No. _____

In The
Supreme Court of the United States

WILLIE KIPYEGO BUTIA,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Virginia

APPENDIX

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APPENDIX:

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 15th day of October, 2019.

Record No. 19060
Court of Appeals No. 0906-18-4

Willie Kipyego Butia, Appellant,

against

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:
Douglas B. Robelen, Clerk

By: /s/ Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Wednesday the 27th day of February, 2019.

Record No. 0906-18-4
Circuit Court No. FE-2016-1060

Willie Kipyego Butia, Appellant,

against

Commonwealth of Virginia, Appellee.

From the Circuit Court of Fairfax County

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is denied for the following reasons:

A jury convicted appellant of abduction and acquitted him of rape. He asserts that the trial court erred by denying his motion to strike because the evidence failed to prove that he abducted the victim, O.B., by "detaining" her within the meaning of Code § 18.2-47. Appellant emphasizes that O.B.'s testimony was "not clear as to when and where she was abducted" and argues that she was "not, in fact, detained or deprived of her personal liberty." Appellant also contends that the evidence failed to prove abduction because it did not establish that he intended to deprive O.B. of her personal liberty.

Rule 5A:18 provides, in pertinent part, that "[n]o ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice." "The purpose of this contemporaneous objection requirement is to allow the trial court a fair opportunity to resolve the issue at trial, thereby preventing unnecessary appeals and retrials." Creamer v. Commonwealth, 64 Va. App. 185, 195 (2015).

At the conclusion of the Commonwealth's case, appellant moved to strike the evidence. Defense counsel stated, "At this time we would make a motion to strike on both counts." When the trial court responded, "All right. Go ahead, ma'am," appellant announced, "We will submit on the evidence that was submitted." The trial court ruled as follows: "All right. With the grounds stated on the motion to strike, the [c]ourt will deny the general motion at this time. I think it's a matter [for] the fact finder. Nothing specific has been articulated. The Court will deny the motion to strike."

Appellant presented evidence. At the conclusion of all of the evidence, he "renewed" his motion to strike without elaboration. The trial court denied the motion, stating, "Without any specific issue to look at with regard to the two charges before the [c]ourt, there's a divergence of testimony and divergence of what actually happened, why — state Count I — why, if and why there was a restraint of [O.B.] . . . . I deny the motion to strike."

Appellant's assignment of error is limited to whether the trial court erred by denying his motion to strike, and we therefore limit our analysis to the

issue as framed in his assignment of error. See Rule 5A:12(c)(1) ("Only assignments of error assigned in the petition for appeal will be noticed by this Court."). A general sufficiency objection in a motion to strike does not preserve for appeal a challenge to whether a particular element of the offense was proved. See Marshall v. Commonwealth, 26 Va. App. 627, 636 (1998). "[A]n 'appellate court, in fairness to the trial judge, should not . . . put a different twist on a question that is at odds with the question presented to the trial court.'" Johnson v. Commonwealth, 58 Va. App. 625, 637 (2011) (quoting Commonwealth v. Shifflett, 257 Va. 34, 44 (1999)). "Making one specific argument on an issue does not preserve a separate legal point on the same issue for review." Id. (quoting Edwards v. Commonwealth, 41 Va. App. 752, 760 (2003) (*en banc*), aff'd by unpublished order, No. 040019 (Va. Oct. 15, 2004)). Under Rule 5A:18, the "same argument must have been raised, with specificity, at trial before it can be considered on appeal." Id. (quoting Correll v. Commonwealth, 42 Va. App. 311, 324 (2004)).

Appellant's general motion to strike the evidence was not specific enough to preserve his arguments on appeal. The trial court expressly stated that appellant had stated "nothing specific" in support of his motion to strike at the conclusion of the Commonwealth's evidence, and when appellant "renewed" that motion, the trial court noted that it had been given nothing "specific . . . to look at," and therefore, denied the motion based upon the "divergence" in the testimony regarding whether O.B. had been restrained. Thus, the trial court

interpreted appellant's argument as a credibility issue.

