

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

THE PEOPLE OF THE VIRGIN ISLANDS **Plaintiff**)
)
 Vs.)
)
 JIM DAVID WALLACE **Defendant**)

CASE NO. SX-10-CR-0000165

ACTION FOR: 14 V.I.C. 625

**NOTICE OF ENTRY OF
MEMORANDUM
OPINION AND ORDER**

TO: ZULEYMA CHAPMAN, ESQ.
MICHAEL JOSEPH, ESQ.
LAW LIBRARY; RECORD BOOK; IT
LAW CLERKS OF THE SUPERIOR COURT
JUDGES AND MAGISTRATES OF THE SUPERIOR COURT

Please take notice that on October 24, 2014 a(n) MEMORANDUM OPINION
AND ORDER dated October 23, 2014 was entered by the Clerk in the
above-entitled matter.

Dated: October 24, 2014

Estrella H. George
ACTING CLERK OF THE SUPERIOR
COURT



IRIS D. CINTRON
COURT CLERK II

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

PEOPLE OF THE VIRGIN ISLANDS,

Plaintiff,

v.

JIM WALLACE,

Defendant.

CRIMINAL CASE No.: SX-10-CR-165

**RECKLESS ENDANGERMENT FIRST
DEGREE, ET AL.**

MEMORANDUM OPINION AND ORDER

THIS MATTER came on for hearing on October 15, 2014 on Defendant's Motion for Expedited Hearing on Motion for New Trial Based on Newly Discovered Evidence ("Motion"), filed September 17, 2014; the People's Opposition, filed September 22, 2014; and Defendant's Reply, filed September 26, 2014. For the reasons that follow, Defendant's Motion will be denied.

On September 9, 2014, a jury empaneled to weigh the People's evidence against Defendant returned a unanimous guilty verdict on all three counts charged in the Information. Defendant timely moved for a new trial on two bases:

1) Newly discovered evidence. Defendant presents "newly discovered evidence" in the form of the affidavit of an individual who claims that one of the People's two eyewitness victims, Ray Webster, and he had engaged in an exchange of gunfire at the time and place of the incident of which Defendant stands convicted, and that Defendant was not present, suggesting that "The People's main witness Ray Webster is proven... to have duped the People into convicting an innocent man."

2) Prosecutorial misconduct: "the People unfairly, if not misleadingly, argued hard to the jury" that Defendant's alibi witnesses gave false testimony, "because if they were telling the

truth [they] would've gone to the police... This was misleading since... the People implied those witnesses had a legal duty to do so when none exists." Motion, at 1, 2.

Prosecutorial misconduct: Considering Defendant's second argument first, Defendant cites no legal authority for the proposition that he is entitled to a new trial because the People argued to the jury that Defendant's two alibi witnesses should not be believed. The prosecutor impeached two defense witnesses who claimed to have been with Defendant when the shooting began by eliciting that neither witness had reported this information to police in the period of more than four years that passed between the date of the incident and trial. In closing argument, counsel for the People emphasized the fact that the witnesses had never come forward prior to trial, stressing multiple times the passage of "four years, six months, one week and three days" during which the witnesses had never advised police that they had been with Defendant when the shooting occurred.

Defendant alleges that the People's argument to the jury "was misleading," since the argument of counsel, "cloaked with imprimatur of officialdom," wrongly implied that the witnesses were under a legal duty to come forward, when no such duty exists. As such, the argument of counsel improperly prejudiced Defendant. Motion, at 2.

"A criminal conviction is not to be lightly overturned on the basis of a prosecutor's conduct standing alone.... Rather, we must examine the prosecutor's offensive actions in context and in light of the entire trial, assessing the severity of the conduct, the effect of the curative instructions, and the quantum of evidence against the defendant... A prosecutor's conduct can create reversible error if it so infected the trial with unfairness as to make the resulting conviction

a denial of due process.” *United States v. Berrios*, 56 V.I. 932, 960 (3d Cir. 2012) (citations and internal quotations omitted).

Here, the jury was instructed on several occasions that the arguments of counsel were not evidence, and that the jury’s unanimous verdict must be based upon the evidence alone. As such, even if the prosecutor’s argument to the jury can be considered improper, a finding the Court does not make, the curative instructions sufficiently guided jurors on the proper basis for their verdict. In the context of the entire trial, the prosecutor’s closing argument cannot be seen as severely and impermissibly prejudicial. The jury found credible the eyewitness testimony of the two victims, apparently discounting the testimony of Defendant’s alibi witnesses. In light of the conduct of the entire trial, the prosecutor’s argument did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. As such this argument of Defendant fails.

Newly discovered evidence: Defendant also contends that newly discovered evidence necessitates that he be granted a new trial pursuant to FED. R. CRIM. P. 33 and SUPER. CT. R. 135. Under those rules, a court may vacate a judgment and grant a new trial if the interest of justice so requires. Unlike a motion for judgment of acquittal, a motion for new trial is based upon the weight of the evidence, and the trial court may weigh evidence and consider the credibility of witnesses.

The decision whether to grant a new trial is left to the sound discretion of the trial court which is to be exercised only in exceptional circumstances. *See Steven v. People of the Virgin Islands*, 52 V.I. 294, 305 (V.I. 2012). A trial judge may not set aside the verdict simply because he would have come to a different conclusion than the jury, but rather only if the court believes

that there is a serious danger that an innocent person has been convicted. *Id.* at 306 (internal citations omitted).

