In The
Supreme Court of Virginia

RECORD NO. 101282

WINSTON TYRONE BURTON
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

BRIEF OF APPELLANT

Richard J. Link (VSB# 36960)
KARPEL & LINK
200 -A Monroe Street
Suite 330
Rockville, Maryland 20850
Telephone: (240) 453-9191
Facsimile: (240) 453-9944
Karpel-link@comcast.net

Counsel for Appellant

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ASSIGNMENT OF ERROR

There was insufficient evidence in the record to find Winston 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 the post-judgment Motion to Set Aside the Verdict. (App. 90, 247, 308, 332)

QUESTION PRESENTED

Whether the evidence adduced at trial was sufficient to permit a rational finder of fact to find Burton guilty of abduction beyond a reasonable doubt? (Assignment of Error noted above)

NATURE OF THE CASE

The instant case arises from a criminal case in the Fairfax County Circuit Court. The Indictment charged the defendant, Winston T. Burton ("Burton") as follows: (1) abduction of Kathleen Tracy ("Tracy") with the intent to deprive her of her personal liberty in violation of Virginia Code §18.2-47; and (2) simulated acts of masturbation in a public place in violation of Virginia Code 18.2-387.1. (App. 1)

Trial in the instant case was held on April 14 & 15, 2009. The evidence showed that a man confronted Tracy in the parking lot of

the Fair Oaks Mall, Fairfax, Virginia on April 28, 2008 at approximately 1:30 p.m. (App. 22) Tracy testified that the defendant advised her that she had a problem with her brakes and had her lie across the front seat of her motor vehicle, at which time she was to pull various wires or levers under the passenger seat. Tracy then decided to leave the scene and she drove away. Tracy identified Burton as the subject who confronted her in the parking lot on April 28, 2008. The jury returned a verdict of guilty as to the abduction charge, and not guilty as to the remaining charge. On September 4, 2009, Burton argued his post-trial Motion to Set Aside the Verdict. The trial court denied the Motion. By Order dated September 4, 2009, the Circuit Court sentenced Burton to a four year term of incarceration (with 18 months suspended). Burton noted a timely appeal in the instant case on September 24, 2009. The Court of Appeals issued its decision denying the Petition for Appeal on March 24, 2010. (App. 349) Thereafter, Burton filed a timely Petition for Rehearing, which was denied on June 8, 2010. (App. 355) The timely appeal to this Court followed. By Order dated June 8, 2010, this Court granted the Petition for Appeal. (App. 356)

STATEMENT OF FACTS

Tracy testified that on April 28, 2008, she was leaving the Fair Oaks Mall at around 1:30 p.m. (App. 22) Tracy said that she had parked her car on the upper parking deck. As she was leaving, Tracy was talking on her cell phone and entered her vehicle, at which point a man approached her vehicle and knocked on the passenger window. (App. 23-24) Tracy identified Burton as that subject. (App. 24) Tracy testified that Burton told her there was a problem with her brakes and that there was brake fluid leaking from the wheel of the car. (App. 24) The subject advised her to pop the hood and to get in the car to apply the brakes. (App. 25) Tracy exited the car while continuing to talk on her cell phone. Burton mentioned that there was a problem with the brakes and said he knew something about cars. (App. 39) He said that he was trying to help her because she had a problem with the brakes. Burton then pointed out something under the car's hood, saying "you see there is a problem" (App. 103) Thereafter, Burton instructed her to get in the car, lie down and pull on the passenger seat lever. (App. 25) "He said I had to actually lay across the middle of the car and apply pressure to the passenger seat and my seat and the driver's seat." (App. 26) While Tracy was

