VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 12th day of January, 2017.

David Meyers, Appellant,

against Record No. 150962
Court of Appeals No. 1263-14-2

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

David Meyers appeals an order from the Court of Appeals denying his petition for appeal. Meyers sought to appeal his convictions and sentences for robbery, malicious wounding, abduction, and several firearm offenses. The Court of Appeals dismissed his appeal as frivolous. We find no error in the judgment of the Court of Appeals and therefore affirm.

I.

On Sunday, January 29, 2012, Maurice Rives and his girlfriend, Shereasa McDaniel, were at their home with another friend, Edward Foxx. Rives was preparing to throw McDaniel a birthday party and was setting up music for the party. Shortly before 9:00 p.m., Foxx told Rives that he heard a knock at the door. After waiting for a few minutes and asking who was at the door, Rives opened the door. A man wearing "half a mask with a hoodie" and another man wearing a hoodie with the hood tied so tightly that only his eyes were visible entered the house with guns and began yelling, "Give it up," referring to money. J.A. at 316-17. One of the men hit Rives in the head with a pistol, causing Rives to fall to the floor. Rives began throwing money, totaling roughly $700, from his pockets onto the floor. He was in possession of this money because McDaniel had recently obtained an insurance settlement after a car accident.

The man wearing the hoodie tied tightly around his face went over to Foxx, who was on the couch, pointed a gun at him, and demanded that he also "give it up." *Id.* at 317. McDaniel, unaware of the intruders, came down the hallway from the back of the house to let Rives know that she was going to take a shower before the party. She saw the two men standing by the fish tank in the front room with guns in their hands. She heard one of the men saying, "Oh, that bitch

know where the money at," and identified that man in court as Meyers. *Id.* at 287-88. Meyers, the man with the hoodie tied around his face, then left Foxx and pointed his gun at McDaniel's head. He led her toward the back of the house, asking her, "Where the money at, bitch?" *Id.* at 288.

Meanwhile, Rives and the half-masked intruder engaged in a loud scuffle as Rives tried to wrestle the gun away. When Meyers heard the commotion as he led McDaniel to the back of the house, he turned and went back down the hallway, shooting his gun. He shot Rives a total of three times, once to his back and once to each side. McDaniel escaped out the back door of her house and went to a neighbor's house for safety and to call the police. Meanwhile, the intruders escaped out the front door and walked down the street before taking off at a run.

Initially, McDaniel told police that she thought the man who led her to the back of the house was a man named "Zo." *Id.* at 297. At trial, however, she testified that later at the hospital she realized her attacker was Meyers when she remembered that Meyers had been to her house the week prior to the robbery. When questioned at the hospital on the night of the shooting and the day after, Rives — who had been shot multiple times and was heavily medicated — told the police both times that he did not know who the robbers were, although he stated that one of them looked like the delivery driver from a Chinese restaurant. Two days later, however, he told the detective that it was Meyers who had shot him and identified Meyers in a photo lineup. Rives also identified Meyers at trial and testified that he was certain it was Meyers who shot him because he had known Meyers since he was 13 years old (for nearly 20 years at the time of the trial in March of 2014).

A grand jury indicted Meyers on nine criminal charges: (1) robbery of Rives, (2) use or display of a firearm during a robbery, (3) malicious wounding of Rives, (4) use or display of a firearm during a malicious wounding, (5) abduction of Foxx, (6) abduction of McDaniel, (7-8) two counts of use or display of a firearm during an abduction, and (9) possession of a firearm by a convicted felon.[1]

During the course of preparing for trial, Meyers was represented by several court-appointed attorneys. He made several handwritten pro se motions for the appointment of new

[1] After the jury returned its verdicts, the Commonwealth made a motion for the entry of a *nolle prosequi* on the yet untried charge of possession of a firearm by a convicted felon, to which

counsel alleging not only that his attorneys were ineffective but that they were also conspiring against him with prosecutors to undermine his defense. In March 2012, Meyers's first court-appointed attorney filed a motion requesting that the trial court appoint a mental-health expert to conduct a competency evaluation and the trial court granted the motion. In April 2012, Dr. Evan Nelson found that Meyers was incompetent to stand trial, which resulted in a court order that he receive psychiatric inpatient treatment to restore him to competency.[2] In August 2012, after Meyers received treatment, Dr. Jennifer Rasmussen determined that Meyers likely was competent to stand trial.

