For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

C'QUAN CELESTINE, Appellant/Defendant, v. **PEOPLE OF THE VIRGIN ISLANDS** Appellee/Plaintiff.	))))))))	**S. Ct. Crim. No. 2017-0066** Re: Super. Ct. Crim. No. 195/2016 (STT)

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

Argued: October 8, 2019
Filed: June 17, 2020

Cite as: 2020 V.I. 10

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

APPEARANCES:

Kele C. Onyejekwe, Esq.
Appellate Public Defender
St. Thomas, U.S.V.I.
Attorney for Appellant,

Dionne G. Sinclair, Esq.
Ian S.A. Clement, Esq. (Argued)
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St. Thomas, U.S.V.I.
Attorneys for Appellee.

OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 C'Quan Celestine appeals from the Superior Court's August 9, 2017 judgment and commitment finding him guilty of attempted second-degree murder and numerous other offenses. For the reasons that follow, we affirm.

I. BACKGROUND

¶ 2 On August 9, 2015, A.G.[1] went to Magens Bay, where she met some friends and had a few drinks. She left Magens Bay in a vehicle with two friends she'd known for about a year: Gerald Lewis, the driver and a coworker, and Tyrone Industrious, Jr., also known as "Junie." She sat in the back with Celestine, an acquaintance she'd known for about a month. The four made several stops, including Lindberg Beach, Anna's Market, and A.G.'s house, before heading back to the north side of the island. They continued to drink alcohol throughout. At some point A.G. noticed a gun in Celestine's waistband, which made her feel "uncomfortable."

¶ 3 The car eventually stopped somewhere in the vicinity of Hull Bay, at which point Lewis and Junie allegedly "went in the back somewhere" out of sight of A.G. and Celestine. At that point, according to A.G., Celestine propositioned her for oral sex, threatening that she wouldn't be allowed back in the car if she refused. She refused and turned away; a few moments later she felt a blow and then blood pouring down her nose. Some time after that the other three drove away.

¶ 4 At about 9:15 pm, Shay Brittingham came across A.G., lying on the ground and "covered in blood" near Hull Bay, and he called 911. The police officer called to the scene found A.G. "disoriented" and apparently intoxicated, and he photographed the scene, though he was unable to locate any physical evidence. A.G. was taken to the hospital where she was treated for a gunshot wound to the face.

¶ 5 Detective Nigel James was assigned to investigate the case. The investigation included speaking to A.G., seeking surveillance footage from the crime scene and places where the car had

[1] In accordance with Rule 15(c) of the Virgin Islands Rules of Appellate Procedure, we refer to the victim using only her initials. *See* V.I. R. APP. P. 15(c)(2) ("If the involvement of a minor child or a victim of a sexual assault crime must be mentioned, only the initials of that child or victim should be used.").

stopped that evening, and attempting to speak to potential witnesses. He located surveillance video from the gas station where the car stopped, but Celestine was not seen on the tape; he also spoke to Lewis, but Lewis refused to make a statement.

¶ 6 When Detective James first spoke to A.G. on August 10, 2015, A.G. did not give him Celestine's name or indicate that she knew who shot her. Two days later, A.G. called Detective James and told him that an anonymous caller wanted to speak to him. The caller, whom A.G. never identified, told Detective James that Celestine had shot A.G., which was the first time Detective James heard Celestine's name in the context of this case. On August 14, 2015, another detective presented A.G. with a photo array from which she identified Celestine as the person who shot her.

¶ 7 During the trial, A.G. testified, as did the emergency room doctor who treated A.G., Brittingham, and three police officers. No other witnesses testified and no physical or circumstantial evidence was presented as to Celestine's involvement. Detective James' testimony included the following exchanges with the prosecution:

> Q. Just now, with the defense, you had testified that there was a lot of questions and testimony regarding this M.C. person, the person on the phone. Why did A.G. refuse to give the name of that person?
> A. The person didn't want to get involved in the case.
> Q. Do you know why they didn't want to get involved?
> A. If I could remember, they were afraid of the defendant.
> Q. With regard to the conversation that you had with Gerald Lewis . . . [w]hat was the relationship between Gerald Lewis and the defendant?
> A. I learned that they had an intimate relationship.
>
> . . . .
>
> Q. With regard to your testimony just now about the tattoo, you were asked that a lot of young people have tear drop tattoos. Based on your experience and training as a police detective, what if any knowledge do you have of the significance of a tear drop tattoo?
> A. Tear drop is for someone who has committed a murder.