lying across the front of the vehicle her feet were hanging out the driver's side door. (App. 27) Tracy said that she followed these instructions because she had just had brake work performed on her car. (App. 28) Tracy testified that the subject walked from the front to the rear wheel of the car while she was lying across the seats, saying he had to check on something at the back wheel. (App. 43) Tracy said she remained on her abdomen, across the seats for a period of five to ten minutes. (App. 28) Tracy's legs were protruding out the driver's side door and her head was on the passenger seat. Her left hand was pulling on a wire or cord under the passenger seat and her arm was on the passenger seat. (App. 46) The subject never physically touched her. (App. 57) Tracy then decided to leave. (App. 29, 31) Burton never said anything to Tracy to the effect she could not leave or that she was not free to leave. (App. 58) At that point, Tracy got back into her car and drove back to work. (App. 31) Tracy admitted that she was free to leave when she was ready to pull off. (App. 50) Tracy then called the police. (App. 32)

Detective Stephen Augustine of the Fairfax County Police Department testified on behalf of the prosecution. Detective

Augustine said that he met with Tracy on May 1, 2008 and showed her a photographic array. (App. 66) Tracy selected a photograph of the defendant, Winston Burton. (App. 70, Commonwealth Exhibit #2) On cross-examination, Detective Augustine admitted that there was no video surveillance of the incident. (App. 85) The Commonwealth did not call any additional witness in the case in chief.

Burton testified in his own defense. (App. 159) He denied being the subject who came into contact with Tracy. (App. 161) Burton called several witnesses in support of his alibi defense although the testimony will not be recounted here insofar as this is not germane to the issue granted for appeal.

ARGUMENT

I. THE EVIDENCE ADDUCED AT TRIAL WAS NOT SUFFICIENT TO PERMIT A RATIONAL FINDER OF FACT TO FIND BURTON GUILTY OF ABDUCTION BEYOND A REASONABLE DOUBT

A. ISSUE PRESERVED FOR APPELLATE REVIEW

The issue of sufficiency of the evidence is properly preserved for appellate review in the case *sub judice* in accordance with Supreme Court Rule 5A:18. At the close of the Commonwealth's case and again at the close of all evidence, counsel timely moved to

strike the prosecution's evidence as being insufficient to sustain a conviction as a matter of law. (App. 90, 247) After the trial, Burton filed a Motion to Set Aside the Verdict and Enter a Judgment Acquittal. Burton argued that, pursuant to Supreme Court Rule 3A:15, the trial court should have entered a judgment of acquittal because there was insufficient evidence to sustain a conviction for abduction. Burton argued that the Commonwealth had failed to prove: (1) deception; (2) any detention or seizure of the victim's person; and (3) an intent to deprive the victim of her personal liberty. (App. 308, 335)

B. STANDARD OF REVIEW

"While a motion to strike is an appropriate way of testing the sufficiency of relevant evidence to sustain an adverse verdict, it is not the only way. It has long been the practice in this jurisdiction to test the sufficiency of such evidence by a motion to set aside the verdict." *McGee v. Commonwealth,* 4 Va. App. 317, 357 S.E.2d 738 (1987) When considering a challenge to the sufficiency of the evidence on appeal, a reviewing court does not "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed.

2d 560 (1979) (emphasis in original; citation and internal quotation marks omitted). Instead, we ask only "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Maxwell v. Commonwealth*, 275 Va. 437, 442, 657 S.E.2d 499, 502 (2008) (quoting *Jackson*, 443 U.S. at 319) (emphasis in original) *Clanton v. Commonwealth*, 53 Va. App. 561, 566, 673 S.E.2d 904 (2009) "Where the sufficiency of the evidence is challenged on appeal, that evidence must be construed in the light most favorable to the Commonwealth, giving it all reasonable inferences fairly deducible there from. *Higginbotham v. Commonwealth*, 216 Va. 349, 352, 218 SE2d 534, 537 (1975); see Code 8.01-680. In so doing we must "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 that may be drawn therefrom." *Parks v. Commonwealth*, 221 Va. 492, 498, 270 SE2d 755, 759 (1980); *Norman v Commonwealth*, 2 Va.App. 518, 520, 346 SE2d 44 (1986) In *Maxwell v Commonwealth*, 275 Va 437, 657 SE2d 499 (2008) this Court reversed the conviction of a defendant for possession of cocaine and

marijuana, where the defendant was found in close proximity to the drugs, but there were other acts that would tend to require an innocent explanation:

