IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 101282

WINSTON TYRONE BURTON

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee

BRIEF FOR THE COMMONWEALTH

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BRIEF FOR THE COMMONWEALTH

This appeal from a judgment of the Court of Appeals challenges the sufficiency of the evidence to sustain the appellant's conviction for abduction under § 18.2-47 of the Code of Virginia.

STATEMENT OF THE CASE

On, January 30, 2009, the Grand Jury for Fairfax County indicted Winston Tyrone Burton, charging in FE-2008-2044 that he had abducted Kathleen Tracy on April 28, 2008, with the intent to deprive her of her

personal liberty, in violation of Code § 18.2-47, and that he that same day had intentionally and obscenely engaged in actual or simulated acts of masturbation in a public place in violation of Code § 18.2-387.1. (App. 1).

The defendant was tried, by a jury, in the Circuit Court of Fairfax County on April 14-15, 2009. The victim identified Burton as the man involved in the incident; for his part, the defendant denied any involvement, claiming that he was working at the time.

The jury found Burton guilty of the abduction, but not guilty of the public obscenity charge. (App. 305-306). The jury fixed his sentence at 4 years in prison. (Tr. April 15, 2009 at 132).

On July 31, 2009, the defense filed a *Motion To Set Aside Verdict* (App. 308), to which the Commonwealth responded on August 11, 2009. (App. 323).

On September 4, 2009, the circuit court heard argument on the defense motion, which the judge denied. (Tr. September 4, 2009 at 16-17). The court then sentenced Burton to serve four years in prison, but suspended 18 months thereof. (App. 347).

Burton noted an appeal to the Court of Appeals in Record No. 2426-09-4. In a *per curiam* order dated March 24, 2010, that court denied the three issues raised by Burton, including his challenge to the sufficiency of the abduction evidence. (App. 349). A three judge panel denied Burton's appeal upon the reasoning of the *per curiam* opinion on June 8, 2010. (App. 355).

Burton appealed to this Court, raising the same issues as in the Court of Appeals. This Court granted him an appeal on November 29, 2010, but limited it to his Assignment of Error No. 1 challenging the sufficiency of the evidence of abduction. (App. 356).

ASSIGNMENT OF ERROR

> "THERE WAS INSUFFICIENT EVIDENCE IN THE RECORD TO FIND [BURTON] GUILTY OF THE CRIME OF ABDUCTION UNDER VIRGINIA CODE § 18.2-47 AND THE TRIAL COURT SHOULD HAVE GRANTED THE DEFENDANT'S MOTION TO STRIKE AND/OR POST-JUDGMENT MOTION TO SET ASIDE THE VERDICT." (APP. 356).

STATEMENT OF FACTS

The Commonwealth's case-in-chief evidence established that Ms. Kathleen Tracy was shopping at the Fair Oaks Mall in Fairfax County on April 28, 2008. She had parked her Honda Civic on the top floor of the parking deck next to Macy's. (App. 22-23).

No one else was walking about when Ms. Tracy got into her car about 1:30 p.m., but a man she had never seen before "approached the passenger side and knocked on the window." (App. 23, 25). Her car did not have power windows, so she interrupted her cell phone conversation, got out of her car, and asked, "What's going on?" (App. 39). The man responded, "'There's a problem with your brakes.'" (App. 39). He told her he "would try to help [her] with it. He said he knew about cars (App. 40) and would try to help [her] with it. He said that there was brake fluid leaking from the wheel of her car." (App. 23-24). When Ms. Tracy did not immediately get off her cell phone, the man said more harshly, "'Are you going to stay on the phone or are you going to listen to what I'm trying to tell you?'" (App. 38).

The man, who Ms. Tracy identified at trial as the defendant Winston Burton (App. 24), was wearing dark clothes that "would reflect that he was a mechanic or something like that," including a dark baseball-type cap with a "W" on it. (App. 25, 54). He told her to "pop the hood" and then had her look at the engine. He pointed and said, "'There's something there,'" but she saw nothing unusual. (App. 24-25). Ms. Tracy, however, explained that, coincidentally, she "had just had the brakes repaired on [her] car so that's why [she] fell into the whole story

about the brakes." Also, she does not "really know much about cars." (App. 41).

