For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

MARIO ROEBUCK, Appellant/Petitioner, v. **GOVERNMENT OF THE VIRGIN ISLANDS, AND JULIUS WILSON (BOC),** Appellees/Respondents.	)	**S. Ct. Civ. No. 2018-0062** Re: Super Ct. Civ. No. 10/339 (STX)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Douglas A. Brady

Considered: April 13, 2021
Filed: September 8, 2021

Cite as: 2021 VI 13

BEFORE: **RHYS S. HODGE**, Chief Justice; **IVE ARLINGTON SWAN**, Associate Justice; and **DENISE M. FRANCOIS,**[1] Designated Justice.

APPEARANCES:

Mario Roebuck
Lecanto, FL
Pro se,

Su-Layne Walker, Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellee.

[1] Associate Justice Maria M. Cabret is recused from this matter; the Honorable Denise M. Francois has been designated in her place pursuant to title 4, section 24(a) of the Virgin Islands Code.

OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 Appellant Mario Roebuck appeals the Superior Court's denial of his petition for a writ of habeas corpus. Roebuck argues that the People failed to allege each material element of his first-degree murder conviction, that the jury instructions improperly shifted the burden of persuasion, and that the trial court failed to provide complete jury instructions. Assuming without deciding that claims of error in jury instructions that are not properly preserved at trial and not pursued during a direct appeal can nevertheless properly be considered for the first time in a petition for a writ of habeas corpus,[2] for the reasons that follow, this Court will affirm the Superior Court's order denying the defendant's petition.

I. BACKGROUND

¶ 2 On December 23, 2005, the People charged Roebuck in a four-count Information with: (1) murder in the first-degree of Alvin Dubois by shooting him with a firearm in the course of a

[2] We take this opportunity to note our agreement with the United States Supreme Court in its view of claims of error pertaining to jury instructions that were not objected to at trial, and not pursued on direct appeal:

> It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.
>
> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," *Cupp v. Naughten*, 414 U.S. [141,] 147 [(1973)], not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned,'" *id*. at 146.

Henderson v. Kibbe, 431 U.S. 145, 154 (1977).

robbery, in violation of 14 V.I.C. § 922(a)(2) and 14 V.I.C. § 11(a); (2) robbery in the first-degree by using a dangerous weapon to take the personal property of Alvin Dubois, in violation of 14 V.I.C. § 1826(2) and 14 V.I.C. § 11(a); (3) the use of a dangerous weapon during a crime of violence, in violation of 14 V.I.C. § 2251(a)(2)(B) and 14 V.I.C. § 11(a); and (4) the unauthorized possession of a firearm, in violation of 14 V.I.C. § 2253(a) and (c). (J.A. 255-257.)

¶ 3 A four-day trial began on March 23, 2009. (J.A. 34.) Many witnesses testified, but we recount only that testimony relevant to our decision.

¶ 4 Dubois owned A.A. Dubois Jewelry Store, on the island of St. Croix. (JA 255.) Petuana Matthew testified that she was a friend of Alvin Dubois and that she spoke with him on the phone the morning of December 12, 2005. (J.A. 280-81.) Matthew stated that Dubois would normally not speak to her when there was a customer in the store. (J.A. 282.) During the phone call, Dubois interrupted their conversation to say, "robber man robber man," after which she heard scuffling before the phone disconnected. (J.A. 281-82.) She visited the store soon after and saw jewelry outside the door on the sidewalk, and learned that Dubois had been shot. (J.A. 285-88.)

¶ 5 Ivan Goodrich testified that he was driving by Dubois's store with his then-girlfriend, Radiance Myers, on December 12, 2005, when he saw two men dragging a third, injured man to a vehicle. (J.A. 328.) Goodrich was able to identify this injured third man as the defendant, Roebuck. (J.A. 341.) Myers also saw the two men move this man into a car. (J.A. 356-57.)[3]

¶ 6 A number of witnesses from the Governor Juan Luis Hospital testified to seeing two men bring a gunshot victim to the emergency room that day. (J.A. 398, 418, 434-36, 458, 469.) One of

[3] Myers stated that she had initially thought it was a kidnapping because she thought they were punching the third man. (J.A. 358, 366.) However, her opinion changed when she found out it was a robbery. (J.A. 358-59.)

the men who brought Roebuck to the hospital was seen giving Roebuck a kiss on the forehead before leaving. (J.A. 459.) Dr. Thomas Starkey testified to treating Roebuck for a gunshot wound on December 12, 2005, which caused paralysis of his legs. (J.A. 303-04.)