> [W]hile a conviction may properly be based upon circumstantial evidence ... there must be an unbroken chain of circumstances proving the guilt of the accused to the exclusion of any other rational hypothesis and to a moral certainty." *Gordon v Commonwealth*, 212 Va 298, 300, 183 SE2d 735, 737 (1971) *Maxwell*, 275 Va at 442-443

Circumstantial evidence is as competent and is entitled to as much weight as direct evidence provided it is sufficiently convincing to exclude every reasonable hypothesis except that of guilt. *Coleman v. Commonwealth*, 226 Va. 31, 53, 307 SE2d 864, 876 (1983) The circumstances of time, place, motive, means and conduct, to the extent that these circumstances are proved, must concur in pointing to the defendant's guilt beyond a reasonable doubt. Not all of those circumstances, however, must be proved in every case. *Cantrell v. Commonwealth,* 229 Va 387, 398, 329 SE2d 22, 29 (1985): *Mullis v Commonwealth*, 3 Va.App. 564, 575-76, 351 SE2d 919, 926 (1987) *McGee v. Commonwealth*, 4 Va.App. 317,322, 357 SE2d 738 (1987)

It is elementary that, to sustain a conviction, the prosecution must prove all elements of the offense beyond a reasonable doubt

and failure to do so is reversible error. For example, in *Jewell v. Commonwealth*, 8 Va.App. 353, 382 SE2d 259 (1989) the Court of Appeals reversed the conviction of a defendant in a prosecution for proposed sexual acts with a minor because the prosecution failed to prove the defendant's age. Similarly, in *Finney v. Commonwealth*, 277 Va. 83, 671 SE2d 169 (2009) the defendant was charged with breaking and entering a storage shed with intent to commit larceny in contravention of Virginia Code 18.2-91 The evidence showed that the property owner discovered the defendant in his shed "rifling" through the items inside. The issue on appeal was whether the evidence showed that the defendant committed a breaking in entering the shed. "[I]n order to establish the element of breaking in the present case, the Commonwealth was required to prove that [the defendant] applied some physical force, however slight, to gain entry to [the victim's shed]." *Id* at 89 This Court examined the facts in accordance with the well –settled principles enunciated above and reversed the conviction; the "circumstantial evidence does not justify the inference that the breaking of the shed door, the entering of the shed, and the larceny of [the victim's] tools in the shed were committed at the same time and by the same person." *Id* at 90

In *Lacey v Commonwealth*, 54 Va.App. 32, 675 SE2d 846 (2009), the Court of Appeals analyzed the process of statutory interpretation:

> [S]tatutory construction presents a pure question of law receiving *de novo* review. *Wright v Commonwealth*, 275 Va 77, 80-81, 655 SE2d 7, 9 (2008) Our primary goal in interpreting a statute "is to ascertain and give effect to legislative intent." *Commonwealth v. Zamani*, 256 Va. 391, 395, 507 SE2d 608, 609 (1998). To this end, the Court determines "the General Assembly's intent from the words contained in a statute. An undefined term must be given its ordinary meaning, given the context in which it used. [citations omitted] We strictly construe penal statutes against the Commonwealth, *Welch v. Commonwealth*, 271 Va 558, 563, 628 SE2d 340, 342 (2006) but remember "that the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow or strained construction." *Turner v Commonwealth*, 226 Va 456, 459, 309 SE2d 337, 338 (1983). Hence, "we will not apply "an unreasonably restrictive interpretation of the statute that would subvert the legislative intent expressed therein." *Armstrong v. Commonwealth*, 263 Va 573, 581, 562 SE2d 139, 144 (2002) (quoting *Ansell v Commonwealth*, 219 Va 759, 761, 250 SE2d 760, 761 (1979)

In *Lacey*, *supra*, the evidence showed that the defendant entered the dwelling through an open garage door and opened a door *within* the house. The evidence established that the defendant had committed an intra-house breaking, but the statute requires that the Commonwealth prove that the defendant committed a breaking at the time of entry into the dwelling. Thus, when examining the evidence in

the light most favorable to the Commonwealth, this Court reversed the defendant's conviction for burglary.

