In The

Supreme Court of Virginia

RECORD NO. 130989

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

TONY MARK HERRING, JR.,

Appellee.

BRIEF OF APPELLEE

John I. Hill (VSB No. 30381)
POINDEXTER, SCHORSCH, JONES & HILL, P.C.
404 South Wayne Avenue
Post Office Drawer 1067
Waynesboro, Virginia 22980
(540) 943-1118 (Telephone)
(540) 949-6476 (Facsimile)
jhill@psjhlaw.com

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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STATEMENT OF THE CASE

On August 10, 2011 Tony Mark Herring, Jr. ("Herring") entered a plea of not guilty to charges of Attempted Murder in violation of Virginia Code Section 18.2-32 and 18.2-26, four (4) counts of abduction in violation of Virginia Code Section 18.2-47 and one (1) count of using a firearm during the commission of a felony in violation of Virginia Code Section 18.2-53.1. (Appendix 12 – 15)[1]. In Herring's closing argument he moved to strike the attempted murder charge, the abduction charges and the use of a firearm in the commission of a felony charge. (Appendix 150). The motion was not sustained. Herring was found guilty of attempted murder in violation of Virginia Code Section 18.2-32 and 18.2-26, four (4) counts of abduction in violation of Virginia Code Section 18.2-47 and one (1) count of using a firearm during the commission of a felony in violation of Virginia Code Section 18.2-53.1. (Appendix 155 – 156).

The Court postponed sentencing pending the preparation of a pre-sentence investigation. (Appendix 156). During a sentencing hearing held on November 22, 2011, testimony was heard *ore tenus*,

[1] Reference to the joint appendix in the Court of Appeals, which includes the relevant portions of the trial record, will be designated as "Appendix _____".

the pre-sentence investigation was admitted without objection as Commonwealth's Exhibit 1 (Appendix 185) and the Honorable Victor V. Ludwig on the one count of attempted murder in violation of Virginia Code Section 18.2-32 and 18.2-26 imposed a sentence of ten (10) years in the penitentiary with two (2) years of said sentence to be suspended, on each of the four (4) counts of abduction in violation of Virginia Code Section 18.2-47 imposed a sentence of five (5) years in the penitentiary with all five (5) years of said sentence to be suspended, and on the count of using a firearm during the commission of a felony violation of Virginia Code Section 18.2-53.1 imposed a sentence of three (3) years in the penitentiary. (Appendix 200).

On December 14, 2011, Herring filed a Notice of Appeal to his conviction on all the indictments to the Court of Appeals. (Appendix 207). On August 11, 2012 a second Notice of Appeal to all convictions was filed. (Appendix 209). On October 2, 2012, Herring filed a Petition for Appeal to the Virginia Court of Appeals. (Appendix 211). On October 23, 2012 the Commonwealth of Virginia by and through the Commonwealth's Attorney for the County of Augusta filed

a Brief for the Commonwealth in opposition to Herring's Petition for Appeal. (Appendix 238).

On April 16, 2013, a panel of the Court of Appeals issued an opinion in which it rejected the Commonwealth's argument that Herring's assignment of error was facially deficient under Rule 5A:12(c)(1)(ii) and mandated dismissal of the appeal. (Appendix 315-320). 2013 Va. App. LEXIS 123 (Apr. 16, 2013). The panel concluded that the assignment of error was sufficient to invoke the Court of Appeals's jurisdiction. On the merits, the panel ruled that the evidence supported the Defendant's convictions for the attempted murder of his wife and the use of a firearm in the commission of that offense. The panel, however, reversed the Defendant's convictions for abduction of his father and his three children on the ground that the evidence did not prove Herring had intended to deprive them of their personal liberty.

Herring then filed a petition for rehearing *en banc* challenging the Court of Appeals's affirmation of the attempted murder and

firearm conviction. (Appendix 321-325). On May 29, 2013, the Court of Appeals denied Herring's petition for rehearing *en banc*.[2]

On December 17, 2013, this Court granted Herring's petition for appeal. On the same date, this Court also granted the Commonwealth's petition for appeal. The Court directed that the two cases be paired for the purposes of oral argument and that a single appendix be filed in the two cases.

