

No. _____

In The
Supreme Court of the United States

BENJAMIN FORREST CARTER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondents.

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

APPENDIX

Andrew M. Sacks
Counsel of Record
Stanley E. Sacks
SACKS & SACKS, P.C.
Town Point Center
150 Boush Street, Suite 505
Norfolk, VA 23510
Telephone: (757) 623-2753
Facsimile: (757) 274-0148
andrewsacks@lawfirmofsacksandsacks.com

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

Order of the Supreme Court of Virginia, filed May 20, 2021	A1
Memorandum Opinion of the Court of Appeals of Virginia, filed July 2, 2019	A2
Order of the Court of Appeals of Virginia, filed February 8, 2019	A8
Sentencing Order of the Circuit Court of Newport News, filed April 26, 2018	A10

VIRGINIA:

**In the Supreme Court of Virginia held at the
Supreme Court Building in the City of
Richmond on Thursday the 20th of May, 2021.**

Record No. 201107
Court of Appeals No. 0801-18-1

Benjamin Forrest Carter, 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

COURT OF APPEALS OF VIRGINIA

Present: Judges Humphreys, O'Brien and AtLee
Argued at Norfolk, Virginia

Record No. 0801-18-1

BENJAMIN FORREST CARTER

v.

COMMONWEALTH OF VIRGINIA

**MEMORANDUM OPINION* BY JUDGE
RICHARD Y. ATLEE, JR.
JULY 2, 2019**

FROM THE CIRCUIT COURT OF THE CITY OF
NEWPORT NEWS
C. Peter Tench, Judge

Jill R. Schmidtke (Andrew M. Sacks; Stanley E. Sacks; Sacks & Sacks, P.C., on brief), for appellant.

Brittany A. Dunn-Pirio, Assistant Attorney General (Mark R. Herring, Attorney General, on brief), for appellee.

Benjamin Forrest Carter appeals his convictions for assault and battery, Code § 18.2-57, carjacking, Code § 18.2-58.1, and two counts of abduction by force, Code § 18.2-47. Carter argues that the trial

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

court erred by admitting a witness's preliminary hearing testimony. He also argues that the evidence was insufficient to support the convictions. We disagree and affirm the trial court.

I. BACKGROUND

Carter and Jasmine Smith-Aaron were in a romantic relationship. In April of 2016, Carter was driving Smith-Aaron's car, with both Smith-Aaron and her infant daughter in the car. Carter parked the car at the library, where the parties got into an argument. A physical altercation ensued,¹ which ultimately resulted in the charges against Carter.

Smith-Aaron was the Commonwealth's primary witness at trial. She cooperated and answered the Commonwealth's questions about the events leading up to Carter's assault on her. When the Commonwealth asked questions about the assault, Smith-Aaron became less cooperative, and she repeatedly answered questions by stating that she did not know what happened or that she could not remember.

The trial court allowed the Commonwealth to treat Smith-Aaron as an adverse witness, but she continued to state that she could not remember. The Commonwealth attempted to use the transcript from Smith-Aaron's preliminary hearing testimony to refresh her recollection. When asked if reviewing the transcript refreshed her memory, Smith-Aaron responded, "Not really." She continued to say that she did not remember what happened. When

¹ Because the details of the incident are immaterial to the issues on appeal, we recite only those facts that are necessary to the consideration of the issues.

confronted with her prior statement, she answered, “That’s what [the] paper says.”

The Commonwealth moved to introduce the transcript of Smith-Aaron’s preliminary hearing testimony into evidence. The trial court stated that it would first have to find Smith-Aaron “unavailable,” and it questioned her about her inability to remember her prior testimony. The trial court informed Smith-Aaron that it could hold her in contempt and send her to jail if it determined she was feigning her memory loss. Smith-Aaron said she understood, but explained that it had been a long time and she could not remember “the exact events.” The trial court found that she was unavailable and granted the Commonwealth’s motion to admit the preliminary hearing transcript.

Carter objected, arguing that Smith-Aaron’s answers to the trial court’s questions were equivocal because she only denied knowing the “exact detail[s].” The trial court required the Commonwealth to question Smith-Aaron further. When the Commonwealth resumed questioning, Smith-Aaron continued to answer with variations of “I don’t remember” or “I don’t know.” When asked if she could recall anything, Smith-Aaron said she only remembered the end of the incident when Carter pulled over the car.

The trial court again ruled the preliminary hearing transcript was admissible. The trial court reminded Smith-Aaron that it could hold her in contempt, but she still stated that she could not remember. Carter’s counsel was permitted to cross-examine Smith-Aaron. She continued to state that she could not remember, and, at best, she could only tell them what she was reading from the preliminary hearing transcript.