C. APPLICATION OF THE LAW TO THE FACTS OF THE INSTANT CASE

In the instant case, the jury found Burton guilty of abduction, which the Virginia Code defines in pertinent part as follows:

> Any person who by force, intimidation or deception, and without legal justification or excuse, seizes, takes or transports, detains or secretes another person with the intent to deprive such person of his personal liberty . . . shall be deemed guilty of "abduction" Virginia Code §18.2-47

The term "deception" is not defined in the Virginia Code. Black's Law Dictionary defines "deception" as "The act of deceiving: intentional misleading by falsehood spoken or acted. Synonymous with fraud." Black's Law Dictionary, Fifth Edition, p. 366 This Court explained the concept of fraud in a civil case, *Patrick v. Summers*, 235 Va. 452, 369 SE2d 162 (1988). In *Patrick*, the plaintiffs had entered a real estate sales contract pursuant to which the defendant was to pay plaintiffs the sum of $5,000.00 in cash, and would assume the plaintiffs' indebtedness on their home in the event the property did not sell within 120 days. The defendant was unable to sell the home and did not pay plaintiffs in accordance with the contract. The trial court entered judgment in favor of plaintiff. On appeal, this court said that

Virginia law requires clear, cogent and convincing evidence to support a claim for fraud and deceit. The plaintiffs argued that the defendant did not have the present intention to carry out the contract because, among other things, the defendant did not have the money available when he entered the contract. This Court reversed the judgment, saying that "[w]hile the evidence may be sufficient to raise doubts concerning the defendant's intention when the time came for performance of his promise to purchase the plaintiff's property, it is insufficient as a matter of law to show he had the intent to defraud at the time he made the promise." *Id* at 456.

This Court has previously had the opportunity to explain the "deception" element under Virginia Code §18.2-47. In *Jerman v Department of Corrections,* 267 Va 432, 593 SE2d 255 (2004), the defendant's co-conspirator told the victim that he was driving her to the house for the purposes of purchasing drugs. This was not true, as the actual purpose was to confront the victim about an earlier drug transaction. Thus, the Supreme Court found that there was sufficient evidence to find the defendant guilty of abduction. In *Kent v Commonwealth*, 165 Va 840, 183 SE 177 (1938) the defendant induced the victim to get into the car for the stated purpose of paying

off a debt. This Court said that "such circumstances amounted to fraud and coercion . . . for the purpose of pecuniary benefit." *Id* at 842. In *Turner v Commonwealth*, 54 Va.App. 458, 458 SE2d 312 (2009) the Court of Appeals addressed a defendant's conviction for abduction in the context of a Petition for a Writ of Actual Innocence under Title 19.2 of the Virginia Code. The Court said: "In this case, by contrast, the evidence is insufficient to support a finding beyond a reasonable doubt that [the defendant] made any statement or engaged in any act showing an intent to deceive [the victim] for the purpose of sexually molesting her against her will. Although the evidence does not preclude the *possibility* that [the defendant] had such an intent, reasonable hypotheses of innocence flow from the evidence, thereby precluding any rational trier of fact from finding Turner guilty beyond a reasonable doubt of abduction with the intent to defile." *Id* at 484

Turning to the instant case, Burton respectfully avers that there is insufficient evidence that the defendant was engaged in a ruse – even when viewing the evidence in the light most favorable to the Commonwealth, and drawing all reasonable inferences from the facts:

