IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 130989

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

TONY MARK HERRING, JR.,

Appellee.

BRIEF OF THE COMMONWEALTH

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BRIEF OF THE COMMONWEALTH

STATEMENT OF THE CASE

On August 10, 2011, Tony Mark Herring, Jr., was convicted in a bench trial in the Circuit Court of Augusta County of the attempted first degree murder of his wife, four counts of abduction of family members, and use of a firearm in the commission of the attempted murder. Herring was

sentenced to a total term in prison of 33 years, with 22 years suspended. (App. 203-204). [1]

On April 16, 2013, a panel of the Court of Appeals of Virginia 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. (App. 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 the 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.

The Commonwealth then filed a petition for rehearing *en banc* challenging the Court of Appeals's dismissal of the four abduction

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

convictions. (App. 326-347). On May 29, 2013, the Court of Appeals denied the Commonwealth's petition for rehearing *en banc*.[2]

On December 17, 2013, this Court granted the Commonwealth's petition for appeal. On the same date, this Court also granted Herring's petition for appeal in which he challenged the ruling of the Court of Appeals affirming his attempted murder and firearm convictions. 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.

ASSIGNMENTS OF ERROR

I. THE COURT OF APPEALS WRONGLY HELD THAT THE DEFENDANT'S ASSIGNMENT OF ERROR DID NOT WARRANT DISMISSAL OF THE APPEAL UNDER RULE 5A:12(c)(1)(ii) AND WRONGLY REACHED THE MERITS OF HIS SUFFICIENCY CLAIM. [PRESERVED IN THE COMMONWEALTH'S BRIEF IN THE COURT OF APPEALS OF VIRGINIA AT PP. 8-9 AND THE COMMONWEALTH'S PETITION FOR REHEARING *EN BANC* AT PP. 7-11].

II. THE COURT OF APPEALS WRONGLY DID NOT ADDRESS OR SUSTAIN THE COMMONWEALTH'S ARGUMENT THAT THE DEFENDANT DEFAULTED AT TRIAL ON HIS ARGUMENT THAT THE EVIDENCE DID NOT PROVE HE INTENDED TO DEPRIVE THE

[2] Herring similarly filed a petition for rehearing *en banc* as to the attempted first degree murder and use of a firearm convictions. (App. 321-325). The Court of Appeals likewise denied his petition for rehearing *en banc* on May 29, 2013. (App. 349).

FOUR VICTIMS OF THEIR PERSONAL LIBERTIES. [PRESERVED IN THE COMMONWEALTH'S BRIEF IN THE COURT OF APPEALS OF VIRGINIA AT PP. 20-21 AND THE COMMONWEALTH'S PETITION FOR REHEARING *EN BANC* AT PP. 11-12].

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STATEMENT OF FACTS

On December 14, 2010, the defendant lived in his Greenville home with his wife Heather, their eleven-year-old twin daughters McClaire and McClayln, and their three-year-old son Kaden. (App. 23-24). The defendant's father, Tony Mark Herring, Sr., and mother also lived with the defendant and his family. (App. 23, 42).[3] Heather left her job at about 5:30 p.m. on December 14 and texted the defendant to come home because she "was curious as to where he was and why he wasn't at home." (App. 35). Heather arrived at their house at about 6:15 p.m. and then checked their computer because she was suspicious that Herring was engaged in

[3] Herring's mother was apparently at work that night and was not present during the incident involving Herring and the rest of his family. (App. 56).

adulterous behavior. (App. 24, 35, 40-41). Herring came home about 30 minutes later and appeared heavily intoxicated. (App. 25, 36).

Shortly after that, Heather told the defendant "to get his stuff and get out" and their argument escalated when they went to Tony Sr.'s bedroom and Heather refused to give Herring the keys to their car. (App. 25-28, 43). Herring then threw his wife on the bed looking for his car keys and the two "steadily argued through the house. He repeatedly wanted the keys. Calling [Heather] names. Hitting [Heather]." (App. 26). At that point, the defendant's twin daughters were in Tony Sr.'s bedroom, but Heather did not know where her son was. (App. 26).

In the living room, Tony Sr. saw the defendant "had hit Heather and Heather had hit the floor." (App. 43). Herring told his wife he "was going to get a gun and kill me." (App. 28, 38). The defendant's father then saw the defendant returning from his own bedroom and "coming back through the den with a shotgun." (App. 44). At that point, Tony Sr. told Heather to leave because he had heard the defendant loading and then carrying a gun, and she consequently "darted out" out the front door. (App. 28, 37, 44, 57). Heather then crawled on her elbows under Tony Sr.'s truck parked in front of the house and hid underneath it. (App. 29-30, 46, 60).

At that point, McClayln Herring was in her grandfather's bedroom, which she had locked to protect herself, and saw her father outside the home. (App. 105). McClayln saw her father loading a shotgun and her mother darting out of the house. (*Id.).* The defendant "was just looking ... to see if he could find her" when he fired the shotgun. (App. 46). McClayln testified at trial that she saw Herring "had his shotgun looking for my mom and he was yelling for her and my grandfather had went out the door to stop him and he, my dad, was getting ready to pull the trigger and my grandfather had hit the back of the gun and it shot up in the air." (App. 105-106). The gun was "aimed down" when Tony Sr. pushed it up and it "shot up in the air." (App. 62). While still hidden under the truck, Heather "heard the gunshot go off and [the defendant] said, 'I will fucking kill you Heather Renee.'" (App. 30, 40).

At trial, the Commonwealth introduced a 911 call that McClaire had made at her mother's direction. (App. 66-87). While she spoke with an officer, the defendant said he would shoot any police officer who came to the house. (App. 48). McClaire called from the laundry room; her sister was in their grandfather's room and was "too afraid to leave the room." (App. 71). Their younger brother was also in Tony Sr.'s bedroom. (App. 72). Later during the call, McClaire said that her grandfather had locked

her and her siblings in his bedroom "so we could stay out of it." (App. 77). The 911 call was made at 7:22 p.m. and lasted until 11:47 p.m. (App. 88).

