For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

COLLY CASCEN, Appellants/Defendants	)	**S. Ct. Civ. No. 2018-0066** Re: Super. Ct. Civ. No. 482/2014 (STX)
v.	)	
GOVERNMENT OF THE VIRGIN ISLANDS, JULIUS WILSON, DIRECTOR OF THE VIRGIN ISLANDS BUREAU OF CORRECTIONS, and DAVID ZOOK, WARDEN OF THE SUSSEX I STATE PRISON, Appellees/Respondents	)	

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Michael C. Dunston

Argued: October 13, 2020
Filed: March 26, 2021

Cite as: 2021 V.I. 4

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Jeffrey Moorhead, Esq.
Law Offices of Jeffrey B.C. Moorhead
St. Croix, U.S.V.I.
Attorney for Appellant,

Ian S.A. Clement, Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellee.

OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 Colly Cascen appeals from the Superior Court's denial of his petition for a writ of habeas corpus. He argues that he was entitled to an evidentiary hearing on his petition and that his trial

and appellate counsel were ineffective. We agree that an evidentiary hearing was required and reverse.

I. BACKGROUND

¶ 2 On October 1, 2008, the People charged Cascen in a six-count Information with: murder in the first-degree of Christian D. Soto in violation of 14 V.I.C. § 922(a)(1); attempted murder in the first-degree of Cyril Peters in violation of 14 V.I.C. §§ 922(a)(1) & 331(1); assault in the first-degree of Cyril Peters in violation of 14 V.I.C. § 295(1); assault in the third-degree of a minor, W.J., in violation of 14 V.I.C. § 297(2); reckless endangerment in the first-degree in violation of 14 V.I.C. § 625(a); and possession of an unlicensed firearm during the commission of a crime of violence in violation of 14 V.I.C. § 2253(a).

¶ 3 After a six-day trial which began on March 8, 2010, the jury convicted Cascen on all counts. On December 28, 2011, the Superior Court sentenced Cascen to life imprisonment without parole for first-degree murder, ten years for the merged counts of attempted first-degree murder and first-degree assault, two years for third-degree assault, five years for reckless endangerment, and five years and a $25,000 fine for the unauthorized possession of a firearm during a crime of violence. The Superior Court entered its judgment and commitment on January 16, 2012.[1] On January 20, 2012, Cascen appealed his judgment and sentence to this Court, arguing among other issues, that the Superior Court erred when it denied his motion for judgment of acquittal as there was insufficient evidence to support his convictions. On January 8, 2014, this Court reversed Cascen's convictions for third-degree assault and the associated conviction for unauthorized

[1] For a recitation of the facts adduced at trial, see *Cascen v. People*, 60 V.I. 392, 397-400 (V.I. 2014).

possession of a firearm during the commission of a crime of violence, but affirmed the remaining convictions. *Cascen v. People*, 60 V.I. 392, 397-98 (V.I. 2014).

¶ 4 On December 9, 2014, Cascen filed a petition for a writ of habeas corpus, and on August 6, 2015, he filed a motion for a ruling on his petition. On October 7, 2015, pursuant to 4 V.I.C. § 123(b)(2),[2] the assigned Superior Court Judge referred the matter to a Superior Court Magistrate Judge to conduct hearings and submit proposed findings of fact and recommendations for the disposition of any motion or application for post-trial relief made by Cascen. On November 10, 2015, the designated Magistrate Judge ordered the government to file a response. The Government responded on December 11, 2015, by filing a motion to dismiss the habeas petition.

¶ 5 On March 21, 2016, Cascen filed an amended petition for a writ of habeas corpus. Cascen's amended petition asserted that his trial counsel was unconstitutionally ineffective in multiple respects, including: (1) failing to object to inadmissible testimony during trial, (2) failing to request a mistrial based on the jury's exposure to inadmissible evidence disclosed at a sidebar conference, (3) failing to request a mistrial based on improper comments made by the prosecution in its closing arguments, (4) introducing inculpatory evidence, (5) failing to subpoena an exonerating witness, (6) garnering admonishments by the Court, and (7) that these errors were cumulatively prejudicial. Cascen's petition also argued that his appellate counsel was unconstitutionally ineffective when: (1) he failed to sufficiently raise the issue of improper closing statements on appeal and (2) he failed to sufficiently raise the issue of jury sequestration on appeal.

---

[2] "Upon designation by a judge of the Superior Court, pursuant to rules adopted by the court, a magistrate judge may. . . [c]onduct hearings, including evidentiary hearings, . . . submit proposed findings of fact and recommendations for the disposition, by a Superior Court judge, of any motion excepted in subsection (b)(1), of applications of post trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement." 4 V.I.C. § 123(b)(2).

