

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

PEOPLE OF THE VIRGIN ISLANDS,	)	CRIMINAL NO. ST-11-CR-474
	)	
	Plaintiff,	V.I. Code Ann. tit. 14, § 2253(a),
	)	11(a)
v.	)	
	)	
GAMBA POTTER,	)	
	)	
	Defendant.	

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant Gamba Potter's Motion for judgment of acquittal or a new trial.¹ For the reasons set forth below, the Court will deny Defendant's Motion.

I. Facts of the Case

Potter was arrested and later charged by an Amended Information in two counts, along with another, with aiding and abetting each other in the unauthorized possession of firearms on August 24, 2011.

At trial, the People called witnesses to establish that Potter had made threats against Jimmy Smith because of a dispute over a repair bill to his car; that Potter had accompanied Cariem Charles in Charles' car; that Potter had been seen by a minor witness with a firearm; that Maximo Smith saw Potter with a firearm; and that Potter later called Jimmy and threatened him. The police also had as evidence two firearms that were seized from the automobile in which Potter was riding in the front passenger seat. One firearm was found on the floor of the driver's side of the vehicle, and the other firearm was found in the glove compartment.

The first two witnesses called by the People were Kimo Crooke and Dion Foy, both of whom worked with Advanced Towing, a small towing business owned by Jimmy. Crooke testified that he had a small towing business, Kimo's Towing Service; that he frequently worked with Advanced Towing; and that, on August 24, 2011, at around 9:00 a.m., he was in the area of Bolongo Bay when he was stopped by Potter who was in a silver car. Potter asked him where Jimmy was. After the encounter, Crooke telephoned Maximo, Jimmy's brother.

Foy testified that on the same date between 9:00 a.m. and 11:00 a.m., while he was dropping off a vehicle from Bovoni, Potter pulled up alongside his truck and said that Jimmy was not taking Potter's telephone calls. Potter also told Foy that he was going to take matters

¹ The Defendant Gamba Potter is represented by Carol A. Rich, Esq. and Lenehn Ning Ricks, Esq. The People are represented by Assistant Attorney General Charles Willoughby, Jr., Esq.

into his own hands. Foy testified that there had been a prior incident in which Potter's car had been damaged while being towed by one of Jimmy's trucks, and that Potter was seeking to be recompensed by Jimmy for the damage to his car.

Maximo testified that he had received a call that Potter was looking for Jimmy. Maximo was at Advanced Towing when Potter arrived in a grey Toyota. He testified that Potter exited from the rear passenger side of the car. He saw the driver of the vehicle with a gun which the driver tucked in his waist. Potter was upset about the damage to his car, and he was asking for Jimmy. Maximo called Jimmy and told him to call 911. Although Maximo testified in Court that Potter was in the rear seat of the car, he had given a previous statement in which he identified Charles as the driver, Potter as the front seat passenger, and two minors in the back seat. Although Maximo testified in court that he did not see Potter with a gun, Maximo had given a statement to Officer James Dowe of the Virgin Islands Police Department that he had seen Potter in possession of a firearm on August 24, 2011.

When the police arrived on the scene, Maximo pointed out Charles and Potter to the officers as Potter walked to the vehicle and gave something to one of the two passengers in the back seat of the vehicle, both of whom were minors. Maximo advised the officers that there was a gun in the vehicle as Charles got into the vehicle and attempted to leave. Officer Aaron Hodge, Sr. instructed Charles to pull his vehicle to the side, and he informed him that the tint was too dark. Officer Hodge then asked Charles for the documents for his vehicle, and as Charles opened the glove compartment, Officer Hodge saw a firearm. Charles admitted that he did not have a license for the firearm, and a search of the automobile revealed that there was a second firearm under the driver's seat of the automobile.

M.S. was called as a witness. He is presently 9 years of age and a student in the 4th Grade at E. Benjamin Oliver School. He testified that he understood what it meant to be under oath, and that if he did not tell the truth, he could go to hell or be locked up. He did not remember the events of the date in question, but he was able to identify his statement. He also testified that he did not go to the police station on the day in question, did not get into the car with Cariem Charles and denied that he had been taken to the police station by police officers.

According to Cpl. Corinne Daniel, who also was sworn and testified, she travelled to the area of Vitracco Mall on August 24, 2011, and when she arrived, she met M.S., who was crying. M.S.'s mother was contacted by the police, and Cpl. Daniel met M.S.'s mother at the police precinct. On the way to the police precinct, M.S. was concerned about Charles, whom he referred to as Remy, and asked why the police had handcuffed Charles. When they arrived at the precinct, they took a written statement from M.S. Although the mother was present when the statement was taken, she refused to sign the statement.