[2] The Commonwealth similarly filed a petition for rehearing *en banc* as to the abduction charges. (Appendix 326-347). The Court of Appeals likewise denied their petition for rehearing *en banc* on May 29, 2013. (Appendix 350).

STATEMENT OF THE FACTS

On December 14, 2010, a domestic disturbance occurred at the residence of Herring, and his wife, Heather Herring ("Heather") located in a rural area of Augusta County, Virginia. (Appendix 28). Present at the home during this incident were Herring, Heather, their three children (McClaire and McClayln aged 11 and Kaden aged 3) and Tony Herring, Sr. ("Tony") the father of the Defendant. (Appendix 36). What began as a disagreement between Heather and Herring over alleged infidelities ended as an armed standoff between Herring and members of the Augusta County Sheriff's Department. (Appendix 25 – 146).

At approximately 6:30 p.m. on December 14, 2010, Heather confronted Herring in regard to text messages he allegedly sent to another adult female. (Appendix 25 and 36). Heather then directed Herring to leave their residence. (Appendix 25). When he requested keys to an automobile she refused, claiming that Herring was intoxicated and in no condition to drive. (Appendix 25). The parties then began a physical confrontation. At this point Heather gave her daughter, McClayln Herring ("McClayln") a jacket containing the disputed keys and tells her to hide them. (Appendix 37).

Heather testified that during this altercation Herring, pushed, shoved, punched and choked her. (Appendix 26 and 28). She also claimed that the Defendant threatened to get a gun and kill her. (Appendix 28). After hearing the threat Heather left the residence, but shortly returned to continue the argument with Herring. (Appendix 28 and 39).

After being warned by Tony that her husband had a gun, Heather ran out into the dark night and hid beneath a large pick-up truck parked in the front yard. (Appendix 28 – 30). Herring proceeded to the front porch carrying a loaded shotgun which he either intentionally or unintentionally discharged once into the air above his head. (Appendix 20, 46, 62, 73, 106 and 115). Heather heard the gunshot and Herring yell only once that he would kill her. (Appendix 30). She did not see Herring shoot the gun nor did she observe him pointing it at her. (Appendix 40). Heather eventually ran to the custody of the arriving Sheriff's Deputies. (Appendix 31).

During the altercation between their parents, McClaire, McClayln and Kaden were in Tony's bedroom. (Appendix 36, 43, 49, 63 and 77). They were directed to that location by the order of their grandfather. (Appendix 77 and 49). Only once during the altercation

with her husband does Heather see one of her children and that is when McClayln appears at the bedroom door. (Appendix 36). While they were in the bedroom, McClaire had a conversation with a 911 operator and observed through a window the Defendant discharge a firearm which she did not believe was pointed at her mother. (Appendix 71, 73 and 100).

While the children were in the bedroom and on the phone with a 911 operator, Tony attempted to speak to his son concerning the developing situation now involving the police. (Appendix 48). During this period of time Herring made several statements about harming himself and the police. (Appendix 47, 49, 70, 75 and 108). According to Tony and McClaire, the Appellant also alluded to shooting Tony and the children. (Appendix 49 and 96).

At no time during the event did Herring, (1) tell the children or his father that they could not leave the residence; (Appendix 98, 117, 118); (2) direct them to remain in a certain location; (Appendix 117); or (3) prevent them from leaving the residence; (Appendix 117).

After himself speaking to the 911 operator Tony proceeded to distract his son while the children ran from the house. (Appendix 50). According to Tony the time which elapsed between Herring's

discharge of the firearm and he and his children exit from the residence was between 45 minutes and one hour (Appendix 45). Shortly thereafter Herring surrendered to the Sherriff's Deputies without incident. (Appendix 119). A Felony arrest warrant was issued against Herring for attempted murder at 10:26 p.m. on December 14, 2010 and served at 11:27 p.m. on the same date (Appendix 1).

