

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

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	CRIMINAL NO. ST-09-CR-549
Plaintiff,	)	
vs.	)	V.I. Code Ann. tit. 14, §§ 924(1), 11(a); 2253(a),
	)	11(a) (2 Counts); 295(1), 11(a); 625(a), 11(a)
RICHIE FONTAINE,	)	
(D.O.B.: 11-15-87)	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

THIS MATTER IS BEFORE THE COURT on the Defendant's Motion for Judgment of Acquittal.¹ Having considered the Motion and the Opposition of the People, the Court will grant the Motion for Judgment of Acquittal as to Counts 1 and 2 of the Amended Information and will deny the Motion for Judgment of Acquittal as to Counts 3 through 5 of the Amended Information.

I. Facts of the Case

Defendant Richie Fontaine is charged with the unlawful killing of Phillip George at the Club Lexus in Smith Bay in the early morning hours of March 7, 2009. Originally, Fontaine was charged in a nine-count Information in which the most serious offense charged was murder first degree. In the initial trial of the matter, Fontaine was found guilty of voluntary manslaughter, assault first degree, using a dangerous weapon during the commission of an assault first degree and reckless endangerment first degree. In an Opinion dated April 12, 2012, the Supreme Court of the Virgin Islands reversed Fontaine's conviction and remanded the case for a new trial.²

On remand, Fontaine was charged in a five-count Fourth Amended Information with voluntary manslaughter, Count 1; unauthorized use of a firearm during the commission of a voluntary manslaughter, Count 2; assault first degree, Count 3; unauthorized use of a firearm during the commission of assault first degree, Count 4; and reckless endangerment first degree, Count 5; all committed "while aiding and abetting another."

¹ The People are represented by Assistant Attorneys General Edward Veronda, Esq., and Quincy McRae, Esq. The Defendant, Richie Fontaine, is represented by James Bernier, Jr., Esq., and Tracy Myers, Esq.

² *Fontaine v. People*, 56 V.I. 571 (2012).

Ruben George, the brother of Phillip George, testified that he and his brother saw Fontaine earlier in the evening, and that there was a discussion about Fontaine paying back a debt that he owed Phillip. However, there were no harsh words that were exchanged at that time, and later when Phillip and Ruben George saw Fontaine at the Club Lexus, Phillip and Fontaine did not argue. At around 2:00 a.m., Ruben saw Fontaine on the ramp outside of the Club Lexus with a gun in his hand. When Ruben and Phillip exited from the Club, Fontaine was shooting at them, and he was accompanied by another individual, that Ruben knew as "Alpha," who was also shooting at them. Phillip took a gun from another individual who was on the ramp who had a firearm, and started firing back at Fontaine, but in the process, he was shot. He later died from gunshot wounds.

Also introduced into evidence was the surveillance video from the Club. This video contained a still frame of Fontaine with an apparent firearm in his hand, thereby corroborating the testimony of Ruben. The video also showed Fontaine pacing up and down on the ramp and then finally going to the right side of the Club, and it showed two other individuals jumping over the side of the balcony on the left side of the Club. There was testimony showing that bullets and casings were found across the street from the Club both on the left and right sides of the Club.

II. Discussion of the Law concerning the 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)³ 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.⁴ A finding of insufficiency should "be confined to cases where the prosecution's failure is clear."⁵ 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.⁶ 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

³ The Federal Rules of Criminal Procedure apply to the Superior Court of the Virgin Islands when not inconsistent with the Rules of the Superior Court. Super. Ct. R. 7.

⁴ *United States v. Salmon*, 944 F.2d 1106, 1113 (3d Cir. 1991); *see also Maynard v. Gov't of the V.I.*, 49 V.I. 718, 721 (D.V.I. App. Div. 2008); *People v. Clarke*, Crim. No. ST-08-CR-371, 2009 WL 8391643, at *2 (V.I. Super. Sept. 21, 2009), *aff'd*, 55 V.I. 473 (2011).

⁵ *United States v. Smith*, 294 F.3d 473, 478 (3d Cir. 2002).

⁶ *Salmon*, 944 F.2d at 1113; *see also United States v. Fredericks*, 38 F. Supp. 2d 396, 398 (D.V.I. 1999).

the jury could find guilt beyond a reasonable doubt.”⁷ 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.⁸ Using these standards, the Court will consider the evidence submitted during the trial to determine whether there was substantial evidence upon which the jury could have found Fontaine guilty of the charges in the Fourth Amended Information beyond a reasonable doubt.

B. There was insufficient evidence presented to the jury to find Fontaine guilty of Voluntary Manslaughter and Using a Firearm During the Commission of Voluntary Manslaughter.