McClaire testified at trial that during the incident, she and her sister had become so "scared [that] we ran into our laundry room and then we went to go out. My dad was standing like in between our living room and our dining room. He kissed us and said this is the last time he was going to see us. And so we went into my grandfather's room and locked the door." (App. 95).[4] Herring explained his last remark to McClaire by saying that "he was going to shoot my grandfather, my sister and my brother and me. And then he said he was going to shoot hisself [sic] so no one had proof that this had happened." (*Id.*)

After the defendant fired the shotgun in front of his house, Herring and his father then both went back into the house. The defendant said that he did not want to go to jail, that "he wasn't going to be arrested," and that "he was going to shoot the police officers ...." (App. 47, 63). At about that point, the defendant's three children were in Tony Sr.'s locked bedroom at

[4] At trial, McClaire clarified the sequence of events to say that she and her sister had initially gone into Tony Sr.'s room but left the door unlocked. When the situation deteriorated, McClaire ran to the laundry room where she was on the phone and her sister "followed me in there because she didn't want to be by herself." (App. 99). Then, when McClaire saw Herring with a gun, Tony Sr. "said to stay in his room and lock the door and do not come out." (App. 100).

his direction, and McClaire Herring called 911 to report the matter. (App. 48, 66-87, 94).

The defendant's father then saw Herring "walking around [and l]ooking out windows" while he "had a shotgun in his hand and some kind of gun on his back." (App. 49, 50). Tony Sr. hit Herring as he sat in a chair and knocked him over while the gun on his back "got stuck in the corner." (App. 50, 52, 96). At Tony Sr.'s directive, his three grandchildren ran to his truck and lay down on the floorboard. (App. 50-51, 95-96, 106). Tony Sr., who did not even have the time to put on a shirt or shoes, then went to the truck and began to drive away but was intercepted by officers who had responded to the 911 call. (App. 51-52, 64). As much as an hour elapsed between Heather fleeing the house and the other family members escaping. (App. 52).

Testifying in his own behalf, Herring stated that after he and his wife began to argue, for the next 20 to 30 minutes he sought the car keys but she refused to give them to him. (App. 113). Then, after they got into a "pushing match," Herring went to his bedroom and grabbed a gun that "stays loaded all the time in the closet." (App. 114). Herring claimed that after he stepped on the porch he held the shotgun "up in the air and shot it off, and I told her, I said, 'Heather Renee give me my fucking keys.'" (App.

115-116). The defendant also maintained that the other people in the house could freely move around and that he had been "smoking a cigarette when [his father] and the kids decided to leave." (App. 118). The defendant estimated that 30 to 40 minutes elapsed between his firing the shotgun and his family leaving the house. (App. 124).

Christopher Kite of the Augusta County Sheriff's Office was one of the officers who responded to the 911 call. Kite first saw Heather Herring running towards him and other officers and asking them, "Help me." (App. 137). Kite described her as "frantic" and "scared." (App. 138). After that, Deputy Kite saw the children approach Tony Sr.'s truck and then heard him yell at them, "'Get in the truck girls.'" (App. 140). Deputy Kite testified at trial that "[a]ll of this was done with a good deal of urgency." (App. 140). After the police stopped Tony Sr.'s truck to investigate the matter, Tony Sr. "seemed relieved," while the children "were wide-eyed. They were rattled. I mean everybody in the vehicle was upset, so." (App. 140-141).

ARGUMENT

I. THE COURT OF APPEALS WRONGLY DECLINED TO DISMISS HERRING'S APPEAL AS JURISDICTIONALLY BARRED , EVEN THOUGH HIS ASSIGNMENT OF ERROR WAS FACIALLY DEFICIENT UNDER RULE 5A:12(c)(1)(ii), FOR FAILURE TO IDENTIFY THE NATURE OF THE CLAIMED INSUFFICIENCY OF THE EVIDENCE AND

FAILURE TO CHALLENGE THE TRIAL COURT'S ACTUAL RULING.

In the Court of Appeals, the defendant challenged all six convictions on sufficiency grounds. His sole assignment of error, though, stated only that the trial court wrongly failed to grant his motion to strike, in that the Commonwealth's evidence was "insufficient as a matter of law to sustain his convictions for attempted murder, abduction and the use of a firearm in the commission of a felony." (App. 258). This assignment of error did not even hint at the ways in which the evidence failed. In the argument portion of his brief, Herring offered discrete contentions as to how and why the evidence failed on the various offenses. (App. 263-274).

Therefore, the defendant's assignment of error was plainly insufficient under Rule 5A:12(c)(1)(ii). This Rule states that an assignment of error is insufficient if it "merely states that the judgment ... is contrary to the law and the evidence ...." Further, in the event of such an insufficient assignment of error, "the petition for appeal shall be dismissed." Herring's assignment of error clearly ran afoul of this unambiguous Rule and thus the appeal should have been dismissed as jurisdictionally barred.

Herring's assignment of error violated Rule 5A:12(c)(1)(ii) for a second reason as well. This provision similarly states that an assignment of error that does not address the trial court's findings or rulings is

insufficient. Here, the appellant's assignment of error in the Court of Appeals asserted that the trial court wrongly failed to grant his motion to strike the Commonwealth's evidence. The fact is, however, that Herring never made a motion to strike at any point during the trial. (App. 109-110, 146). Instead, defense counsel simply presented closing argument challenging the sufficiency of the evidence. (App. 148-150).