¶ 6 On June 11, 2016, the designated Magistrate Judge ordered the Government to respond to the amended petition no later than July 22, 2016, and set the matter for a hearing to be held on October 21, 2016. On July 22, 2016, the Government filed its return, and on August 15, 2016, Cascen filed a reply. On October 19, 2016, the Superior Court canceled the scheduled hearing, and the case was reassigned to Judge Harold W. L. Willocks. Thereafter, by order entered October 12, 2018, the Superior Court denied the petition without ever holding an evidentiary hearing, concluding that Cascen had failed to make a prima facie claim for habeas review.[3] This appeal timely followed.

II. JURISDICTION AND STANDARD OF REVIEW

¶ 7 "The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court." 4 V.I.C. § 32(a); *see also* 48 U.S.C. § 1613a(d). The Superior Court's October 12, 2018 Order denying Cascen's writ of habeas corpus constituted a final judgment, and this Court, therefore, possesses jurisdiction over this appeal. *Suarez v. Gov't of the V.I.*, 56 V.I. 754, 758 (V.I. 2012) ("An order denying a petition for a writ of habeas corpus is a final order . . . from which an appeal may lie.").

¶ 8 This Court exercises plenary review over the dismissal of a habeas corpus petition. *Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 293 (V.I. 2014) (citing *Mendez v. Gov't of the V.I.*, 56 V.I. 194, 199 (V.I. 2012)). When examining the Superior Court's application of law, this Court applies a plenary standard of review, while the trial court's findings of fact are reviewed for clear error. *Blyden v. People*, 53 V.I. 637, 646 (V.I. 2010).

[3] Although the case was reassigned to Judge Willocks, the October 12, 2018 memorandum opinion was authored by Judge Dunston. The record does not provide an explanation for this further reassignment.

III. DISCUSSION

¶ 9 Cascen's first assignment of error is that the Superior Court erred in failing to hold an evidentiary hearing after the court had initially ordered that Cascen's petition established a prima facie case for habeas relief and the Government had filed its return. Cascen argues that the failure to hold an evidentiary hearing violated 5 V.I.C. § 1311. We agree.

¶ 10 In general, the Superior Court "must hold an evidentiary hearing after it has concluded that a petitioner has alleged a prima facie case for relief, a writ of habeas corpus has been issued, and the respondent has filed a return." V.I. H.C.R.2(g)(1); *see also Rivera-Moreno*, 61 V.I. at 314. However, the right to an evidentiary hearing is not absolute and an evidentiary hearing is "not necessary if the submissions before the court, including any reply or traverse by the petitioner, reveal no factual disputes that are material to disposition of the issues raised in the petition, and the court makes a written finding to that effect." V.I. H.C.R.2(g)(1); *see also Rivera-Moreno*, 61 V.I. at 314.

¶ 11 In the present case, material factual disputes existed regarding whether Cascen's trial counsel was unconstitutionally ineffective in at least two respects: (1) when trial counsel failed to object, move for a mistrial, or request a curative instruction when told that the jury possibly overheard an incriminating sidebar conference, and (2) when trial counsel failed to object or move for a mistrial during the prosecution's closing arguments. Therefore, for the reasons expressed below, we will reverse the Superior Court's order and direct the court to grant the writ and conduct an evidentiary hearing on remand to address these and the other issues regarding ineffective assistance of trial and appellate counsel identified by Cascen.

A. Ineffective Assistance of Counsel

¶ 12 In his second assignment of error, Cascen argues that the Superior Court erred in holding that his trial counsel's performance was not constitutionally ineffective on four occasions: (1) when he failed to move for a mistrial after the jury allegedly heard inadmissible evidence at a sidebar conference, (2) when he failed to move for a mistrial and object to the People's closing arguments, (3) when he caused the introduction of inculpatory evidence during cross-examination, and (4) when he garnered admonishments by the court in the presence of the jury. (Appellant Br. at i-ii.) Cascen also contends that his attorney's inadequate performance was prejudicial pursuant to the cumulative error doctrine. (Appellant Br. at 28-29.) Cascen additionally argues that his appellate counsel was constitutionally ineffective when he waived Cascen's arguments regarding the Government's closing arguments and an issue regarding jury sequestration.[4] Since we will reverse and direct the court to conduct an evidentiary hearing on remand to permit Cascen the opportunity to further develop all of these arguments, we decline to address each individual argument raised but instead will focus our discussion on the issues of trial counsel's performance regarding the sidebar conference and during closing arguments.