Appellant does not assert on appeal that O.B.'s testimony was not credible. He attacks the sufficiency of the evidence supporting his abduction conviction on grounds different than those raised at trial, and therefore, has failed to preserve his arguments. Rule 5A:18. "Although Rule 5A:18 contains exceptions for good cause or to meet the ends of justice, appellant does not argue these exceptions and we will not invoke them *sua sponte*." Williams v. Commonwealth, 57 Va. App. 341, 347 (2010). Accordingly, we decline to consider the first assignment of error.

II. Appellant asserts that the trial court erred by incorrectly instructing the jury in Instruction No. 7 that "the definition of detain is to restrain, and that the victim was detained if she was restrained by the defendant for a brief period of time." He concedes that he did not object to the instruction, but asks that we consider his argument under the ends of justice exception in Rule 5A:18.

"The purpose of th[e] contemporaneous objection requirement [in Rule 5A:18] is to allow the trial court a fair opportunity to resolve the issue at trial, thereby preventing unnecessary appeals and retrials." Creamer, 64 Va. App. at 195. "The 'ends of justice' exception to Rule 5A:18 is 'narrow and is to be used sparingly.'" Pearce v. Commonwealth, 53 Va. App. 113, 123 (2008) (quoting Bazemore v. Commonwealth, 42 Va. App. 203, 219 (2004) (*en banc*)). "[F]or this Court to consider the merits of appellant's assignment of error, he must show that either the conduct for which he was convicted is not a criminal offense or that the record affirmatively

establishes that an element of the offense did not occur. Merely claiming that the Commonwealth failed to prove an element of the offense will not constitute a miscarriage of justice." Le v. Commonwealth, 65 Va. App. 66, 74 (2015).

On appeal, this Court's "sole responsibility in reviewing [jury instructions] is to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises." Molina v. Commonwealth, 272 Va. 666, 671 (2006) (quoting Swisher v. Swisher, 223 Va. 499, 503 (1982)). Code § 18.2-47(A) provides that

> [a]ny person who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes another person with the intent to deprive such other person of his personal liberty or to withhold or conceal him from any person, authority or institution lawfully entitled to his charge, shall be deemed guilty of "abduction."

Although the term "detain" is not defined by statute, the Supreme Court has held that, "[f]or purposes of Code § 18.2-47(A), a defendant 'detains' a victim by having that victim 'remain in a certain location, or even in a certain position' through the use of force, intimidation, or deception." Commonwealth v. Herring, 288 Va. 59, 74 (2014) (quoting Burton v. Commonwealth, 281 Va. 622, 628 (2011)). Thus, [f]or purposes of Code § 18.2-47(A), it is possible to 'detain[]' a victim by having that victim remain within a house." Id. at 75.

Here, the trial court instructed the jury as follows regarding the evidence required to prove that appellant abducted O.B.:

> The defendant is charged with the crime of abduction. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:
>
> 1. That the defendant by force or intimidation, did seize, take, transport, or detain [O.B.]; and
>
> 2. That the defendant did so with the intent to deprive [O.B.] of her personal liberty; and
>
> 3. That the defendant acted without legal justification or excuse.
>
> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty . . . .

It also instructed the jury in Instruction Number 7 that the term "detain" meant "to hold, to keep in, or to restrain." Finally, it instructed the jury that the Commonwealth "d[id] not need to prove that the Defendant detained [O.B.] for the entire incident. [O.B.] was detained if she was held, kept in, or restrained by the Defendant for a brief period of time."

"When reviewing jury instructions on appeal, we read the instructions together and consider them as

a whole." SuperValu, Inc. v. Johnson, 276 Va. 356, 366 (2008). Read together, Instruction Numbers 6 and 7 properly instructed the jury that appellant was guilty of abduction if the evidence proved beyond a reasonable doubt that he "detained" O.B. by restraining her through force or intimidation with the intent to deprive her of her personal liberty. See Herring, 288 Va. at 74. Accordingly, because the two instructions correctly stated the Commonwealth's burden of proof, the record does not justify application of the ends of justice exception.