STANDARD OF REVIEW
ARGUMENT AND AUTHORITIES

I. THE COURT OF APPEALS PROPERLY DECLINED TO DISMISS HERRING'S APPEAL AS JURISDICTIONALLY BARRED UNDER RULE 5A:12(C)(1)(II)

In his Petition to the Court of Appeals Herring assigned as his sole error the Trial Court's ruling that the Commonwealth's evidence was sufficient as a matter of law to sustain his convictions for attempted murder, abduction and use of a firearm in the commission of a felony. (Appendix 217). The objectionable ruling by the Trial Court was specifically located in the Trial Transcript. (Appendix 217). Additionally, Herring identified that the trial court made the ruling after a motion to strike the Commonwealth's Evidence. (Appendix 217).

As the Commonwealth correctly states out Rule 5A:12(c) sets out as a requirement for petitions to the Court of Appeals that it shall contain 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. In addition, Rule 5A:12(c)(1)(ii) states "an assignment of error which does not address the findings or rulings in the trial court or other tribunal from which an appeal is taken, or which merely states that the judgment or award is contrary to the law and the evidence is not sufficient. If the

assignments of error are insufficient or otherwise fail to comply with the requirements of this Rule, the petition for appeal shall be dismissed". Failure to comply with this requirement deprives the Court of its active jurisdiction to consider the appeal." Davis v. Commonwealth, 282 Va. 339, 339, 717 S.E.2d 796, 796-97 (2011).

As this Court stated in Findley v. Commonwealth, ___ Va. ___ 752 S.E.2d 868, 2014 Va. Lexis 5 (Jan. 10th, 2014), "The purpose of assignments of error is to point out the errors with reasonable certainty in order to direct this court and opposing counsel to the points on which [the] appellant intends to ask a reversal of the judgment, and to limit discussion to these points. Without such assignments, [the] appellee would be unable to prepare an effective brief in opposition to the granting of an appeal, to determine the material portions of the record to designate for printing, to assure himself of the correctness of the record while it is in the clerk's office, or to file, in civil cases, assignments of cross-error." Citing Harlow v. Commonwealth, 195 Va. 269, 271-72, (1953); see also Friedline v. Commonwealth, 265 Va. 273, 278, (2003). "Consequently, it is the duty of an appellant's counsel "to 'lay his finger on the error' in his [assignment of error]," Carroll v. Commonwealth, 280 Va. 641, 649

(2010), Findley v. Commonwealth, ___ Va. ___, 7525.E.2d 868 2014 Va. Lexis 5 (Jan. 10, 2014) and not to invite an appellate court "to delve into the record and winnow the chaff from the wheat." Loughran v. Kincheloe, 160 Va. 292, 298 (1933). If in fact this is the purpose of 5A:12(c) and 5A:12(c)(1)(ii) then Herring argues that his assignment of error complies the requirement of the Rules. Herring states in his Assignment of Error that the Commonwealth's evidence was insufficient and then pointed to a specific page in the Trial Transcript where his argument as to this error was raised with the trial court. It would require counsel for the Commonwealth to read less than two pages of the Trial Transcript in order to discern the error from which the appeal is taken. No delving or winnowing was required for the Commonwealth to fully Brief an Opposition to the Petition (Appendix 238), and an Opposition to the Appeal (Appendix 279). The clear focus of these two briefs is as this Court considered in Findley evidence of the sufficiency of Herring's Assignment of Error. No hunting through the record for every conceivable error of the trial court was required.