Considering that, for example, the trial court would have been obligated to view the evidence in the light most favorable to the Commonwealth as to any motion to strike after the Commonwealth's case in chief, but would have been under no such constraints in assessing the parties' closing arguments, Herring's assignment of error failed because it did not challenge the trial court's actual ruling but instead a non-existent incident at trial. *See Envtl. Staffing Corp. v. B&R Construction Mgmt.*, 283 Va. 787, 792, 725 S.E.2d 550, 553 (2012) (assignments of error insufficient, for failure "to accurately address the facts of the trial below"); *Davis v. Commonwealth*, 282 Va. 339, 717 S.E.2d 296 (2011) (appeal dismissed that assigned error only to trial court's acceptance of guilty plea, but not to Court of Appeals's ruling that guilty plea waived non-jurisdictional defects); *Coleman v. Commonwealth*, 60 Va. App. 618, 731 S.E.2d 22 (2012) (appeal dismissed under Rule 5A:12(c)(1)(ii) which challenged

suppression hearing ruling on basis of probable cause argument; trial court's actual ruling was that defendant lacked standing to raise Fourth Amendment claim).

Regarding Herring's failure to identify the nature of the insufficiency of the evidence in his assignment of error, the Court of Appeals said only that the two parties "were aware of the asserted trial court errors presented by appellant and fully briefed those issues for consideration by this Court. We conclude on this record that appellant's petition for appeal sufficiently invokes our jurisdiction to consider the asserted trial court errors." (App. 316). The ruling of the Court of Appeals regarding Rule 5A:12(c)(1)(ii) "presents a question of law that we review de novo." *LaCava v. Commonwealth*, 283 Va. 465, 469-470, 722 S.E.2d 838, 840 (2012).

The reasoning of the Court of Appeals could be applied to virtually any other case in which an assignment of error was as patently insufficient under Rule 5A:12(c)(1)(ii) as that in the case at bar. Certainly, the mere fact that the Commonwealth, as an alternative argument, addressed Herring's sufficiency arguments on the merits begs the question regarding whether his assignment of error required the dismissal of this appeal.

This Court's recent decision in *Findlay v. Commonwealth*, __ Va. __, S.E.2d __, 2014 Va. LEXIS 5 (Jan. 10, 2014), underscores the conclusion

that Herring's assignment of error in the Court of Appeals was doubly deficient under Rule 5A:12(c)(1)(ii). There, this Court ruled that the defendant's sole assignment of error in his appeal of five possession of child pornography convictions to the Court of Appeals satisfied the requirements of Rule 5A:12(c)(1)(ii). The assignment of error challenged "the trial court's denial of his Motion to Suppress all of the seized videos that came from the defendant's computer, and his computer hard drive, and all derivatives thereof." *Id.* at *1. This Court's reasoning on this issue demonstrates why Herring's assignment of error in the Court of Appeals was facially deficient.

> Findlay's assignment of error goes beyond the bare-bones allegations prohibited by Rule 5A:12(c)(1)(ii). ***Findlay does not merely allege that his convictions are contrary to the law. Likewise, he does not state generally that the evidence is insufficient***. Rather, Findlay ***points* to *a specific preliminary ruling of the trial court*** – the trial court's denial of his motion to suppress - that he believes to be in error. Such specificity adequately puts the court and opposing counsel on notice as to "what points [appellant]'s counsel intends to ask a reversal of the judgment or decree" and prevents them from having to "hunt through the record for every conceivable error which the court below may have committed.

Id. at 6 (alterations and quotations in original).

The violations of Rule 5A:12(c)(1)(ii) that this Court indicated in *Findlay* would render an assignment of error facially deficient were contained in Herring's one assignment of error. Unlike the assignment of

error in *Findlay*, Herring's assignment of error ***was*** a "bare-bone" allegation that his convictions were "insufficient as a matter of law" and amounted to nothing more than a general complaint that the evidence was insufficient. Additionally, this Court's statement in *Findlay* that an assignment of error pointing to "a specific preliminary ruling of the trial court" may comply with Rule 5A:12(c)(1)(ii), because it adequately apprises the court and counsel for appellee as to the points the appellant intends to raise on appeal, surely presupposed that the assignment of error correctly identified the specific preliminary ruling at issue. In the case at bar, Herring's assertion that the trial court had wrongly denied his non-existent motion to strike could hardly have adequately apprised the court and opposing counsel as to the issues Herring might raise on appeal.[5]

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[5] *Findlay* stated that the adequacy of the appellant's assignment of error was "further evidenced by the fact that the Commonwealth's attorney clearly understood the issues on appeal well enough to prepare a focused brief in opposition to Findlay's petition." *Id.* at 7. The dissenting opinion in *Findlay* challenged this point on the ground that the appellant's petition for appeal included not only the assignment of error but an argument section, "which was what the Commonwealth addressed in its brief in opposition." *Id.* at *15-16. In the case at bar, there is no need to determine whether the argument section bears upon the adequacy of the assignment of error. Herring's assignment of error violated the express language of Rule 5A:12(c)(1)(ii), and under any circumstances the argument portion of his brief could not serve to rectify any facial inadequacy in the assignment of error.

Moreover, the Court of Appeals's apparent suggestion in a footnote to its opinion that the Commonwealth's failure to challenge Herring's assignment of error in its brief in opposition supported its ruling is baseless. (App. 316 n.1). This Court has quoted with approval the rule of the United States Court of Appeals for the Fourth Circuit that "'[a] prevailing party may urge an appellate court to affirm a judgment on *any ground appearing in the record*.'" *Perry v. Commonwealth*, 280 Va. 572, 581-582, 701 S.E.2d 431, 437 (2010) (alterations and emphasis in original). Thus, the Commonwealth had every right to argue in its brief that the defendant's assignment of error violated Rule 5A:12(c)(1)(ii), no matter whether that argument was raised in the brief in opposition.

