In The
Supreme Court of Virginia

RECORD NO. 101282

WINSTON TYRONE BURTON
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENT

In its Brief, the Commonwealth argues that the evidence adduced at trial proves that the defendant, Winston Burton ("Burton") utilized deception in detaining Ms. Tracy. As a threshold matter, the question arises: what was the ruse at issue? In the light most favorable to the Commonwealth, the purported ruse surrounded an attempt to assist Ms. Tracey with her vehicle. (App. 24-25) The Commonwealth argues that "there was no evidence presented that anything was in fact wrong with Ms. Tracy's brakes at the time or of leaking fluid." (Commonwealth's Brief, p. 18) To be clear, the evidence is entirely absent on this subject. The only testimony that pertained to the brakes was that Ms. Tracy had recently had them repaired. (App. 41) Again, there is no mention as to whether Ms. Tracey's brake repair worked – Ms. Tracy indicates that she believed Burton when he mentioned that there was a brake problem. (App. 41) The Commonwealth also argues that "the defendant never did anything to "fix" them, allegedly the whole point of stopping her." (Commonwealth's Brief, p. 18) Again, this is an entirely speculative statement. The evidence was that the car hood was open; that Ms. Tracy pumped the car brakes; and that Burton looked under the hood and looked at the rear tire. (App. 25, 27, 43) Ms. Tracy was not able to offer any testimony as to what Burton was or was not doing as she was

inside the vehicle. The Commonwealth has failed to rebut the argument in Burton's Opening Brief; i.e. in cases of breaking and entering, the Commonwealth is required to prove the element of a breaking to be found guilty of as in *Lacey v Commonwealth*, 54 VaApp 32, 675 SE2d 846 (2009) and *Finney v. Commonwealth*, 277 Va 83, 671 SE2d 169 (2009) Just as the prosecution bears the burden of proving this element, so too does the prosecution bear the burden of proving "deception." The jury is not entitled to speculate that there "must have been" a ruse. The Commonwealth cannot rely upon conjecture in proving deception under the abduction statute.

The Commonwealth also argues that the defendant was a convicted felon and that the jury was entitled not to believe his testimony. A review of the trial transcript reveals that the defendant's prior record was not introduced into evidence in the guilt phase of the trial; therefore, this argument is without merit. The Commonwealth next argues that Burton had committed "strikingly similar acts involving another young woman in a Maryland parking lot a year earlier." (Brief, p. 19) This argument ignores the fact that this evidence cannot be considered as evidence of defendant's guilt on the underlying abduction charge. The sole purpose of this evidence was on the issue of identity. (App. 265-266) In sum, this is not probative evidence that the jury could consider on the issue of guilt. Given the

standard of appellate review, this Court cannot rely upon this evidence to support a conviction for abduction.

The Commonwealth next argues that Ms. Tracy was detained so that Burton could watch his body movements or have a young woman follow her commands. (Brief, p. 19) One problem with this argument is that the defendant was found not guilty of the charge under 18.2-387.1 of actual or simulated acts of masturbation in a public place.

The Commonwealth argues, inter alia, that *Johnson v. Commonwealth*, 221 VA 872, 275 SE2d 592 (1981) is factually distinguishable from the case at bar. Specifically, the Commonwealth says that "unlike Johnson, the defendant did not immediately let the victim leave when she made known her intent to do so." (Commonwealth's Brief, p. 21) This is an overstatement: Ms. Tracy testified that she left the mall parking lot when she was free to leave (App. 50). At most, the evidence establishes that Ms. Tracy brushed against him – but this does not constitute a detention. (App. 50) This is especially true when no words were used to detain Ms. Tracy when she decided to leave the parking lot.

The Commonwealth maintains that the conviction should be sustained because the jury disbelieved Burton's alibi defense and thus, the jury was free to use this as affirmative evidence of guilt. While it is true that the jury

did not accept the alibi defense, it does not logically follow that the Commonwealth adduced sufficient evidence of deception to establish guilt beyond a reasonable doubt.

The Commonwealth argues that "even if there had been such a [brake] problem, Burton made no effort to actually fix it." (Brief, p. 22) This begs the question: what evidence is there that Burton made no effort to fix it? This is a circumstantial evidence case, and as such, the evidence must be such as to exclude every reasonable hypothesis of guilt. *Coleman v. Commonwealth*, 226 VA 31, 53, 307 SE2d 864, 876 (1983) Frankly, the evidence, when viewed in the light most favorable to Commonwealth, just as likely supports the inference that there was a car problem and that an attempt was made to repair it. Indeed, the car hood was open; Ms. Tracy pumped the brakes; and he was crouched at the rear wheel of the car.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the conviction for abduction be reversed.

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CERTIFICATE OF SERVICE PURSUANT TO RULE 5A:17(e)

The undersigned, Richard J. Link, Esq., hereby certifies that Rule 5:17 has been complied with, and further certifies as follows:

1. The name of the Appellant is Winston Burton.

2. The name, address and telephone number of counsel for the Appellant is: Richard J. Link, 200-A Monroe Street, Suite 330, Rockville, MD 20850 (240) 453-9191.

3. The Appellee is the Commonwealth of Virginia.

4. The name, address and telephone number of counsel for the Appellee is: Richard Smith, Office of the Attorney General, 900 E. Main Street, Richmond, VA 23219.

5. Counsel for the Appellant is privately retained.

6. In accordance with Rule 5:26(d), an original and fifteen (15) copies of this Reply Brief for the Appellant have been hand-delivered to the Clerk of the Supreme Court of Virginia, this 17th day of February, 2011. Three (3) copies of this Reply Brief were hand-delivered to: Richard B. Smith, Office of the Attorney General, 900 E. Main Street, Richmond, VA 23219.

7. I also certify compliance with the word count in that this brief contains 877 words, exclusive of those parts that by Rule do not pertain to the word count.

RICHARD J. LINK