For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

JEFF J. DAVIS, Appellant/Defendant, v. **PEOPLE OF THE VIRGIN ISLANDS,** Appellee/Plaintiff.	)	**S. Ct. Crim. No. 2016-0020** Re: Super. Ct. Crim. No. F82/2013 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Denise M. Francois

Argued: January 10, 2017
Filed: February 16, 2021

Cite as: 2021 VI 2

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **HAROLD W.L. WILLOCKS**, Designated Justice.[1]

APPEARANCES:

Kele C. Onyejekwe, Esq.
Appellate Public Defender
St. Thomas, 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] Associate Justice Ive Arlington Swan is recused from this matter; the Honorable Harold W.L. Willocks, a judge of the Superior Court of the Virgin Islands, sits in his place by designation pursuant to title 4, section 24 of the Virgin Islands Code.

¶ 1 Appellant Jeff J. Davis appeals from the Superior Court's August 4, 2016 judgment and commitment, which adjudged him guilty of first-degree assault, third-degree robbery, and grand larceny. For the reasons that follow, we affirm.

I. BACKGROUND

¶ 2 On February 12, 2013, the People of the Virgin Islands charged Davis with various offenses stemming from an incident that occurred on December 26, 2012. At a jury trial that began on April 14, 2016, the People presented testimony from Sylvia Son, who testified that Davis had yanked a 14-carat gold chain from her neck near her home at approximately 9:30 p.m. Son further testified that the area was illuminated at the time of the incident, and that she knew Davis because he had rented a room in her guest house in the past, frequently visited a store she owns, and had always been "friendly and nice" and called her "Mammy." (J.A. 271.) In addition, her son, Leston Stoutt, was present at the time of the incident and identified Davis as the assailant. Davis, who testified in his own defense, maintained that he had been painting a house in a different part of St. Thomas that morning and afternoon, which was corroborated by another defense witness, Masdem Isaac.

¶ 3 Ultimately, the jury found Davis guilty of all counts. The Superior Court held a sentencing hearing on July 26, and sentenced Davis to two years' incarceration on each charge, to be served concurrently; however, the Superior Court invoked title 14, section 104 of the Virgin Islands Code to stay execution of the sentences for robbery and grand larceny. The Superior Court subsequently memorialized its oral sentence into an August 4, 2016 judgment and commitment. Davis timely filed his notice of appeal with this Court on April 20, 2016. *See* V.I. R. APP. P. 5(b)(1)[2] ("A notice

[2] Effective March 1, 2017, Supreme Court Rules 1 through 41 were redesignated as the Virgin Islands Rules of Appellate Procedure. *See* Promulgation Order No. 2017-004 (V.I. Jan. 18, 2017).

of appeal filed after the announcement of a decision, sentence, or order – but before entry of the judgment or order – is treated as filed on the date of and after the entry of the judgment.").

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 4 The Revised Organic Act of 1954 confers jurisdiction on this Court over "all appeals from the decisions of the courts of the Virgin Islands established by local law." 48 U.S.C. § 1613a(d); *see also* 4 V.I.C. § 32(a) (granting this Court jurisdiction over "all appeals arising from final judgments, final decrees or final orders of the Superior Court"). The written judgment embodying the adjudication of guilt and sentence imposed based on that adjudication constitutes a final judgment. *Jackson-Flavius v. People*, 57 V.I. 716, 721 (V.I. 2012). Accordingly, the Court has jurisdiction over this appeal.

¶ 5 This Court applies plenary review to the Superior Court's application of law, while the trial court's findings of fact are reviewed for clear error. *Boynes v. Transportation Servs. of St. John*, 60 V.I. 453, 458 (V.I. 2014) (citing *St. Thomas-St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007)). However, "[w]hen a timely objection to a final jury instruction [is] made, we review the objection for abuse of discretion," unless no objection is made, in which case it is reviewed only for plain error. *Prince v. People*, 57 V.I. 399, 405 (V.I. 2012).

B. Sufficiency of the Evidence

¶ 6 Davis, as his first issue on appeal, maintains that the People introduced insufficient evidence to sustain his convictions. As this Court has repeatedly emphasized, "[w]hen reviewing the sufficiency of the evidence, we . . . view[] the evidence in the light most favorable to the People," and must "affirm[] the conviction if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Woodrup v. People*, 63 V.I. 696, 707

(V.I. 2015) (quoting *Percival v. People*, 62 V.I. 477, 484 (V.I. 2015)). Under this highly-deferential standard, even "the testimony of a single witness is sufficient to support a conviction, even if uncorroborated and contradicted by other testimony." *Cascen v. People*, 60 V.I. 392, 406 n.4 (V.I. 2014); *Connor v. People*, 59 V.I. 286, 290 ("[A] single positive eyewitness identification may be sufficient proof of guilt, even if it is contradicted by the accused or by alibi testimony."), *cert. denied*, 134 S. Ct. 793 (2013).

