

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

PEOPLE OF THE VIRGIN ISLANDS,

Plaintiff,

v.

KENNETH MILLIGAN,

Defendant.

CRIM NO. SX-09-CR-480

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant's Renewed Motion for Judgment of Acquittal or, In the Alternative, for a New Trial (Motion), filed September 15, 2016. The People has not opposed the Motion and the time with which to file has passed. For the reasons that follow, the Motion will be granted in part and denied in part.

Background

The People charged Defendant Kenneth G. Milligan with: (1) Negligent Homicide by Means of a Vehicle in violation of Title 20 V.I.C. § 504; (2) Involuntary Manslaughter in violation of Title 20 V.I.C. §§ 492 and 924(2); (3) Reckless Driving in Violation of Title 20 V.I.C. § 492; and (4) Failure to Report an Accident in violation of Title 20 V.I.C. § 541. *See* Amended Information, filed September 2, 2016. Trial commenced on August 29, 2016 and concluded September 2, 2016. At the close of the People's case, on Defendant's Fed. R. Crim. P. 29(a) Motion,¹ the Court dismissed Counts 3 and 4 of the original Information (Count 3: Driving Under the Influence of an Intoxicating Liquor in violation of 20 V.I.C. § 493(a)(1); Count 4: Driving with a Blood Alcohol Content of .08 Percent or More in violation of 20 V.I.C. § 492). The People then filed the operative Amended Complaint, referenced above. The jury found Defendant not guilty of Counts 1 and 2 (Negligent Homicide and Involuntary Manslaughter), and guilty of Counts 3 and 4 (Reckless Driving and Failure to Report an Accident).

¹ The Court does not apply Fed. R. Crim. P. 29 reflexively and mechanistically through Super. Ct. R. 7, as the federal rules "represent rules of last resort" and are applied through Rule 7 only when local rules, statutes, or Supreme Court precedent do not cover the same subject matter. *Sweeney v. Ombres*, 60 V.I. 438, 442 (V.I. 2014). The Supreme Court has repeatedly cautioned that wholesale adoption of the Federal rules "may be problematic... [as] inappropriately delegating the judicial power of the Virgin Islands to foreign courts..." *Percival v. People of the Virgin Islands*, 62 V.I. 477, 485 n.1 (V.I. 2015), citations and internal quotations omitted. Here, since the Rules of the Superior Court do not set standards for motions for judgment of acquittal, and because Fed. R. Crim. P. 29 has been routinely relied upon by the Superior Court, the Court will apply Fed. R. Crim. P. 29 to this Motion. *See e.g., Virgin Islands v. Brewer*, 46 V.I. 3, 7 (V.I. Super. Ct. 2001); *Williams v. People of the Virgin Islands*, 55 V.I. 721, 734 (V.I. 2011); *People of the Virgin Islands v. Ward*, 52 V.I. 71, 80-81 (V.I. Super. Ct. 2009); *People of the Virgin Islands v. Thomas*, 53 V.I. 319, 328-29 (V.I. Super. Ct. 2010); *People of the Virgin Islands v. Morton*, 57 V.I. 72, 75-76 (V.I. Super. Ct. 2012); *People of the Virgin Islands v. Thomas*, 2016 V.I. LEXIS 137, *9 (V.I. Super. Ct. 2016); *People of the Virgin Islands v. Ponce*, 62 V.I. 458, 466 (V.I. Super. Ct. 2015); *People of the Virgin Islands v. Encarnacion*, 2015 V.I. LEXIS 16, at *5-6 (V.I. Super. Ct. 2015).

Legal Standard

A defendant who believes that he was denied the right to a fair and impartial jury may move for judgment of acquittal pursuant to Fed. R. Crim. P. 29 or request a new trial pursuant to V.I. Super. Ct. R. 135. When reviewing a jury's verdict to ensure there existed sufficient evidence for the defendant to be convicted, "a court must affirm the jury's verdict as long as substantial evidence was presented at trial to allow a rational trier of fact to convict when evidence is viewed in a light most favorable to the government."

People of the Virgin Islands v. Ponce, 62 V.I. 458, 466 (V.I. Super. Ct. 2015) (quoting *Fahie v. People*, 2015 V.I. Supreme LEXIS 12, *6 (V.I. 2015) (citing *Webster v. People*, 60 V.I. 666, 678-79 (V.I. 2014)); see also *Percival v. People of the Virgin Islands*, 62 V.I. 477, 490-91 (V.I. 2015).

Fed. R. Crim. P. 29, Motion for Judgment or Acquittal, in pertinent part, provides:

(c) After Jury Verdict or Discharge.