The trial court continued the case.² When it resumed, the Commonwealth again attempted, unsuccessfully, to refresh Smith-Aaron's memory. The trial court ruled that Smith-Aaron was unavailable. Carter objected, and his attorney was again permitted to cross-examine her.

The trial court found that Smith-Aaron was refusing to testify, and it held her in contempt of court. Smith-Aaron explained that she truly did not remember because the abuse "happened for hours," and she did not remember the details. The trial court allowed the Commonwealth to question her again. Smith-Carter answered some questions that she had not answered before, but was still unable to give many details.

The Commonwealth then read into evidence portions of the preliminary hearing testimony that related to the subjects Smith-Aaron was unable to remember. Smith-Aaron provided some additional details on cross-examination.

After the Commonwealth rested its case, Carter renewed his motion to strike the preliminary hearing transcript from evidence. After arguments, the trial court granted Carter's motion and struck the preliminary hearing testimony from the record.

In closing, Carter argued that the evidence was insufficient to convict him, though he noted that "he was not going to argue with regards to the assault and battery" charge. The trial court found Carter guilty of all four charges against him. This appeal followed.

² The Commonwealth attempted to introduce records of text messages, and Carter objected on best evidence grounds. The trial court continued the case to allow Smith-Aaron to retrieve her cellphone in order to determine if the original text messages could be obtained from the cellphone.

II. ANALYSIS

A. Admissibility of the Preliminary Hearing Testimony

Carter assigns error to the trial court's decision to admit the preliminary hearing transcript into evidence.

An appellant must point to the specific error(s) in the trial court's ruling upon which he or she intends to rely. Rule 5A:12(c)(1). If the assignment of error "does not address the findings or rulings in the trial court," the assignment of error is not sufficient. Rule 5A:12(c)(1)(ii). Therefore, if the assignment of error does not address an actual ruling made by trial court, we will not consider it on appeal. Teleguz v. Commonwealth, 273 Va. 458, 471 (2007).

Carter's assignment of error alleges that the trial court improperly admitted the transcript of Smith-Aaron's preliminary hearing testimony into evidence at the trial. Although the trial court initially admitted the transcript into evidence, it subsequently granted Carter's motion to strike the preliminary hearing transcript from the record. Thus, despite Carter's argument, the preliminary hearing transcript was not admitted into evidence. Because the trial court did, in fact, grant Carter's motion to strike, Carter's assignment of error refers to an alleged error corrected by the trial court and does not address the final ruling of the trial court. Consequently, we will not consider this argument on appeal.

B. Sufficiency of the Evidence

Carter argues that the evidence was insufficient to convict him of the crimes for which he was

charged. Specifically, he argues that the testimony of Smith-Aaron, even if admissible, was not credible as a matter of law.

Rule 5A:20(e) requires that an opening brief contain the argument, principles of law, and authorities relating to each assignment of error. “Unsupported assertions of error ‘do not merit appellate consideration.’” Bartley v. Commonwealth, 67 Va. App. 740, 744 (2017) (quoting Jones v. Commonwealth, 51 Va. App. 730, 734 (2008)). “The appellate court is not a depository in which the appellant may dump the burden of argument and research.” Fadness v. Fadness, 52 Va. App. 833, 850 (2008) (quoting Jones, 51 Va. App. at 734-35). “[W]hen a party’s “failure to strictly adhere to the requirements of Rule 5A:20(e)” is significant,’ this Court may treat the question as waived.” Bartley, 67 Va. App. at 744 (quoting Parks v. Parks, 52 Va. App. 663, 664 (2008)).

Here, Carter’s argument that the evidence is insufficient consists solely of two conclusory sentences. Further, Carter does not present a single citation or legal authority to support his contention. Because we consider Carter’s failure to comply with Rule 5A:20(e) significant, we consider this assignment of error waived.

III. CONCLUSION

Because Carter did not meet his burden to prove the trial court committed reversible error, we affirm his convictions.

Affirmed.

VIRGINIA:

**In the Court of Appeals of Virginia on Friday
the 8th day of February, 2019.**

Record No. 0801-18-1
Circuit Court Nos. 01893-14(01), CR16001389-00
through
CR16001391-00 and CR16001473-00

Benjamin Forrest Carter, Appellant,

against

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Newport News
Per Curiam

A judge of this Court having determined that this petition should be granted, an appeal is hereby awarded to the appellant from judgments of the Circuit Court of the City of Newport News dated April 18, 2018 and April 26, 2018.

Appeal bond or an irrevocable letter of credit in the amount of \$500 shall be posted as required by Code § 8.01-676.1(B). The clerk is directed to certify this action to the trial court and to all counsel of record.

Pursuant to Rule 5A:25, an appendix is required in this appeal and shall be filed by the appellant at the time of the filing of the opening brief.