¶ 7 Here, Davis acknowledges that, at trial, Son and Stoutt both expressly identified him as Son's assailant. Nevertheless, Davis maintains that "[t]he evidence was insufficient . . . because his identification by Son and Stoutt was unreliable." (Appellant's Br. 11.) To support this claim, Davis asks that this Court consider (1) various law review articles and social science studies discussing eyewitness identification and the risk of mistaken identifications, (2) that the United States Court of Appeals for the Third Circuit established a task force to evaluate eyewitness identification, and (3) the opinion of the Supreme Court of Oregon in *State v. Lawson*, 291 P.3d 673 (Or. 2012), in which that court established standards for the admissibility of eyewitness identification evidence.

¶ 8 Davis is correct that several courts are re-evaluating the procedures and standards utilized to determine whether eyewitness identification testimony should be admitted into evidence, in order to account for new scientific developments and reduce the possibility of wrongful convictions due to misidentification. *See, e.g.*, *Young v. State*, 374 P.3d 395, 416 (Alaska 2016); *State v. Guilbert*, 49 A.3d 705, 720 (Conn. 2012); *State v. Henderson*, 27 A.3d 872, 918 (N.J. 2011). What Davis fails to acknowledge, however, is that "when an appellate court reviews the sufficiency of the evidence, it must 'consider all the evidence the [jury] had before it, including any evidence that is later determined to be inadmissible.'" *Ambrose v. People*, 56 V.I. 99, 107

(V.I. 2012) (quoting *State v. Frazier*, 622 N.W.2d 246, 261 (S.D. 2001)); *see also Cascen*, 60 V.I. at 409. This is because "if the evidence were determined to be insufficient, it would be unfair to the People because other evidence might have been produced by the [prosecutor] at trial if the questioned evidence had been excluded there." *Ambrose*, 56 V.I. at 107 (quoting *People v. Sisneros*, 606 P.2d 1317, 1319 (Colo. App. 1980)).

¶ 9 Here, Son and Stoutt's eyewitness identification testimony was before the jury. In fact, Davis vigorously cross-examined both Son and Stoutt with respect to their eyewitness identifications, such as inquiring about the lighting at the time of the incident. Moreover, Davis never moved the Superior Court to exclude their testimony on grounds that their identifications may be unreliable. Consequently, the People introduced sufficient evidence at trial identifying Davis as the perpetrator of the charged offenses.[3]

C. Jury Instruction

¶ 10 Davis also challenges the propriety of the jury instruction for eyewitness testimony used by the Superior Court, which was based on a model jury instruction utilized by the United States Court of Appeals for the Third Circuit.[4] According to Davis, the jury instruction is improper

[3] Davis also notes that the People failed to introduce expert testimony to "help the jury understand the complex issues of eye-witness testimony," and contends that this failure means that the People "did not prove the case against [him] beyond all reasonable doubt." (Appellant's Br. 28.) However, this Court has already held that the People's failure to introduce expert testimony to explain an issue to the jury does not warrant setting aside a conviction on sufficiency grounds. *Rawlins v. People*, 58 V.I. 261, 274 (V.I. 2013) (rejecting argument that evidence was insufficient due to the prosecution's failure to introduce expert testimony explaining how a breathalyzer machine works).

[4] The Superior Court instructed the jury, in pertinent part, as follows:

> During the trial, some witnesses identified the defendant as the person responsible for the crimes charged in the Information. One of the issues in this case

is whether the defendant is the same person who committed the crimes charged in the Information. The People, as I have explained, have the burden of proving every element, including identity, beyond a reasonable doubt. Although it is not essential that a witness testifying about the identification himself be free from doubt as to the accuracy or correctness of the identification, you must be satisfied beyond a reasonable doubt based on all of the evidence in that case that the defendant is the person who committed the crimes charged. If you are not convinced beyond a reasonable doubt that the defendant is the person who committed the crimes charged in the Information, you must find him not guilty.

Identification testimony is, in essence, the expression of an opinion or belief by the witness. The value of the identification depends on the witness' opportunity to observe the person who committed the crime at the time of the offense and the witness' ability to make a reliable identification at a later time based on those observations.

You must decide whether you believe the witness' testimony and whether you find beyond a reasonable doubt that the identification is correct. You should evaluate the testimony of a witness who makes an identification in the same manner as you would any other witness. In addition, as you evaluate a witness' identification testimony, you should consider the following questions, as well as any other questions you believe are important.