The statement of M.S. was admitted into evidence. According to the statement, Charles and M.S. were going to the barber, but they picked up D.M. from his home and also picked up Potter "on the block." They went to "a place where they fix cars," and Potter and Charles were talking to a man. M.S. was in the back of the car with D.M. D.M. went to buy something and returned to the back seat of the car with M.S. The police came and they asked Charles for his

driver's license and registration, and when Charles opened the glove compartment, the police saw a gun. M.S. knew there was a gun in the glove compartment because Potter clicked the gun and took out the clip when they were "on the block," and Potter put the gun in the compartment when he finished. M.S. also stated that he had seen Charles with a gun on the day of the incident, and that Charles had it in the front in his waist.

The guns were seized from the automobile, and they were both tested and found to be operable. Both Charles and Potter were placed under arrest for unauthorized possession of firearms.

Detective Sofia Rachid testified that Jimmy called her at the investigation bureau on August 29, 2011, and when he arrived, he played for her and several other officers a recording on his cell phone in which a voice was heard saying: "If you do not pay the money you owe, I'm going to shoot you in the head." Jimmy identified the voice as belonging to Potter to Detective Rachid and the other officers present at the investigation bureau. At trial, Jimmy was unable to tell the jury whose voice was on the line, but Detective Rachid testified that Jimmy told the officers present that it was Potter's voice. Before this evidence was allowed to be played before the jury, the Court listened to the testimony in open court outside of the presence of the jury. At this hearing, it was established that the police did not attempt to preserve the voicemail recording, although there were other officers present who had cell phones.

After the testimony had been completed in the trial and the jury was sent to deliberate, the Court received a note indicating that the jurors had reached a verdict. Waiting for the verdict, along with the attorneys and Potter, were Potter's family members and other members of the public who had not been in the courtroom throughout the trial. When the jury was coming into the courtroom to read the verdict, several members of the jury refused to enter the courtroom. The jurors sent a note to the Court indicating that "as a result of certain individuals in the courtroom, the jury wished to remain anonymous." The note was signed by 4 members of the jury. The Court initially questioned counsel about the procedure to follow, and then called the jury into court without the public present, and advised them that the law required that the verdict had to be delivered in open court.

Thereafter, another conference was held with counsel present, and the Court received another note from the jury which said that one of the jurors felt uncomfortable about delivering the verdict in the courtroom because she had a problem with another case. The note was signed by the juror. Potter then moved for a mistrial. The Court denied the Motion and directed the parties to brief the issue to determine how to proceed.

The issue was briefed, and a hearing was held several days thereafter. The Court inquired of the 4 jurors as to the reasons why they had not come into court to render a public verdict. Three of the jurors testified that they did not render the verdict because of the conduct of one of the jurors who appeared to be hysterical and hyperventilating. The single juror who had signed the note stated that she was hesitant to deliver the verdict at the conclusion of the trial because she saw Potter's family and friends in the courtroom and she does "not like to be public." She also stated that she had had a previous experience as a juror in federal court. The

defendant in the case had friends who were police officers, and after the verdict was rendered in the case, the police gave the juror's husband tickets which were never filed. The juror also said that she spoke to the judge about the issue, but did not clarify which judge she was referring to.

The four jurors who were questioned stated that they did not have a problem with delivering the verdict in open court. The verdict was unsealed and read. Potter was found guilty by the jury on both counts. The jury was polled, and a sentence date was set. Thereafter, Potter moved for a new trial and for a judgment of acquittal.

Potter attached an affidavit signed by Zoe Mathis, the mother of M.S., to the Motion. In the affidavit, Mathis stated that the testimony of Cpl. Daniel stating that Mathis was present during the taking of the statement from M.S. was false. To the contrary, according to Ms. Mathis, she was not present, and she had previously advised the prosecution that she had not been present when her son's statement was taken. She did not come forward until April 12, 2013 because she had not learned until that time that Cpl. Daniel had testified in court that Mathis was present while M.S.'s statement was taken. Mathis stated in her affidavit that the testimony of Cpl. Daniel was not true.

II. Potter's Motion for Judgment of Acquittal under Rule 29

A. Legal Standards for a Motion for Judgment of Acquittal Pursuant to Fed. R. Crim. P. 29

Federal Rule of Criminal Procedure 29(c)(2)² provides that the court may set aside a guilty verdict and enter a judgment of acquittal if appropriate. In considering this motion, the standard is whether, viewing the evidence adduced at trial in the light most favorable to the government, there was substantial evidence upon which a reasonable jury could have based its guilty verdict.³ A finding of insufficiency should "be confined to cases where the prosecution's failure is clear."⁴ Stated differently, the Court must determine whether a reasonable jury, on the evidence presented, could find beyond a reasonable doubt that the government has proved all the elements of the offenses.⁵ When deciding a motion for judgment of acquittal, the Court should not engage in weighing and evaluating the testimony presented, and a jury verdict should not be disturbed unless "the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt."⁶ The Court should not usurp the role of the jury by assigning weight to the evidence or by substituting its judgment for that of the jury.⁷

² The Rules of the District Court, the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure and the Federal Rules of Evidence apply to the Superior Court of the Virgin Islands when not inconsistent with the Rules of the Superior Court. . Super. Ct. R. 7.