Findlay is also instructive on this point. This Court noted there that, consistent with the ruling of the Court of Appeals that the assignment of error failed under Rule 5A:12(c)(1)(ii), that court should have "dismissed" and not "denied" the petition. 2014 Va. App. LEXIS 5 at *3 n.1. *See Smith v. Commonwealth*, 281 Va. 464, 467, 706 S.E.2d 889 (2011) (in absence of jurisdiction "over an appeal, the appeal must be dismissed" rather than denied). This Court also pointed out in *Findlay* that Rule 5A:12(c)(1)(ii) has been amended so that "'the inclusion of sufficient assignments of error is a mandatory procedural requirement and that the failure to comply with this

requirement deprives the Court of its active jurisdiction to consider the appeal." 2014 Va. LEXIS 5 at *4 n.2, (quoting *Davis*, 282 Va. at 339, 717 S.E.2d at 796-797). And, pointing to various prior decisions of this Court reviewing assignments of error that provided detail equivalent to Findlay's assignment of error, this Court noted that even though "the Commonwealth did not specifically argue that the assignments of error were insufficient in these cases, we routinely decline to review insufficient assignments of error *sua sponte*. In fact, [under Rule 5:17(c)(1), which is substantially the same as Rule 5A:12(c)(1)(ii)] "the Court is now required to do so ...." 2014 Va. LEXIS 5 at *10 n.3 (citations omitted).

This Court's recent decision in *Amin v. County of Henrico*, 286 Va. 231, 749 S.E.2d 169 (2013), likewise demonstrates the lack of active jurisdiction to consider Herring's assignment of error in the Court of Appeals. In *Amin*, the appellant's sole assignment of error in his petition for appeal in the Court of Appeals was that the trial court wrongly denied the motion to suppress. In his later brief on rehearing in that court, Amin added a second assignment of error asserting that his conviction had been void as a matter of law because there was no county ordinance incorporating Virginia Code § 18.2-308. 286 Va. at 233, 749 S.E.2d at 169-170. In its opinion on rehearing, the Court of Appeals indicated that on the merits the

appellant's second assignment of error challenging the trial court's jurisdiction was well-taken but that it could not decide that issue because the appellant had not included it in his petition for appeal. *Id.* at 234, 749 S.E.2d at 170.

Amin then appealed the Court of Appeals's ruling to this Court, which reversed and remanded. This Court stated that the Court of Appeals could not rely on a rule of court such as Rule 1:1, which limits a trial court's jurisdiction to 21 days after entry of final order, "to supersede th[e] principle of law" that authorizes challenges at any time to judgments as void *ab initio*. *Id.* at 235-236, 749 S.E.2d at 171. Even so, "[a]s vital as this principle of law is, ... in order to be able to consider the merits of Amin's argument on this point, the Court of Appeals must have acquired appellate jurisdiction over the case." *Id.* at 236, 749 S.E.2d at 171. This Court concluded that because Amin's petition for appeal included one proper assignment of error, the Court of Appeals in fact had acquired active jurisdiction over Amin's appeal, sufficient to permit it to rule on his jurisdictional argument. *Id.* at 236-237, 749 S.E.2d at 171.

This Court's description of the circumstances under which the Court of Appeals could properly have declined to rule on a jurisdictional argument

like Amin's, which circumstances it distinguished from those in that case, clearly reflect the lack of active jurisdiction in the case at bar:

> A litigant's failure to include any sufficient assignments of error in a petition for appeal can deprive this Court of active jurisdiction to consider the appeal. If Amin's petition for appeal had been untimely, had failed to include any assignments of error, ***or if the only assignment of error had been insufficient to comply with Rule 5A:12***, the Court of Appeals would have lacked active jurisdiction and ***would have been required to dismiss the petition for appeal***.

Id. at 236, 749 S.E.2d at 171 (emphasis added).

It is fundamental that a party cannot confer jurisdiction on a court. *See Wagner v. Shird*, 257 Va. 584, 588, 514 S.E.2d 613, 615 (1999); *Morrison v. Bestler*, 239 Va. 166, 169-170, 387 S.E.2d 753, 755 (1990). It is equally settled that erroneous concessions as to conclusions of law, as well as misstatements of the law by the Commonwealth in the lower court, are not binding on appeal. *See, e.g., Tuggle v. Commonwealth*, 230 Va. 99, 111 n.5, 334 S.E.2d 838, 846 n.5 (1985) (Court rejected Commonwealth's position that error in penalty phase of death penalty trial required remand for resentencing); *In Re: Department of Corrections*, 222 Va. 454, 462-465, 281 S.E.2d 857, 861-864 (1981) (Commonwealth could argue on appeal that circuit court's post-trial orders were jurisdictionally barred under Rule 1:1, despite erroneous contrary position of Commonwealth in trial court). *See also Glasco v. Commonwealth*, 257 Va.

433, 447-448, 513 S.E.2d 137, 145-146 (1999) (Lacy J., concurring) (notwithstanding Commonwealth's concession during oral argument that there was no probable cause to search defendant's vehicle, in fact probable cause supported search and seizure of car). If, then, the Commonwealth's affirmative misstatements of the law in the trial court are not binding on appeal and cannot establish jurisdiction otherwise lacking, then the Commonwealth's ***silence*** in its brief in opposition in the case at bar concerning Rule 5A:12(c)(1)(ii) surely warrants no different outcome.

The panel's opinion, if not corrected by this Court, would effectively render the Rule a nullity. To state it differently, if the assignment of error here did not violate Rule 5A:12(c)(1)(ii), it is difficult to conceive of an assignment of error that ***would*** be facially inadequate. It is noteworthy that another panel of the Court of Appeals rendered an opinion on the same day as the panel's opinion in the case at bar and reached a very different result for an equally plain violation of Rule 5A:12(c)(1)(ii). In *Sexton v. Commonwealth*, 2013 Va. App. LEXIS 119 (Apr. 16, 2013), the defendant's assignment of error challenging his construction fraud conviction stated that "the trial court erred in finding Sexton guilty of violating Section 18.2-200.1 of the 1950 Code of Virginia, as amended, as the evidence presented was insufficient to prove guilt beyond a reasonable doubt." 2013 Va. App.