¶ 7 Dr. Francisco Landron testified that he performed an autopsy of Dubois and that he died from four gunshot wounds. (J.A. 968.)

¶ 8 Stephen Shaw, trace evidence examiner for the FBI, testified that he analyzed Roebuck's pants, socks, and shirt, and found fibers with the same microscopic and optical properties as fibers from a carpet sample of the jewelry store. (J.A. 535-36.) In addition, Eric Pokorak, forensic examiner for the FBI, testified that Roebuck's DNA matched the DNA of blood found at the crime scene. (J.A. 606, 892.)

¶ 9 A .40 caliber SIG Sauer firearm and a .38 caliber Smith and Wesson firearm were recovered from the scene. (J.A. 1106.) The former was registered to Dubois. (J.A. 621, 649.) Maurice Cooper, forensic science consultant for the Virgin Islands Police Department, testified that the bullet, visible in the x-ray of Roebuck's spine, appeared consistent with the .40 caliber bullets fired by a SIG Sauer firearm. (J.A. 627-28.) Cooper also testified that he evaluated five bullets from the crime scene. (J.A. 616, 621.) Two bullets were similar enough to conclude that they came from the same firearm but could not have come from either the Smith and Wesson or the SIG Sauer firearms recovered. (J.A. 622, 624.) The source of the other bullets was indeterminate, (J.A. 622.) suggesting the presence in the store of at least two guns, and possibly three, in addition to Dubois's SIG Sauer.

¶ 10 On March 27, 2009, Roebuck was convicted on all counts. (J.A. 1192.) On July 15, 2009, Roebuck was sentenced to life imprisonment without the possibility of parole for first-degree

murder, 30 years' imprisonment for first-degree robbery,[4] 15 years' imprisonment for using a dangerous weapon during a crime of violence, and 20 years' imprisonment for unauthorized possession of a firearm. These sentences were ordered to run concurrently. Following sentencing, Roebuck filed an appeal on July 27, 2009. (J.A. 27.) This Court dismissed the appeal on June 21, 2010, for lack of prosecution. (J.A. 27.)

¶ 11 On July 26, 2010, Roebuck, as a *pro se* petitioner, filed a petition for a writ of habeas corpus requesting the court to vacate the criminal judgement against him. (J.A. 27-28.) The Superior Court referred his petition for a writ of habeas corpus to the Magistrate Division pursuant to title 4, section 123 of the Virgin Islands Code for the limited purpose of submitting a recommendation to a Superior Court judge for final disposition. 4 V.I.C. § 123 (b)(2). In his petition for writ of habeas, Roebuck argued that he was deprived of his constitutional right to be fairly informed of the charges against him and to a fair trial because the information did not allege "premeditation," "willfulness," and "deliberateness," and because the trial court did not give a jury instruction regarding these terms. The Magistrate Division, without holding an evidentiary hearing, issued a recommendation to deny the writ on June 22, 2012. (J.A. 30.) The Magistrate Judge determined that the Virgin Islands first-degree murder statute permitted a conviction when a killing is committed during the perpetration of certain enumerated crimes. Therefore, the People were not required to prove willfulness, deliberateness, or premeditation in order to secure a conviction. (J.A. 28.) On September 11, 2018, the Superior Court adopted the Magistrate Judge's

[4] This sentence exceeds the 20-year statutory maximum under section 1862. However, the People filed a habitual criminal information pursuant to 14 V.I.C. § 61 and 62, to which Roebuck did not object, and which the Superior Court relied on in imposing a sentence in excess of the statutory maximum. (J.A. 9.)

recommendation, stating that it fully incorporated the reasoning of the Magistrate Judge. (J.A. 25.) Therefore, the Superior Court found that Roebuck had failed to present a prima facie case for habeas relief and denied his writ. (J.A. 25.) Roebuck timely filed a notice of appeal with this Court on October 10, 2018. (J.A 1-2.) *See* V.I. R. APP. P. 5(a)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 12 "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 September 11, 2018 order denying Roebuck's writ of habeas corpus was a final order within the meaning of 4 V.I.C. § 32(a). *George v. Wilson*, 59 V.I. 984, 988 (V.I. 2013). We therefore have jurisdiction over this appeal.