Specifically, a court can only grant a defendant a new trial based upon newly discovered evidence if the trial judge finds that the defendant has satisfied a five-part test:

- (1) the motion must allege facts from which the court may infer diligence on the part of the movant;
- (2) the evidence must indeed be newly discovered, meaning discovered since the trial;
- (3) the evidence must not be merely cumulative or impeaching;
- (4) the evidence must be material to the issues involved; and
- (5) the evidence must be of such probative value, and of such nature, that it would probably produce an acquittal if presented at a new trial.

Government of the Virgin Islands v. Sampson, 42 V.I. 246, 265-66 (D.V.I. App. 2000)(citing *United States v. DiSalvo*, 34 F.3d 1204, 1215 (3d Cir. 1994); *Government of the Virgin Islands v. Lima*, 774 F.2d 1245, 1250 (3d Cir. 1985)).

With his Motion, Defendant presented an affidavit of Angel “Bebo” Sanes, an incarcerated individual familiar with Defendant, in which Mr. Sanes claimed that in the evening of March 1, 2010, while he was on his way to Defendant’s home, “Ray Webster saw me while he was driving near the trash dumps and fired about three shots at me.” Mr. Sanes claims that he “fired back with my unlicensed 9mm firearm, emptying its clip.” Motion, Affidavit of Angel Sanes, at 1. According to Mr. Sanes, “Jim Wallace was not around when the shooting took place.” *Id.*

At trial, Ray Webster testified that he was in the front passenger seat as his girlfriend Tajaira Gomez drove adjacent to Defendant’s mother’s house in the direction of the trash dumps some distance down the street. They met Defendant directly across the street from his mother’s house, where Defendant began shooting at their car as they approached a speed bump. Mr. Webster testified that additional gunfire was directed at their car as they drove further down the

road and passed over a second speed bump in the area of the trash dumps. Mr. Webster testified that he immediately identified Defendant as the only person present and shooting at their car in the vicinity of the first speed bump adjacent to Defendant's mother's house. This testimony was independently corroborated by Tajaira Gomez, who identified Defendant as the initial shooter and confirmed the location of the shooting as by the speed bump in front of Defendant's mother's house.

Applying the 5-part test set out in *Sampson*, the Court finds that Defendant failed to establish part 4: "the evidence must be material to the issues involved." Even accepting Mr. Sanes' version of facts in its entirety, the jury could still find that Defendant was the initial shooter in the area across the street from Defendant's mother's house, and that there was a second barrage of gunfire moments later involving Mr. Sanes and Mr. Webster, as Ms. Gomez and Mr. Webster sped away toward the second speed bump near the trash dumps, a scenario not inconsistent with the Sanes affidavit.

Since the purported newly discovered evidence logically comports with the People's evidence at trial, it is not material to the issues involved. To be material, Defendant's newly adduced evidence would need to address, for example, whether Defendant was present when shots were fired at Mr. Webster in the vicinity of the first speed bump adjacent to Defendant's mother's house. As Mr. Sanes' affidavit speaks only to a shootout that he had with Mr. Webster "near the trash dumps," it cannot be said that this "newly discovered evidence" is material to the issues involved.

Additionally, the Court finds that Defendant has failed to establish part 5 of the *Sampson* test: "the evidence must be of such probative value, and of such nature, that it would probably

produce an acquittal if presented at a new trial.” For the reasons set out in the preceding paragraphs, the new evidence lacks sufficient probative value and is not of such nature that it would probably produce an acquittal if presented at a new trial. The new evidence, accepted at face value, does not negate the trial evidence to the effect that Defendant fired an initial volley of shots at Mr. Webster near the first speed bump and Defendant’s mother’s house, up the street from the area “near the trash dumps” where Mr. Sanes claims to have encountered Mr. Webster. Even if probative, taking into consideration the reliable eyewitness testimony adduced at trial and the total evidentiary record, the Court cannot find that this additional evidence would “probably produce an acquittal if presented at a new trial.”

In its Opposition, the People present two arguments, the second being that the “new evidence” is cumulative thereby failing the third prong of the *Sampson* test. It is accurate to state that the Sanes affidavit presents cumulative evidence regarding the two alibi witnesses who testified that Defendant was with them at the time of the incident. However, because Sanes presents additional details of his alleged shootout with Ray Webster near the trash dumps, it cannot be said that the Sanes’ evidence is “merely” cumulative.

Because the Court finds that the newly presented evidence is not of sufficient quality or probative value to meet the criteria for granting a new trial, it is unnecessary to reach the other issue posited by the People. The People suggests that the facts require an inference of lack of diligence on the part of Defendant, such that the first prong of the *Simpson* test also fails. Angel “Bebo” Sanes was named by Ray Webster as being present with Defendant hours before the incident in the statement Mr. Webster gave police within three weeks of the shooting. That statement was delivered to Defendant in discovery more than four years prior to trial. However,

the time and space considerations that distinguish the Sanes affidavit from Ray Webster's trial testimony are such that the Court hesitates to find affirmatively that Defendant's failure to track down and interview Mr. Sanes prior to trial constitutes lack of diligence requiring denial of the motion without considering its substance.

Examining the totality of the evidence and considering the credibility of the witnesses, the Court does not find the existence of such exceptional circumstances which requires, in the interest of justice, that this Court vacate the jury's September 9, 2014 verdict and grant Defendant a new trial.

On the basis of the foregoing, it is hereby

ORDERED that Defendant's Motion for Expedited Hearing on Motion for New Trial Based on Newly Discovered Evidence is DENIED. It is further

ORDERED that a copy of this Order be served on the Parties FORTHWITH.

Dated: October 23, 2014.


DOUGLAS A. BRADY, JUDGE

ATTEST:

Estrella George
Acting Clerk of the Court

By: 
Court Clerk Supervisor