1. The victim admits that she recently had work performed on her car brakes "and I felt like something wasn't quite right with them". (App. 28, 41)
2. Burton told her that there was a problem with the brakes and that there was fluid leaking from the wheel of the car. (App. 24)
3. The subject looked under the hood of the car, showed Tracy what the problem was and said he had to check something at the back wheel of the car. He stayed at the back wheel of the car. He was looking at the rear wheel. (App. 25-27, 39, 43)
4. Tracy said she looked under the hood but does not know much about cars. (App. 41)
5. When Tracy exited the car, "he's squatting at the back wheel." (App. 29)
6. The defendant asked Tracy to pump her brakes while he stood at the front of the car. (App. 25, 40, 41)
7. Burton directed Tracy to pull on wires or cords underneath the passenger seat. She had no idea where the wire leads. (App. 45) There was no expert testimony or other evidence to contradict any claim that there was *not* a brake problem.

8. There was no evidence that the efforts that the subject and/or the victim undertook would not solve the problem.

9. The incident occurred outside of a major mall, in a parking lot with other cars and people in the vicinity. (App. 22-23, 49)

"When the facts, viewed in the light most favorable to the Commonwealth, "are equally susceptible to more than one interpretation, one which is consistent with the innocence of the accused, the trier of fact cannot arbitrarily adopt an inculpatory interpretation." *Moody v Commonwealth*, 28 Va.App. 702, 706, 508 SE2d 354, 356 (1954) Indeed, "evidence must establish guilt of an accused beyond a reasonable doubt . . . [guilt] is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence." *Cameron v. Commonwealth*, 211 Va. 108, 110-111, 175 SE2d 275, 276 (1970) Therefore, viewing the evidence in the light most favorable to the Commonwealth, no rational finder of fact could find that that there was deception.

In responding to the Defendant's Motion to Set Aside the Verdict, the Commonwealth argued as follows: "The jury could permissibly find based upon the totality of the evidence that the Defendant's Statements to Ms. Tracy about her brake fluid and his

action towards her utilized deception. When Ms. Tracy stood up after performing the maneuver Defendant had ordered her to perform she observed Defendant's whole hand inside his unzipped pants, touching his genitalia. The jury could use this testimony to find that Defendant was not a "good Samaritan" worried about Ms. Tracy's brakes, but rather, someone who was using a ruse and deception in order to detain a woman and sexually gratify himself. Therefore, there was sufficient evidence of deception to sustain a conviction." (App. 325) The only evidence in the record that supports this argument is as follows:

> A: * * * *
>
> So I step out of the vehicle and I take a step back and I see his hand in his pants and then he took the hand out and the pants were unzipped.
>
> * * * *
>
> Q: And when you saw his hand in his pants, how was his hand inside his pants?
>
> A: Well, the pants were unzipped and his hand was inside.
>
> * * * *
>
> A: I would say almost the whole hand.
>
> (App. 29-30)

While the defendant's behavior at the scene may be suspicious, Burton respectfully avers that the evidence adduced at trial is insufficient as a matter to law to prove the necessary element of "deception." Indeed, Tracy did not see the defendant's underwear or

his genitalia, and does not even recall if the right or left hand was in his pants. (App. 53) This happened in only a moment – a quick second. (App. 53) Just as in *Lacey*, Va.App. 32, 675 SE2d 846 (2009) and *Finney v. Commonwealth*, 277 Va. 83, 671 SE2d 169 (2009), the evidence is lacking. The mere fact that a defendant was inside a home is not sufficient to permit a jury to speculate that there was a breaking. Similarly, the mere fact that the defendant was found with his hand down in his pants is not sufficient to permit a jury to speculate that there was "deception". Without evidence of deception, the conviction cannot stand. Given that the hood of the car was open, the victim had a prior brake problem, and the defendant was either under the hood or at the rear wheel of the car, the evidence does not contain an unbroken chain of inferences that would support a finding of guilt. Although *Patrick v. Summers* is a civil case, the underlying principle holds true: a finder of fact should not be permitted to speculate as to whether there has been deceit.