First, you should ask whether the witness was able to observe and had an adequate opportunity to observe the person who committed the crime charged. Many factors affect whether a witness has an adequate opportunity to observe the person committing the crime. The factors include the length of time during which the witness observed the person; the distance between the witness and the person; lighting conditions; how closely the witness was paying attention to the person; whether the witness was under stress while observing the person who committed the crime; whether the witness knew the person from some prior experience; whether the witness and the person committing the crimes were of different races, and any other factors you regard as important.

Second, you should ask whether the witness is positive in the identification and whether the witness' testimony remains positive and unqualified after cross-examination. If the witness' identification testimony is positive and unqualified, you should ask whether the witness' certainty is well-founded.

Third, you should ask whether the witness' identification of the defendant after the crime was committed was the product of the witness' own recollection. You may take into account both the strength and the later identification and the circumstances under which that identification was made. You may wish to consider how much time has passed between the crime and the witness' later identification of the defendant. You may also consider whether the witness gave a description of the person who committed the crime, and how the witness' description of the person who committed the crime compares to the defendant.

You may also consider whether the witness was able to identify other

because (1) the Third Circuit is considering its revision, and (2) the instruction is similar to the one utilized in *State v. Classen,* 590 P.2d 1198 (Or. 1979), which the Oregon Supreme Court subsequently described in *Lawson* as "incomplete." 291 P.3d at 688.

¶ 11 Because Davis stated that he had "[n]o objection" to the Superior Court's jury instruction, however, this Court reviews the instruction given—at most—only for plain error. *See* V.I. R. APP. P. 4(h). "The plain error standard is met where there is 'an error, that was plain, that affected the defendant's substantial rights.'" *Canton v. People*, 61 V.I. 511, 519 (V.I. 2014) (quoting *Webster v. People*, 60 V.I. 666, 672 (V.I. 2014)). However, "[e]ven then, this Court will only reverse where the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

¶ 12 Davis has failed to satisfy every prong of the plain error test. As the People correctly note in their brief, this Court has previously approved a very similar eyewitness testimony instruction. *Woodrup*, 63 V.I. at 720-21; *Ostalaza v. People*, 58 V.I. 531, 561-62 (V.I. 2013). However, even if this Court—like the Third Circuit and the Oregon Supreme Court—were inclined to revisit the propriety of the instruction, the second prong of the plain error test requires that the "error be

---

> participants in the crime. If the identification was made under circumstances that may have influenced the witness, you should examine that identification with great care. Some circumstances which influence a witness' identification [are] whether the witness was presented with more than one person or just the defendant; whether the witness made the identification while exposed to the suggestive influences of others; and whether the witness identified the defendant in conditions that created the risk – excuse me, that created the impression that he was involved in the crime.
>
> Fourth, you should ask whether the witness failed to identify the defendant at any time, identified someone other than the defendant as the person who committed the crime, or changed his or her mind about the identification at any time. You should receive the identification testimony with caution and scrutinize it with care. If, after examining all of the evidence, you have a reasonable doubt as to whether the defendant is the individual who committed the crimes charged in the Information, you must find him not guilty.

(J.A. 433-37.)

'plain' at the time of appellate consideration." *Canton*, 61 V.I. at 519. To be "plain," there must be pre-existing binding authority resolving the question in the manner proffered by the defendant. *McIntosh v. People*, 57 V.I. 669, 682 n.11 (V.I. 2012) (citing *Billu v. People*, 57 V.I. 455, 463 n.5 (V.I. 2012)).

¶ 13 In this case, there is no binding authority from this Court or the Supreme Court of the United States providing that the Third Circuit's model eyewitness testimony jury instruction is erroneous. On the contrary, the only binding authority approves of the instruction. *Woodrup*, 63 V.I. at 720-21; *Ostalaza* 58 V.I. at 561-62. Consequently, the Superior Court did not commit plain error with regard to its eyewitness testimony jury instruction.

D. Due Process

¶ 14 In his appellate brief, Davis—relying solely on the Oregon Supreme Court's *Lawson* decision—also argues that the eyewitness identification testimony in this case violated his due process rights. Because this issue was not asserted below, it is also reviewed solely for plain error, and fails for the same reason as Davis's challenge to the eyewitness testimony instruction: the *Lawson* decision represents non-binding persuasive authority at best, and there is no binding authority from this Court or the Supreme Court of the United States holding that the admission of eyewitness identification testimony contrary to the *Lawson* factors violates the constitutional right to due process. *Canton*, 61 V.I. at 519; *McIntosh v. People*, 57 V.I. at 682 n.11; *Billu*, 57 V.I. at 463 n.5.