LEXIS 119 at *12. The Court of Appeals in *Sexton* held that this assignment of error did not comply with Rule 5A:12(c)(1)(ii), stating: "This assignment of error does not even hint at the particular way in which the evidence was deficient. Thus, pursuant to the Supreme Court's holding in *Davis ...,* Rule 5A:12(c)(1)(ii) mandates its dismissal in the absence of any motion by appellant here for leave from this Court to amend this assignment of error." *Id.* at *13. Absent any such motion to amend, the panel in *Sexton* dismissed the appellant's assignment of error challenging the sufficiency of the evidence on his construction fraud conviction.

No principled distinction exists between the assignment of error in *Sexton* and that raised in the case at bar. Like the appellant in *Sexton*, Herring never moved to amend his assignment of error even though on March 26, 2013, or well before the present case concluded in the Court of Appeals, that court issued its *en banc* opinion in *Whitt v. Commonwealth*, 61 Va. App. 637, 739 S.E.2d 254 (2013) (*en banc*). There, the Court of Appeals made clear that even if an assignment of error does not comply with Rule 5A:12(c)(1)(ii), it retains the authority to grant a motion for leave to amend an inadequate assignment of error.[6]

[6] For the record, as reflected in its assignment of cross-error in Whitt's appeal to this Court (Record No. 130683), the Commonwealth does not agree that the Court of Appeals had the authority to grant motions to

Herring's protracted failure to seek leave to amend his patently inadequate assignment of error even in the wake of the Court of Appeals's *en banc* decision in *Whitt* is equivalent to the situation in *Brooks v. Commonwealth*, 61 Va. App. 576, 739 S.E.2d 224 (2013) (*en banc*). *Brooks* held *en banc* that the defendant's "repeated failure to correct the defect [in his assignment of error that did not provide an exact reference to the place in the record where the assigned error had been preserved at trial] in spite of multiple opportunities to do so" mandated the dismissal of the appeal, for failure to comply with Rule 5A:12(c)(1). *Id*. at 579, 739 S.E.2d 226.

Finally, the Court of Appeals did not mention, much less rule upon, the second deficiency in Herring's assignment of error identified by the Commonwealth in its brief. That is, the Court of Appeals did not explain why this case should not be dismissed even though the assigned error challenged a non-existent ruling at trial—the denial of a motion to strike that

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amend assignments of error as recited in its decision in *Whitt*. The Commonwealth also notes that in *Findlay* this Court found it unnecessary to decide whether the appellant should have been allowed to amend his petition before the Court of Appeals dismissed the appeal. 2014 Va. LEXIS 5 at *11 n.4.

was never made. Consistent with the authorities cited above, the Court of Appeals should have dismissed the appeal on this ground.[7]

II. THE COURT OF APPEALS WRONGLY DISREGARDED THE FACT THAT THE DEFENDANT NEVER CHALLENGED THE ABDUCTION CHARGES AT TRIAL ON THE GROUND THAT THE EVIDENCE FAILED TO PROVE HE INTENDED TO DEPRIVE THE VICTIMS OF THEIR PERSONAL LIBERTY. FURTHER, THE RECORD FAIRLY SUPPORTS THE TRIER OF FACT'S FINDING THAT THE DEFENDANT INTENDED TO DETAIN THE VICTIMS.

In the Court of Appeals the defendant challenged his four abduction convictions on the ground 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." (App. 273). Herring pointed to the fact

[7] It is noteworthy that in *John Crane, Inc. v. Bristow*, Record No. 120947 (enclosed as a addendum), which this Court may consider pursuant to Rule 5:1(f), this Court recently dismissed an appeal pursuant to Rule 5:17(c)(1). There, the defendant in a wrongful death suit appealed to this Court, in part, on the ground that the jury had been wrongly instructed as to causation. This Court concluded that the assignment of error failed under Rule 5:17(c)(i), because it set forth "a limited choice between two erroneous standards: the 'substantial contributing factor' standard <u>or</u> the 'but for' standard. In other words, the Court cannot reverse the circuit court's judgment and remand for a new trial under the 'sufficient to cause' standard [adopted by this Court in *Ford Motor Co. v. Boomer*, 285 Va. 141, 736 S.E.2d 724 (2013)] without expanding the assignment of error beyond its plain language." (Order 3, emphasis in original). This Court thus dismissed the appeal even though the argument portion of the appellant's petition correctly referred to the "sufficient to cause" standard. (*Id*.).

that a number of his actions and statements directly concerned his wife rather than any of the four abduction victims. (*Id.*). The defendant further said that his statements "about harming himself, his father and children were made in the context of destroying evidence of a crime thereby precluding the Appellant from ever having to go to jail." (App. 273-274). And, the defendant asserted that he never ordered any of the abduction victims to go to any particular location within the home, did not prevent any of them from talking with the police and the 911 operator, but did allow his father and his children to leave the house without interference. (App. 274).

The Court of Appeals reversed Herring's abduction convictions, for failure to prove the defendant's intent to deprive each victim of his or her personal liberty. (App. 319). The panel stated that the record demonstrated that Herring's three children and his father "were able to move around the house. Appellant's father and [one of the defendant's daughters] each communicated separately with a 911 dispatcher. ... Moreover, appellant's father and the three children were able to leave the house with little interference from the appellant." (*Id.*). The panel thus concluded that although Herring's "actions caused [the four victims] to be afraid of what might transpire generally, nothing presented in the record

establishes that his purpose was to deprive them of their personal liberty 'by force, intimidation or deception.'" (*Id.*).