(1) *Time for a Motion*. A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

(2) *Ruling on the Motion*. If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) *No Prior Motion Required*. A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

Superior Court Rule 135 provides:

The court may grant a new trial to a defendant if required in the interest of justice. The court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before, or within two years after, final judgment. A motion for a new trial based on other grounds shall be made within 10 days after finding of guilty, or within such further time as the court may fix during the 10-day period. In no event shall this rule be construed to limit the right of a defendant to apply to the court for a new trial on the ground of fraud or lack of jurisdiction.

Discussion

Defendant argues that the People did not present sufficient evidence at trial to sustain a conviction for either of the two counts on which the jury returned a verdict of guilty: Reckless Driving and Failure to Report an Accident.

Reckless Driving

Defendant contends:

The People expected to prove willful and wanton conduct with evidence of intoxication. However, none of the People's witnesses supported that theory. Ultimately Counts 3 and 4, namely Driving Under the Influence of an Intoxicating Liquor and

Driving with a Blood Alcohol Content of .08 Percent or More, were dismissed on Defendant's initial Rule 29 motion. The People did not introduce any other evidence from which the jury could infer the state of Defendant's physical or mental condition or any other possible type of impairment than intoxication [sic].

Similarly, the People failed to introduce any evidence from area [sic] where Defendant's vehicle was found in the bush from which a jury could infer Defendant operated his vehicle in a willful and wanton manner. There was no evidence that Defendant had been speeding driving erratically or run a red light. The People's only evidence of anything unusual at the scene was a corpse almost 200 feet away from where Defendant's vehicle was found in the bush. In acquitting Defendant of the Negligent Homicide and Involuntary Manslaughter charges, the jury must have concluded there was no correlation between Defendant's operation of his vehicle on that day and the death of that person. ...

The fact of the vehicle [sic] in the bush in and of itself is not evidence per se of "willful or wanton" operation of a vehicle by Defendant.

Motion, at 3-4.

The Reckless Driving statute (20 V.I.C. § 492) provides:

It is unlawful for any person to operate a motor vehicle in a reckless manner over and along the public highways of this Territory. For the purpose of this section to "operate in a reckless manner" means the operation of a vehicle upon the public highways of this Territory in such a manner as to indicate either a willful or wanton disregard for the safety of person or property.

Defendant concedes that he operated a motor vehicle on the public highways of the Territory, as those relevant terms are defined in 20 V.I.C. § 101.

The Court instructed the jury:

It is unlawful for any person to operate a motor vehicle in a reckless manner over and along the public highways of this Territory. For the purpose of this section to "operate in a reckless manner" means the operation of a vehicle upon the public highways of this Territory in such a manner as to indicate either a willful or wanton disregard for the safety of person or property. 20 V.I.C. § 492.

The Court instructed the jury that "[t]he term 'willfully' as used in these instructions to describe the alleged state of mind of the Defendant, means that he knowingly performed an act on purpose as contrasted with accidentally, carelessly or unintentionally." The term "wanton" was defined as "unreasonably or maliciously risking harm while being utterly indifferent to the consequences," citing Black's Law Dictionary 10th ed. 1613.

In *Galloway v. People of the Virgin Islands*, 57 V.I. 693, 708, 711 (V.I. 2012), the Supreme Court found that "the Superior Court correctly instructed the jury on the elements of reckless driving," when it instructed the jury similarly that "'[w]illful and wanton misconduct' is defined by Black's Law Dictionary as 'conduct committed with an intentional or reckless disregard for the safety of others, as

by failing to exercise ordinary care to prevent a known danger or to discover danger.”

Defendant characterizes the People’s “entire case-in-chief” as “predicated on one issue: whether Defendant was intoxicated while operating his vehicle.... The People did not introduce any other evidence from which the jury could infer the state of Defendant’s physical or mental condition or any other type of impairment than intoxication.” Motion, at 3. Yet, reckless driving and driving while under the influence of an intoxicating liquor are two different statutory violations and each requires different elements to be proved by the People at trial. The inability to sustain a charge for driving while under the influence of an intoxicating liquor, in itself, does not prove that a conviction for reckless driving is unsustainable.

In *Gov’t of the Virgin Islands v. Anduze*, the Court found that although the jury was “hung” on the driving under the influence count, a finding that the defendant was guilty of negligent homicide could stand because “a reasonable jury could find a motor vehicle operator to be under the influence of or affected by alcohol but not intoxicated.” 1984 V.I. LEXIS 34 at *5 (V.I. Terr. Ct. 1984). Similarly, here, a reasonable jury could find that the evidence presented supported a finding that Defendant drove with a wanton disregard for the lives or property of others despite a lack of evidence demonstrating that he was intoxicated or under the influence of an intoxicating liquor. The People need not present evidence of intoxication to support a reckless driving conviction.

