trial court’s ruling was not a waiver of his insufficiency argument based upon lack of notice.

III.

On the issue of judicial notice, we have previously observed:

[while] a trial court need not intone the words “judicial notice” in order to notice a fact, the evidence, the arguments of the parties and the *statements of the trial court must demonstrate clearly* that the trial court has taken judicial notice of the fact before a party may rely upon such notice on appeal.

Williams v. Commonwealth, 289 Va. 326, 333-34 (2015) (quoting *Edmonds v. Commonwealth*, 43 Va. App. 197, 201 (2004)). When a trial court “denie[s] the motion to strike the evidence . . . without commenting on the issue of judicial notice,” this Court is “unable to discern whether the trial court decided to take judicial notice . . . or simply accepted the Commonwealth’s sufficiency argument . . . based upon the evidence adduced from testimony.” *Id.* at 334. When the trial court does not indicate that it is taking judicial notice, it deprives a party of “the opportunity to object to the trial court’s action or dispute the accuracy of any ‘facts’ noticed prior to the trial court’s ruling” on his motion to strike the evidence. *Id.* at 334-35.

In this case, the trial court responded to the Commonwealth's request that it take judicial notice of Burgess' court records by telling the parties to "move along." This statement of the trial court is insufficient to demonstrate that the trial court took judicial notice of anything. If the trial court intended to take judicial notice with its statement, Burgess was deprived of the opportunity to challenge the judicial notice or the evidence within his court records.

VI.

Burgess did not waive his argument regarding the insufficiency of the evidence to prove he willfully failed to appear on August 6, 2018. Therefore, the Court of Appeals erred in ruling Burgess failed to preserve his argument regarding the insufficiency of the evidence. Moreover, the trial court did not clearly demonstrate that it took judicial notice of its record.

Accordingly, we reverse the judgment of the Court of Appeals affirming Burgess' conviction for failure to appear in violation of Code § 19.2-128(B) and remand to the Court of Appeals for consideration of Burgess' insufficiency claim on the merits.

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

A Copy,

Teste:

A handwritten signature in blue ink, appearing to read "M. M. [unclear] [unclear]".

Acting Clerk