³ *United States v. Salmon*, 944 F.2d 1106, 1113 (3d Cir. 1991); *See also Maynard v. Government of the Virgin Islands*, 49 V.I. 718, 721 (D.V.I. App. Div. 2008); *People v. Clarke*, Criminal No. ST-08-CR-371, 2009 WL 8391643, at *2 (Super. Ct. Sept. 21, 2009), *aff'd*, 55 V.I. 473 (2011)

⁴ *United States v. Smith*, 294 F.3d 473, 478 (3d Cir. 2002).

⁵ *Salmon*, 944 F.2d at 1113; *see also United States v. Fredericks*, 38 F. Supp. 2d 396, 398 (D.V.I. 1999).

⁶ *United States v. Anderson*, 108 F.3d 478, 480 (3d Cir. 1997).

⁷ *United States v. Flores*, 454 F.3d 149, 154 (3d Cir.2006) (quoting *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005)).

Using these standards, the Court will weigh the evidence submitted during the trial to determine whether there was substantial evidence upon which the jury could have found Potter guilty beyond a reasonable doubt of the charges of unauthorized possession of a firearm in Counts One and Two of the Amended Information.

B. The Jury Verdict Is Supported by Substantial Evidence

The jury verdict in this case finding Potter guilty of unauthorized possession of a firearm under Counts One and Two of the Amended Information is supported by substantial evidence. In both Counts, the Amended Information charged Potter “and another, aiding and abetting each other” in the unauthorized possession of a firearm. Under this language, Potter was either the principal who was aided and abetted by another, or the other person who aided and abetted the principal in the unauthorized possession of the firearm. Under either theory, if there was substantial evidence, the jury could find Potter guilty on the particular count.⁸ The Court must, therefore, determine whether there was substantial evidence for a jury to find beyond a reasonable doubt that Potter either aided and abetted in the unauthorized possession of a firearm under each count or directly committed the crime of unauthorized possession of a firearm.

To find a criminal defendant guilty of aiding and abetting in the commission of an offense, the jury has to find beyond a reasonable doubt that “‘the substantive crime has been committed and that the defendant knew of the crime and attempted to facilitate it,’ and must also produce ‘proof that the defendant had the specific intent to facilitate the crime.’”⁹ Phrased in another way, for the jury to find “aiding and abetting,” it must find that the defendant associated himself with the venture, that he participated in it as something that he wished to bring about, and that he sought by his words and actions to make it succeed.¹⁰

Count One concerned the possession of the firearm with serial number FBN584, the firearm found on the floor on the driver’s side of the automobile. To find Potter guilty of possessing that firearm as the one directly committing the acts, the People had to prove that Potter (1) on the date in question in St. Thomas/St. John, Virgin Islands; (2) knowingly; (3) possessed a firearm; (4) and that the said possession was without the authorization of the law. To find that Potter possessed the firearm as an aider and abettor, the jury had to find that Charles, the person who is being aided, committed the crime of possessing the firearm without authorization of the law; that Potter knew that Charles was committing the crime and attempted to facilitate it; and that Potter had the specific intent to facilitate the possession of the firearm.¹¹

The jury could find from the evidence that on the date of the incident, Potter made it clear to two witnesses that he was perturbed by the fact that Jimmy owed him money for the repair of his vehicle, and that he had expressed to one witness that he was going to take matters into his own hands. In apparent pursuit of this plan, his friend, Charles, the driver of the automobile,

⁸ V.I. Code Ann. tit. 14, § 11 (2012) provides: “(a) Whoever commits a crime or offense or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”

⁹ *Fontaine v. People*, 56 V.I. 571, 578 (2012) (quoting *Kareem Brown v. People*, 54 V.I. 496, 505 (2010).

¹⁰ *Nanton v. People*, 52 V.I. 466, 484 (2009) (quoting *United States v. Xavier*, 2 F. 3d 1281, 1288 (3d Cir. 1993).