Burton then told Tracy that she "would have to get in the car and reach over, lay down, and pull under the passenger seat on the lever" or "cord." (App. 24-25, 42). He told her to "lay across the middle of the car and apply pressure to the passenger seat and…the driver's seat." She complied, but "we just kind of repeatedly went through this where he told [her she] was doing it incorrectly and getting frustrated with [her] and saying that he was just trying to help." The 5'10" tall Tracy (App. 44) was "[c]ompletely laid on [her] stomach across" the car's front seats, with her legs dangling outside the open doorway from her knees down. (App. 25-22, 44).

Burton said he had to check something and moved back to the driver's side rear wheel. He told Ms. Tracy "that [she] needed to apply more pressure to the passenger side, lay harder on it, apply equal weight, move [her] knee up, put it, you know, applying pressure to the driver's side." (App. 26-27). Ms. Tracy thus moved one of her knees into the seat, causing her pants to rise up above her ankles. (App. 44, 52).

Ms. Tracy remained in this position for “five to ten minutes,” until she began to get anxious about the situation with the defendant. (App. 43-44, 53). She thus got out of the vehicle and saw Burton “squatting down at the back wheel” with his legs apart. (App. 29, 53). His whole hand was inside his unzipped pants and he was “definitely” touching his genitals. (App. 29, 53, 64).

The defendant quickly pulled his hand out, and Ms. Tracy said, “Well, okay, you know, I need to leave.” (App. 29). “At that point, [Burton] stepped in front of [her] to kind of block [her] way back into the vehicle” (App. 29, 58), standing within a foot of her. (App. 31). She “just sternly said ‘I need to leave right now’” and then “made a forward motion to get back in the vehicle and [Burton] moved aside,” but she had to brush up against him to get back into her car. (App. 29).

Ms. Tracy then pulled off and saw the defendant walking towards a row of vehicles. (App. 50, 54). She testified that she initially had exited her car because the defendant said he had something to show her under the hood (App. 39) and that she would not have stayed in the parking garage but for his story. (App. 33). A few people had come and gone in the garage during the incident. (App. 23).

There was no evidence that Ms. Tracy had any problem with her brakes after she left the deck. When she arrived at her nearby work place, she called her boyfriend and then the authorities. She estimated the man to have been 5'10" to 6' tall and weighing 200 pounds. (App. 55).

The police showed Ms. Tracy a photo lineup a couple of days later. (App. 56, 66) (Comm. Ex. 2). She testified that "[w]ith the last picture I knew right away" as this photo looked identical to the man. (App. 56-57). Detective Steve Augustine testified that as soon as Ms. Tracy saw the defendant's photograph she said, "'That's him.'" (App. 71).

Detective Augustine interviewed the defendant after he had been arrested. Burton said he worked for Percontee Dump Trucks in Silver Spring, Maryland. (App. 78). He told the officer that "'[i]f I asked her to move her car, there wouldn't have been enough time. There's no way I could make it back [to Silver Spring].'" The officer noted this because he had said nothing to Burton about the perpetrator telling the victim to move her car or about the time involved in the incident. (App. 79).

Burton asked the officer "'if there was semen or fingerprints around the scene.'" When Augustine said, "No," the defendant then said, "'I was not there. I had nothing to do with either.'" (App. 80).

The defense called Burton to testify on his own behalf. The defendant, a convicted felon (App. 196), said he was a dump truck driver who often made runs between Silver Springs, Maryland, and a rock quarry in Chantilly, Virginia, and said he had made two such trips on April 28, 2008. (App. 161-162). Burton denied he was at the Fair Oaks Mall on April 28, 2008, and said he did not approach the victim that day. (App. 174, 188). However, although Burton claimed he had never been to the Fair Oaks Mall (App. 188), he admitted he passed right by that very mall every time he took that route to the quarry. (App. 191).

The defendant's supervisor and a fellow truck driver also testified, but had no specific recollections of April 28, 2008. (App. 130, 155). The defendant's company time sheets for that day, however, showed that Burton left the Chantilly quarry at 7:51 a.m., made the 50-mile return trip to Maryland (App. 110), unloaded his rocks and then drove back to Virginia for his next load, leaving the quarry the second time at 11:59 a.m. (App. 119). Based on his company time sheets, Burton admitted

that he would not have dumped his second load in Maryland that day until "between 2:35, 2:40 [p.m.]." (App. 179).

