IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 130989

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

TONY MARK HERRING, JR.,

Appellee.

REPLY BRIEF OF THE COMMONWEALTH

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REPLY BRIEF OF THE COMMONWEALTH

ARGUMENT

I. THE DEFENDANT'S ASSERTION THAT HE COMPLIED WITH RULE 5A:12(c)(1)(ii) BY POINTING TO THE PLACE IN THE RECORD WHERE HE HAD CHALLENGED THE SUFFICIENCY OF THE EVIDENCE IS NOT WELL-TAKEN.

Herring acknowledges that "the Commonwealth correctly states" that Rule 5A:12(c)(1)(ii) requires an appellant to set forth "under the heading of 'Assignments of Error' clearly and concisely and without extraneous

argument, the specific errors in the rulings below upon which the party intends to rely." (Def. Br. 9). Likewise, Herring acknowledges Rule 5A:12(c)(1)(ii) expressly provides that an assignment of error that "does not address the findings or rulings in the trial court or other tribunal from which an appeal is taken, or which states the judgment or award is contrary to the law and the evidence is not sufficient." (*Id.*). And, Herring acknowledges that, as per *Davis v. Commonwealth*, 282 Va. 339, 717 S.E.2d 796 (2011), an assignment of error failing to meet these requirements in Rule 5A:12(c)(1)(ii) deprives the appellate court of active jurisdiction to adjudicate the appeal. (Def. Br. 10).

Herring's arguments on brief aimed at showing he complied with Rule 5A:12(c)(1)(ii) are not persuasive. First, it is significant that Herring does ***not*** argue that the actual language in his assignment of error in the Court of Appeals complied with Rule 5A:12(c)(1)(ii) or, standing alone, was sufficient to identify "with reasonable certainty" the particular claim he was advancing on appeal. (Def. Br. 10, quoting *Findlay v. Commonwealth*, __ Va. __, 752 S.E.2d 868, 871 (2014)). To the contrary, the defendant's contention that his assignment of error satisfied Rule 5A:12(c)(1)(ii), thereby establishing the Court of Appeals's active jurisdiction to consider the appeal, hinges entirely on the fact that at the conclusion of his

assignment of error he stated his "[o]bjection to this error of the trial court was preserved at trial as noted in (Appendix 150)." (App. 217, 258).

For several reasons, this argument fails. First, nothing in Rule 5A:12(c)(1)(ii) indicates that an appellant's reference to the place in the record where he assertedly preserved the assignment of error satisfies his obligation under the Rule to list his Assignments of Error in his petition.[1] Rather, the actual wording in Rule 5A:12(c)(1)(ii) reflects that an assignment of error is distinct from an appellant's duty to indicate where in the record the assigned error was preserved. For example, Rule 5A:12(c)(1) recites that a petition for appeal should list "[u]nder a heading entitled 'Assignments of Error,' ... ***clearly and concisely and without extraneous argument***, the specific errors in the rulings below upon which the party intends to rely." (emphasis added). The Rule then goes onto state: "***An exact reference*** to the pages of the transcript, written statement of facts, or record where the alleged error has been preserved in the trial court ... ***shall be included with each assignment of error***." (emphasis added). The emphasized language in Rule 5A:12(c)(1) plainly points to the fact that an assignment of error is distinct from the appellant's reference to the place in the record where the issue was preserved. To state it

[1] The Commonwealth's arguments apply with equal force to the equivalent Rule in this Court, Rule 5:17(c)(1).

differently, the description of a claim is distinct from an identification of its location in the record.

Certainly, *Findlay* focused solely on the language in the defendant's assignment of error in the Court of Appeals and did not even hint at any notion that anything else, such as the appellant's statement regarding where in the record he had preserved the claim, bore upon any assessment of the adequacy of the assignment of error. Indeed, *Findlay* effectively differentiated between an assignment of error and an identification of the place in the record where the claim was raised: "***Immediately following the assignment of error, Findlay provided an exact reference*** to the page of the suppression hearing transcript where the alleged error was preserved." 752 S.E.2d at 870 (emphasis added). Further, as Herring himself acknowledges on brief, *Findlay* emphasized an appellant's duty in an assignment of error "to lay his finger on the error" and to obviate any need by the court and opposing counsel to "delve into the record and winnow the chaff from the wheat." (Def. Br. 10-11, internal quotations omitted, citing *Findlay*, 752 S.E.2d at 871).