However, in June 2013, Meyers's new attorney filed a motion for another competency evaluation based on recent letters from Meyers that accused the attorney of "war games and retribution" based on racial hatred against Meyers and of being a member of a group conspiring to maliciously prosecute Meyers. *Id.* at 24. The trial court ordered another competency evaluation, and Dr. Nelson found Meyers competent to stand trial in August 2013. In his report, Dr. Nelson described in detail how Meyers understood the charges against him and was able to make decisions about his own defense. Specifically, as of the July 2013 interview for the report, "Meyers'[s] mental state was the best it had ever been." *Id.* at 554. Several different times, Meyers refused to cooperate with his evaluators, contending that he was competent to stand trial and submitting handwritten descriptions of the roles of courtroom personnel to prove his competency to stand trial. He submitted several handwritten motions to the trial court arguing that the competency evaluations were slanderous against him.

One of Meyers's several recurring complaints against his attorneys concerned their refusal to subpoena individuals as alibi witnesses to testify on his behalf. Meyers made it known during a colloquy with the trial court before his trial began that he wished to call Earnest Jones as an alibi witness to testify that he was at Sheila Crockett's house at the time of the robbery. However, Meyers's counsel stated that he had not subpoenaed this witness because he "did not think it would be in [Meyers's] interest" to do so. *Id.* at 241. After investigation and an

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Meyers consented and which the trial court granted. *See* J.A. at 44, 513-14.

[2] The trial court sealed the psychological evaluations and their corresponding court orders pursuant to Code § 19.2-152.4:2. To the extent that we mention facts found only in the sealed record, we unseal only those specific facts, finding them relevant to our decision in this case. The remainder of the previously sealed record remains sealed.

interview with Crockett, he concluded that neither Jones nor Crockett could verify Meyers's location at the specific time of the robbery. Counsel expected Crockett, who was present as a witness for the Commonwealth, to testify that Meyers was at her house on the night of the robbery but left to get her a sandwich between approximately 8:00 p.m. and 9:00 or 9:30 p.m., which coincided with the timeframe of the robbery. Counsel also stated that Jones would only be able to testify that he dropped Meyers off at Crockett's apartment around 7:30 p.m. on the night of the robbery and was unaware of Meyers's whereabouts after that point. The trial court stated, "I don't think that is alibi testimony." *Id.* at 248.

While Meyers's counsel did not elect to call Jones, he did re-call Crockett to the stand during the defense's case-in-chief in order to impeach her testimony. Crockett had testified during the Commonwealth's case-in-chief that Meyers was not at her house at all on the day or evening of the robbery and had denied telling detectives that he came to her house that evening but left to get her a sandwich. She also had testified that Meyers called her "after midnight" and at 5:00 a.m. the morning after the robbery and asked her to say that he did not commit the robbery but had remained at her house all weekend. *Id.* at 365-66. Meyers's attorney re-called Crockett to the stand during the defense case-in-chief to impeach her. During cross-examination, the Commonwealth's Attorney played the audio of a recorded interview in which Crockett clearly states that Meyers was at her apartment on the night in question but left for an hour or an hour-and-a-half to get her a sandwich. Crockett also stated during the interview and confirmed in court that Meyers came to her house already upset at 7:30 p.m. — before the robbery — and said that people were accusing him of shooting somebody.

At the close of the Commonwealth's case-in-chief, the trial court asked Meyers if he wanted to "waive" the opportunity to make a "pro forma motion to strike" the Commonwealth's evidence. *Id.* at 385. Counsel responded, "I can make it, but I know [what] the Court's ruling will be." *Id.* The trial court stated that the case came down to a "credibility issue" and that there was enough evidence at that stage to "survive a motion to strike." *Id.* After the defense's case-in-chief, the trial court again asked if Meyers's counsel had any motions at the conclusion of the evidence, at which point, counsel responded, "Judge, it's pure credibility at this point. I have no motion." *Id.* at 445. The trial court replied, "All right. Then the court finds the case sufficient to go to the jury." *Id.*

A jury convicted Meyers of all eight charges on March 7, 2014, after a two-day trial. The jury also sentenced Meyers to the following terms of imprisonment for a total of 30 years: (1) five years for the robbery of Rives, (2) three years for the use or display of a firearm during a robbery, (3) five years for the malicious wounding of Rives, (4) five years for the use or display of a firearm during a malicious wounding, (5) one year for the abduction of McDaniel, (6) five years for the use or display of a firearm during the abduction of McDaniel, (7) one year for the abduction of Foxx, and (8) five years for the use or display of a firearm during the abduction of Foxx. Meyers's counsel specifically declined to make a motion to set aside the verdict based on the sufficiency of the evidence after the jury read the sentences. *See id.* at 518. The trial court decided to impose these sentences consecutively, noting that

> guessing what jury motives are is an inexact science, and this Court's not going to delve into that. They did have before them an extensive criminal record to go along with these facts, a violent history, and they also had the facts of this particular case. For all the reasons already argued and based on the whole history of the case, the Court finds the recommendation to be appropriate and follows the jury recommendation.