¹¹ *Id.*

picked him up, and they went to Jimmy's place of business, apparently to speak to Jimmy, who was not present at the time. Both Potter and Charles were seen in possession of firearms at Advanced Towing in Vitracó Mall by Maximo and by the minor, M.S. Later, Potter called Jimmy on his cell phone and threatened him. Although Maximo testified in court that Potter was sitting in the back seat of the automobile, in his earlier statement, Maximo stated that Charles was the driver of the automobile and that Potter was sitting in the front passenger seat. The firearm identified in Count One was found on the driver's side of the vehicle on the floor, and it was not unreasonable for the jury to conclude that the firearm that was seen in Charles's possession by both Maximo and M.S. was the same firearm that was found on the driver's side of the automobile, since Charles was the driver of the automobile. From this evidence, the jury could find, beyond a reasonable doubt, the elements of Potter aiding and abetting in the possession of the firearm that was possessed by Charles.

The jury could conclude beyond a reasonable doubt that Charles intentionally committed the crime of aiding and abetting in possessing the firearm on the floor on the driver's side of the car beyond a reasonable doubt. This possession was without authorization of the law because Charles admitted to the police that he did not have a license to possess a firearm. They could also conclude from the evidence that Potter knew that Charles had the firearm, that he participated in some way in Charles's possession of the firearm, and that he sought to bring it about by his actions. Since there was substantial evidence from which the jury could conclude that Potter aided and abetted in the possession of the firearm on the driver's side, it is not necessary to analyze whether the elements to establish Potter's guilt of directly possessing that firearm could be found by the jury beyond a reasonable doubt.¹²

With respect to the firearm identified in Count Two, serial number PJK9HP, found in the glove compartment, there was substantial evidence for the jury to find that Potter directly participated in the possession of that weapon. In addition to the evidence outlined above, Maximo stated to Officer Dowe that he saw Potter with a firearm. M.S. also stated to Cpl. Daniel that he saw Potter with a firearm that Potter was checking, and that Potter put it in the glove compartment. From this, and the additional evidence that Potter was not licensed to possess a firearm, the jury could conclude that Potter possessed the firearm found in the glove compartment directly as a principal. Since there is substantial evidence to find beyond a reasonable doubt that Potter possessed the firearm as a principal, it is not necessary to analyze whether there was substantial evidence for a jury to find Potter guilty beyond a reasonable doubt of possessing the firearm in Count Two as an aider and abettor.

After considering the facts presented in the light most favorable to the People and the arguments of counsel, the Court, therefore, finds that there was sufficient evidence before the jury for it to find Potter guilty beyond a reasonable doubt under Counts One and Two of the Amended Information, unauthorized possession of a firearm. Thus, the Court denies Potter's Motion for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

¹² The Amended Information charged aiding and abetting and being the direct participant in the offense in the alternative

III. Potter's Motion for a New Trial under Superior Court Rule 135 and Rule 33 of the Federal Rules of Civil Procedure

A. Legal Standards for Motion for New Trial

Potter has also asked that the Court set aside the verdict and grant a new trial. The standard for ruling on a defendant's motion for a new trial is based upon Rule 135 of the Superior Court Rules and Rule 33¹³ of the Federal Rules of Criminal Procedure. Superior Court Rule 135 provides that "[t]he court may grant a new trial to a defendant if required in the interest of justice." The court must grant a new trial if after weighing the evidence, it is convinced that there has been a miscarriage of justice or "if trial error had a substantial influence on the verdict."¹⁴ Similarly, Rule 33(a) of the Federal Rules of Criminal Procedure provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires."¹⁵

The court is obliged to grant a defendant a new trial due to trial error only if it finds a "reasonable possibility that trial error could have had a substantial influence on the jury's decision."¹⁶ The decision to grant or deny a motion for new trial is committed to the sound discretion of the trial court. It can be granted: (1) when after weighing the evidence, the court determines that there has been a miscarriage of justice;¹⁷ and (2) where there is a reasonable probability that trial error had a substantial influence on the jury verdict.¹⁸ In determining whether or not to grant a new trial in the interest of justice, the Court is accorded broad latitude. The Court is allowed to weigh and evaluate the testimony of the witnesses under a Rule 33

¹³ Fed. R. Crim. P. 33 provides:

(a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(b) Time to File.

(1) *Newly Discovered Evidence*. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty.

(2) *Other Grounds*. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

¹⁴ *Government of the V.I. v. Baron*, 48 V.I. 88, 93 (Super. Ct. 2006) (quoting *Government of the V.I. v. Commissioning*, 706 F. Supp. 1172, 1184 (D.V.I. 1989)).