(J.A. 333-340.) The defense attorney re-crossed:

> Q. Detective that's not the only reason people put tear drop tattoo on their faces; isn't that true?
> A. That's the only reason that I know of.
> Q. Oh, that you know of?
> A. Yes.
> Q. But in fact, there are many young people with tear drop tattoo that never commit any murder; isn't that true?
> A. I don't know.
> Q. You don't know. And isn't it also true that not everyone with a tear drop tattoo has committed a murder?
> A. I don't know.
> Q. And you don't know Mr. Celestine to have committed any murder; do you?
> A. I don't know.

(J.A. 340-41.)

¶ 8 At the conclusion of the trial on May 23, 2017, the jury found Celestine guilty of seven counts including attempted murder in the second degree, assault in the first and third degree, and unauthorized possession of a firearm during the commission of each of the aforementioned crimes. On July 26, 2017, the Superior Court sentenced Celestine to 40 years' imprisonment as a habitual offender based on an unrelated prior July 2013 conviction for assault in the third degree. The Superior Court merged the assault offenses with the attempted murder charge and stayed the sentences for the lesser charges. On July 31, 2017, Celestine timely filed this appeal. *See* V.I. R. APP. P. 5(b)(1) ("A notice 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 judgment."). The Superior Court subsequently memorialized its oral sentence in an August 18, 2017 judgment and commitment.

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 9 This Court has appellate 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). Because the Superior Court's August 9, 2017 judgment and commitment is a final order, we have jurisdiction over the appeal. *Allen v. HOVENSA, L.L.C.*, 59 V.I. 430, 434 (V.I. 2013).

¶ 10 This Court exercises plenary review of "all constitutional questions of law." *Carty v. People*, 56 V.I. 345, 354 (V.I. 2012). We review questions of judicial discretion, including evidentiary rulings, for abuse of discretion. *Smith v. Henley*, 67 V.I. 965, 970 (V.I. 2017). However, if a defendant does not raise an issue at trial, we review only for plain error. V.I. R. APP. P. 22(m).

B. Due Process

¶ 11 Celestine argues that the proceedings in this case violated his due process rights to a fair trial in two ways: first, because Detective James' testimony was improper, and second, because A.G.'s eyewitness identification was highly likely to be incorrect and therefore should have been disallowed. We address each issue in turn.

1. Detective James' Testimony

¶ 12 Celestine primarily argues that three aspects of Detective James' testimony violated Celestine's due process rights to a fair trial: (1) his statement that Celestine's teardrop tattoo meant that Celestine was a murderer; (2) his statement that another anonymous witness chose not to testify because he was "afraid" of Celestine; and (3) his statement that Celestine had an "intimate" relationship with the driver. Although we agree that Detective James' testimony pertaining to the

teardrop tattoo and the anonymous witness's alleged fear were not admissible, we conclude that Celestine has failed to meet his burden of proving that these rose to the level of plain error.[2]

¶ 14 We agree with Celestine that Detective James' statement that Celestine's teardrop tattoo meant he had committed murder should not have been admitted into evidence. All evidence, including testimonial evidence, must be relevant. V.I. R. EVID. 402. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." V.I. R. EVID. 401. Rule 404 of the Virgin Islands Rules of Evidence expressly provides that "[e]vidence 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." V.I. R. EVID. 404(b)(1); thus, such evidence is not relevant under Rule 401 unless it is introduced for another purpose. *See* V.I. R. EVID. 404(b)(2) ("Evidence of a crime, wrong, or other act may be admissible for other purposes, such as addressing issues, if actually contested in the case, concerning . . . identity . . . provided that the