This Court's records reflect that Andrew M. Sacks, Esquire, Stanley E. Sacks, Esquire, and Jill R. Schmidtke, Esquire, are counsel of record for appellant in this matter.

A Copy,

Teste:
Cynthia L. McCoy, Clerk

By: /s/
Deputy Clerk

CERTIFICATE OF CLERK

I, Cynthia L. McCoy, Clerk of the Court of Appeals of Virginia, do hereby certify that on February 8, 2019 an appeal was awarded as described in the order to which this certificate is appended. A copy of this certificate and a copy of the order to which it is appended were this day sent to the trial court indicated in the order and to all counsel of record.

Given under my hand this 8th day of February, 2019.

Cynthia L. McCoy, Clerk

By: /s/
Deputy Clerk

SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT OF
NEWPORT NEWS

Hearing Date: APRIL 13, 2018

Present: C. Peter Tench, Judge

Offense date 04/12/2016 through 04/13/2016

COMMONWEALTH OF Virginia

v.

BENJAMIN FORREST CARTER, Defendant

This case came before the Court for sentencing of the defendant, who appeared in person with his attorneys Stanley Sacks and Jill Schmidtke. The Commonwealth was represented by Andrea Boeden. Kimberly Belbin, court appointed court reporter was sworn to faithfully transcribe the proceedings herein.

On December 13, 2016 the defendant was found guilty of the following offenses:

OTN; Description & Code Section; VCC; Case Number

701GM1600004588; Abduction by Force, VA Code §18.2-47 (felony); KID-1010-F5; CR16001389-00

701GM1600004589; Carjacking, VA Code §18.2-58.1 (felony); ROB-1217-F9; CR16001390-00

700JM1600003392; Abduction by Force, VA Code §18.2-47 (felony); KID-1010-F5; CR16001391-00

700CR1600147300; Assault & Battery, VA Code
§18.2-57 (misdemeanor); ASL-1313-M1; CR16001473-
00

The defendant, by counsel moved the Court to set aside the verdicts of guilty for reasons stated on the record and find the defendant not guilty or for a new trial in these matters, all arguments of counsel being heard, said motion the Court DENIES and notes the defendant's exception to the Court's ruling.

The presentence report was considered and is ordered filed as a part of the record In this case in accordance with the provisions of Virginia Code § 192-299, pursuant to the provisions of Virginia Code § 19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The sentencing guidelines worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

The arguments of counsel being heard as to sentencing, the Court, before pronouncing the sentence, inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court SENTENCES the defendant to:

Case No. CR16001389-00 ABDUCTION: BY FORCE: Incarceration with the Virginia Department of Corrections for the term of: 10 years. **COSTS:** The defendant is ordered to pay all costs of this case. The Court SUSPENDS 7 years of incarceration for a period of 20 years upon conditions specified below:

Case No. CR16001390-00 CARJACKING:

Incarceration with the Virginia Department of Corrections for the term of: 10 years. COSTS: The defendant is ordered to pay all costs of this case. The Court SUSPENDS 7 years of incarceration for a period of 20 years upon conditions specified below:

Case No. CR16001391-00 ABDUCTION: BY

FORCE: Incarceration with the Virginia Department of Corrections for the term of: 10 years. COSTS: The defendant is ordered to pay all costs of this case. The Court SUSPENDS 7 years of incarceration for a period of 20 years upon conditions specified below:

Suspended Sentence Conditions:

Good Behavior: The defendant shall be of good behavior for 20 years from today's date.

Supervised Probation: The defendant is placed on probation under the supervision of a Probation Officer to commence upon release from incarceration for 1 year or unless sooner released by the court or by the Probation Officer. The defendant shall comply with all the rules and requirements set by the Probation Officer.

Case No. C.R16001473-00 ASSAULT &

BATTERY: Incarceration with the Virginia Department of Corrections for the term of: 12 months. COSTS: The defendant is ordered to pay all costs of this case. Good Behavior: The defendant shall be of good behavior for a period of 20 years from

today's date. The Court SUSPENDS 12 months of incarceration for a period of 20 years.

DNA: The defendant shall provide a DNA sample and legible fingerprints as directed.

Credit for time served. The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Virginia Code Section 53.1-187.

Appeal: The Court advised the defendant that he had a right to petition for an appeal to the Virginia Court of Appeals if he so desired.

And, the record made by the Court Reporter herein of the said proceedings is filed as part of the record in this case; The Court certifies that at all times during the trial of this case the defendant was personally present and his attorneys were likewise personally present and capably represented the defendant.

The defendant was remanded to the custody of the sheriff.

Enter: 4/26/18

/s/ C. Peter Tench
Judge

Sentence Summary:

Total Incarceration Sentence Imposed: 30 years and 12 months.

Total Sentence Suspended: 21 years & 12 months

Total Supervised Probation Term: 1 year