The Court of Appeals noted in a footnote to it's opinion that the Commonwealth failed to challenge Herring's assignment of error in its

Brief in Opposition. (Appendix 316 n.1). The Court apparently did so to support its ruling that Herring had properly invoked its jurisdiction. The Commonwealth has argued that reliance upon this failure is baseless citing the decision of this Court in Perry v. Commonwealth, 280 Va. 572, (2010). In Perry the Court was dealing with a ruling of the Court of Appeals that the trial court had reached the right result for the wrong reason in an evidentiary ruling concerning the legality of a search and subsequent arrest. Id. at 577. The Court in Perry citing a case from the United States Supreme Court and the Fourth Circuit Court of Appeals ruled that "an appellee is free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the [trial court] or the Court of Appeals" at 581. It would seem that these rulings applying 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 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. For these reasons the Court of Appeals

properly declined to dismiss Herrings Appeal as being jurisdictionally barred under Rule 5A:12(c)(1)(ii).

II. THE COURT OF APPEALS PROPERTY RULED THAT THE EVIDENCE AT TRIAL FAILED TO ESTABLISH THAT HERRING DETAINED HIS THREE CHILDREN AND HIS FATHER WITH THE INTENT TO DEPRIVE EACH OF HIS OR HER PERSONAL LIBERTY

In his closing argument Herring's counsel quoted the statutory language of 18.2-47 and argued that the evidence in this case did not prove abduction under the statute. (Appendix 150). Counsel subsequently argued that Herring had not taken actions to "prevent anybody's liberty of being impinged upon." (Appendix 150). Counsel directed the Court's attention to several specific facts regarding to Herring actions or lack of actions that would tend to disprove the Commonwealth's allegations that he had violated Virginia Code Section 18.2-47. (Appendix 149-150). Herring's argument on intent was presented at trial by his quoting of the statutory language of 18.2-47 and his Motion to Strike the Commonwealth's Evidence as being insufficient to convict under those provisions.

When the question of the sufficiency of the evidence is raised on appellate review, the court must determine whether a reasonable fact finder could have found from the evidence before it that guilt had

been proven beyond a reasonable doubt. Crump v. Commonwealth, 20 Va. App. 609, 617 (1995)

At the appellate level, the Court views the facts in the light most favorable to the Commonwealth, the prevailing party in the trial court, and accords the Commonwealth the benefit of all inferences fairly deducible from the evidence. Muhammad v. Com., 269 Va. 451, 479 619 S.E.2d 16, 31 (2005), Riner v. Com., 268 Va. 296, 303-04, 601 S.E.2d 555, 558-59 (2004).

Herring stands convicted of four separate counts of unlawfully without legal justification abducting by force, intimidation or deception, his father and his children in violation of Virginia Code Section 18.2-47. To be convicted of this offense the Commonwealth must prove that Herring did by force, threat or intimidation seize, take, transport, detain or hide a person and that he did so to deprive the individual of his personal liberty without legal justification or excuse.

In this case, Herring did not attempt to deceive any of the alleged victims. Nor did the Appellant make any threats against his father or children in regard to their presence in the family residence. At trial, therefore, the Commonwealth argued that Herring, by his

words and actions, intimidated the victims into remaining in the residence.

The Commonwealth suggests that Herring's possession, handling and discharge of a firearm on the night of the alleged offenses intimidated the victims into remaining at the residence. In addition, the Commonwealth believes that Herring's statements to the victims that he intended to end his own life also intimidated these victims thereby engendering a fear that if they left the residence they would be subject to actual harm. Finally, the Commonwealth draws attention to Herring's alleged threats against his wife and his daughters as evidence of his intent to detain his father and children.

The Commonwealth's evidence at trial established the ability of the victims to move freely within the residence during the time they were allegedly detained. McClaire testified that after she sees her parents fighting she voluntarily went to her grandfather's room. (Appendix 97). She further testifies that they didn't lock or even close the door to the bedroom. (Appendix 99). On direct examination McClaire states that during the time she was on the phone with the 911 operator she wasn't scared. (Appendix 96). This lack of fear is demonstrated by her ability to leave the bedroom during the 911 call

and proceed to a better location (the laundry room) from which to observe and report her parents' actions. (Appendix 99).