Burton said he was wearing a black cap with "Percontee White Oak written in front." (App. 168). (Def. Ex. 60).

In rebuttal to the defense evidence, the Commonwealth called Lisa Glenzer. Ms. Glenzer testified that she was walking from her car in a hospital parking lot in Rockville, Maryland, on August 17, 2007, when a man pulled up in a red jeep. (App. 217-218). He "told [her] that [her] brake fluid was leaking and asked if I knew how to fix that." She answered, "No," and he said, "'Well I am a security guard here in the parking lot. I can help you with that." (App. 215). Ms. Glenzer thus walked back to her car and the man drove over and got out of his vehicle. He said his name was "Winston" and his work shirt also said "Winston." (App. 215).

The man told Ms. Glenzer to "pop open" her hood which she did, leaving her door open. "He looked under the hood a little bit and then he came around and told [Ms. Glenzer] to lean underneath the seat, the passenger seat, and pull a wire." (App. 215-216). When she responded that she did not know what wire he was talking about, the man more forcefully repeated his directions. (App. 216). She repeated there was

no wire under the passenger seat that she needed to pull, and he said, "'Okay; well, just pump your brakes.'" Ms. Glenzer did so, he shut the hood and said, "'You're all set,'" and then left. (App. 217).

Ms. Glenzer said she could no longer identify the man, but described him at the time as being a "[b]lack male, about five eleven, heavy set," and wearing a blue work shirt. (App. 217).

Ms. Glenzer told her radiologist what had happened and he accompanied her back to her car. She looked around and saw a red jeep like the one the man was driving. When the jeep stopped, they pulled in behind it and she recognized the driver as being the same man. (App. 218-219).

Ms. Glenzer wrote down the jeep's license tag number. She then called the police, told them what had happened and gave them the tag number. (App. 219).

Montgomery County Officer Robert Johnson ran the Maryland tag number Ms. Glenzer had given him. It came back to a jeep registered to a Silver Spring resident: "Winston Burton." (App. 224-226).[1]

[1] The jury was instructed that Burton's prior acts could be considered only as "evidence of the identity of the person involved in the instant offense and for no other purpose." (App. 265).

ARGUMENT

The defendant was convicted of abducting Ms. Tracy with the intent to deprive her of her personal liberty in violation of Code § 18.2-47. (App. 1, 305). That statute, in pertinent part, makes it a Class 5 felony when:

> Any person who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes another person with the intent to deprive such other person of [her] personal liberty…shall be deemed guilty of abduction. (Parts A and C).

Code § 18.2-47 also states that "[t]he terms 'abduction' and 'kidnapping' shall be synonymous in this Code." Id.

There is no contest on appeal that the incident did not take place as described by Ms. Tracy or that the defendant was not the man involved. However, Burton still contends, as he did in the circuit court and Court of Appeals, that the evidence was insufficient to convict him because it supposedly failed to prove "deception," the "intent to deprive Tracy of her personal liberty" and that "Tracy was detained." (Def. Br. 19, 20, 22). All his arguments are without merit, however, and the evidence was sufficient to sustain his § 18.2-47 conviction under the appropriate standard of review.

STANDARD OF REVIEW

"An appellate court does not 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' Rather, the relevant question is whether '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Williams v. Commonwealth, 278 Va. 190, 193, 677 S.E.2d 280, 282 (2009) (quoting Jackson v. Virginia, 443 U.S. 307, 318-319 (1979)) (emphasis in original).

Thus, when addressing a claim on appeal that the evidence is insufficient, the appellate court considers the evidence and all inferences fairly deducible therefrom in the light most favorable to the prevailing party at trial, *i.e.*, here the Commonwealth. Commonwealth v. Hudson, 265 Va. 505, 514, 578 S.E.2d 781, 786 (2003). This controlling principle requires an appellate court 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." Parks v. Commonwealth, 221 Va. 492, 498, 270 S.E.2d 755, 759 (1980).