¹⁵ See *U.S. v. Charles*, 949 F. Supp. 365, 368 (D.V.I. 1996) ("In assessing such 'interest,' the court may weigh the evidence and credibility of witnesses; if the court determines that there has been a miscarriage of justice, the court may order a new trial."); *Gov't of the V.I. v. Leycock*, 93 F.R.D. 569, 571 (D.V.I. 1982) (stating that under "exceptional circumstances," the court may exercise its discretion to order a new trial when it is in the interests of justice).

¹⁶ *United States v. Mastro*, 570 F. Supp. 1388, 1390 (E.D. Pa. 1983).

¹⁷ *Commissioning*, 706 F. Supp. at 1184.

¹⁸ *People v. Brewley*, 49 V.I. 137, 141 (Super Ct. 2007).

motion in reaching its determination as to whether a new trial should be ordered.¹⁹ A criminal defendant is entitled to a fair trial, but not a perfect one.²⁰ Therefore, allegations of trial error are subject to “harmless error” analysis.²¹

The Court may grant a new trial based upon newly discovered evidence if the Defendant has satisfied a five part test: the motion must show due diligence; it must be discovered since the trial; it must not be merely cumulative or impeaching; it must be material to the issues involved; and it must be of such probative value, and of such a nature that it would probably produce an acquittal at a new trial.²²

B. The Evidence from Zoe Mathis Which Was Allegedly Discovered After the Trial Was Not Newly Discovered Evidence Which Would Entitle the Defendant to a New Trial

Potter argues that the information contained in the affidavit of Zoe Mathis, M.S.’s mother, is newly discovered evidence that entitles him to a new trial. Mathis alleges that Cpl. Daniel’s testimony is false because Cpl. Daniel’s assertion that Mathis was present while M.S.’s statement was taken is false. Potter also argues that the information constitutes *Giglio* material and the prosecutor knowingly used perjured testimony by allowing Cpl. Daniel to testify.

Initially, the Court must determine whether the information contained in Mathis’s affidavit is in fact newly discovered evidence under the test set out in *Government of the Virgin Islands v. Sampson*.²³ As noted above, to satisfy this test, the Defendant must show due diligence and that the evidence was discovered after trial, is not cumulative or impeaching, is material, and is of such a character that it would probably result in an acquittal at a new trial.

Utilizing this test, it is difficult to see how the information received from Mathis qualifies as newly discovered evidence under Rule 135. Defendant states that the evidence is newly discovered and he did not learn that Mathis would contradict Cpl. Daniel’s testimony that Mathis was present when M.S.’s statement was taken. Yet, at the suppression hearing held in October 2012, Potter’s defense attorney cross-examined Cpl. Daniel extensively about whether Mathis was present during the taking of M.S.’s statement. During Cpl. Daniel’s testimony at the suppression hearing, as at trial, Cpl. Daniel stated that Mathis was present during the questioning of M.S. It is difficult to see how Mathis’s statement that she was not present can be considered newly discovered or how the Court can find that Potter exercised due diligence. It would have been very easy to interview Mathis after the October 2012 hearing regarding Cpl. Daniel’s testimony, and elicit from her whether or not she was present. The fact that Potter did not take this simple step in preparing for trial shows a lack of due diligence on Potter’s part.

¹⁹ *Id.* at 142.

²⁰ *Commissiong*, 706 F. Supp. at 1184 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)).

²¹ See *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991) (defining trial error as “error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine” its effect on trial).

²² *Gov’t of the V.I. v. Sampson*, 42 V.I. 247, 265-66 (D.V.I. App. Div. 2000).

²³ *Id.*

Also, to qualify as newly discovered evidence, the evidence cannot be cumulative or impeaching and it must be material. The alleged newly discovered evidence is simply of an impeaching character regarding Cpl. Daniel's testimony, and is not material to the question of the truth of the statement of M.S. Indeed, the issue of whether Mathis was present while M.S. was giving his statement is only tangential and does not directly impact whether or not the statement of M.S. was true. Thus, the proffered testimony of Mathis cannot be considered material to the question of Potter's guilt or innocence.

Finally, the evidence must be of such a character that it would probably result in an acquittal at a new trial. The testimony of Mathis, if allowed at a new trial, would controvert a small point in the testimony at the trial. Again, if the facts asserted in the affidavit are true, it does not detract from the statement of M.S., the important piece of evidence in issue in the trial. In this Court's evaluation, the fact that Mathis may not have been present during the taking of M.S.'s statement would not undermine the statement to such an extent that it could have caused an acquittal.

Potter also contends that the prosecutor was aware of Mathis's testimony that she was not present during the questioning of M.S., and that this evidence should have been turned over to him before trial as *Giglio* material. This argument, however, suffers from the same infirmity as the assertion that this information is newly discovered.