Id. at 532–33.

Pursuant to *Anders v. California*, 386 U.S. 738, 744 (1967), Meyers's counsel submitted a petition for appeal on Meyers's behalf in the Court of Appeals, along with a motion to withdraw as counsel and a motion for an extension of time for Meyers to file a supplemental petition for appeal. The Court of Appeals granted counsel's motion to withdraw and granted Meyers an extension of time to file his supplemental petition for appeal, which it ultimately denied as "wholly frivolous." J.A. at 127. Meyers then filed a petition for rehearing, which that court also denied. Finally, Meyers filed a petition for appeal in this Court, as well as a motion for the appointment of appellate counsel, both of which we granted.

II.

A. Waiver

At the outset, we address Meyers's argument that the Commonwealth waived each of the arguments it makes in its brief by not raising them in its brief in opposition to Meyers's petition for appeal. We find Meyers's waiver argument meritless.

An appellee is not required to file a brief in opposition to the petition for appeal. *See* Rule 5:18(a) ("A brief in opposition to granting the appeal *may* be filed . . . within 21 days after [the] petition for appeal is served . . . ." (emphasis added)). "We have never before held that an appellee waives any argument, either procedural or on the merits, by failing to appear and assert it in response to a petition for a writ of error. We decline to adopt such a rule now." *Shareholder Rep. Servs., LLC v. Airbus Ams., Inc.*, 292 Va. ___, ___ n.4, 791 S.E.2d 724, ___ n.4 (2016).[3] We acknowledge *Calloway v. Commonwealth*, 62 Va. App. 253, 746 S.E.2d 72 (2013), but find its reasoning unpersuasive. In that case, the Court of Appeals held that the Commonwealth's failure to object to an assignment of error as legally insufficient under Rule 5A:12 at the petition for appeal stage precluded the Commonwealth from making that argument in its appellee brief on the merits. *Id.* at 257-60, 746 S.E.2d at 74-76. However, in *Davis v. Commonwealth*, 282 Va. 339, 717 S.E.2d 796 (2011), we dismissed an assignment of error as legally insufficient after granting an appeal and hearing oral argument even though the Commonwealth raised the sufficiency of the assignment of error for the first time in its appellee brief and not in its brief in opposition to the petition for appeal. *See id.* at 339-40, 717 S.E.2d at 796-97.[4] We therefore find that the Commonwealth has not waived the arguments it raises in its appellee brief.

B. Assignments of Error 1 & 2: Alibi Testimony

We review a trial court's decision to admit or exclude testimony for an abuse of discretion, *see Commonwealth v. Swann*, 290 Va. 194, 197, 776 S.E.2d 265, 267 (2015), and conclusions of law by the Court of Appeals de novo, *see Haas v. Commonwealth*, 283 Va. 284, 289-90, 721 S.E.2d 479, 480 (2012).

Meyers asserts that the Court of Appeals erred under *Anders* by failing to identify as error and reverse the circuit court's "exclusion" of alibi testimony from Jones. Appellant's Br. at 27. *Anders*, however, merely provides a procedural mechanism to protect an indigent client's right to effective assistance of counsel on appeal. *See* 386 U.S. at 744 (requiring attorneys who request

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[3] Meyers's counsel effectively conceded this point at oral argument, admitting that *Shareholder Representative Services* "says what it says." Oral Argument Audio at 1:12 to -1:45.

[4] *But cf. Ghameshlouy v. Commonwealth*, 279 Va. 379, 394, 689 S.E.2d 698, 706 (2010) (holding that the Commonwealth waived its argument that the notice of appeal was defective for failing to name the proper appellee when it raised that argument for the first time in a motion to

to withdraw from an appeal they see as meritless to follow a more exhaustive "procedure," namely filing a "brief referring to anything in the record that might arguably support the appeal," supplying a copy to the client, and requesting an extension of time for the client to "raise any points that he chooses"). In order to avoid a violation of the defendant's constitutional right to effective assistance of counsel on appeal by contravening the holding in *Anders*, an appellate court must decide, "after a full examination of all the proceedings, . . . whether the case is wholly frivolous." *Id.* If the appellate court finds any issues that are "arguable on their merits," it must, before issuing a decision in the case, appoint appellate counsel for the indigent. *Id.*

Meyers fails to recognize that his *Anders* arguments are now moot. This Court granted his petition for appeal and appointed appellate counsel to represent him. Meyers has had an opportunity before this Court to receive a full review on the merits of the purported "exclusion" of Jones's alibi testimony. The question before us is not whether the appeal was in fact wholly frivolous — thereby truncating his appellate review — but instead whether Meyers's arguments on appeal are simply wrong. We ask ourselves the same question the Court of Appeals would have had to answer if it had heard the appeal outside the *Anders* context: Did the trial court abuse its discretion in "excluding" Jones's alibi testimony?