"[C]ircumstantial evidence is as competent and is entitled to as much weight as direct evidence. . . ," Coleman v. Commonwealth, 226

Va. 31, 53, 307 S.E.2d 864, 876 (1983), and the inferences to be drawn from such evidence are solely for the fact finder. LaPrade v. Commonwealth, 191 Va. 410, 418, 61 S.E.2d 313, 316 (1950).

While it has been said that, "'where the evidence is circumstantial, 'all necessary circumstances must be consistent with guilt and inconsistent with innocence and exclude every reasonable hypothesis of innocence,'" Stover v. Commonwealth, 222 Va. 618, 623, 283 S.E.2d 194, 196 (1981) (citation omitted), this "is simply another way of stating that the Commonwealth has the burden of proof beyond a reasonable doubt." Hudson, 265 Va. at 513, 578 S.E.2d at 785. In any event, the Commonwealth's case was not grounded on ***wholly*** circumstantial evidence, so the "every hypothesis of innocence" requirement does not apply here. See, e.g., Rogers v. Commonwealth, 242 Va. 307, 317, 410 S.E.2d 621, 627 (1991) ("[W]hen the evidence is wholly circumstantial..., 'all necessary circumstances proved must be consistent with guilt and inconsistent with innocence and exclude every reasonable hypothesis of innocence."). Beavers v. Commonwealth, 245 Va. 268, 281, 427 S.E.2d 411, 420 (1993) (rejecting Beaver's reliance on "reasonable hypothesis of innocence" rule even though evidence of intent was "wholly

circumstantial" because "both the *corpus delecti* and criminal agency were established by direct evidence.").

Because the trier of fact "is in a unique position to evaluate the demeanor of the witnesses," Sapp v. Commonwealth, 263 Va. 415, 427, 559 S.E.2d 645, 651 (2002), it is their province, not an appellate court's, to judge witness credibility. Commonwealth v. Presley, 256 Va. 465, 470, 507 S.E.2d 72, 75 (1998). Burton was a convicted felon, so the fact finder could consider this in assessing his credibility. See Code § 19.2-269. The weight given the determination of witness credibility is the same whether it was a bench or jury trial. Evans v. Commonwealth, 215 Va. 609, 613, 212 S.E.2d 268, 271 (1975).

Finally, Code § 8.01-680 mandates that, on appeal, "the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it." And, "[w]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. Anderson v. Bessemer City, 470 U.S. 564, 574 (1985).[2]

[2] The "plainly wrong" and "clearly erroneous" standards typically are treated as being synonymous. See, e.g., Jones v. United States, 828 A.2d 169, 174 (D.C. Cir. 2003).

ABDUCTION

The defendant was indicted with abducting Ms. Tracy with the intent to deprive her of her personal liberty. (App. 1). Defense counsel conceded at the close of the Commonwealth's case-in-chief that "[i]t is clear from the evidence that the Commonwealth intends for this Court to believe that Mr. Burton by way of deception did detain the complaining witness with the intent to deprive her of her personal liberty." (App. 93).

This Court held in Scott v. Commonwealth, 223 Va. 519, 323 S.E.2d 572 (1986), that Code § 18.2-47 changed the common-law rule so that an abduction charge can now be sustained by proof of detention alone, without any asportation. Id. at 526, 323 S.E.2d at 576. The duration of the detention usually comes into play only in an "incidental detention" case, i.e., where the defendant is convicted of abduction by detention and a crime always involving some inherent restraint such as rape. See Walker v. Commonwealth, 272 Va. 511, 515-16, 636 S.E.2d 476, 478-79 (2006). Here, "[s]ince [the defendant] was only convicted of one crime, abduction, the incidental concept has no application in the case at bar." Id.

The specific intent required for an abduction and conviction under Code § 18.2-47 can be either intent to defile or deprive of personal

liberty, the one involved here. Thus, "[a] defendant could abduct with intent to deprive a victim of personal liberty, without having any intention of defiling that person." McKinley v. Commonwealth, 217 Va. 1, 4, 225 S.E.2d 352, 353 (1976).