¶ 15 However, even the Oregon Supreme Court recognized that "the Due Process Clause is not implicated absent some form of state action, such as the state's use of a suggestive identification procedure." *Lawson*, 291 P.3d at 688. This is because the Supreme Court of the United States has held that "the Due Process Clause does not require a preliminary judicial inquiry into reliability of

an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." *Perry v. New Hampshire*, 565 U.S. 228, 248 (2012). In this case, neither Son nor Stoutt identified Davis because of a line-up, photo array, or other identification procedure—let alone a suggestive identification procedure—arranged by law enforcement. On the contrary, Davis himself concedes in his brief that Son and Stoutt both knew Davis prior to the incident due to his frequent visits to Son's store as well as from having rented a room from her, and that the police arrested Davis only after Son alerted the police that he was the one who assaulted and robbed her. (Appellant's Br. 7.) Therefore, the use of the eyewitness identification testimony in this case did not violate Davis's due process rights.

E. Prior Crime Testimony

¶ 16 Finally, Davis contends that the Superior Court erred in failing to *sua sponte* issue a curative instruction when Stoutt testified to Davis having committed prior crimes. During his initial testimony, the People asked Stoutt, "As part of your official police duties, had you ever arrested or investigated Jeff Davis in the past?" to which Stoutt replied, "I have not investigated nor arrested him in the past, but I've been on cases whereas he has been accused of robbing people's houses." (J.A. 286.) Davis did not object to this testimony, but later recalled Stoutt as a witness, and through his counsel engaged in the following colloquy:

> Q: Had you known Mr. Davis to have committed any crime prior to this, prior to the incident?
>
> A: Yes.
>
> Q: Tell us about that?
>
> A: There was a tenant that was in my apartment, and Mr. Davis was in the room next to the tenant in the guest house, and the tenant came to my room because I was staying in the guest house at the time, and he told me he needs help, call the police. I asked him what happened. He said he's afraid for his life because the guy in the next room is the guy who shot him in the stomach. So I spoke with him. He gave me the name of the individual. He say, no, what are you talking about? He say, well, his case is already in the Attorney General's Office and he's waiting a

> disposition of the case as far as the incident between him and Jeff Davis. So that same night I had to take him and carry him by a next residence with all his stuff in Smith Bay because he was in fear of his life.

(J.A. 364-65.)

¶ 17 Because Davis failed to object when the People asked Stoutt if he had arrested or investigated Davis in the past as part of his official police duties, we review only for plain error. "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." FED. R. EVID. 404(b)(1).[5] However, "[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." FED. R. EVID. 404(b)(2). To be admitted under Federal Rule 404(b)(2), the evidence must be relevant, and must not be substantially more prejudicial than probative under Rule 403 of the Federal Rules of Evidence. *Chinnery v. People*, 55 V.I. 508, 526 (V.I. 2011).

¶ 18 We agree that Stoutt's testimony that Davis "has been accused of robbing people's houses" is substantially more prejudicial than probative. Although it is arguable that this testimony could have been used by the People to establish that Stoutt knew Davis prior to the incident, the People had previously asked Stoutt if he knew Davis before December 26, 2012, to which Stoutt replied "Yes, I've known him quite a while. He rents rooms at the guest house which I run." (J.A. 286.)

[5] At the time of trial, the Federal Rules of Evidence were applicable to actions in the Superior Court pursuant to Act No. 7161. However, on July 31, 2016, the Governor signed Act No. 7888 into law, which conferred this Court with the authority to promulgate the rules of evidence to be used in Virgin Islands courts. Although this Court exercised that authority to promulgate the Virgin Islands Rules of Evidence, which went into effect on March 31, 2017, *see* Promulgation Order No. 2017-002 (April 3, 2017), we continue to apply the Federal Rules of Evidence on appeal because Davis's trial concluded before that date. *Blyden v. People*, 53 V.I. 637, 658 n.15 (V.I. 2010).

Since Davis was being charged with third-degree robbery and grand larceny, the potential prejudice from informing the jury that he had previously been accused of robbing houses clearly outweighed the probative value from that line of questioning.