As the Commonwealth argued in its brief, however, the defendant's closing argument never challenged the defendant's intent in detaining the four victims. (App. 148-150). Case law makes clear that, in order to prove an abduction, the Commonwealth must show not only that the defendant detained the victim, but also that the defendant intended to deprive the victim of his or her personal liberty. *See Burton v. Commonwealth*, 281 Va. 622, 708 S.E.2d 892 (2011) (evidence proved that defendant had detained victim in car by deception, but failed to prove his requisite intent to deprive her of her personal liberty). Here, defense counsel's closing argument challenged the Commonwealth's evidence on the attempted murder and firearm counts on the ground that the Commonwealth had not proven Herring "had any intent to kill anybody," but merely asserted as to the abduction charges that the defendant "did not abduct anybody according to the statute." (App. 150). Thus, the defendant's intent argument on brief (App. 273-274) came too late under Rule 5A:18.

Despite the Commonwealth's procedural argument, the Court of Appeals, after concluding that Rule 5A:12(c)(1)(ii) allowed review of Herring's sufficiency arguments, simply addressed those arguments on the

merits. (App. 315-316, 318-319). The Court of Appeals thus erred in not ruling on, or sustaining, the Commonwealth's default argument.

On the merits, Herring's argument in the Court of Appeals was both legally and factually flawed; it offered the most benign explanation for his actions and either disregarded or misstated evidence by prosecution witnesses plainly confirming his guilt on the abduction counts.

In assessing the sufficiency of the evidence, this Court must consider all of the evidence and reasonable inferences fairly deducible therefrom in the light most favorable to the Commonwealth. *See Phan v. Commonwealth*, 258 Va. 506, 507, 521 S.E.2d 282, 282 (1999). This Court must affirm, unless it appears from the evidence that the lower court judgment is plainly wrong or without supporting evidence. *See Sullivan v. Commonwealth*, 280 Va. 672, 676, 701 S.E.2d 61, 63 (2010). Further, it is within the province of the trier of fact to draw inferences from the proven evidence, and its inferences are binding so long as they are reasonable and justified. *See Sullivan*, *id.* at 676, 701 S.E.2d at 63-64; *Commonwealth v. Hudson*, 265 Va. 505, 514, 578 S.E.2d 781, 786 (2003); *Johnson v. Commonwealth*, 209 Va. 291, 295, 163 S.E.2d 570, 574 (1968). If there is evidence to sustain the verdict, this Court may not overrule it and substitute its own judgment, even if it differs from that of the trial court. *See Lawlor v. Commonwealth*, 285 Va.

187, 224, 738 S.E.2d 847, 868 (2013). That is, upon a review of the evidence in the light mandated on appeal, "the question is whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Commonwealth v. McNeal*, 282 Va. 16, 20, 710 S.E.2d 733, 735 (2011), *quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *See also Williams v. Commonwealth*, 278 Va. 190, 193, 677 S.E.2d 280, 282 (2009), *aff'g*, 52 Va. App. 194, 662 S.E.2d 627 (2008). Likewise, an appellate court may not reweigh the evidence, because it has no authority to preside *de novo* over a second trial. *See Nusbaum v. Berlin*, 273 Va. 385, 408, 641 S.E.2d 494, 507 (2007); *Holloway v. Commonwealth*, 57 Va. App. 658, 664, 705 S.E.2d 501, 512 (2011) (*en banc*).

The defendant was convicted under § 18.2-47(A), which states in relevant part: "Any person who, by ... ***intimidation*** ... and without legal justification or excuse, seizes, takes, transports, ***detains*** or secretes another person with the intent to deprive such other person of his personal liberty ... shall be deemed guilty of abduction." (Emphasis added). Unquestionably, the defendant's statements and conduct intimidated his father and children into taking refuge behind Tony Sr.'s locked bedroom door. The four victims were then detained in the bedroom for a sufficient

period to prove that Herring had abducted them through intimidation, and with the intent to deprive them of their personal liberty.

First, it is clear that the Commonwealth did not have to prove any asportation of the victims. Rather, "mere detention is sufficient, ... and the asportation or detention can be accomplished by either force, intimidation, or deception." *Jerman v. Director*, 267 Va. 432, 439, 593 S.E.2d 255, 259 (2004). *See also Smith v. Commonwealth*, 56 Va. App. 711, 724, 697 S.E.2d 14, 20 (2010).

The defendant's threats to kill his wife, coupled with his firing a shotgun outside his house after Heather had fled from the premises, far from being irrelevant to the abduction counts, in fact constituted much of the intimidation that caused the victims to lock themselves in Tony Sr.'s bedroom. The fact that Herring also said that he was going to shoot his father and his children simply heightened their fear of what he might do to them and their need to protect themselves. (App. 95). *Cf. Joyce v. Commonwealth*, 210 Va. 272, 170 S.E.2d 9 (1969) (defendant properly convicted of breaking and entering with intent to commit abduction where evidence supported conclusion that defendant and other escapee had entered house with intent to hide from pursuing officers and, by extension, with intent to keep any occupants discovered there from leaving).

The trier of fact could certainly conclude that the defendant intended the natural and probable consequences of his actions. *See generally Schmitt v. Commonwealth*, 262 Va. 127, 145, 547 S.E.2d 186, 198-199 (2001). Indeed, in convicting Herring, the trial judge alluded to the attendant circumstances of the case to conclude that the defendant, "by force or intimidation, detained those people in that house." (App. 155). And, by any measure, the defendant's several threats to kill his wife, his acts of violence against her, and his discharge of a gun outside the home all had the entirely predictable result of coercing the other people inside into remaining within the residence. The trier of fact thus could find that the defendant intended to deprive his father and three children of their personal liberty.