Reviewing the underlying legal question de novo, we hold the trial court did not err by excluding Jones's putative alibi testimony. In fact, the trial court made no ruling excluding any evidence whatsoever. Before the trial began, Meyers made it known to the trial court that he wished to subpoena Jones as an alibi witness. Meyers's counsel explained to the trial court that Crockett was the only one who might be able to testify to Meyers's whereabouts during the time of the crime, but she was present as a Commonwealth witness and was expected to testify that Meyers had left to get her a sandwich during the time the crime occurred. Meyers's counsel explained to the trial court that Jones would only be able to testify that he dropped Meyers off at Crockett's house around 7:30 p.m. on the night of the robbery and was unaware of where Meyers went after that. The trial court simply agreed with counsel by saying, "I don't think that is alibi testimony." J.A. at 248.

Meyers and his counsel remained free to call Jones to the stand at any time, but Meyers's counsel made a strategic decision not to call Jones because he could not testify to Meyers's

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dismiss the appeal after both parties had submitted their briefs on the merits).

whereabouts during the time of the crime. Moreover, Meyers's counsel did re-call Crockett during the defense's case-in-chief after she had testified for the Commonwealth that Meyers was never at her house on the night of the robbery. He impeached her by questioning her about a taped interview with the police in which she stated that Meyers was at her house on the night of the robbery but had left for an hour or an hour-and-a-half to get her a sandwich. In other words, Meyers received the benefit of all of the "alibi" testimony that he could have hoped to present when his counsel forced Crockett to admit the conflicting statements in her recorded interview. Because the trial court did not actually exclude any alibi testimony, it could not have committed the alleged error.

C. Assignments of Error 3 & 4: Concurrent Sentences

Meyers next argues that the Court of Appeals erred under *Anders* in failing to recognize the meritorious appellate issue regarding the trial court's imposition of consecutive sentences for his convictions for use or display of a firearm. However, we adopt our reasoning above, *see supra* Part II.B., and hold that the *Anders* issue is now moot given Meyers's opportunities to present argument on the merits of this issue before this Court and with the assistance of counsel.

Reviewing the issue de novo, we find no merit in either assignment of error. "A court's assessment of punishment, when the sentence 'does not exceed the maximum sentence allowed by statute,' is reviewed for an abuse of discretion." *Woodard v. Commonwealth*, 287 Va. 276, 280, 754 S.E.2d 309, 311 (2014) (citation omitted). When an individual is convicted of using or displaying a firearm during a felony, that conviction

> shall constitute a *separate and distinct felony* and any person found guilty thereof shall be sentenced to a mandatory minimum term of imprisonment of three years for a first conviction, and to a mandatory minimum term of five years for a second or subsequent conviction under the provisions of this section. *Such punishment shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony.*

Code § 18.2-53.1 (emphases added). While a trial court has no discretion under this statute to make the sentence for use of a firearm run concurrently with the sentences for the "primary" or predicate felonies, *id.*, the trial court does have the discretion to run a sentence under this section concurrent with a sentence for "a crime other than the primary felony." *Brown v. Commonwealth*, 284 Va. 538, 543-45, 733 S.E.2d 638, 640-41 (2012).

Meyers argues that the trial court abused its discretion because it "considered and [gave] significant weight" to the "irrelevant or improper factor" of the jury's recommendation. Appellant's Br. at 37 (alteration in original) (quoting *Lawlor v. Commonwealth*, 285 Va. 187, 213, 738 S.E.2d 847, 861 (2013)). We disagree. During the sentencing hearing, the trial court simply stated that it was "not going to delve into" guessing jury motives, but because the jury had evidence of Meyers's "extensive criminal record" and "violent history" to "go along with" the facts of this case, it found their "recommendation to be appropriate" and followed it. J.A. at 532.

Contrary to Meyers's assertion, we do not read this statement to indicate that the trial court believed that it shared authority with the jury to determine whether to impose Meyers's sentences concurrently or consecutively. The trial court simply stated that the jury reasonably determined that Meyers deserved to spend a total of 30 years in prison for his crimes based on the information it considered. Meyers concedes in his brief that the jury "did not actually make" a specific recommendation that Meyers serve consecutive sentences, Appellant's Br. at 37, and we do not believe that the trial court erroneously thought that the jury had made such a recommendation.[5] In fact, the trial court analyzed the evidence that the jury had before it and independently found the total sentence to be reasonable. Therefore, the trial court did not abuse its discretion in imposing consecutive sentences.