¶ 13 The Superior Court must grant a writ of habeas corpus "if the petition states a prima facie case for relief—alleging facts that, if true, entitle the petitioner to relief—and the petition is not procedurally barred." *Ledesma v. Gov't of the V.I.*, 72 V.I. 797 (2019). In this case, the Superior Court denied Roebuck's writ because it found that Roebuck failed to present a prima facie case for relief. We review de novo this denial. *Rodriguez v. Bureau of Corr.*, 70 V.I. 924, 929 (V.I. 2019).

¶ 14 Regarding jury instructions, this Court has repeatedly held that "where . . . the question is whether the jury instructions failed to state the proper legal standard, this court's review is plenary." *Gilbert v. People*, 52 V.I. 350, 354 (2009); *Gov't of the V.I. v. Isaac*, 50 F.3d 1175, 1180 (3d Cir. 1995). But such plenary review applies only where an objection regarding the jury instructions that were given was raised at trial and properly preserved for appeal. *Ostalaza v. People*, 58 V.I. 531, 556 (V.I. 2013) (an asserted error in jury instructions is usually reviewed for abuse of discretion only if fairly presented at trial); *Jackson-Flavius v. People*, 57 V.I. 716, 721 (V.I. 2012)

(same). Absent a timely objection having been raised, jury instructions are reviewed for plain error only. *See, e.g.*, *David v. People*, 73 V.I. 476, 480 (2020); *Rodriguez v. People*, 71 V.I. 577, 594 (V.I. 2019); *Wallace v. People*, 71 V.I. 703, 741-42 (2019). Further, in determining the adequacy of any jury instruction, the court "must examine the jury instructions as a whole to determine whether [a particular instruction] was misleading or inadequate to guide the jury's deliberation." *Cascen v. People*, 60 V.I. 392, 413 (2014); *Prince v. People*, 57 V.I. 399, 409 (V.I. 2012). In conducting this examination, the Court has held that "the jury is required to be guided by the specific final jury instructions on the elements of . . . [a] crime, and not guided by reference to or reliance upon the elements of the crime being mentioned in a different context elsewhere in the trial record." *Nanton v. People*, 52 V.I. 466, 481 (2009).

B. Section 922(a)(2) of Title 14 does not Require a Showing of Premeditation or Deliberation

¶ 15 Roebuck argues that the trial court failed to provide complete jury instructions on the terms "premeditation" and "deliberation." (Appellant's Br. 7.) He argues that the court failed to submit all essential elements to the jury under section 922 and therefore he could not properly be convicted of first-degree murder. (Appellant's Br. 8-9.)

¶ 16 "The first step when interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning." *Brady v. Gov't of the V.I.*, 57 V.I. 433, 441 (V.I. 2012). As provided in 14 V.I.C. § 922, first-degree murder can be perpetrated in three different ways.[5]

[5] (a) All murder which-

(1) 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;

(2) is committed in the perpetration or attempt to perpetrate arson, burglary, kidnapping, rape, robbery or mayhem, assault in the first degree, assault in the second degree, assault in the third degree and larceny; or

Section 922(a)(1) includes murder that is "willful, deliberate, and premeditated." Section 922(a)(2) does not include the words "willful," "deliberate," or "premeditated," and instead applies to murder committed during the perpetration or attempt to commit certain felonies. Lastly, section 922(a)(3) applies to murder committed against certain Virgin Island employees or persons assisting a criminal investigation and under special circumstances.

¶ 17 In this case, Roebuck was convicted under 14 V.I.C. § 922(a)(2). We have explained that this part of the statute is "clear and unambiguous." *Heyliger v. People*, 66 V.I. 340, 349 (2017). Section 922(a)(2) is a felony-murder statute and is similar to those of many other jurisdictions. *Id*. at 351. It is designed to punish an individual who caused another person's death while committing or attempting to commit certain felonies, including "arson, burglary, kidnapping, rape, *robbery* or mayhem, assault in the first-degree, assault in the second-degree, assault in the third degree and larceny." 14 V.I.C. § 922(a)(2) (emphasis added).