"Intent in fact is the purpose formed in the person's mind and may be, and frequently is, shown by circumstances. It is a state of mind which may be shown by a person's conduct or his statements." Hargrave v. Commonwealth, 214 Va. 436, 437, 201 S.E.2d 597, 598 (1974). "The question of [the defendant's] intent must be determined from the outward manifestation of his actions leading to usual and natural results under the peculiar facts and circumstances disclosed." Ingram v. Commonwealth, 192 Va. 794, 801-02, 66 S.E.2d 846, 849 (1951). And, "[t]he determination [of intent] presents a factual question which lies peculiarly within the province of the [fact finder]." Id.

With respect to the "deception" element of the crime, the Court of Appeals of New Mexico has considered its meaning in the context of that State's kidnapping statute, which crime, like our Code § 18.2-47, can be accomplished by deception without any force or threat. As the Court explained:

> "Deception" is the act of deceiving; the intentional misleading of another by actions or falsehood. See State v. Colbert, 557 P.2d 1235 (Kan. 1976); State v. Dalton, 298 N.W.2d 398 (Wis. App. 1980); see also Everett v. Gilliland, 141 P.2d 326 (N.M. 1943). "Deceit" is any trick, collusion, contrivance, false representation, or underhanded practice, used to defraud another; to "deceive," i.e., "deception," is to take unawares, ensnare, mislead, delude or practice deceit. *Webster's Third New International Dictionary* (1969).[3]
>
> The word deception as employed in § 30-4-1. . . necessarily implies that the victim be unaware that she was being kidnapped. Colbert, supra. As observed in State v. Dalton, supra, in kidnapping by deception, the "[o]ccasion for exercise of free will or choice [of the victim] will not ordinarily arise, and the induced travel from one place to another will usually appear consensual, if the deceit is successful." The term "deception," as employed in our kidnapping statute, embodies either affirmative acts intended to delude a victim or omissions that conceal the intent and purpose of an accused. See State v. Stettheimer, 607 P.2d 1167 (N.M. App. 1980).

State v. Garcia, 666 P.2d 1267, 1271 (N.M. App. 1983). In addition, the Garcia Court also stated:

> Proof of the victim's state of mind is not essential to prove kidnapping by deception. Circumstantial evidence indicating that defendant kidnapped the victim by deception may properly serve as a basis for an inference of fact essential to the offence. It is not an essential element of kidnapping by deception that the victim knew that she was being kidnapped.

Id. at 1272.

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[3] "Deception" is also defined as the act of "hoodwinking, misleading or deluding." *Webster's Third New International Dictionary* 585 (1981).

THE EVIDENCE WAS SUFFICIENT

The Court of Appeals concluded that the evidence was sufficient to convict Burton of abduction in violation of Code § 18.2-47. (App. 350, 355). The Court of Appeals was correct.

The evidence in the case at bar, viewed under the applicable standard of review, showed that the victim was leaving an almost deserted parking deck when the defendant approached her car. He told her something was wrong with her car, that brake fluid was leaking from a wheel, that he knew about cars and that he would help her fix the problem. In response to these claims, Ms. Tracy stopped and hung up her cell phone as the defendant demanded.

There was no evidence presented that anything was in fact wrong with Ms. Tracy's brakes at the time or of leaking brake fluid. To the contrary, she testified that they had recently been repaired. And, of course, the defendant never did anything to "fix" them, allegedly the whole point of stopping her.

The defendant squatted down next to the rear tire and placed his hand inside his pants while keeping Ms. Tracy's legs in view. He then orchestrated her machinations in the front seats by telling her she

needed to pull on a wire under the passenger's seat while also pushing on the brakes.

Ms. Tracy finally figured out that something was not right about the situation and got out, at which point she saw that the defendant's hand was hand inside his pants touching his genitals. When she told the defendant she was leaving, he did not just let her go; he jumped up and blocked her way back into her car by standing between her and the door, not relenting until she repeated herself more sternly.

The defendant, a convicted felon, claimed he was not the man. However, besides the victim identifying him, the evidence showed that his job as a Maryland truck driver took him by this same mall twice that day, the second time being in the same time frame as the incident with Ms. Tracy. In addition, he had been identified as the man who had committed strikingly similar acts involving another young woman in a Maryland parking lot a year earlier.

From the evidence, the jury could infer that the defendant intended to keep Ms. Tracy detained so he could watch her body movements while he "touched" himself. It also could infer that he did so to, in his mind, exercise control over a young woman by having her follow his commands. "Even though the prosecution is not required to prove

motive," it is "relevant to establish a defendant's intent." Payne v. Commonwealth, 233 Va. 460, 465, 357 S.E.2d 500, 503 (1987).