D. Pro Se Assignments of Error 3, 6, 8, 9, 10, & 11: Double Jeopardy & Fatal Variance[6]

Meyers next contends that his two convictions for the use or display of a firearm during an abduction violate the Double Jeopardy Clauses of the United States and Virginia Constitutions because neither indictment included the name of the victim of the abduction. He also contends that the failure to include the name of the victim in each of these indictments created a fatal variance between the crimes alleged in the indictments and the crime proven by

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[5] For this reason, the cases Meyers relies upon for this argument are inapposite. Each of those cases dealt with a specific, written recommendation from the jury that the trial court suspend all or a portion of the sentence that the jury was then imposing. *See Clarke v. Commonwealth*, 207 Va. 298, 299, 149 S.E.2d 875, 875 (1966); *Mann v. Commonwealth*, 177 Va. 875, 877, 14 S.E.2d 283, 283 (1941).

[6] Meyers has abandoned Pro Se Assignments of Error 4 and 7. Appellant's Br. at 3-4, 49. We thus do not address them.

the evidence at trial as described in the jury instructions.[7]

Addressing the double-jeopardy issue first, we find that Meyers has waived this argument. When a defendant objects to an indictment on "Double Jeopardy grounds," he must file such objection by written motion before trial. *See* Code § 19.2-266.2(A)(ii)(b), (B); Rule 3A:9(c); *see also supra* note 7. Failure to do so "shall constitute a waiver" of the objection. Rule 3A:9(b)(1); *see also Williams v. Commonwealth*, 57 Va. App. 750, 767-68, 706 S.E.2d 530, 538-39 (2011). Meyers did not raise any objection to the indictments until the close of the Commonwealth's case-in-chief. *See* J.A. at 369-72.

Even if Meyers had not waived his double-jeopardy argument, we also find no constitutional violation in Meyers's two convictions for using or displaying a firearm during an abduction. An individual commits an abduction when he, "by force, intimidation or deception,

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[7] To the extent that Meyers challenges the facial validity or sufficiency of the indictment, he has waived this issue. First, Meyers presented no "argument" or "authorities" regarding the facial validity of these indictments to this Court in his opening brief. Rule 5:27(d). Instead, in a footnote, he opted to rely "on the record and the Commonwealth's waiver of arguments" on this issue. Appellant's Br. at 38 n.9. We have already found that the Commonwealth did not waive its arguments by failing to state them in its brief in opposition to this appeal, *see supra* Part II.A, and Meyers's failure to adequately brief this issue waives his argument. *Muhammad v. Commonwealth*, 269 Va. 451, 478, 619 S.E.2d 16, 31 (2005), *cert. denied*, 547 U.S. 1136 (2006); *see* Rule 5:27(d).

Meyers also waived these arguments under the Statute of Jeofails. *See* Code § 19.2-227 (providing that a judgment in any criminal case "shall not be . . . reversed upon any exception or objection made after a verdict to the indictment or other accusation, unless it be so defective as to be in violation of the Constitution"). A defendant also must raise "[d]efenses and objections based on defects" in an indictment either "before a plea is entered . . . or, if the motion raises speedy trial or Double Jeopardy grounds . . . , at such time prior to trial as the grounds for the motion or objection shall arise, whichever occurs last." Rule 3A:9(b)(1), (c). Meyers did not raise any objection to or make a motion to strike the indictments until the Commonwealth had rested its case-in-chief, and he only argued that the two indictments for use or display of a firearm during an abduction were a "[d]uplication." *See* J.A. at 369-72. By failing to object to the facial validity or sufficiency of the indictments before trial or before the verdict, Meyers waived these arguments. *See Wolfe v. Commonwealth*, 265 Va. 193, 223-24, 576 S.E.2d 471, 488-89 (2003) (collecting authorities to demonstrate that "this Court has consistently and repeatedly held that generally a defendant must challenge the sufficiency of an indictment before the jury's verdict, or the alleged defect is waived"), *cert. denied*, 545 U.S. 1153 (2005). Therefore, we decline to analyze any arguments pertaining to the invalidity or insufficiency of the indictments in Assignments of Error 6, 8, 9, 10, and 11.

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." Code § 18.2-47(A). An individual commits a "separate and distinct felony" when he uses or displays a firearm during an abduction. Code § 18.2-53.1.

"[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). However, "[i]t is well settled that two or more distinct and separate offenses may grow out of a single incident or occurrence, warranting the prosecution and punishment of an offender for each." *Martin v. Commonwealth*, 221 Va. 720, 723, 273 S.E.2d 778, 780 (1981).[8] It thus follows that "if an accused is prosecuted for multiple offenses based upon *distinct and separate acts, the offenses would be neither identical nor lesser-included* for double jeopardy purposes." *Id.* (emphasis added); *see also* 5 Ronald J. Bacigal, Virginia Practice Series: Criminal Procedure § 14:15, at 404 (2015-2016 ed.). Finally, the Commonwealth is not required to name the victims of a crime in an indictment. *See* Code § 19.2-220.