[2] However, we conclude that Detective James's statement that Celestine had an "intimate" relationship with the driver was properly admitted. While Celestine asserts that this reference may have stirred "negative emotions of homophobia" in the jury, (Appellant's Br. 30), and while we agree that testimony as to alleged homosexuality may inflame jurors' prejudices against people in same-sex relationships and thus be unfairly prejudicial, *United States v. Delgado-Marrero*, 744 F.3d 167, 205-06 (1st Cir. 2014), we decline to presume that all jurors are necessarily prejudiced against gays and lesbians. *See, e.g.*, *Stern v. Cosby*, 645 F.Supp.2d 258, 274 (S.D. N.Y. 2009) (noting changing public attitudes towards gays and lesbians); *Yonaty v. Mincolla*, 945 N.Y.S.2d 774, 777 (N.Y. App. Div. 2012) (overturning precedents that had categorized allegations of homosexuality as defamation per se). Characterizing the relationship between Celestine and Lewis as an "intimate" one does not necessarily mean that the relationship was sexual in nature. *See Riedel v. Vasquez*, 930 N.Y.S.2d 238, 239 (N.Y. App. Div. 2011) ("[W]hat qualifies as an 'intimate relationship' . . . is determined on a case-by-case basis . . . . Relevant factors include the nature or type of relationship, regardless of whether the relationship is sexual in nature.") (internal quotation marks and citations omitted). Moreover, the closeness of Celestine's relationship with Lewis is highly relevant and greatly outweighs any unfair prejudice, in that the existence of a close relationship—whether it be sexual or non-sexual—would explain why Lewis failed to make a statement.

probative value of such proof, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.").

¶ 15 The People maintain that Detective James' testimony was admissible relevant evidence because it was admitted for a purpose other than Celestine's propensity to commit a violent crime; specifically, the People argue that the teardrop tattoo testimony was necessary to prove identity. We agree that Detective James properly testified that Celestine had a teardrop tattoo, given that A.G. had identified the person who shot her as "a brown skin male with a tear drop tattoo under his eye and a low haircut." (J.A. 193.) However, testimony as to the existence of a teardrop tattoo is distinct from testimony about the meaning of a teardrop tattoo; while it is certainly relevant that Celestine had the tattoo, the *meaning* behind the tattoo is wholly irrelevant to proving identity or any other legitimate purpose. *See Brown v. Commonwealth*, 313 S.W.3d 577, 619 (Ky. 2010) (holding that prosecution's questioning about the meaning of the defendant's tattoo was not relevant to identification or other material issue, "but merely tended to suggest . . . that [the defendant] was the sort of angry, disaffected person capable of murdering [the victim]."); *Pagan v. State*, 809 N.E.2d 915 (Ind. Ct. App. 2004) ("Although the fact that [the defendant] had a tattoo on one hand was relevant to the victim's identification of the robber, the State's repeated questioning on the meaning of the tattoo was completely irrelevant and potentially prejudicial."). Because we hold that the testimony about the meaning of the teardrop tattoo was not relevant, we need not decide whether its admission was unfairly prejudicial. *See* V.I. R. EVID. 403 ("[T]he court may exclude *relevant* evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice.") (emphasis added). Nevertheless, we note that an allegation that the defendant previously committed an unrelated murder inherently "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision

on something other than the established propositions in the case,'" which would make it unfairly prejudicial under Rule 403. *Carty v. People*, 56 V.I. 345, 358 (V.I. 2012) (quoting *Bhaya v. Westinghouse Elec. Corp.*, 922 F.2d 184, 193 (3d Cir. 1990)). Thus, the Superior Court erred when it permitted Detective James to testify about the meaning of the teardrop tattoo.

¶ 16 Similarly, Detective James' testimony that an anonymous potential witness told him that Celestine was the shooter, but did not want to testify because he was afraid of Celestine, was also inadmissible. Even if we were to assume, without deciding, that this testimony was relevant to explain how Detective James determined that Celestine had shot A.G., Detective James essentially testified that Celestine was a dangerous person who scared a potential witness from coming forward, without any actual evidence to support the accusation. Well-established legal principles render this kind of speculation and conjecture impermissible. *See, e.g.*, *People v. Clarke*, 55 V.I. 473, 481-82 (V.I. 2011). Further, such unfounded suggestions are highly prejudicial and, at the same time, lacking in probative value, so as to compel their exclusion under Rule 403.