III. Appellant argues that the trial court erred by denying his motion to set aside the verdict and for a new trial with respect to his abduction conviction. He asserts that the jury's verdict was plainly wrong because the evidence failed to prove that he intended to deprive O.B. of her liberty. Instead, appellant contends that he detained her to "further his sexual advances." He cites O.B.'s testimony that he "was trying to get [her] to sleep with him" when he "grabbed [her] from behind" and "sat down with [her]" and "again wrapped his arms around [her]." He also argues that he did not "detain" O.B. for purposes of Code § 18.2-47 because he only "momentar[ily]" deprived O.B. of her liberty when he wrapped his arms around her. Appellant asserts that the jury erroneously assumed, based upon Instruction Number 7, that restraint "even for a brief period of time[] satisfied the definition of 'detain' . . . and therefore could be a basis for conviction."

"When considering on appeal the sufficiency of the evidence presented below, we 'presume the judgment of the trial court to be correct' and reverse only if the trial court's decision is 'plainly wrong or

without evidence to support it.'" Kelly v. Commonwealth, 41 Va. App. 250, 257 (2003) (*en banc*) (quoting Davis v. Commonwealth, 39 Va. App. 96, 99 (2002)). As the Commonwealth was the prevailing party below, we state the facts in the light most favorable to it. Gerald v. Commonwealth, 295 Va. 469, 472-73 (2018). Therefore, we discard any of appellant's conflicting evidence, and regard as true all credible evidence favorable to the Commonwealth and all inferences that may reasonably be drawn from that evidence. Id.

Appellant and O.B. were married on July 23, 2008. In 2016 they were experiencing marital difficulties, and separated in early April 2016. At the end of May 2016, however, the couple attempted to reconcile, and O.B. moved back in with appellant. During the week preceding Friday, May 27, 2016, appellant and O.B. resumed marital relations. On the evening of Thursday, May 26, 2016, appellant and O.B. quarreled about a text message exchange between him and his former wife, prompting appellant to give O.B. his phone so that she could "see how the conversation went." O.B. looked through his conversation history and became angry when she found messages between appellant and other women when O.B. was pregnant with their son in September 2014. O.B. announced "there would be no more reconciliation and [that she] was done with him." She told appellant that she was going to bed and that she would sleep in the spare bedroom or that he could. Appellant replied that they could sleep in the same room, and O.B. agreed, "[a]s long as [he] d[id]n't touch [her]." O.B. testified:

> And so I went upstairs, I went to the bathroom. When I came out, he was standing at the sink where I normally wash my hands and he was trying to talk to me. So I went over to the other sink and he came over and he grabbed me from behind and I told him to just leave me alone, I wasn't interested in anything. And he grabbed me from behind and I sat down on the floor. I was crying, I was upset. I sat down on the floor, he sat down with me and again wrapped his arms around me and I stood up and I told him, "I don't want any of this, just leave me alone." And he was trying to get me to sleep with him.

O.B. left the bathroom and lay down on their bed. She testified that appellant lay down beside her, put his arm around her, and made sexual advances toward her. In response, she "got out of the bed and . . . told him to just leave me alone."

Appellant urged O.B. to come back to bed and promised that he would not touch her. When she relented, however, he put his arm around her again, "grabbing [her] even tighter . . . ." He started slapping her thigh and holding her "tight so [she] couldn't move very well . . . ." O.B. "screamed" and began to cry. She "finally got off the bed onto the floor" and walked over to check on her son, who had been awakened by her screaming. O.B. then left the master bedroom and locked herself in the spare bedroom.

After a "few minutes," she decided that she "didn't want to leave [her] son in there alone with [appellant]," and returned to the master bedroom.

She did not lie down in bed next to appellant, however; instead, she sat in a chair next to the crib. Appellant asked her, "What are you doing?" and she told him that she was "just trying to go to sleep" and to "leave [her] alone."

Appellant climbed on top of her as she sat in the chair and began to kiss her. When he attempted to pull her out of the chair, she "grabbed on" to her son's crib, but appellant continued to pull her with his arms around her waist. Because she was "moving the crib," O.B. released her grip and "started screaming for help." Appellant told her, "Who's going to help you? Nobody wants you here. Who are you screaming for?" O.B. stated that appellant "pulled" her out of the chair "by [her] arm," and held her down on the bed, "telling me what a stupid bitch I was, and how nobody wanted me here."[1]

O.B. eventually got out of bed, gathered her possessions and her son, and left the house at 1:30 a.m. After reporting the incident to the police, O.B. telephoned appellant and recorded the conversation. Appellant admitted during the phone call that he "pinn[ed] [her] down" and "restrain[ed]" her because he did not want her to leave. He denied any recollection of pulling her out of the chair; however, he did admit, "You struggled . . . so I held you down . . . you kept struggling . . . I held you down . . . you screamed . . . and I let you go." He said he "tried to keep [her] [t]here" and that he "just wanted [her] to stay." Appellant noted that he was "holding her with his arms and legs locked around her." O.B. disputed appellant's recollection that he immediately released

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[1] Appellant and O.B. gave conflicting testimony about whether they had sexual intercourse and whether appellant raped her, but the jury acquitted appellant of rape.

her when she screamed, stating that she screamed "like five times."