Burton respectfully avers that there is insufficient evidence to find a requisite intent to deprive Tracy of her personal liberty. "It is elementary that where, as here, the statute makes an offense consist of an act combined with a particular intention, proof of such intent is

as necessary as proof of the act itself and must be established as a matter of fact. " *Peterson v. Commonwealth*, 215 Va 698, 699, 213 SE2d 752, 753 (1975); *Dixon v Commonwealth,* 197 Va. 380, 382, 89 SE2d 344, 345 (1955) "Intent is the purpose formed in a person's mind which may, and often must, be inferred from the facts and circumstances in a particular case. The state of mind of an alleged offender may be shown by his acts and conduct." *Ridley v Commonwealth* 219 Va 834, 836, 252 SE2d 313, 314 (1979)]

In *Johnson v. Commonwealth*, 221 Va. 872, 275 SE2d 592 (1981), this Court reversed the defendant's conviction for abduction as there was no evidence of an intention to deprive the victim of her personal liberty. Rather, the defendant apparently wished to engage in consensual sexual intercourse, and he abandoned his purpose once the victim resisted:

> When Johnson put his arms around Mrs. Michalek and held her tightly this was done in furtherance of his sexual advances and not with the intent to deprive her of her personal liberty, although such a deprivation did occur momentarily. The evidence is not sufficient to sustain his conviction for abduction, i.e. seizing and detaining Mrs. Michalek with intent to deprive her of her personal liberty. *Johnson* 221 Va. 872, 879, 275 SE2d 592 (1991)

Similarly, in the case at bar, the victim left in her car as soon as she wished to terminate the encounter. (App. 50) The subject never

said "you can't go" or "wait a minute" to keep Tracy at the scene. (App. 58) While the defendant in *Johnson* was charged with abduction with intent to defile, the same logic holds true for a prosecution of abduction with intent to deprive one of her personal liberty. The lack of evidence of "deception" is closely related to the remaining element - the intention to deprive the victim of her personal liberty. The facts in the case *sub judice* could just as likely support a claim that the defendant had the intention to help Tracey with her vehicle's brake problems, which vitiates the intent element. The bottom line is that no reasonable fact finder could find Burton guilty because of the lack of evidence as to the essential elements of the crime of "abduction".

Finally, there is insufficient evidence to conclude that Tracy was detained as required by the abduction statute. Indeed, Tracy testified that she ultimately decided to leave the scene. The subject never said anything to her to the effect she could not leave or she was not free to leave. (App. 58) When she decided to leave, she got back into her car and drove away. (App. 31) Tracy admitted that she was free to leave when she was ready to pull off. (App. 50) At

all times the victim's car door was open and she was in a public place (a mall parking lot). (App. 35).

CONCLUSION

For the foregoing reasons, the conviction for abduction should be reversed as no rational finder of fact could find the defendant guilty based upon the direct or circumstantial evidence adduced at trial.

WHEREFORE, Appellant Winston Burton respectfully requests that this Honorable Court reverse the conviction for abduction.

WINSTON T. BURTON
By Counsel

RICHARD LINK, VSB #36960
Counsel for Appellant
200-A Monroe Street, Suite 330
Rockville, MD 20850
(240) 453-9191
karpel-link@comcast.net

CERTIFICATE OF SERVICE PURSUANT TO RULE 5:17(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 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, Richard B. 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 Opening Brief for the Appellant have been hand-delivered to the Clerk of the Supreme Court of Virginia this 10th day of January, 2011. Three (3) copies of this Opening Brief for Appellant was hand-delivered this 10th of January, 2011, to: Richard Smith, Office of the Attorney General, Office of the Attorney General, 900 E. Main Street, Richmond, VA 23219.

7. I also certify compliance with the word court in that this brief contains 4,286 words, exclusive of those parts that by rule do not count toward the word limit.

_____

RICHARD LINK