In *Galloway*, the Supreme Court cited *State v. Salveson*, 719 N.W.2d 747, 749 (N.D. 2006) for the proposition that driving under the influence and aggravated reckless driving “do not relate to each other” for they involve separate acts and different criminal objectives.² 57 V.I. at 713 (although convictions for reckless driving and failure to stop at a red light arose from “an indivisible course of conduct,” the defendant’s decision to drive while under the influence occurred at an earlier time than his subsequent failure to stop at the red light, such that his convictions for both offenses were not part of “an indivisible state of mind or coincident error of judgment”). Similarly here, because the separate counts of driving under the influence and reckless driving are conceptually distinct, the absence of evidence sufficient to permit a jury to find that Defendant was intoxicated or driving under the influence does not preclude the jury from finding Defendant guilty of reckless driving at trial.

² In North Dakota, aggravated reckless driving includes the separate act of inflicting “injury upon the person of another.” N.D.C.C. § 39-08-03. Salveson’s separate act of striking two pedestrians, mutilating the leg of one, is more than merely reckless drunk driving. The act that inflicted injury was separate and distinct, supporting the aggravated reckless driving charge. This separate act evidences a new “substantially different criminal objective.” N.D.C.C. § 12.1-32-11(3), permitting an enhanced sentence. *State v. Salveson*, 719 N.W.2d at 749.

In evaluating the pending motion for judgment of acquittal, the Court examines whether sufficient trial evidence was presented, viewed in the light most favorable to the prosecution, to support a finding that Defendant operated a vehicle in a reckless manner as to indicate “a willful or wanton disregard for the safety of person or property.” Testimony established the following: (1) Defendant admitted that he had been driving his car westbound on Melvin Evans Highway near Williams Delight, about 6 a.m. as night turned to dawn, when it “got mashed up” in the bush alongside the highway; (2) Defendant had been one of the event organizers of a Generation Now function held the prior evening at the Canegata Ballpark east of Christiansted; (3) the organizers set up the event beginning late afternoon to early evening and broke down the event after its conclusion about 3 a.m.; (4) following the cleanup of the venue, Defendant and his fellow organizers transported tables and related items back to Generation Now headquarters in Peter’s Rest, where they relaxed and socialized; (5) Defendant and his co-organizers left Peter’s Rest at some time near 5 a.m. and Defendant began his drive home to Frederiksted; (6) on his way home, Defendant’s car ran off the highway and came to a stop in the bush on the side of the highway; (7) co-organizer Kevin Williams, who had attended the event with Defendant, received a call from Defendant at minutes before 6 a.m. informing him that Defendant had “mashed up his car;” (8) Kevin Williams came to the scene and met with Defendant, concluding that Defendant had fallen asleep while driving, run off the road, and ended up in the bush; (9) a lifeless body was found adjacent to the highway about 200 feet east of Defendant’s vehicle; and (10) the medical examiner determined that the lifeless body had been killed while walking west to east along the shoulder of the highway when she was struck by a vehicle traveling in the opposite direction.

The Court finds that the evidence presented is sufficient to uphold the jury’s finding on the charge of reckless driving. Defendant had set up and torn down the social event, without sleep throughout the night. In that condition, at daybreak, he made the determination to drive to his home across the island. The jury could reasonably infer that he nodded off while driving, causing his vehicle to leave the highway, crossing the adjacent roadway shoulder and getting “mashed up” in the bush. The jury could reasonably find that Defendant’s decision to drive following a sleepless night was an act taken in disregard for the safety of others who might be traveling on or walking adjacent to the highway.

Courts in other jurisdictions have held that under similar statutes, similar conduct to that present here could be deemed to reflect “manifest a disregard by the driver for the consequences of his act and an indifference to life, limb, or property sufficient to find the operator guilty of reckless

driving.” *Kennedy v. Commonwealth*, 1 Va. App. 469, 473 (Va. Ct. App. 1986).³ A driver has a duty to keep his vehicle under proper control. In this case, the jury could reasonably find that by allowing his car to drive off the roadway, across the shoulder and into the bush and/or by deciding to drive while tired enough to fall asleep while driving, Defendant acted in such a manner to demonstrate a “wanton disregard for the safety of person or property,” constituting reckless driving under the Virgin Islands statutory standard.