Giglio material, or the term "*Giglio* violation," derives from *Giglio v. United States*,²⁴ which prohibits the prosecution from suppressing exculpatory material of an impeaching character "when the reliability of a given witness may well be determinative of guilt or innocence."²⁵ A *Giglio* violation occurs when "the undisclosed evidence reveals that the prosecution knowingly made false statements or introduced or allowed trial testimony that it knew or should have known was false."²⁶ In order to prevail on a *Giglio* claim, it must be shown that the prosecutor knowingly used false testimony or failed to correct what he knew to be false testimony and that such use was material.²⁷ *Giglio* claims are subject to a higher standard of materiality than other *Brady* claims,²⁸ since a *Giglio* violation should only be ignored if it is harmless beyond a reasonable doubt.²⁹

The Court has to evaluate the materiality of the alleged testimony of Mathis in its analysis of whether a *Giglio* violation has occurred. Considering that Mathis's testimony dealt with a tangential issue as to whether she was present while M.S.'s statement was being taken and her testimony would not have directly impacted the truth or falsity of M.S.'s statement, the Court

²⁴ 450 U.S. 150 (1972).

²⁵ *Id.* at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

²⁶ *Smith v. Sec'y, Dep't of Corr.*, 577 F.3d 1327, 1333 (11th Cir. 2009) (citing *United States v. Agurs*, 427 U.S. 97, 103-04 (1976)).

²⁷ *People v. Ward*, 55 V.I. 829, 842 (2011).

²⁸ *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (suppressing evidence favorable to an accused upon request violates due process when the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecutor.)

²⁹ *Ward*, 55 V.I. at 842.

believes that the non-availability of this testimony was harmless beyond a reasonable doubt, and would not have impacted the jury verdict. This is particularly so because testimony was developed before the jury during cross-examination suggesting that Mathis was not present during the taking of M.S.'s statement, and Cpl. Daniel's testimony was impeached to some extent by the fact that Mathis did not sign the statement. It is not clear whether Mathis testifying before the jury would have been stronger in impeaching Cpl. Daniel on this point. Even if it were, it is not clear what effect Mathis's testimony would have had on the main issue before the jury, i.e., whether they believed or disbelieved the contents of the statement given by M.S.

One must also note that the contention that there was a knowing use of false testimony is undercut by the fact that the evidence that could have allegedly impeached Cpl. Daniel's testimony was as readily available to Potter as to the prosecution if Potter had been reasonably diligent, and Potter did nothing to bring this testimony before the jury.

C. The Introduction of the Evidence Concerning the Cell Phone Threat to Jimmy Smith Does Not Violate the Best Evidence Rule

Potter contends that he is entitled to a new trial because the Court committed error by allowing a recording of a threat communicated to a witness into evidence in alleged violation of the best evidence rule. Since the evidence presented to the jury was proof of the cell phone threat made by Potter, and the original recording had not been preserved, the best evidence rule was not violated by allowing Detective Rachid to testify to the fact that she and several other officers heard the threat of Potter on Jimmy's voicemail on his cell phone.

The best evidence rule provides that to prove the content of a writing, recording or photograph, the original is ordinarily required, unless a contrary rule of evidence would allow otherwise.³⁰ Typically, duplicates are admissible to the same extent as the original, unless a genuine question is raised about the original's authenticity or there are other circumstances that would make it unfair to use a duplicate.³¹ Also, an original is not required, and other evidence of the contents of a recording are admissible, if "all of the originals are lost or destroyed, and not by the proponent acting in bad faith."³²

Recently, the Supreme Court of the Virgin Islands reviewed a decision involving the best evidence rule where the original of a surveillance video was not available, and a camcorder video was admitted, although it was not a duplicate. The Supreme Court allowed both the testimony of the camcorder and the testimony of the officer who explained what he saw on the original video. The Court noted that when an original is lost through no fault of the proponent of the evidence, the proponent is not required to produce the original or a duplicate of a recording under the best

³⁰ Fed. R. Evid. 1002.

³¹ *Id.* 1003.

³² *Id.* 1004.

evidence rule.³³ Once the original is not available, the law does not provide any preference as to what type of proof is used to prove the contents of the original.³⁴

In this case, the Court allowed Detective Rachid to testify about the contents of the voicemail message pursuant to Rule 1004. Under the circumstances, the testimony of the detective was not prohibited by the best evidence rule because the original recording did not exist. Although the People failed to preserve the evidence, the Court does not find that the People's failure was due to any bad faith on their part. Potter was allowed to cross examine the detective before the jury, and the jury could draw its own conclusions about the credibility of the detective's testimony, including the failure to preserve the evidence.