¶ 13 "The Sixth Amendment guarantees the right to effective assistance of counsel in criminal proceedings." *Gumbs v. People*, 64 V.I. 491, 505 (V.I. 2016). To prove that trial counsel's assistance was unconstitutionally ineffective, a petitioner must show that (1) the attorney's performance fell below an objective standard of reasonableness and (2) "that there is a reasonable

[4] On the morning of the last day of trial, a juror reported that she had seen an unfamiliar black pick-up truck on her street that was similar to the shooter's. After the juror discussed the truck sighting with the Court and the parties, defense counsel moved for a mistrial, which the Court denied. The Government then requested that the jury be sequestered for the weekend. The defense counsel opposed this request, arguing that it would further prejudice the jury against Cascen. Ultimately, the Court decided to sequester the jury.

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 506 (citations and quotation marks omitted).

¶ 14 "The proper measure of [an] attorney['s] performance . . . [is] simply reasonableness under prevailing professional norms, and, therefore, review of counsel's performance is generally highly deferential, as there is a presumption that under the circumstances, the challenged action might be considered sound trial strategy." *Powell v. People*, 59 V.I. 444, 453 (V.I. 2013) (citations and quotation marks omitted); *see also Suarez*, 56 V.I. at 559-60 (reasoning that when assessing the reasonableness of counsel's performance, this court "must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance") (citations and quotation marks omitted). Furthermore, "tactical decisions about which competent counsel might disagree do not qualify as objectively unreasonable." *Id*. When determining whether trial counsel's errors resulted in prejudice, this Court "should presume . . . that the judge or jury acted according to law" and "must consider the totality of the evidence before the judge or jury." *Strickland v. Washington*, 466 U.S. 668, 694-95 (1984).

1. *Jury's Exposure to Inadmissible Evidence at Sidebar*

¶ 15 Cascen asserts that his trial defense counsel's assistance was ineffective because he failed to request a mistrial or a curative instruction during a sidebar conference where the Marshal supervising the jury informed the parties to the sidebar that the jury could hear their conversation. (Appellant Br. 13-14.)

¶ 16 The sidebar conference in question took place during the People's direct examination of Yessenia Knowles. Knowles began her testimony by describing the night of the murder. When she testified during direct examination that she did not know who the shooter was, the People began questioning her regarding her previous interviews with Detectives Dino Herbert and Fred

Brathwaite, and Tom Drummond, an FBI agent. During this line of questioning, defense counsel objected that "the People [were] trying to impeach their own witness" and requested the sidebar conference at issue. During the sidebar conference, the People explained that Knowles's testimony was inconsistent with previous statements she had made to detectives that she recognized Cascen as the shooter, that Cascen had shot Peters, and that she "is terrified of Cascen because he's had her and Peter[s] followed in the past." (J.A. 270-71.) At that point, the Marshal indicated to the sidebar participants "[t]hey [the jury] can hear." (J.A. 271.) None of the participants acknowledged the Marshal's statement, and the People continued to state that Knowles "ha[d] also indicated that Cascen had told her that he was going to kill [Peters]." (J.A. 271.)

¶ 17 Defense counsel responded by arguing that the statement to which the People were referring was written by the detectives and had not been adopted by Knowles. The People responded by arguing that Agent Drummond could testify that Knowles had adopted the written statement. The Court expressed agreement with defense counsel's position by asking the People, "[s]o why don't you call Drummond to contradict him [sic]? Why are you going to impeach your own witness? … It seems inappropriate, if not unethical, to try to impeach [Knowles] by simply reading from a statement that Drummond made when Drummond is available." (J.A. 273.) At this point, the Marshal again reiterated to the participants of the sidebar conference that "[t]he jury can hear the conversation." (J.A. 273.) The Court then excused the jury from the courtroom and continued the sidebar conference.

¶ 18 "The purpose of a sidebar conference is to allow the attorneys and the court an opportunity to conveniently have a private conversation outside the jury's hearing without retreating to the judge's chambers. This is not accomplished when the jury can hear inflammatory remarks due to loud voices." *McDaniels v. Ehrhard*, 877 S.W.2d 688, 690 (Mo. Ct. App. 1994). In the event that

the jury overhears a sidebar conversation, prejudice may result. *State v. Curtis*, 317 P.3d 968, 982 (Utah Ct. App. 2013) (assessing whether a criminal defendant suffered prejudice by a sidebar conversation that the jury allegedly overheard). This danger is especially present where the sidebar discussions contain inadmissible evidence. *See* V.I. R. EVID. 103(d) ("To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.").