At trial, O.B. was asked to identify when appellant was "physically holding [her] or restraining [her]," and answered, "When I was standing at the sink washing my hands, he was holding onto me from the back and he did let go of me as I sat down and then he did grab onto me again when I was sitting down and I told him to let me go." She also stated, "A couple of times when we were laying in bed and then he pulled me out of a chair and he was holding onto me and forced me onto the bed again."

Appellant argues that the evidence failed to prove that he abducted O.B. because he did not intend to deprive her of her personal liberty; instead, he contends that he detained her to "further his sexual advances." He cites O.B.'s testimony that he "grabbed [her] from behind" in the bathroom and "wrapped his arms around [her]" because "he was trying to get [her] to sleep with him." Relying on Johnson v. Commonwealth, 221 Va. 872 (1981), appellant asserts that the evidence proved that he briefly detained O.B. because he wanted to have sex with her, not because he intended to deprive her of her personal liberty.

Johnson is distinguishable from the facts here in two respects. First, the Supreme Court held that Johnson restrained his victim only long enough to further his sexual advances because he detained her only "ten to fifteen seconds" while he tried to kiss her and "rub" against her. Id. at 874. By contrast, appellant pulled O.B. from a chair toward the bed as she "struggled" with him and pinned her on the bed as she continued to struggle. Second, unlike

appellant, Johnson never stated that he restrained the victim because he wanted to keep her inside the apartment. See Code § 18.2-47(A) (requiring proof that a defendant detain the victim with the intent to deprive her of her personal liberty); Herring, 288 Va. at 75 ("[I]t is possible to 'detain' a victim by having the victim remain within a house.").

"The question of [appellant's] intent [had to] be determined from the outward manifestation of his actions leading to usual and natural results, under the peculiar facts and circumstances disclosed. This determination present[ed] a factual question which l[ay] peculiarly within the province of the [fact finder]." Ingram v. Commonwealth, 192 Va. 794, 801-02 (1951). Further, the Supreme Court of Virginia has held that statutory abduction is complete upon "the physical detention of a person, with the intent to deprive [her] of [her] personal liberty, by force." Scott v. Commonwealth, 228 Va. 519, 526 (1984). Here, appellant admitted during his phone call with O.B. that he restrained her and held her down because he did not want her to leave. He gave a different account at trial, testifying that he restrained her because she woke him up, "hitting" him in anger after finding evidence of his infidelity on his phone. Appellant stated that he restrained her until she agreed to stop hitting him. He admitted that he followed her into the bathroom and "hugged" her, but stated that she "rejected" his overtures and left the house with their son. The inconsistencies in appellant's accounts entitled the jury to find rationally that he lied at trial to conceal his guilt. See Flanagan v. Commonwealth, 58 Va. App. 681, 702 (2011).

Based on this record, a reasonable fact finder could conclude that appellant "detained" O.B. by force and that he did so with the intent to deprive her of her personal liberty.[2] Accordingly, the trial court did not err by denying appellant's motion to set aside the verdict.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

The Commonwealth shall recover of the appellant the costs in the trial court.

This Court's records reflect that Hunter A. Whitestone, Esquire, is counsel of record for appellant in this matter.

A Copy,

Teste:
Cynthia L. McCoy, Clerk

By: /s/ Deputy Clerk

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[2] We need not apply the incidental detention doctrine articulated in Brown v. Commonwealth, 230 Va. 310, 314 (1985), because it "only applies when a[n appellant] is convicted of two or more crimes arising out of the same factual episode." Walker v. Commonwealth, 272 Va. 511, 516 (2006). Here, appellant was convicted only of abduction.