¶ 19 Nevertheless, to prevail under the plain error test, Davis bears the burden of proving that this portion of Stoutt's testimony, "taken in the context of the trial as a whole, w[as] sufficiently prejudicial to have deprived [him] of his right to a fair trial." *Augustine v. People*, 55 V.I. 678, 686 (V.I. 2011) (quoting *Gov't of the V.I. v. Charleswell*, 24 F.3d 571, 576 (3d Cir. 1994)). To determine the extent of the prejudice, this Court must consider "(1) whether [the witness's] remarks were pronounced and persistent, creating a likelihood they would mislead the jury; (2) the strength of the other evidence; and (3) curative action taken by the [trial] court." *Augustine*, 55 V.I. at 686 (quoting *United States v. Lore*, 430 F.3d 190, 207 (3d Cir. 2005)). Here, Stoutt's improper testimony was an isolated incident limited to a single question, and Davis failed to request that the Superior Court issue a curative instruction. Moreover, Stoutt only said that Davis had been accused of robbery, and in fact stated that he had not been arrested or even investigated. *Augustine*, 55 V.I. at 686 ("[D]espite [the defendant's] claim that the statement communicated to the jury that he is a life-long criminal and a habitual crook, [the officer] only said that he had 'stopped' [the defendant] on several occasions, not that he had arrested him."). Additionally, the evidence of Davis's guilt was strong, in that Son testified that she recognized him as her assailant due to having known him through the guest house and her business, and Davis's defense only established that he was at a different location in St. Thomas hours before the robbery occurred. Therefore, the testimony of prior robberies, while improper, did not rise to the level of plain error.

¶ 20 With respect to the testimony that Davis had previously shot someone, we conclude that the issue is precluded under the invited error doctrine. This Court has repeatedly held that when a

defendant, through his counsel, induces or encourages an error in the proceedings before the Superior Court, the invited error doctrine precludes that error from forming the basis for reversal on direct appeal. *See, e.g.*, *Williams v. People*, 59 V.I. 1024, 1033 (V.I. 2013); *Fontaine v. People*, 56 V.I. 571, 583 (V.I. 2012). In fact, this Court has previously held that the invited error doctrine is implicated when defense counsel actively solicits improper testimony from a prosecution witness. *Duggins v. People*, 56 V.I. 295, 308-09 (V.I. 2012).

¶ 21 We recognize that Davis may have believed that the robbery testimony elicited by the People triggered an exception to the invited-error doctrine that authorized him to ask Stoutt about his knowledge of Davis's prior crimes. It is well-established that when one party "opens the door" by eliciting testimony that is arguably inadmissible or improper, "the opposing party may then respond or retaliate with evidence on the same subject" and still raise the issue on appeal without running afoul of the invited-error doctrine. *See State v. Lindsey*, 720 P.2d 73, 78 (Ariz. 1986) (citing M. UDALL & J. LIVERMORE, LAW OF EVIDENCE § 11 at 11 (2d ed. 1982)); *Cathey v. Missouri, K. & T. Ry. Co.*, 133 S.W. 417, 419 (Tex. 1911) ("It would indeed be a strange doctrine . . . to hold a litigant has waived his objection to improper testimony because by further inquiry he sought on cross-examination to break the force or demonstrate the untruthfulness of the evidence given in chief."). However, "[a]n 'open door' . . . does not give an opponent [an] unbridled license . . . nor does it justify receipt of rebuttal evidence merely because it is in the same category of excludable evidence as the evidence previously offered." *United States v. Martinez*, 988 F.2d 685, 702 (7th Cir. 1993).

¶ 22 Here, the line of questioning initiated by Davis's counsel—whether Stoutt knew Davis "to have committed *any crime*"—went significantly beyond the People's inquiry as to whether Stoutt had ever arrested or investigated Davis as part of his official police duties, and Stoutt's testimony

that Davis had been accused of robbing houses. Consequently, Davis still invited the error by initiating an inquiry that went beyond what had been commenced by the People, and permitted Stoutt to testify to a matter—his knowledge that Davis had shot someone—that had not been elicited by the People. *State v. Woods*, No. 2 CA-CR 2008-0036, 2009 WL 142986, at *2 & n.2 (Ariz. Ct. App. Jan. 21, 2009) (unpublished). Because Davis's counsel invited the error by eliciting this testimony, Davis has waived any argument based on that evidence. *See Latalladi v. People*, 51 V.I. 137, 143-33 (V.I. 2009) ("A defendant cannot complain on appeal of alleged errors invited or inducted by himself.").

III. CONCLUSION

¶ 23 The People introduced sufficient evidence of Davis's identity as Son's assailant and robber. Moreover, every other issue Davis asserts on appeal either fails to meet every prong of the plain error test or was invited by Davis himself, and therefore cannot serve as the basis for a reversal of the Superior Court's rulings. Accordingly, we affirm the Superior Court's August 4, 2016 judgment and commitment.

Dated this 16th day of February, 2021.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court