Potter cites to cases that stand for the proposition that the proponent must use diligent means to obtain the original when the original of a recording is not lost or destroyed, or secondary evidence of its contents will be inadmissible.³⁵ These cases are not pertinent to the Court's analysis of the present case because, here, the recording was not available at all. Since there was no evidence of bad faith involved in failing to preserve the recording, secondary evidence is admissible.

Detective Rachid's testimony was also admissible as a prior inconsistent statement pursuant to the provisions of the Virgin Islands Code. Evidence of a prior inconsistent statement is not inadmissible as hearsay if the prior statement is inconsistent with a witness's trial testimony.³⁶ Potter makes much of the fact that the detective was unable to identify the voice in the recording and relied on Jimmy's statement that the voice was that of Potter. Since Jimmy testified that he did not know whom the voice belonged to, the detective could testify that Jimmy told the detective that it was Potter's voice to impeach Jimmy's testimony as a prior inconsistent statement. As such, the statement could be considered as substantive evidence under the rule.³⁷

D. Potter Is Not Entitled to a New Trial Based upon the Manner in Which the Verdict Was Received

The manner in which the verdict was received does not entitle Potter to a new trial. The Court did not err in handling the rather unusual situation of several jurors initially refusing to enter the courtroom and deliver the verdict. Further, Potter was not denied a fair trial by virtue of

³³ *Ostalaza v People of the Virgin Islands*, S. Ct. Crim. No. 2012-71, 2013 WL 3233244 (V.I. June 26, 2013).

³⁴ *Id.* (Citing *United States v. Carriles*, No. EP-07-CR-0087-KC, 2010 WL 4918770, at *11 (W.D. Tex. Nov. 19, 2010) ("Where all originals are lost or destroyed and no bad faith caused their destruction, *any* form of secondary evidence will suffice . . . [and] challenges to the secondary evidence go to weight, not admissibility." (emphasis added))).

³⁵ *United States v. Bennet*, 363 F.3d 947, 954 (9th Cir. 2004) (finding that Government made no showing that the original of the GPS was not available or that it had been lost or destroyed, and the Government was not excused from the best evidence rule's preference for the original and the oral testimony as to its contents was excluded.) *United States ex rel. Magid v. Wilderman*, No. Civ.A.96-CV-4346, 2004 WL 1987219, at *3 (E.D. Pa. Aug. 18, 2004) (excluding secondary evidence of the contents of claim forms where original claim forms were not lost or destroyed and the proponent did not use existing judicial process to obtain them).

³⁶ V.I. Code Ann. tit. 14, § 19 (2012).

³⁷ *Williams v. People*, 56 V.I. 821, 827-30 (2012).

the procedure utilized by the Court, and there is no indication that the individual reluctant juror was biased in rendering a fair verdict. The Court will, therefore, not set aside the verdict and grant Potter a new trial on this asserted basis.

The Court is allowed to replace a juror with an alternate juror when circumstances arise that indicate that “the juror’s ability to perform his duty as a juror is impaired.”³⁸ Conversely, in this case, the Court was only dealing with a question of several jurors’ reluctance to deliver the verdict in open court after they had already deliberated and reached a verdict. The Supreme Court of the Virgin Islands has recognized that questions concerning jurors after jury deliberations have begun are controlled by Federal Rule of Criminal Procedure 23(b)(2)(B), while questions concerning a juror’s fitness before deliberations have begun are controlled by Rule 24(c)(1).

The Virgin Islands Supreme Court has dealt with several predeliberation juror removal cases under Federal Rule of Criminal Procedure 24(c)(1).³⁹ In these cases, the Court stated that the judge may exercise his or her sound discretion to remove a juror when the juror cannot be fair and impartial.⁴⁰ A reviewing court gives a trial judge’s findings concerning a juror’s honesty and credibility great deference.⁴¹ Before a juror can be removed, a hearing is necessary when facts about the juror’s ability to serve cannot be determined without further inquiry. Where the factual basis of a deception by a juror during or following voir dire is not verifiable or apparent, the jurors have routinely been questioned by the trial court to determine whether there is a basis for removal.⁴² A two-part test has been developed to determine jury partiality, as only a lack of impartiality will affect the defendant’s right to a fair trial.⁴³ To determine whether the essential fairness of the trial has been affected and whether the defendant is entitled to a new trial, “a party must first demonstrate that a juror failed to honestly answer a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.”⁴⁴

Though the Supreme Court has not discussed the test for the removal of a juror once deliberations have begun, similar considerations should apply. Applying the *McDonough* test in this case, there has been no showing that the juror accused of implied bias answered any question incorrectly or dishonestly. During voir dire, the juror advised the Court that she had previously served on a jury trial, and told the Court that she could be fair and impartial. The facts later developed by the Court through questioning the juror only showed that she had a previous bad experience in the delivery of a verdict because her husband had been harassed by friends of the defendant. She did not indicate that she could not be fair and impartial by this statement—only that she had a basis for the hesitancy in delivering the verdict in open court.