¶ 17 Although we have found error with two aspects of Detective James's testimony, that does not end our inquiry. Because Celestine did not object to any of this testimony during trial, we review only for plain error. "Under the plain error standard of review, 1) there must be an error, 2) that is plain, 3) that affects the defendant's substantial rights, and 4) that affects the fairness, integrity, or public reputation of judicial proceedings." *Miller v. People* , 67 V.I. 827, 837 (V.I. 2017). "Unlike harmless error analysis, under plain error analysis, the burden falls on the appellant to show how the error prejudiced him." *Fahie v. People*, 59 V.I. 505, 511 (V.I. 2013) (citing *United States v. Olano*, 507 U.S. 725, 734 (1993)).

¶ 18 We conclude that Celestine has failed to show that these evidentiary errors affected his substantial rights. "To affect . . . substantial rights, the error must [have] affected the outcome of

the trial." *Fahie*, 59 V.I. at 511. These portions of Detective James's testimony, while irrelevant and prejudicial, were only a small part of the trial, in which sufficient properly admitted evidence was introduced for the jury to conclude that Celestine shot A.G.—including A.G.'s own unequivocal identification of Celestine as the person who shot her—and were not mentioned again in closing arguments or otherwise.[3] *See Benaffane v. State*, No. 01-15-00840-CR, 2017 WL 2117538, at *12 (Tex. App. May 16, 2017) (unpublished) (holding that teardrop tattoo testimony did not affect the defendant's substantial rights when other evidence supported the jury verdict, and the testimony "was only briefly addressed during the trial and not mentioned in closing"). It is therefore unlikely that this testimony affected the outcome of the trial, and thus on this record, the plain error standard is not met.

2. A.G.'s Eyewitness Identification

¶ 19 Celestine also argues that A.G.'s eyewitness identification of him as her shooter violated his due process rights because there was purportedly a high likelihood of misidentification. He does not challenge the identification procedure used by the police; rather, he argues that the circumstances surrounding A.G.'s statement that Celestine shot her were highly suspect, and therefore that she should not have been permitted to identify him as the shooter.

¶ 20 It is well-established that it is the province of the jury to determine the credibility of all witnesses, including those providing eyewitness testimony. *Venture v. People*, 64 V.I. 589, 607 (V.I. 2016). In addition, "the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair." *Perry v. New Hampshire*, 565 U.S. 228,

[3] In his appellate brief, Celestine correctly notes that counsel for the People stated during closing arguments that A.G. had identified the shooter as having a teardrop tattoo just like Celestine's. However, the People did not reference the meaning of the teardrop tattoo. As discussed above, the existence of the teardrop tattoo was admissible to establish identity.

245 (2012). Here, the record reflects that A.G. testified that she knew Celestine for a month prior to the incident, sat in the backseat of the vehicle with him, observed a firearm on his waist, was told after exiting the vehicle with him that he would not let her back in if she did not perform oral sex, and then was subsequently shot when she refused. Although A.G. did not initially identify Celestine as the person who shot her, Celestine had the opportunity to cross-examine her at trial and challenge both her credibility and the reliability of that identification. A.G.'s testimony as presented at trial was not inherently suspect under the Virgin Islands Rules of Evidence and was based on extensive personal observation. *See, e.g.*, V.I. R. EVID. 602 ("A witness may testify to a matter . . . if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter," and such evidence "may consist of the witness' own testimony."). Accordingly, it was not unreliable as a matter of law and the jury was free to choose to accept it. *Connor v. People*, 59 V.I. 286, 290-91 (V.I. 2013).