Herring's argument, however, would undermine these principles. That is, a clear and concise recitation of a specific error in the rulings below and "without extraneous argument" as required under Rule 5A:12(c)(1)

provides "reasonable certainty" regarding the nature of the appellant's argument. In contrast, a reference, for example, to the defendant's arguments in a motion to strike, which often go on for several pages of trial transcript and raise discrete issues, provides no equivalent reasonable certainty.

Indeed, this very case illustrates as much. In the Court of Appeals the defendant pointed to page 150 of the joint appendix in that court as the place in the record where he preserved his sufficiency challenge to all six convictions.[2] That one page, though, provided only a portion of the defendant's closing argument that challenged the abduction counts. In particular, it offered only the most fragmentary argument as to how and why the evidence on the attempted murder and firearm counts failed. Surely, Rule 5A:12(c)(1)(ii), as described by this Court in *Findlay*, requires more.[3]

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[2] The pagination in the joint appendix in this Court, insofar as it sets forth the relevant trial record, is identical to that in the appendix in the Court of Appeals.

[3] By Herring's own description his assignment of error in the Court of Appeals challenged the trial court's ruling that the Commonwealth's evidence was sufficient as a matter of law to sustain his six convictions. (Def. Br. 9). Such an assignment of error did not provide the slightest indication as to how or why the trial court's ruling was erroneous, thereby confirming that Herring's assignment of error amounted to nothing more than an assertion that the trial court's judgment was "contrary to the law and the evidence ...."

Moreover, this Court's acceptance of Herring's argument that his reference to one page in the trial transcript rendered his assignment of error facially adequate under Rule 5A:12(c)(1)(ii) would contravene one fundamental rule of construction. Again, this Rule expressly states that an assignment of error "which merely states that the judgment ... is contrary to the law and the evidence is not sufficient," and mandates dismissal of the petition for appeal. As stated above, Herring does not argue that his assignment of error in the Court of Appeals, by itself, passed muster under this provision. To hold that his identification of the place in the record where he raised his sufficiency claim nevertheless served to satisfy Rule 5A:12(c)(1)(ii) would rob this language of any meaning. Familiar rules of statutory construction provide that "'every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary.'" *Robinson v. Commonwealth*, 274 Va. 45, 51-52, 645 S.E.2d 470, 473 (2007).

On a separate point, Herring states that he made a motion to strike the Commonwealth's evidence. (Def. Br. 9). In this regard, in its opening brief the Commonwealth asserted that Herring's assignment of error in the Court of Appeals violated Rule 5A:12(c)(1)(ii) for a second reason — namely, that the defendant had never moved to strike at any point during

the trial, and thus his assignment of error did not challenge any actual ruling of the trial court. (Comm. Br. 10-11, 21-22).

The record on this point is ambiguous. Of course, on appeal the record relevant to an issue must be evaluated in the light most favorable to the appellee. *See, e.g., McCain v. Commonwealth*, 261 Va. 483, 490, 545 S.E.2d 541, 545 (2001); *Pavlick v. Commonwealth*, 27 Va. App. 219, 226-227, 497 S.E.2d 920, 924 (1998).

Here, neither at the conclusion of the Commonwealth's case-in-chief nor at the conclusion of all the evidence did the defense move to strike the evidence. (App. 109-110, 146). After the trial judge asked counsel for their "views," the Commonwealth's Attorney presented closing argument. (App. 146-148). Next, defense counsel presented a brief argument, most of which plainly amounted to closing argument (for example, that the court should not credit the testimony of the defendant's father and wife). (App. 148-150).

It is true that at the conclusion of his argument defense counsel stated that he "would make [a] motion to strike the Commonwealth's case with respect to the attempted murder charge as well as all of the abduction charges." (App. 150). Defense counsel further stated that the Commonwealth had not proven Herring "had any specific intent based on

the two witnesses who were there, that he had any intent to kill anybody, and that he did ... not abduct anybody according to the statute." (*Id.*). After that, the Commonwealth provided rebuttal argument, and the trial judge, as the trier of fact, convicted Herring on all six offenses. (app. 150-156).