¶ 18 Roebuck was convicted of robbery in the first-degree, in addition to murder in the first-degree. Robbery is a felony that may form the basis of a first-degree murder conviction under § 922(a)(2). Given the forensic evidence, eyewitness testimony, and other circumstantial evidence described above presented at trial, it was reasonable for the jury to conclude that a robbery had taken place, and that Roebuck, or his accomplices, had shot and killed Alvin Dubois during the

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> (3) is committed against (A) an official, law enforcement officer, or other officer or employee of the Government of the Virgin Islands while working with law enforcement officials in furtherance of a criminal investigation (i) while the victim is engaged in the performance of official duties; (ii) because of the performance of the victim's official duties; or (iii) because of the victim's status as a public servant; or (B) any person assisting a criminal investigation, while that assistance is being rendered and because it is first degree murder;

is murder in the first degree.

(b) All other kinds of murder are murder in the second degree. 14 V.I.C. § 922.

robbery. This evidence is all that was required to sustain a guilty verdict on first-degree felony-murder.

¶ 19 At trial on March 27, 2009, after the final instructions were read to the jury, the Superior Court judge asked whether the defense was satisfied with those instructions. (2 J.A. 1149-1183; 1184). In response, the defense did not raise any of the issues that are presented in the habeas petition as purported errors in the first-degree murder jury instruction. (2 J.A. 1184). Reviewing the final instructions that were given to the jury, guided by the applicable precedent discussed above, we find no reversible error. Thus, the Superior Court did not err in rejecting Roebuck's claim of error regarding the first-degree murder jury instruction.

C. The Court did not Err in Instructing on the Lesser Included Second-Degree Murder

¶ 20 Roebuck argues that the holding of the United States Supreme Court in *United States v. Cotton*, 535 U.S. 625, 627 (2002), is applicable to his case on appeal and should result in a reversal of his conviction. (Appellant's Br. 4.) He also argues that the Superior Court committed plain error in its jury instructions in that the instructions did not clearly articulate the relevant legal standards. (Appellant's Br. 5.) He argues that the instructions misled the jury because the jury was told in "mandatory language" to consider his guilt for murder in the second-degree if the jury did not find him guilty of murder in the first-degree. (Appellant's Br. 7.)

¶ 21 We fail to see the relevance of the holding of the *Cotton* decision to this case. In *Cotton*, 535 U.S. at 631-33, the Supreme Court explained that the omission of the drug quantity from an indictment, making the indictment defective, did not deprive the trial court of jurisdiction. In addition, due to the overwhelming evidence of the drug quantity, the defect did not justify vacating

the sentence. *Id*. at 634. Here, *Cotton* does not apply because the Superior Court's jurisdiction was not in question, nor was the information defective.

¶ 22 Section 921 defines murder as "the unlawful killing of a human being with malice aforethought." 14 V.I.C. § 921. As quoted above, Section 922(a) then goes on to define the three ways in which first-degree murder can be committed.[6] Section 922(b) provides that "all other kinds of murder are murder in the second-degree." 14 V.I.C. § 922(b). Because of this statutory structure, "there is 'necessarily included' in any first-degree murder an unlawful killing with malice aforethought, i.e., a second-degree murder." *Gov't of the V.I. v. Carmona*, 422 F.2d 95, 100 (3d Cir. 1970). A jury could harbor a reasonable doubt on first-degree murder but still find the elements of second-degree murder to be proven beyond a reasonable doubt. *Id*.

¶ 23 Here, an instruction on second-degree murder benefitted Roebuck because it presented to the jury the possibility that Roebuck might be guilty of a lesser crime. In addition, we note that, as was the situation regarding the first-degree murder instruction, the defendant likewise did not raise any of the issues that are presented in the habeas petition as purported errors in the second-degree murder jury instruction. (2 J.A. 1184). Reviewing the final instructions that were given to the jury, guided by the applicable precedent discussed above, we conclude that, by instructing the jury on second-degree murder, the Superior Court committed no reversible error.[7]

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[6] *See supra* note 5.