C. Sentence Enhancement Under 14 V.I.C § 61

¶ 21 The Superior Court enhanced Celestine's sentence under 14 V.I.C § 61, the habitual offender statute,[4] based on Celestine's January 11, 2013 conviction of Assault in the Third Degree in a prior unrelated proceeding. Celestine argues that that conviction is invalid because the statute creating the offense, 14 V.I.C § 297(a), is unconstitutionally vague. That statute reads as follows:

> (a) Whoever, under circumstances not amounting to an assault in the first or second degree—
> (1) assaults another person with intent to commit a felony;
> (2) assaults another with a deadly weapon;

[4] This statute provides that any person who has been convicted of an offense that "would be a felony in the Virgin Islands" "shall upon a subsequent conviction of a felony in the Virgin Islands be incarcerated for a term of imprisonment of not less than ten years and may be incarcerated for the remainder of his natural life if such subsequent felony for which the person is convicted in the Virgin Islands was committed within ten (10) years after the date the person has completed serving his sentence on the prior felony conviction." 14 V.I.C § 61(a).

> (3) assaults another with premeditated design and by use of means calculated to inflict great bodily harm;
> (4) assaults another and inflicts serious bodily injury upon the person assaulted; or whoever under any circumstances;
> shall be fined not less than $500 and not more than $3,000 or imprisoned not more than 5 years or both.

14 V.I.C § 297(a). Celestine argues that the requirement of "circumstances not amounting to an assault in the first or second degree" is a separate element that the prosecution must prove, and because in that case Celestine's conviction was under circumstances that did amount to an assault in the first degree (namely, the use of a firearm, Appellant's Br. 46), the conviction cannot stand.

¶ 22 We have already addressed the statutory language in section 297. *Davis v. People*, 69 V.I. 619, 632-33 (V.I. 2018). As we noted in *Davis*, "the language 'under circumstance not amounting to an assault in the first or second degree' does not establish an additional, substantive element of the offense, but rather constitutes a condition precedent to the Superior Court's application of the sentencing range prescribed in § 297." *Id.* at 632. In addition, the jury in Celestine's earlier trial found him guilty of assault in the third degree but not in the first degree, thereby finding that the "circumstances" of his assault had not amounted to an assault in the first degree. This satisfied section 297's condition precedent. As a result, the use of the third-degree assault conviction as a prior offense under section 61 is proper.

D. *Titre*

¶ 23 In *Titre v. People*, 2019 V.I. 3 (V.I. 2019), this Court examined title 14, section 104 of the Virgin Islands Code, which provides that "[a]n acquittal or conviction and sentence under any [provision of Virgin Islands law] bars a prosecution for the same act or omission under any other." 14 V.I.C. § 104. We had previously held that the appropriate remedy under this provision was the "merger-and-stay" remedy, under which convictions under multiple statutes are "merged" and any

lesser sentences stayed. *Williams v. People*, 56 V.I. 821, 834 n.9 (V.I. 2012). However, in *Titre* we determined that the "merger-and-stay" remedy "only creates confusion and the possibility of more errors at the trial court level which then need to be corrected by this Court," and that vacatur of any lesser convictions was a more appropriate remedy.

¶ 24 Celestine argues that our holding in *Titre* applies in his case and thus that the secondary convictions should be vacated. We agree. As we noted in *Mercer v. Bryan*, 53 V.I. 595, 601 (V.I. 2010), a new legal rule will by default apply retroactively to "all pending cases, whether or not those cases involve predecision events." This includes all cases still open on direct appeal, including this one. Thus, *Titre* applies, and Celestine's lesser convictions should be vacated.

III. CONCLUSION

¶ 25 Detective James' statements that Celestine's tattoo meant that he was a murderer and that a witness was afraid of him should have been excluded by the trial judge, but they were a small part of the otherwise sufficient evidence against him, and thus admission of these two items of proof did not demonstrate the prejudice needed to meet the plain error standard. Further, A.G.'s eyewitness identification was properly admitted, as her identification was not unbelievable and credibility determinations are the province of the jury. And the allegation of unconstitutionality in Celestine's prior conviction is an incorrect reading of the governing statute, 14 V.I.C § 297, and inconsistent with our very recent caselaw. Finally, however, the ruling in *Titre* is applicable to this case. We therefore affirm the Superior Court but remand for resentencing in accordance with *Titre*.

Dated this 17 day of June, 2020.

BY THE COURT:

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

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court