¶ 19 Here, it is indisputable that the information discussed at the sidebar in question—that Knowles, an eyewitness of the shooting, had previously identified Cascen as the shooter, had admitted that Cascen had previously threatened her and Peters, who was one of the victims, and that he had stated to her that he was going to kill Peters—had the potential to prejudice the jury if in fact they overheard it. *See* *Billu v. People*, 57 V.I. 455, 460, 465 (2012) (reasoning that two testifying witnesses' previous statements which were made to the police identifying the defendant as the shooter and which were inconsistent with the witnesses' testimony at trial were "prejudicial, perhaps, extremely so . . .").

¶ 20 In denying Cascen's petition, the Superior Court explained that from the trial transcript it is not clear whether any juror actually heard the comments at sidebar or if what they heard was inadmissible or improper. We agree that this information is not available from the transcript as "[m]any intangibles occur at trial which may not be apparent simply from reading the record." *Ehrhard*, 877 S.W.2d at 690. However, it is precisely *because* the record is unclear that an evidentiary hearing is necessary. The only way to determine whether the jury overheard the sidebar, and thus, whether defense counsel was ineffective in failing to object or move for a mistrial, is by adducing further facts through an evidentiary hearing. Without an evidentiary hearing where evidence is elicited from the Marshal as to her basis for advising that the jury was

able to hear the sidebar conversation, it is impossible for us to determine whether defense counsel's failure to move for a mistrial or request a curative instruction was motivated by legitimate trial strategy or unprofessionalism. Therefore, we will remand so that this issue can be inquired into at an evidentiary hearing.

2. *Closing Arguments*

¶ 21 Cascen also asserts that defense counsel was unconstitutionally ineffective in failing to adequately object or move for a mistrial based on the Government's allegedly improper closing remarks. (Appellant Br. at 18-19.) Cascen argues that the prosecution impermissibly vouched for witnesses and appealed to the jury's emotions and prejudices and that his counsel's failure to remedy these remarks constituted ineffective assistance of counsel. (Appellant Br. at 17-18.) Specifically, Cascen points to the prosecution's closing argument comments that witnesses Dooly, Knowles, Christian, Peters, and Rodriguez were afraid to cooperate with police or testify at trial because "[t]hey all know that this Defendant is a cold-blooded murderer. They know him and his crew. They know if they cooperate with the police, they are dead." (J.A. 689, 694, 697.)

¶ 22 We agree that the prosecution's closing statements were improper. Appeals to the "emotions, passions, and prejudices of a jury [are] improper" because they "divert[ ] the jury's attention from its duty to decide the case on the evidence." *DeSilvia v. People*, 55 V.I. 859, 872 (V.I. 2011). Here, the prosecution's repeated suggestions that Cascen or his "crew" had intimidated witnesses and that Cascen was "a cold-blooded murderer" improperly appealed to the jury's emotions, passions, and prejudice. *Francis v. People*, 59 V.I. 1075, 1080 (V.I. 2013) (holding that the prosecution's remark in closing argument that "an average male teenager will not lie about being molested by another male" improperly appealed to the jury's emotions and prejudices); *see*

also United States v. Khatallah, 313 F. Supp. 3d 176, 194-95 (D.D.C. 2018) (holding that the government's reference to the defendant as a "stone cold terrorist" in rebuttal improperly appealed to the passions and prejudices of the jury); *Urbin v. State*, 714 So. 2d 411, 420 (Fla. 1998) (holding that the characterization of the defendant as "cold-blooded killer" in closing argument was improper).[5]

¶ 23 However, without an evidentiary hearing, we are unable to conclude whether defense counsel's response to these improper comments rose to the level of ineffective assistance of counsel. Again, without further evidence, we cannot determine at this time whether defense counsel's failure to remedy these improper comments was the result of strategy or negligence. Therefore, we direct the court to address this issue in an evidentiary hearing on remand.

¶ 24 Because we conclude that the issues regarding the sidebar conference and the Government's closing arguments require the case to be remanded for an evidentiary hearing, we need not address in this proceeding the remaining issues raised by Cascen of (1) inculpatory evidence, (2) admonishments by the court, (3) cumulative error; or (4) ineffective assistance of appellate counsel.