Moreover, the issue of Herring's intent in detaining the family members for several hours is reviewable like any other issue of intent on appeal. "'Intent may, and often must, be inferred from the facts and circumstances of the case, including the actions of the accused and any statements made by him.'" *Carter v. Commonwealth*, 280 Va. 100, 105, 694 S.E.2d 590, 594 (2010). *See also Patterson v. Commonwealth*, 215 Va. 698, 699, 213 S.E.2d 752, 753 (1975) ("Because direct proof is often impossible in this type case, intent may be shown by circumstantial

evidence."); *Collins v.* Commonwealth, 57 Va. App. 355, 371, 702 S.E.2d 267, 274 (2010), *aff'd*, 283 Va. 263, 720 S.E.2d 530 (2012) (defendant's actions may prove intent). The determination of a defendant's intent "'presents a factual question which lies peculiarly within the province of the jury.'" *Ingram v. Commonwealth*, 192 Va. 794, 801-802, 66 S.E.2d 846, 850 (1951); *Hughes v. Commonwealth*, 18 Va. App. 510, 519, 446 S.E.2d 451, 457 (1994) (*en banc*).

Further, the testimony of the defendant's two daughters and his father all made clear that they and Herring's young son were wrongly detained within the meaning § 18.2-47. McClaire Herring, for example, testified that she had wanted to leave but did not think she could do so prior to her grandfather devising a plan for them to escape from the house. (App. 96). She further testified that at one point she and her sister were so scared that they hid behind a laundry basket and then, at her grandfather's urging, went to Tony Sr.'s bedroom, locked the door and did not come out. (App. 100). Similarly, McClayln Herring testified that before her grandfather gathered the grandchildren together she had not felt safe to leave because she thought "maybe my dad would probably like shoot one of us." (App. 108-109).

Likewise, Tony Sr. testified that after the defendant had fired his shotgun and repeatedly threatened to shoot police officers who might respond to the scene, Tony Sr. had had his grandchildren go into his bedroom. (App. 48-49). Only after Tony Sr. struck his son from behind were his grandchildren able to run out of the house to his truck. (App. 50). After the grandchildren ran to the truck and Tony Sr. likewise was about to leave the house, the defendant said, "I'm going to have to shoot you." (App. 51). Tony Sr. was under such duress that he did not have the time to put on a shirt or shoes before he fled to his truck. (App. 64, 141). Unsurprisingly, he and his grandchildren all appeared upset to the responding police officers. (App. 141).

Based on this record, the trial court properly convicted the defendant on the four abduction counts:

> [T]here is really no evidence that Mr. Herring literally locked the door on anybody. No evidence that he told them to go anywhere. But there is an abundance of [evidence] that he created an environment which caused two little girls to huddle in a laundry room. Which caused a grandfather to police them up and get them into his room and lock the door along with their little brother. Which caused the grandfather at the right moment to hustle them out of that house and get them into a truck and get them out of harms way. [A] man walking around the house with a loaded shotgun which he has already discharged and another weapon either on his person or near his person, coupled with the comments to the daughter, of all things, that he was going to shoot all of them; her, her sister, her brother, her grandfather and himself, leads me to the

> necessary conclusion that Mr. Herring, by force or intimidation, detained those people in that house.
>
> But you have to couple it with the intent to deprive them of their personal liberties. Well, when I come to the comment that he's going to shoot them all and then I couple that with the comment that Mr. Herring Sr. testified to as he was leaving and the defendant said "I'm going to have to shoot you," I infer from that he intended those people not to leave. Now he didn't shoot them. Thank God he didn't shoot them, but "I'm going to have to shoot you," that tells me what I need to know about what his intent was with respect to keeping them there. He didn't indicate he was going to shoot them because they were going to stay, he indicated he was going to shoot them because they were going to leave, and I think that constitutes abduction and I think it constitutes it for all [of] them and so I find him guilty of all four of those charges.

(App. 155-156).

Beyond this, the trier of fact's finding that Herring intended to deprive the victims of their personal liberty and keep them from leaving the home refutes his contention that he may have had some other intent. (App. 155-156). *See Clanton v.* Commonwealth, 53 Va. App. 561, 569, 673 S.E.2d 904, 908 (2009) (issue of defendant's intent in detaining victim is issue of fact, and its resolution must be honored on appeal if supported by record). The fact that Herring never expressly directed any victim to go to any particular location within the home cannot obscure the fact that, as a direct, predictable result of his threatening, violent acts, the victims did not feel free to leave the home and instead were constrained to flee to the relative

security of Tony Sr.'s locked bedroom. Further, the fact that Tony Sr. and McClaire each spoke with the 911 operator shows little more than that they were in the locked bedroom for much of the protracted incident. And, even if they talked "freely" with the police and the 911 operator, Tony Sr. and McClaire certainly did not feel free to move about the home or leave it of their own volition.

Considering that "proof of either element may be used to establish the other" under § 18.2-47, *Burton*, 281 Va. at 628, 708 S.E.2d at 895, the collective circumstances here amply supported the trier of fact's factual finding regarding the defendant's intent. *Cf. Clanton*, 53 Va. App. at 570-571, 673 S.E.2d at 908-909 (defendant abducted infant girl during home invasion where evidence showed that her father while bound in duct tape repeatedly said she was "in here" and one intruder then took infant from bed to second bedroom and told father's bound girlfriend to "watch her"; irrespective of whether infant was moved to safer area, defendant was still guilty of her abduction). Even if Herring made no "attempt ... to impede their departure" from the house, at best that shows that the abductions had ended, not that they never occurred. (App. 274). *See Collins v.* Commonwealth, 283 Va. 263, 272, 720 S.E.2d 530, 534 (2012) (Court rejected defendant's argument in attempted abduction appeal that he

abandoned any intent to abduct once he became aware he had seized wrong man and ended his detention; if person "resolves on a criminal enterprise and proceeds so far in it that his act amounts to an indictable attempt, it does not cease to be such, though he voluntarily abandons the evil purpose"). This is especially true, given that by the defendant's own estimate as much as 40 minutes passed between his firing the shotgun and the flight from the house by Tony Sr. and the grandchildren. (App. 124). And, the three children ran out of the house only after the defendant's father had hit him and the gun "on his back got stuck in the corner." (App. 50).