³⁸ *United States v. Cameron*, 464 F. 2d 333, 335 (3d Cir. 1972).

³⁹ See, e.g., *Vergile v. People*, 54 V.I. 455, 460 (2010); *Dowdye v. People*, 55 V.I. 736, 754-755 (2011).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Dowdye*, 55 V.I. at 758- 759.

⁴³ *Id.* (citing *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 556 (1984)).

⁴⁴ *Id.* (citing *McDonough Power Equip.*, 464 U.S. at 556; *United States v. Hodge*, 321 F.3d 429 (3d Cir. 2003)).

Potter contends that the Court should have conducted a hearing in this matter. Indeed, the Court conducted a hearing by calling the jurors who had hesitated in coming into open court, and allowing the parties to question the jurors. The questions that could be asked of the jurors were only limited with respect to questions about the actual deliberations of the jurors, since the actual deliberative process of the jury is privileged.

Potter had a complete voir dire prior to the selection of the jury. The juror who initially refused to deliver the verdict stated that she could be a fair and impartial juror during voir dire. There was no indication that the jurors were in any way affected by the juror's behavior in rendering a verdict, particularly because this behavior occurred after the verdict had already been reached. The juror was only hesitant about delivering the verdict in public, not in being able to be fair and impartial in reaching a verdict. When the juror was advised that she had to deliver the verdict in public, she did so. There is no indication that the actions of the jurors in initially refusing to render a public verdict deprived Potter of a fair trial, and the Court did not err in taking the verdict. Therefore, the Motion for a new trial based upon the alleged implied bias of a juror is denied.

CONCLUSION

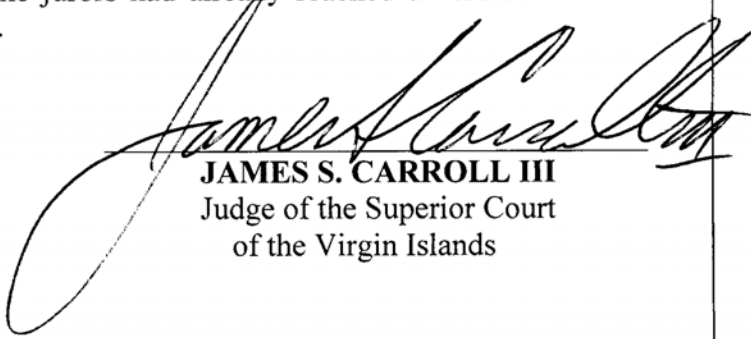
Potter's Motion for judgment of acquittal or a new trial is denied.

When considered in the light most favorable to the People, there was substantial evidence to find Potter guilty of aiding and abetting in the unauthorized possession of a firearm under Count One of the Amended Information, and of directly being in unauthorized possession of a firearm under Count Two of the Amended Information. Therefore, the Motion for judgment of acquittal based on insufficiency of the evidence is denied.

The Motion for new trial is also denied. The affidavit of M.S.'s mother, Zoe Mathis, was not newly discovered evidence entitling Potter to a new trial because Potter did not exercise due diligence in discovering the alleged evidence, and the evidence was not material. Since it was not material and was equally available to Potter, the evidence is not *Giglio* material entitling Potter to a new trial. The best evidence rule was not violated by the use of Detective Rachid's testimony establishing that she had heard evidence of a threat made by Potter to Jimmy as a voicemail on Jimmy's cell phone. Also, the evidence identifying Potter as the caller was properly received as a prior inconsistent statement. There was no error in receiving the verdict after jurors initially indicated reluctance in delivering the verdict in open court because there was no evidence that any of the jurors were not fair and impartial in deliberating. The incident involving

the delivery of the verdict occurred after the jurors had already reached a verdict. For these reasons, the Motion for a new trial is denied.

Dated: July 18 2013



JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

ATTEST:

VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court

BY: 

LORI BOYNES-TYSON

Court Clerk Supervisor 7/18/13

PEOPLE OF THE VIRGIN ISLANDS,) **CRIMINAL NO. ST-11-CR-474**
)
Plaintiff,) V.I. Code Ann. tit. 14, § 2253(a),
) 11(a)
v.)
)
GAMBA POTTER,)
)
Defendant.)

JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

Court Clerk Supervisor

¹ The People are represented by Assistant Attorney General Charles Willoughby, Jr., Esq., and the Defendant is represented by Carol A. Rich, Esq. and Lenehn Ning Ricks, Esq.