Upon reviewing the evidence presented to the jury concerning the charge of voluntary manslaughter and unauthorized use of a firearm during the commission of voluntary manslaughter, the Court concludes that there was insufficient evidence presented to the jury to support the conviction for these offenses. The Court will, therefore, set aside the conviction of Fontaine under Counts 1 and 2 of the Fourth Amended Information.

The charge of voluntary manslaughter is defined as the unlawful killing of a human being without malice aforethought as a result of a sudden quarrel or heat of passion.⁹ To convict a Defendant of this charge, the People have to prove that Fontaine unlawfully killed a human being, that it was without malice aforethought, that the killing was the result of a sudden quarrel or heat of passion and that it was either with an intent to kill or an intention to inflict serious or grievous bodily injury that would likely cause or result in the death of another.¹⁰ The essential element of manslaughter that distinguishes it from murder is “whether the killing was committed in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.”¹¹ Where there is no evidence of a quarrel or fit of passion, the jury cannot find the Defendant guilty of voluntary manslaughter.¹²

No evidence was presented by the People supporting a conviction for an unlawful killing as a result of a sudden quarrel or heat of passion. Indeed, the only testimony concerning the mood of Fontaine came from Ruben, and he testified that everything was peaceful before the shooting occurred, and that there was no argument between Fontaine and Phillip. Additionally, the surveillance video does not show any quarrel and does not support the theory that the shots were fired in the heat of passion. The surveillance video which did not have an audio component, showed people dancing and playing the slot machines at the Club, but did not show any other activities of the patrons of the nightclub that would support the theory that the shots were fired as

⁷ *United States v. Anderson*, 108 F.3d 478, 480 (3d Cir. 1997).

⁸ *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)).

⁹ V.I. Code Ann. Tit. 14, §924(1).

¹⁰ *Gov’t of the V.I. v. Knight*, 26 V.I. 280 (D.V.I. 1991).

¹¹ *Nicholas v. People*, 56 V.I. 718, 733 (2012) (quoting 40 CJS Homicide § 35).

¹² *Gov’t of the V.I. v. Carmona*, 422 F.2d 95 (3d Cir. 1970).

a result of a quarrel or in the heat of passion. Also, there is no evidence of any provocation that would have resulted in the shots being fired in the heat of passion as required by the statute and case law.¹³

The People argue that Fontaine is precluded from arguing that there was insufficient evidence before the jury because of the invited error doctrine. The invited error doctrine precludes errors stemming from erroneous jury instructions proposed by a defendant's counsel from forming the basis for reversal of a conviction.¹⁴ This doctrine prevented Fontaine from arguing on appeal that the evidence was insufficient to sustain a conviction on the lesser included offense of voluntary manslaughter (not charged in the Information) when the party requested the instruction at the trial level, and the evidence was sufficient to convict the defendant of the greater offenses charged.¹⁵ This doctrine prevents a defendant from benefitting twice from an erroneous lesser included offense instruction, first from being acquitted of the greater offense as an act of grace by the jury, and then benefitting a second time by a reversal of the conviction for the lesser offense by the appellate court.¹⁶

Although this Court understands the asserted unfairness of Fontaine benefitting from misleading the Court on an erroneous lesser included offense instruction on the appellate level, this Court does not see any inherent unfairness in requiring the People to prove the charges against the defendant at trial, on the remand from the Appellate Court. The jury may have acquitted Fontaine of murder in the first trial as an act of grace. The jury may have also acquitted him because they did not find the necessary elements for a conviction for the greater offenses of murder first degree or second degree, and believed erroneously that there was sufficient evidence for a conviction of voluntary manslaughter. It is only speculation what the motivation of the jury was in not convicting Fontaine of the greater offenses at the first trial, and such speculation does not relieve the People of their burden, by any principle of law or fairness, to prove guilt beyond a reasonable doubt at the retrial on the lesser included offense. Since the People have not presented sufficient proof of voluntary manslaughter at the retrial, that charge and the charge of possession of a firearm during the commission of voluntary manslaughter must be dismissed. Therefore, Fontaine's Motion for Judgment of Acquittal as to Counts 1 and 2 will be granted, and the charges on those counts will be dismissed.

¹³ *Id.*

¹⁴ *Fontaine*, 56 V.I. at 583.

¹⁵ *Id.* at 582-84.

¹⁶ *Id.* at 582.

C. There was sufficient evidence before the jury to find Fontaine guilty beyond a reasonable doubt as an aider and abettor under Counts 3 through 5 of the Information.