In the Commonwealth's view, defense counsel's reference to a motion to strike was a misnomer — that is, it actually was part of his closing argument. As stated above, any ambiguity on this point must be resolved in favor of the Commonwealth, the appellee in this case. If, however, the Court concludes otherwise, that Herring's assignment of error in the Court of Appeals would still fail on the primary ground advanced by the Commonwealth – that it amounted to nothing more than an assertion that the judgment was contrary to the law and the evidence.

Finally, Herring asserts that the Court of Appeals had active jurisdiction in this case, based on the Commonwealth's failure to challenge his assignment of error in its brief in opposition in the Court of Appeals. (Def. Br. 11-12). Referring to the fact the Court of Appeals mentioned this omission in a footnote to its opinion, the defendant says that that court "apparently did so to support its ruling that Herring had properly invoked its jurisdiction." (Def. Br. 12). In an attempt to distinguish *Perry v. Commonwealth*, 280 Va. 572, 701 S.E.2d 431 (2010), wherein this Court

quoted with approval the rule in the Fourth Circuit that an appellee may defend the judgment on any ground appearing in the record (Comm. Br. 15), Herring maintains: "It would seem that these rulings apply ... specifically to facts and arguments raised at the trial court level and not when dealing with the jurisdiction of an appellate court. A more appropriate analysis maybe [sic] that the Commonwealth waived the right to contest the jurisdiction of the Court of Appeals when it filed its Brief without raising the issue of the sufficiency of the Assignment of Error." (*Id.*).

This argument is baseless. As discussed in the Commonwealth's brief (Comm. Br. 15-19), it is fundamental that a party cannot confer jurisdiction on a court. Herring concedes on brief that it was his duty under Rule 5A:12(c)(1)(ii) to set forth an assignment of error sufficient to bestow active jurisdiction on the Court of Appeals in this case. (Def. Br. 9-10). Under these circumstances, the Commonwealth's failure to challenge the adequacy of Herring's assignment of error in its brief in opposition in the Court of Appeals is simply of no consequence.

II. THE DEFENDANT DOES NOT CONTEST THE COMMONWEALTH'S ARGUMENT THAT THE COURT OF APPEALS WRONGLY FAILED TO ADDRESS ITS CONTENTION THAT HERRING PROCEDURALLY DEFAULTED ON ANY CLAIM THAT THE EVIDENCE FAILED TO PROVE HE HAD INTENDED TO DEPRIVE THE VICTIMS OF THEIR PERSONAL LIBERTY.

FURTHER, THE DEFENDANT'S ARGUMENT DOES NOT DEMONSTRATE THAT HE RAISED SUCH AN ARGUMENT AT TRIAL.

Case law makes clear that, in order to make out a violation of § 18.2-47, the Commonwealth must show both that the defendant detained the victim and also intended to deprive the victim of his or her personal liberty. (Comm. Br. 24). *See Burton v. Commonwealth*, 281 Va. 622, 708 S.E.2d 892 (2011). The Commonwealth asserted in its opening brief that the Court of Appeals had wrongly ignored its argument that at trial Herring did not challenge the Commonwealth's proof on the intent element of the abduction counts. (Comm. Br. 24-25).

On brief, Herring does not mention, much less dispute, the Commonwealth's contention on this point. Herring's main assertion as to why he did not default on any challenge to the intent element of the abduction charges is that in the trial court he quoted the statutory language of § 18.2-47. (Def. Br. 13). That alone, however, counts for little. If a statute (such as § 18.2-47) contains several elements of proof, then the defendant must provide specific arguments at trial that the evidence failed under each of those elements, in order to preserve appellate review of any sufficiency claim. Plainly, defense counsel argued that the Commonwealth did not prove Herring had detained the victims. Counsel, for example,

argued that Herring "didn't lock anybody in any rooms. He didn't tell anybody to go into any rooms. He didn't stop anybody from leaving the home." (App. 150).