In its brief the Commonwealth argues that Herring's actions to intimidated his father and children to remain in a locked bedroom (Brief of the Commonwealth 26). First, the record does not clearly establish that Tony Herring ever locked himself in his bedroom.

Tony seems to spend most of his time in the living room of the residence speaking with either his son or daughter in law. (Appendix 106). Secondly, McClaire testifies that it is when she sees her parents "putting their hands on each other" that she repairs to the bedroom. (Appendix 97). Finally, it is Tony who tells the children to lock the bedroom door. (Appendix 98, 108).

The Virginia Supreme Court has stated that "when a statute makes an offense consist of an act combined with a particular intent, proof of such intent is as necessary as proof of the act itself and must be established as a matter of fact." Burton v. Commonwealth, 281 Va. 622 (2011) quoting the Court in Ridley v. Commonwealth, 219 Va. 834 (1979). The Supreme Court continued by reminding us that that "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." Id. at 627

The Supreme Court in the cases of Burton and Johnson v. Commonwealth, 221 Va. 872 (1981) reversed convictions against defendants convicted of abduction allegedly accomplished by deception. The Court reasoned that "when a defendant accomplishes an abduction by seizing, taking, transporting or secreting a victim, it may be a reasonable inference just from those physical actions that the defendant's intent was to deprive the victim of her personal liberty." Burton at 628. The Court found that intent was much more difficult to discern when deception was the method of detention because depriving a person of his or her liberty was only one of many possible explanations for the deception.

In this case, Herring's actions and statements are also subject to multiple explanations all of which are inconsistent with the intent to deprive the victims of their personal liberty. First, the statement allegedly made by Herring that he wanted to harm his wife was directed to her alone. Second, Herring's arming himself was directly related to his threats against Heather. Third, the discharge of the weapon occurred as he was searching for his wife. Fourth, Herring's

anger was directed at his wife alone. Fifth, Herring's statements about harming himself, his father and his children were made in the context destroying evidence of a crime thereby precluding the him from ever having to go to jail. Sixth, Herring never ordered his children or his father to any particular location either inside or outside the house. Seventh, Herring allowed both his father and his children to talk freely with the police and the 911 operator. Finally, the alleged victims exit from the house was made without any attempt by Herring to impede their departure.

While these acts may have been frightening and intimidating, they do not show a specific intent by the Appellant to use that fear and intimidation to restrict their liberty.

CONCLUSION

For the foregoing reasons, the Court should uphold the judgment of the Court of Appeals of Virginia that the evidence was insufficient on the abduction convictions and that Herring had property invoked the jurisdiction of the Court of Appeals or grant other such relief as is proper.

John T. Hill
Counsel for Defendant
VSB #30381
Poindexter, Schorsch, Jones & Hill, P.C.
404 South Wayne Avenue
P.O. Drawer 1067
Waynesboro, Virginia 22980
540-943-1118
540-949-6476(Facsimile)
jhill@psjhlaw.com

CERTIFICATE OF TRANMISSION AND SERVICE

In accordance with Rule 5:26(e) of the Rules of the Supreme Court of Virginia, I hereby certify that I have this 21st day of February, 2014, hand-filed the required fifteen (15) copies of this Brief of the Appellee in the Clerk's Office, together with an electronic version of this brief on CD-ROM in Adobe Acrobat Portable Document Format (PDF), and served, via UPS Ground Transportation the required three (3) copies of this Brief to Robert H. Anderson, III, counsel for Appellee, Office of the Attorney General, 900 East Main Street, Richmond, VA 23219..

Pursuant to Rule 5:26(h): this Brief contains 3,435 words.

John J. Hill
Counsel for Defendant
VSB #30381
Poindexter, Schorsch, Jones & Hill, P.C.
404 South Wayne Avenue
P.O. Drawer 1067
Waynesboro, Virginia 22980
540-943-1118
540-949-6476(Facsimile)
jhill@psjhlaw.com