Fontaine argues that the Court should grant his Motion for Judgment of Acquittal because there was insufficient evidence to find that he was guilty as an aider and abettor in the assault first degree, unauthorized use of a firearm during the commission of assault first degree and reckless endangerment in the first degree. The Court disagrees with Fontaine and will deny the Motion as it pertains to Counts 3 to 5.

Fontaine is charged as an aider and abettor under Counts 3 to 5 in the commission of separate crimes. 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.”¹⁷ 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.¹⁸

Through the testimony of Ruben, the video evidence, and the ballistics evidence, there was sufficient evidence to establish that Fontaine and others were in possession of firearms on August 7, 2009 in the early morning hours at the Club Lexus, that Fontaine and others fired at Phillip from across the street from the Lexus nightclub, and that Phillip died as a result of the shots that were fired. The video and the testimony show that there were two groups of individuals firing shots at Phillip on that night. Two were on the left side of the nightclub, and there were also two individuals, Alpha and Fontaine, firing from across the street on the right side of the nightclub.

The jury can conclude from this set of facts that other individuals were the direct actors in an assault in the first degree, since they assaulted Phillip with firearms with the intent to commit murder. The evidence is also sufficient to show that Fontaine knew what the other individuals were doing, that by shooting at Phillip he acted to facilitate the murder, and that he had the requisite specific intent to bring about the crime. The same reasoning supports the aiding and abetting conviction under Count 4 of the Information charging Fontaine with unauthorized possession of a firearm and under Count 5 charging him with reckless endangerment in the first degree. This Court also notes that the Supreme Court went through the same analysis on the same set of facts on the appeal from the conviction after the first trial. The Supreme Court found that there was sufficient evidence to support Fontaine’s conviction as an aider and abettor for the

¹⁷ *Id.* at 578 (quoting *Brown v. People*, 54 V.I. 496, 505 (2010)) (internal quotations omitted).

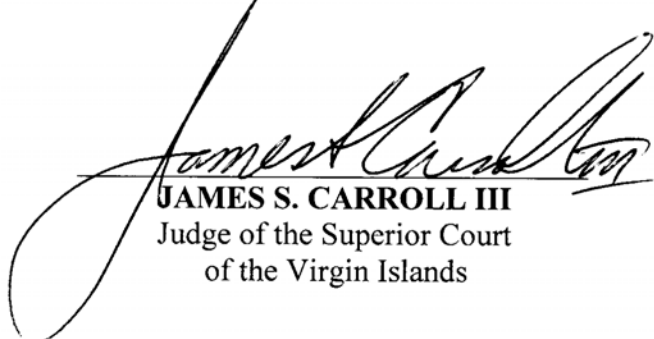
¹⁸ *Nanton v. People*, 52 V.I. 466, 484 (2009) (quoting *United States v. Xavier*, 2 F. 3d 1281, 1288 (3d Cir. 1993)).

assault, weapons, and reckless endangerment counts.¹⁹ This Court draws the same conclusion as the Supreme Court did, and will deny the motion for judgment of acquittal for Counts 3 to 5.²⁰

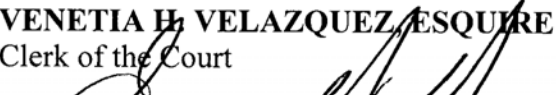
III. Conclusion

The Court will grant the Motion for Judgment of Acquittal as to Counts 1 and 2 of the Information, and the Court will deny the Motion for Judgment of Acquittal as to Counts 3 through 5 of the Information. The Court finds that there is insufficient evidence that there was a sudden quarrel or heat of passion to support the manslaughter conviction, and this lack of proof also means that there is insufficient evidence to support the conviction of unauthorized use of a firearm during the commission of a voluntary manslaughter. The evidence that there were other individuals present at the scene of the crime who were all firing guns at Phillip George and in a public place, and that Fontaine also participated in these activities, is sufficient to support the convictions for aiding and abetting an assault first degree, unauthorized use of a firearm during the commission of assault first degree, and reckless endangerment first degree (Counts 3 through 5 of the Information). The Court will therefore grant the Motion for Judgment of Acquittal as to Counts 1 and 2 of the Information and deny the Motion for Judgment of Acquittal as to Counts 3 through 5 of the Information.

DATED: July 17, 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 7/17/2013

¹⁹ *Fontaine*, 56 V.I. at 586.

²⁰ This Court also notes that had the People chosen to charge Fontaine as a direct actor, the evidence that Fontaine possessed a firearm, the testimony of Ruben George that Fontaine was shooting at him and his brother, and the ballistics evidence would have been sufficient for the jury to find Fontaine guilty beyond a reasonable doubt of the crimes charged as a direct participant and not solely as an aider and abettor.