Consistent with these inferences, the jury also could conclude that the defendant lied to Ms. Tracy about her car's alleged "problem" because he believed this deception was the easiest way to obtain his desired ends, perhaps the only way, without having to exercise actual force.

In addition, since the jury obviously concluded that Burton was lying about being elsewhere and not involved, it could "infer that he [was] trying to conceal his guilt." Black v. Commonwealth, 222 Va. 838, 842, 284 S.E.2d 608, 610 (1981). Indeed, if a jury does disbelieve a defendant, it is "further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt." Wright v. West, 505 U.S. 277, 296 (1992) (citations omitted) (applying Virginia law in sufficiency case). See Carter v. Commonwealth, 233 Va. 328, 332, 290 S.E.2d 865, 867 (1982) (same).

"The fact that the victim did not know that she was being restrained is of no consequence. The word 'deception' as used in [the kidnapping statute] implies the victim did not know she was being restrained. It is the intent of the accused which the state has to prove,

not that of the victim." State v. Smith, 502 A.2d 874, 878 (Conn. 1984) (finding evidence sufficient to prove kidnapping by deception).

The defendant relies on Johnson v. Commonwealth, 221 Va. 872, 275 S.E.2d 592 (1981), to support his insufficiency argument, but his reliance is misplaced. In Johnson, this Court reversed the abduction conviction because the evidence did not support a finding that the defendant either intended to defile the victim or to deprive her of her personal liberty. Rather, the evidence showed that he intended to persuade her to engage in consensual sexual intercourse. Id. at 879, 275 S.E.2d at 596-97. Johnson is distinguishable from the facts of the present case where the evidence did not support any intent other than to deprive Ms. Tracy of personal liberty. Moreover, unlike Johnson, the defendant did not immediately let the victim leave when she made known her intent to do so. Instead, when Ms. Stacy said she was leaving, Burton moved to place himself between her and her car door until she repeated herself more strongly.

The defendant, of course, suggests that "the facts…could just as likely support a claim that the defendant had the intention to help [the victim] with her vehicle's brake problem, which vitiates the intent element." (Def. Br. 22). What "brake problem"? There was no evidence

that one actually existed. Indeed, the victim testified her brakes had just recently been repaired. Even if there really had been such a problem, Burton made no effort to actually "fix" it. In any event, Burton's contention is akin to the Court of Appeals' statement in Commonwealth v. Hudson that "there is some evidence that [the victim] may have fatally fired the gun." This Court, however, held that this reliance on this assertion was "manifest" error because it "viewed the evidence in the light most favorable to [the defendant] rather than to the Commonwealth as required." 265 Va. at 513-14, 578 S.E.2d at 785-86.

A "*reasonable* hypothesis of innocence [must] flow from the evidence itself, and not from the imagination of [a] defendant's counsel." Tyler v. Commonwealth, 254 Va.162, 166, 487 S.E.2d 221, 223 (1997) (emphasis in original) (citations omitted). "[E]ven if defendant's story was not inherently incredible, the trier of fact need not have believed the explanation." Montgomery v. Commonwealth, 221 Va. 188, 190, 269 S.E.2d 352, 353 (1980).

In this case, the "hypothesis of innocence" proffered by Burton is based on statements by him which the jury clearly found to be untrue. In Fox v. Commonwealth, 207 Va. 701, 152 S.E.2d 60 (1967), this Court considered the sufficiency of the evidence to prove the defendant had

falsified DMV documents. Although Fox had given an innocent explanation for his actions, this Court noted that "[t]he only evidence [supporting his theory of innocence] was the testimony of the defendant, which the [trier of fact] found to be untrue." Id. at 704, 152 S.E.2d at 64. Accordingly, the evidence was held to be sufficient. Id.