The record demonstrates that Meyers committed two distinct abductions and used or displayed a firearm in each of them. After entering the home, he walked over to the couch and held Foxx at gunpoint while demanding money from him. He then turned and walked over to McDaniel and led her down the hallway to the back of the house with his gun pointed at her head while demanding money from her. *Blockburger*, by its own terms, only applies to situations in which "the *same act or transaction* constitutes a violation of *two distinct statutory provisions*." 284 U.S. at 304 (emphases added). In this case, we have exactly the opposite scenario — two factually separate violations of the exact same statute. The *Blockburger* analysis is thus

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[8] Even though a defendant commits a single act, the Double Jeopardy Clauses of the United States and Virginia Constitutions permit him to be convicted of both an abduction and a separate substantive offense when the "detention underlying the abduction conviction was not the kind of restraint that is *inherent in*" the other substantive offense. *Brown v. Commonwealth*, 230 Va. 310, 314, 337 S.E.2d 711, 714 (1985) (emphasis added). This analysis thus does not consider whether restraint is used to commit a detention-plus crime, but rather it considers whether the restraint is an "intrinsic element" of or "inherent" in the detention-plus crime. *Lawlor v. Commonwealth*, 285 Va. 187, 225-26, 738 S.E.2d 847, 869 (2013); *see, e.g., Pryor v.*

inapplicable. *See* Bacigal, *supra*, § 14:15, at 404. The Commonwealth was free to charge as many counts of use or display of a firearm during an abduction as Meyers had committed without naming the victims of the abductions in the indictments. *See* Code § 19.2-220.[9] We thus find that Meyers's convictions for the use of a firearm during an abduction do not violate the Double Jeopardy Clauses of the United States or Virginia Constitutions.[10]

We also find no fatal variance between these two indictments and the crimes proven at trial as described in the jury instructions. A variance is "[a] difference or disparity between two statements or documents that ought to agree; esp., in criminal procedure, a difference between the allegations in a charging instrument and the proof actually introduced at trial." Black's Law Dictionary 1787 (Bryan A. Garner ed., 10th ed. 2014). A variance between the indictment and

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Commonwealth, 48 Va. App. 1, 6, 628 S.E.2d 47, 49 (2006).

[9] Meyers's reliance on *Powell v. Commonwealth*, 267 Va. 107, 134-35, 590 S.E.2d 537, 554-55 (2004), is misplaced. In that case, the defendant was tried twice for capital murder with the gradation offense of rape. The initial indictment did not specify the victim of the rape. *See id.* at 134, 590 S.E.2d at 553. This Court reversed and remanded for a new trial on the maximum charge of first degree murder because there was insufficient evidence from which the jury could find that the defendant raped his murder victim before or during the murder or that the rape of the murder victim's sister occurred before or during the murder. *See id.* at 116-17, 590 S.E.2d at 543-44. After sending an angry letter to the Commonwealth's attorney describing in detail how he attempted to rape his murder victim before he killed her, the defendant was prosecuted by the Commonwealth a second time for capital murder with the murder victim now identified as the victim of the gradation offense of rape. *See id.* at 117-18, 590 S.E.2d at 544. The Court found no double jeopardy in this second prosecution because the Commonwealth had issued a bill of particulars in the first prosecution identifying the murder victim's sister as the victim of the gradation offense of rape. *See id.* at 133-35, 590 S.E.2d 553-54. In other words, jeopardy had never attached for the crime of capital murder during or subsequent to the rape *of the murder victim*. *See id.* at 135, 590 S.E.2d at 554.

In the present case, Meyers was not tried for an abduction with a gradation offense and then tried again for the same crime and gradation offense with the identity of the victim of the gradation offense being the only difference in the second indictment. Using or displaying a firearm during an abduction is not a gradation offense but is a "separate and distinct felony." Code § 18.2-53.1. Moreover, Meyers never faced two successive indictments, one omitting the victim of a gradation offense and one identifying the victim of the gradation offense. Instead, Meyers was tried simultaneously for two distinct abductions and for two distinct instances of using or displaying a firearm during an abduction. Therefore, we find the dicta in *Powell* unpersuasive.