[7] In *Tyson v. People*, 59 V.I. 391, 413 n.19 (V.I. 2013) this Court expressed concern when a felony-murder jury instruction did not specify that the murder must be "committed in furtherance of the underlying felony" and instead merely stated that the jury must find that the killing was "during" the underlying felony. *Id.* Here, the jury instruction was similarly flawed, stating only that the jury must find that "the killing occurred during the commission of a robbery" and did not communicate to the jury that the murder must be causally connected to the felony. (J.A. 1170.) While section 922(a) does not list an "in furtherance requirement," this Court cited approvingly to Pennsylvania's established doctrine that "[i]t is necessary . . . to show that the conduct causing death was done in

D. The Superior Court's instructions with respect to malice aforethought were not in error and did not shift the burden of persuasion

¶ 24 Finally, Roebuck claims that the Superior Court's instructions with respect to malice aforethought violate the principles articulated in *Sullivan v. Louisiana*, 508 U.S. 275 (1993). He claims that the Superior Court's jury instruction that malice may be inferred when killing is done with a deadly weapon is a burden- shifting instruction that violates his due process. (Appellant's Br. 9) He also claims the jury instruction was confusing, arguing that the evidence demonstrated only an intent to rob the store and that there was no evidence of a malicious intent to kill. (Appellant's Br. 13.)

¶ 25 This Court has explained that, historically, common-law felony murder was the "accidental or unintentional homicide committed in the perpetration of or attempt to perpetrate a felony" and "the malice necessary to make the killing murder [was] constructively imputed by the malice incident to the perpetration of the initial felony." *Tyson*, 59 V.I. at 408 (citing *Commonwealth v. Redline*, 137 A.2d 472, 475 (Pa. 1958) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *200-

furtherance of the design to commit the felony." *Tyson*, 59 V.I. at 405 (citing *Commonwealth v. Redline*, 137 A.2d 472, 476 (Pa. 1958)); *see also Schnitker v. State*, 401 P.3d 39, 45-46 (Wyo. 2017) ("[F]or a finding of felony murder, the killing must occur as part of the res gestae or 'things done to commit' the felony.") Were it not for the "in furtherance" requirement a jury might otherwise incorrectly find felony murder "based solely on a finding that the murder was committed during the perpetration of or flight from the crime." *Tyson*, 59 V.I. at 413 n.19 (citing *Simmons v. Love*, No. 95-1495, 1996 U.S. App. LEXIS 34786, at *19-20 (3d Cir. Oct. 10, 1996)). However, based on applicable precedent, we review this issue for plain error because this issue was not raised by Roebuck at trial nor in his brief. *See David*, 73 V.I. at 480; *Rodriguez*, 71 V.I. at 594; *Wallace*, 71 V.I. at 741-42; V.I. R. CRIM. P. 52(b). Here, this error is harmless because strong evidence indicates that the murder was committed either during the robbery, or while in flight. In *Tyson*, there was a genuine question whether the killing was in furtherance of the underlying felony because the murder was allegedly committed not by the defendant or an accomplice, but by those returning gunfire against the defendants. Here, however, the evidence establishes that the shooting was done by either Roebuck or his accomplice, either mid-robbery or as the assailants were fleeing. Therefore, this Court concludes it was harmless error to omit the "in furtherance" language from the jury instructions.

01)). This Court further explained that under the Virgin Islands felony murder statute "it is the malice motivating the specified felony that is imputed, and not the act of killing." *Tyson*, 59 V.I. at 413. Malice is inferred from the commission of the felony. In addition, "the use of a gun alone could be sufficient for a finding of actual malice." *Powell v. People*, 70 V.I. 745, 750 (2019) (citing *Nicholas v. People*, 56 V.I. 718, 736 (V.I. 2012)).

¶ 26 Therefore, in this case, instructing the jury that it could infer malice from the use of a gun was not in error. In addition, malice sufficient to find first-degree murder could be inferred from the felony, here robbery, because it is a designated felony listed in section 922(a)(2).

¶ 27 Again, we reiterate that the defendant did not raise any of the issues that are presented in the habeas petition as purported errors in the jury instruction pertaining to malice aforethought. (J.A. 1184). Reviewing the final instructions that were given to the jury, guided by the applicable precedent discussed above, we find no reversible error.

III. CONCLUSION

¶ 28 This Court affirms the Superior Court's denial of Roebuck's writ of habeas corpus, having concluded that the jury instructions given were proper and that any error in those instructions was harmless.

DATED this 8th day of September, 2021.

BY THE COURT:

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

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: /s/ Reisha Corneiro
Deputy Clerk

Dated: September 8, 2021