There are numerous cases involving abduction or kidnapping by deception which support the sufficiency of the evidence in this case.[4] In Jerman v. Director, 267 Va. 432, 593 S.E.2d 255 (2004), this Court described the "first abduction" in that case as having occurred when the defendant's cohort, Panko, "picked [the victim] up and drove him to her house on the pre-text that some of her friends were there and they 'all wanted to trip.'" Because Panko "did not disclose to [the victim] the fact that Jerman, Bohn, and Joe were awaiting him with baseball bats," the court held that "abduction was accomplished…by deception, which is proscribed by Code § 18.2-47." Id. at 439, 593 S.E.2d at 259 (involving abduction through asportation).

In State v. Garcia, supra, the evidence showed that the three-year-old victim was seen riding happily on the defendant's shoulders as he

[4] Many of these cases involve asportation rather than just detention or both detention and asportation, but that does not detract from their relevance vis-à-vis the issues of "deception," "detention" or "intent."

carried her towards an arroyo; when the child was next seen she was crying and had blood in her pants; the defendant tried to flee when approached by the police; and, blood was found on the inside of his pants leg. On appeal, Garcia "argue[d] there was no evidence that the victim was in fact deceived and without evidence as to the victim's state of mind, no deception can be proven." However, the New Mexico Court of Appeals disagreed, holding that it could be inferred from the evidence that the child had been deceived into going with Garcia and that, as discussed previously herein, it was not necessary to prove her state of mind. 666 P.2d at 1271-72.

In Commonwealth v. Shank, 883 A.2d 658 (Pa. Super. 2005), the defendant had his female friend, Shannon Dodson, lure the intended victim out of a pool hall so Shank and his cohorts could assault and rob him. On appeal, "Shank contend[ed] that the evidence failed to establish his guilt [of kidnapping] because the ruse employed. . . to entice the victim into the car did not rise to the level of deception required to substitute for force or threat ….'" Rejecting Shank's claim, the reviewing court held:

> Although Shank disputes the adequacy of the evidence of "deception" on which the Commonwealth relied, he fails to acknowledge that the victim's path into harm's way was paved entirely with Dobson's falsehoods. In the absence of

> Dobson's lies concerning her purported marital distress, the victim would have not met her at the County Market, and certainly would not have ventured with her behind the B&H Tire warehouse. The fact that he accompanied Dobson willingly, recognizing that he might face hostility from her putative husband in no way negates the fact that his only motivation to go with her rested on the false pretense that she needed protection. Although one might debate the wisdom of the choice the victim made, the fact remains that he acted on the basis of false information in an effort to address a threat to Dobson's safety that did not exist. Accordingly, we find no merit in Shank's assertion that the lies Dobson told were not sufficient to overcome the victim's free will; indeed, without them the victim would have had no occasion to make the choice he made to follow Dobson to his death. Consequently, we find the evidence legally sufficient to sustain Shank's conviction as an accomplice to kidnapping. See Commonwealth v. Begley, 780 A.2d 605, 619 (Pa. 2001) (finding evidence legally sufficient to sustain kidnapping conviction based on deception where defendant lured victim to the place of her death by asking her to meet him there to discuss her availability for a secret government job he had offered but that did not exist).

Id. at 667.

And, in State v. Smith, supra, the defendant contended the evidence did not prove he had kidnapped by deception the victim in the jurisdiction named in the indictment because she initially agreed to go with him and did not protest while in that town. The Supreme Court of Connecticut, however, held that "[t]he jury could…have found…that the defendant's request [for help] and promise were a ruse employed to lure

the victim into his control and that she was therefore deceived into remaining with him.

CONCLUSION

"[M]ere detention is sufficient under Code § 18.-2-47 to establish abduction and the detention may be accomplished by…deception." Walker, 272 Va. at 517, 636 S.E.2d at 479 (citations omitted). This is exactly what happened here, and it cannot be said that there was no evidence to support the defendant's abduction conviction under Code § 18.2-47. See Code § 8.01-680.

This Court, therefore, should affirm the judgment of the Court of Appeals affirming appellant's abduction conviction in the Circuit Court of Fairfax County.

Respectfully submitted,

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CERTIFICATE OF TRANSMISSION AND SERVICE

On February 3, 2011, in compliance with Rule 5:26, the required paper and electronic copies of this Brief For The Commonwealth containing 5,268 words were filed with this Court and sent to appellant's counsel: Richard J. Link, Esquire, 200A Monroe Street, Suite 330, Rockville, MD 20850; e-mail: karpel-link@comcast.net.

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