[10] Meyers's claim for relief is similarly flawed. *See* Appellant's Br. at 50 (requesting, inter alia, that we "vacate all" of his convictions). The proper remedy for a double-jeopardy violation in the multiple-punishment context is to vacate only the conviction of the lesser of the two offending charges.

the evidence offered at trial is fatal "only when the proof is different from and irrelevant to the crime defined in the indictment and is, therefore, insufficient to prove the commission of the crime charged." *Hawks v. Commonwealth*, 228 Va. 244, 247, 321 S.E.2d 650, 651-52 (1984); *see also Gardner v. Commonwealth*, 262 Va. 18, 25, 546 S.E.2d 686, 690 (2001). "Often called a constructive amendment, a fatal variance occurs where the indictment charges a *wholly different* offense than the one proved . . . ." *Purvy v. Commonwealth*, 59 Va. App. 260, 266-67, 717 S.E.2d 847, 850 (2011) (emphasis added) (footnote omitted). We decline to hold that failing to name the individual victims in the indictments for use or display of a firearm during an abduction made the evidence at trial "different from and irrelevant to," *Hawks*, 228 Va. at 247, 321 S.E.2d at 651-52, the crimes listed in the indictments.

The cases Meyers relies on to argue that the identity of the victim is a "'legally essential' element of the crime charged," Appellant's Br. at 41 (citation omitted), are inapposite because each of those cases addressed a situation in which the indictment specifically included the identity of the victim and the proof at trial "pointed to a *different victim*." *Commonwealth v. Nuckles*, 266 Va. 519, 523, 587 S.E.2d 695, 697 (2003) (emphasis added); *see also Commonwealth v. Bass*, 292 Va. 19, 27-28, 786 S.E.2d 165, 170 (2016); *accord Gardner v. Commonwealth*, 262 Va. 18, 25, 546 S.E.2d 686, 690 (2001).

We have held that "[w]hile it may not have been necessary under the statute to allege whose residence was fired into, when the Commonwealth *chose to specify* the residence involved as that of Edna Harper, it had the burden of establishing that fact," and thus "when the Commonwealth showed that it was the residence of Alberta Riddick where the shooting occurred, it *proved a different offense*." *Etheridge v. Commonwealth*, 210 Va. 328, 330, 171 S.E.2d 190, 191-92 (1969) (emphases added). We have never held, however, that when the Commonwealth chooses not to identify the victim of the offense in an indictment, that any proof, jury instruction, or verdict form at trial pertaining to the victim of the offense creates a fatal variance. We decline to do so now. There was no "difference" or "disparity" between the indictments and the evidence offered at trial. Black's Law Dictionary, *supra*, at 1787. Thus, no variance existed at all between the indictments and the proof at trial, much less a fatal one. We therefore find that the trial court did not err in allowing the indictments to stand.

See Brown v. Commonwealth, 222 Va. 111, 116, 279 S.E.2d 142, 145-46 (1981).

E. Pro Se Assignments of Error 1 & 5: Sufficiency of the Evidence

Meyers next alleges that the evidence produced at trial was insufficient for the jury to convict him of the crimes charged. We first find that Meyers waived this argument by not presenting it to the trial court. At both the close of the Commonwealth's case-in-chief and at the close of all the evidence, the trial court asked Meyers's counsel whether he wished to make a motion to strike the evidence. Counsel responded to the first inquiry, "I can make it, but I know [what] the Court's ruling will be." J.A. at 385. The trial court then stated that the case came down to a "credibility issue" and found enough evidence at that stage of the trial to "survive a motion to strike." *Id.* After the defense's case-in-chief, counsel responded to the trial court's second inquiry, "Judge, it's pure credibility at this point. I have no motion." *Id.* at 445. The trial court replied, "All right. Then the court finds the case sufficient to go to the jury." *Id.* Most notably, Meyers's counsel specifically declined to make a motion to set aside the verdict based on the sufficiency of the evidence when the trial court asked if he wished to do so after the jury read the sentences. *See id.* at 518. Meyers thus did not timely object to the sufficiency of the evidence, and his argument is waived. *See* Rule 5:25.

Preserved or not, the sufficiency argument is meritless in any event. On appeal, this Court "review[s] the evidence in the 'light most favorable' to the Commonwealth, the prevailing party." *Vasquez v. Commonwealth*, 291 Va. 232, 236, 781 S.E.2d 920, 922 (2016) (citation omitted). "Viewing the record through this evidentiary prism requires us to 'discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences to be drawn therefrom.'" *Bowman v. Commonwealth*, 290 Va. 492, 494, 777 S.E.2d 851, 853 (2015) (citation omitted).

An appellate court reviewing the sufficiency of the evidence will not disturb a jury's verdict unless it is "plainly wrong or without evidence to support it." Code § 8.01-680; *see also Viney v. Commonwealth*, 269 Va. 296, 299, 609 S.E.2d 26, 28 (2005). In light of this high standard, this Court does not "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Williams v. Commonwealth*, 278 Va. 190, 193, 677 S.E.2d 280, 282 (2009) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). Instead, the only "relevant question is, after reviewing the evidence in the light

most favorable to the prosecution, whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Sullivan v. Commonwealth*, 280 Va. 672, 676, 701 S.E.2d 61, 63 (2010) (emphasis added).