Authority throughout various jurisdictions supports “a finding of criminal recklessness where a defendant chooses to drive an automobile knowing he suffers from a condition that could cause him to fall asleep or lose consciousness at the wheel.” *People v. Botsis*, 902 N.E.2d 1092, 1098 (Ill. App. Ct. 1st Dist. 2009) (collecting cases).⁴ Without evidence of any specific medical “condition” that could cause a driver to know that he was prone to fall asleep, a reasonable jury could nonetheless conclude here that Defendant’s lack of sleep throughout the night constituted a “condition” that Defendant should have known made him susceptible to falling asleep, and that his decision to take the wheel in that “condition” constituted reckless driving, by evidencing a “wanton disregard for the safety of person or property.”

As such, the Court finds that sufficient evidence was presented at trial to allow a rational trier of fact to convict Defendant of reckless driving, and Defendant’s Motion as to the jury’s reckless driving verdict will be denied.

Failure to Report an Accident

Title 20 V.I.C. § 541 provides:

In case of accident to person or property due to the operation of a motor vehicle or bicycle, the person operating such vehicle shall stop and give his name and address and license number to the person injured, or to any policeman or other person interested, and if he is not the owner of the vehicle, also the name and address of such owner. He shall also report the details of such accident at the nearest police station. In case of personal injury, the motor vehicle causing such injury shall take the injured person or person to the hospital, if desired, or the residence of such injured person.

³ Virginia Code § 46.1-189 provides: “Irrespective of the maximum speeds herein provided, any person who drives a vehicle upon a highway recklessly or at a speed or in a manner so as to endanger life, limb, or property of any person shall be guilty of reckless driving; provided that the driving of a motor vehicle in violation of any speed limit provision of § 46.1-193 shall not of itself constitute ground for prosecution for reckless driving under this section.”

⁴ The Illinois statute defines “recklessness” as follows: “A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.” 720 ILCS 5/4-6 (West 2006).

Defendant argues that the “evidence showed that Defendant called the Police Commissioner, Novelle Francis, almost immediately after the incident. Defendant also reported the incident to his friend, Kevin Williams, who called 911.” Motion, at 6. Defendant states that the evidence presented demonstrated that Defendant provided his registration, driver’s license, and insurance information to Officer Arthur Joseph, the investigating police officer at the scene. *Id.*

By reporting the accident to Kevin Williams, who in turn called 911, and by personally calling Police Commissioner Novelle Francis, Defendant did in fact report the accident to “any policeman” and to an “other person interested.”⁵ There was no “person injured” in the accident.⁶ By tendering his registration, driver’s license, and insurance information to the officer at the scene, Defendant complied with all statutory requirements. As such, the evidence presented at trial was insufficient to sustain a conviction on this count and judgment of acquittal must enter.

Motion for a New Trial

“The Superior Court may ‘grant a new trial in the interest of justice.’” *Percival*, 62 V.I. at 490-91. Defendant does not present any arguments to persuade the Court that a new trial is warranted, but simply states that, in the alternative to entry of judgment of acquittal, he requests a new trial. Being unpersuaded, the Court declines to award a new trial as to the reckless driving verdict, and will deny Defendant’s request in the alternative for a new trial. As such, it is hereby

ORDERED that Defendant’s Renewed Motion for Judgment of Acquittal on Count 3, Reckless Driving is DENIED. It is further

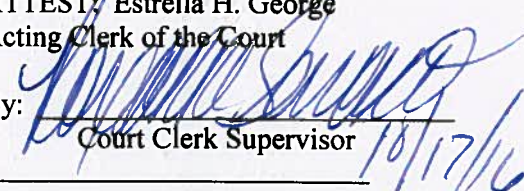
ORDERED that Defendant’s Renewed Motion for Judgment of Acquittal on Count 4, Failure to Report an Accident is GRANTED, and judgment of acquittal is ENTERED on Count 4. It is further

ORDERED that Defendant’s request in the alternative for new trial is DENIED.

DATED: October 14, 2016.


DOUGLAS A. BRADY, Judge

ATTEST: Estrella H. George
Acting Clerk of the Court

By: 
Court Clerk Supervisor 10/17/16

⁵ The Court accepts that the 911 call and the cell phone call to the VIPD Commissioner are the functional equivalent of and satisfy the requirement within Section 541, last revised in 1940, decades before the advent of cellular phone technology, that a person involved in an accident “also report the details of such accident at the nearest police station.”

⁶ By its verdict, the jury rejected the People’s charge that Defendant’s actions resulted in the death of Augusta Alcindor, constituting vehicular homicide and involuntary manslaughter. By that verdict, the jury found that Ms. Alcindor was not a “person injured” in the accident. For that reason, and because Ms. Alcindor was deceased at the scene, no reporting identification information to her or transporting her to the hospital or her residence was statutorily required.