B. Application of *Titre*

¶ 25 Although not briefed by Cascen, the Government correctly notes in their brief that Cascen's conviction for the merged offenses of attempted first-degree murder and first-degree assault is in

[5] *But see Commonwealth v. Clancy*, 192 A.3d 44, 67 (2018) (holding that prosecutor's characterization of the defendant as a "cold blooded killer" in closing arguments was not improper and "constituted permissible (if aggressive) oratorical flair"); *State v. Morton*, 715 A.2d 228, 265–66 (N.J. 1998) ("Because the prosecutor's labeling of defendant as a "cold-blooded killer" was supported by the evidence and was made in response to defense counsel's argument, it does not constitute reversible error.").

contravention of our subsequent ruling in *Titre v. People*, 70 V.I. 797, 807 (V.I. 2019).[6] (Appellee Br. at 4.) The Government asserts that Cascen's sentence of ten years' imprisonment for the merged offenses violated the Double Jeopardy Clause of the Fifth Amendment. (Appellee Br. at 4.)

¶ 26 "[I]t is well established that an appellate court, when ordering a remand to a trial court for further proceedings based on its disposition of one issue may, in the interests of judicial economy, nevertheless consider other issues that, while no longer affecting the outcome of the instant appeal, are likely to recur on remand." *Smith v. Turnbull*, 54 V.I. 369, 374 (V.I. 2010). Therefore, in the interest of justice, we consider this issue and direct the Superior Court to address whether to retroactively apply *Titre* on remand.[7]

[6] The Superior Court's sentence and the following direct appeal predated our decision in *Titre*.

[7] In *Boston v. People*, this Court reasoned that an appellant's failure to raise an issue in their opening brief will typically waive the issue because "it protects the appellee from the prejudice that results from the court's consideration of a late argument to which the appellee ordinarily cannot issue a written response," and because "it promotes the values of our adversarial system by ensuring that the court has heard adequate argument on a particular issue prior to rendering its decision. 56 V.I. 634, 645 (V.I. 2012) (quoting *Gambino v. Morris*, 134 F.3d 156, 168–69 (3d Cir. 1998) (Roth, J., concurring)). In the present case, neither of these purposes is adversely affected because the Government raised the issue in their brief. Thus, our consideration of the issue does not prejudice the Government or compromise the adversarial values of our judicial system as the Government already had the opportunity to address the issue and took that opportunity to explicitly request that this Court remand the issue for the purpose of vacating Cascen's first-degree assault conviction. (Appellee Br. at 4.) Further, because appellants are prohibited from raising new issues within their reply brief or at oral argument, Cascen was barred from introducing this issue later. *Better Bldg. Maint. of the Virgin Islands, Inc. v. Lee*, 60 V.I. 740, 748 n.2 (V.I. 2014) (reasoning that arguments raised for the first time in an appellant's reply brief are waived); *Allen v. Hovensa, L.L.C.*, 59 V.I. 430, 436 (V.I. 2013) (reasoning that arguments made for the first time at oral argument are waived).

¶ 27 In determining whether Cascen was convicted twice "for the same offense" as proscribed by the Double Jeopardy Clause of the Fifth Amendment, the court must "determine whether each offense requires proof of a fact that the others do not." *Titre v. People*, 70 V.I. 797, 805 (V.I. 2019); *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Here, as in *Titre*, the lesser included offense of first-degree assault did not require the People to prove any additional element beyond those required to obtain a conviction for first-degree attempted murder and the convictions are thus "within the purview of the Double Jeopardy Clause of the Fifth Amendment."[8] 70 V.I. at 807. By merging these convictions—rather than announcing a conviction for both and vacating the lesser offense—the Superior Court violated the Double Jeopardy Clause and section 104, title 14 of the Virgin Islands Code. *Id*.; *Rutledge v. United States*, 517 U.S. 292, 308 (1996). Accordingly, we direct the Superior Court to consider this violation on remand.

IV. CONCLUSION

¶ 28 We hold that an evidentiary hearing regarding Cascen's petition for a writ of habeas corpus was necessary. Accordingly, we reverse the Superior Court's order and direct the court to grant the writ and conduct an evidentiary hearing on remand in accordance with the Virgin Islands Habeas Corpus Rules and this Court's precedent. On remand, we further direct the Superior Court to apply the ruling in *Titre* to Cascen's merged offenses.

Dated this 26th day of March, 2021.

BY THE COURT:

/s/ Rhys S. Hodge

[8] *Compare* 14 V.I.C. § 922(a)(1) (all murder which is perpetrated by means of poison, lying in wait, torture, detonation of a bomb or by any other kind of willful, deliberate and premeditated killing) *with* 14 V.I.C. § 295(1) (whoever with intent to commit murder, assaults another).

RHYS S. HODGE
Chief Justice

ATTEST

VERONICA J. HANDY, ESQ.
Clerk of the Court