Applying these principles, we find the evidence adduced at trial sufficient such that a rational trier of fact could conclude beyond a reasonable doubt that Meyers committed the crimes charged. Two of the three victims of this robbery made an in-court identification of Meyers as the robber. They testified unequivocally that he was the one who walked McDaniel down the hall with a gun to her head and came back down the hall and shot Rives. Rives had known Meyers since he was 13 years old (for nearly 20 years at the time of trial in 2014), and McDaniel had seen Meyers at her house the week prior to the robbery. Crockett also testified that Meyers asked her to tell the police that he was with her the whole weekend and did not leave her home. She also stated to the police and confirmed in court that Meyers came to her house already upset at 7:30 p.m. — before the robbery — and said that people were accusing him of shooting someone.

The defense had ample opportunity to question these witnesses regarding their initial inability to make an identification, their initial identifications of individuals other than Meyers, and their conflicting accounts as to Meyers's whereabouts on the night of the robbery. Ultimately, the jury chose to credit their testimony. Giving the Commonwealth the benefit of all reasonable inferences from this evidence, *see Bowman*, 290 Va. at 494, 777 S.E.2d at 853, we cannot say that the jury's decision was "plainly wrong or without evidence to support it," Code § 8.01-680; *see also Viney*, 269 Va. at 299, 609 S.E.2d at 28.

F. Pro Se Assignments of Error 2, 12, & 13: Mental Incompetence

Meyers has waived his argument that the trial court erred in allowing him to be tried while incompetent. An appellant's opening brief before this court must contain "[w]ith respect to each assignment of error," the "principles of law and the authorities" supporting the position argued in the brief. Rule 5:27(d). "Failure to adequately brief an assignment of error is considered a waiver." *Muhammad v. Commonwealth*, 269 Va. 451, 478, 619 S.E.2d 16, 31 (2005), *cert. denied*, 547 U.S. 1136 (2006). Moreover, a party must object to a ruling of the trial court at the time it is made, Rule 5:25, and must "make[] known to the court the action which he desires the court to take" at the time such action is sought. Code § 8.01-384.

Meyers presents only three sentences of argument pertaining to this assignment of error: (1) a sentence stating that the determination of competence is a question of fact, the determination of which must be "plainly wrong" for this Court to overturn; (2) a sentence stating that this issue was adequately preserved; and (3) a sentence stating that the Commonwealth has waived its arguments on this issue. Appellant's Br. at 48 (citation omitted). Meyers offers no explanation as to how the trial court's determination of competence was plainly wrong. Moreover, Meyers never made the argument during his March 2014 trial that he was incompetent to stand trial, and Meyers's counsel made no motions for a competency evaluation during the trial. As evidence that he preserved this argument in the trial court, Meyers cites only his attorney's motions for competency evaluations in 2012 and 2013, and a pro se letter he wrote to his attorney in August 2013 requesting a copy of Dr. Evan Nelson's most recent evaluation. *Id.*; *see also* J.A. at 3-5, 21-25, 29. Therefore, he has waived this issue under Rule 5:27(d), Rule 5:25, and Code § 8.01-384. Finally, we have already concluded that the Commonwealth did not waive its argument on this issue by failing to respond to it in its brief in opposition to the petition for appeal. *See supra* Part II.A.

G. Pro Se Assignments of Error 12 & 13: Ineffective Assistance of Counsel

Meyers finally argues that he received ineffective assistance of counsel at trial. Generally, claims of ineffective assistance of counsel are not reviewable on direct appeal but instead are only properly raised in a habeas corpus action. *See Walker v. Mitchell*, 224 Va. 568, 570-71, 299 S.E.2d 698, 699-700 (1983). Meyers concedes as much in his brief, *see* Appellant's Br. at 48 (stating that "[i]neffective assistance of counsel claims are not typically reviewed on direct appeal"), but offers no argument as to why we should not follow this rule. Instead, he only argues that if we do not vacate his conviction on this ground, we should at least recognize that the Commonwealth waived its own argument on this point so as to preserve this waiver argument in a future habeas corpus proceeding. However, as we have concluded previously, *see supra* Part II.A., the Commonwealth did not waive its argument on this issue by failing to address the issue in its brief in opposition.

For the foregoing reasons, the judgment of the Court of Appeals is affirmed. The appellant shall pay to the Commonwealth of Virginia two hundred and fifty dollars damages.

This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of the City of Petersburg.

A Copy,

Teste:

Clerk