Regarding the intent element of the abduction charges, it is true that defense counsel stated: "I don't know what he did, specifically to prevent anybody's liberty of being impinged upon." (App. 150). It is hardly clear, however, from this one sentence, which defense counsel said immediately before his above-quoted remarks about Herring's claimed failure to detain anyone within the home, that the defense was challenging the intent element of the abduction charges as well. Certainly, defense counsel's contention that the evidence failed to prove Herring had intended to commit murder was far more detailed and left no doubt that the defense was challenging that element of the attempted murder charge. (App. 148-149). As stated above, any ambiguity regarding whether Herring challenged the proof on the intent element of the abduction charges must be resolved in favor of the appellee in this appeal.

II. THE DEFENDANT'S ARGUMENTS CHALLENGING HIS ABDUCTION CONVICTIONS ARE MISPLACED BECAUSE THEY ARE NOT BASED UPON A REVIEW OF THE RECORD IN THE LIGHT MOST FAVORABLE TO THE COMMONWEALTH.

The defendant asserts that he did not "make any threats against his father or children in regard to their presence in the family residence." (Def. Br. 14). Likewise, the defendant maintains that the evidence at trial "established the ability of the victims to move freely within the residence during the time they were allegedly detained." (Def. Br. 15). Further, Herring says that "the record does not clearly establish that Tony Herring ever locked himself in his bedroom." (Def. Br. 16).

As discussed in the Commonwealth's opening brief, however, the Commonwealth presented testimony at trial that Herring had told his daughter McClaire that "this [was] the last time he was going to see us" and that "he was going to shoot my grandfather, my sister and my brother and me." (App. 95). Further, even if there was no express "threat" by Herring against the four family members, by any measure his actions intimidated them into not leaving the residence. Of course, § 18.2-47(A) expressly includes "intimidation" as one of the actions by which the defendant may illegally "detain" another person with the intent to deprive that person of his personal liberty. (Comm. Br. 26).

As for the claimed ability of the victims "to move freely within the residence" during the period in which they were detained, that ignores such evidence as McClaire's testimony that her sister was in their grandfather's room and was "too afraid to leave the room." (App. 71). McClaire further testified that while she was on the phone with a 911 operator her grandfather had locked her and her siblings in his bedroom "so we could stay out of it." (App. 77). The very fact that the children fled from the home after Tony, Sr. had struck Herring and knocked him over refutes any notion that they had any "freedom" of movement within the home during the protracted period in which the defendant menaced his wife and other family members. And, in any event, if the four victims did not feel free to leave the home itself in the several hours in which the incident was ongoing, that surely was enough to make out a violation of § 18.2-47.

Finally, on brief Herring does not challenge the Commonwealth's arguments that the issue of his intent in detaining the family members for several hours raised an issue of fact, and that the trier of fact's resolution of this issue is binding on appeal unless plainly wrong or not fairly supported by the record. (Comm. Br. 28-29). Herring says only that his "actions and statements are ... subject to multiple explanations all of which are inconsistent with the intent to deprive the victims of their personal liberty."

(Def. Br. 17). The trier of fact's findings in convicting Herring on the four abduction counts, however, appropriately resolved the various factual issues against the defendant, and he has provided no justification for setting them aside on appeal. (App. 153-156).

CONCLUSION

For these reasons, as well as those stated in the Opening Brief of the Commonwealth, the Court should reverse the judgment of the Court of Appeals of Virginia wrongly disregarding the defendant's two violations of Rule 5A:12(c)(1)(ii) and holding the evidence insufficient on the abduction convictions and instead should affirm the judgment of the Circuit Court of Augusta County.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
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CERTIFICATE OF TRANSMISSION AND SERVICE

On March 7, 2014, the required copies of this brief were hand-delivered to the Clerk's Office of this Court for filing and one electronic PDF copy was submitted to this Court by email. Three copies of the brief were mailed to John I. Hill, POINDEXTER, SCHORSCH, JONES & HILL, P.C., 404 South Wayne Avenue, Post Office Drawer 1067, Waynesboro, VA 22980, and one electronic PDF copy was emailed to jhill@psjhlaw.com .

The Commonwealth desires to present oral argument in this case.

_____
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