In sum, the record does not support the Court of Appeals's conclusion that the evidence did not establish that Herring's "purpose was to deprive [the victims] of their personal liberty 'by force, intimidation or deception.'" (App. 319). At a minimum, the Commonwealth's evidence was enough to create an issue for the trier of fact regarding the defendant's intent in committing or threatening various acts of violence before the four victims, which caused them to seek refuge within the home for a protracted period. The Court of Appeals, then, erroneously substituted its view for that on the trier of fact on this intent issue.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Court of Appeals of Virginia improperly excusing the defendant's two clear-cut 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
Appellee herein.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On January 27, 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.

_____
Robert H. Anderson, III
Senior Assistant Attorney General

ADDENDUM

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 25th *day of* October, 2013.

John Crane Inc., Appellant,

against Record No. 120947
Circuit Court No. CL10-00972P-03(DP)

Anne M. Bristow, Administratrix of the Estate of John K. Bristow, Deceased, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Newport News.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that the appeal must be dismissed pursuant to Rule 5:17(c)(1).

Anne M. Bristow filed suit against John Crane, Inc. ("John Crane") for the wrongful death of her husband, John K. Bristow, allegedly caused by mesothelioma resulting from exposure to asbestos in products manufactured by John Crane. Bristow asserted negligence and strict liability claims under federal maritime law for alleged exposures between 1962 and 1970, and a breach of implied warranty claim under Virginia law for alleged exposures between 1970 and 1978.

At trial, John Crane argued that all three of Bristow's claims were governed by Virginia substantive law and therefore the "but for" standard for causation applied. The circuit court rejected this argument and instructed the jury on the "substantial contributing factor" standard. The court held that the "substantial contributing factor" standard applied because there

were independent acts of negligence that could have caused Bristow's injuries, and it was "impossible to determine what portion each contributed to the injury . . . ."

The jury ultimately returned a verdict against John Crane on all claims in the amount of $9,182,906.23. On a special verdict form, the jury awarded $4,902,906.23 pursuant to the Virginia implied warranty claim, and an additional $4,280,000 pursuant to the maritime claims. John Crane filed a motion to set aside the verdict, which the circuit court denied.

John Crane filed a petition for appeal asserting several assignments of error, including that the jury was erroneously instructed as to causation. The Court held the appeal until after our decision in Ford Motor Co. v. Boomer, 285 Va. 141, 158-59, 736 S.E.2d 724, 732-33 (2013), in which we rejected both the "substantial contributing factor" and "but for" standards and clarified that the proper test for establishing causation in multiple exposure mesothelioma cases is that "the exposure [to a particular defendant's asbestos-containing product] must have been 'a' sufficient cause of the injury."

The parties subsequently submitted letter briefs addressing the effects of Boomer on this appeal. John Crane argued that Boomer directly applies and requires us to reverse the circuit court's judgment and remand for a new trial on all claims. Bristow argued that (1) Boomer has no bearing on the maritime portion of the judgment; (2) Boomer should only apply prospectively; and (3) even if the jury was erroneously instructed, such error was harmless. We granted John Crane's appeal solely as to the proper causation standard for the Virginia implied warranty claim.

On appeal, John Crane argues that the circuit court's use of the "substantial contributing factor" standard was erroneous with respect to the Virginia claim, and that the case should be remanded for a new trial under the "sufficient to cause" standard. We agree that "sufficient to cause" is the proper standard for causation, as articulated in Boomer. However, we hold that John Crane's assignment of error explicitly forecloses the relief it is seeking on appeal.

John Crane's assignment of error states:

> The trial court committed reversible error in permitting the implied warranty claim to be tried under a 'substantial contributing factor' theory of causation, instead of Virginia's well-established 'but for' standard for causation.

(Emphasis added.) The assignment of error presents the Court with a limited choice between two erroneous standards: the "substantial contributing factor" standard or the "but for" standard. In other words, the Court cannot reverse the circuit court's judgment and remand for a new trial under the "sufficient to cause" standard without expanding the assignment of error beyond its plain language.[1]

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[1] John Crane's assignment of error is distinguishable from the assignments of error set forth in Boomer. The assignments of error in Boomer did not include constraining language similar to the "instead of" phrase used by John Crane. Ford Motor Company's and Honeywell International Incorporated's assignments of error indicated that the jury had been improperly instructed as to causation, but did not specifically identify which causation standard the circuit court should have used in place of "substantial contributing factor."

Because John Crane's sole assignment of error is insufficient under Rule 5:17(c)(1), we hold that the order awarding an appeal to John Crane was improvidently granted and, accordingly, that order will be vacated and the appeal dismissed.

JUSTICE McCLANAHAN, with whom JUSTICE GOODWYN joins, dissenting.

I respectfully dissent.

In Ford Motor Co. v. Boomer, 285 Va. 141, 736 S.E.2d 724 (2013), Ford's third assignment of error stated:

> The Circuit Court erred in instructing the jury on "substantial contributing factor" causation, thus modifying Virginia's traditional "but for" causation standard.

In this case, John Crane's assignment of error states:

> The trial court committed reversible error in permitting the implied warranty claim to be tried under a 'substantial contributing factor' theory of causation, instead of Virginia's well-established 'but for' standard for causation.

I fail to see the material distinction between these two assignments of error justifying different treatment. Therefore, I would not dismiss John Crane's appeal on the ground that its assignment of error violates Rule 5:17(c)(1).

This order shall be certified to the said circuit court.

A Copy,

Teste:

Kate L Harrington

Clerk

Add. 4