

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

THE PEOPLE OF THE VIRGIN ISLANDS **Plaintiff**)
)
 Vs.)
)
 AURIEL DEVON FRETT **Defendant**)

CASE NO. ST-08-CR-0000452

ACTION FOR: 14 V.I.C. 1862

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

TO: RENEE GUMBS-CARTY, ESQ.
MICHAEL JOSEPH, ESQ.
LAW CLERKS, LAW LIBRARY, IT, RECORD BOOK
JUDGES AND MAGISTRATES OF THE SUPERIOR COURT

Please take notice that on September 04, 2015 a(n) MEMORANDUM
OPINION AND ORDER dated September 04, 2015 was entered by the Clerk in
the above-entitled matter.

Dated: September 04, 2015

Estrella H. George
ACTING CLERK OF THE SUPERIOR
COURT



IRIS D. CINTRON
COURT CLERK II

NOT FOR PUBLICATION

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

PEOPLE OF THE VIRGIN ISLANDS,
PLAINTIFF,

ST-08-CR-452

v.

AURIEL FRETT,
DEFENDANT.

MEMORANDUM OPINION

THIS MATTER comes before the Court on Defendant Auriel Frett's (hereinafter "Frett") Motion for a New Trial, filed on June 20, 2015. The People of the Virgin Islands (hereinafter "the People") filed their Opposition to Frett's Motion on August 18, 2015. For the reasons set forth, the Court shall deny Frett's Motion for a New Trial finding that there was sufficient evidence to sustain the conviction of Frett on Counts I, III and V; that the interest of justice does not require a new trial ; and that the testimony of Judge Hollar was proper.

I. FACTUAL AND PROCEDURAL HISTORY

This matter is on remand from the Supreme Court of the Virgin Islands. Jury selection and retrial in this matter began on June 09, 2015 and ended on June 11, 2015. The facts presented at trial indicate that Frett and his alleged accomplice John Southwell (hereinafter "Southwell") were the last seen with Gabriel Lerner. The jury heard testimony from eight witnesses; the two of concern by Frett are Superior Court Judge Brenda Hollar (hereinafter "Hollar") and Southwell.

Prior to the jury coming into the courtroom the court ruled as to the testimony of Judge Brenda Hollar, stating that she will not be allowed to testify as a character witness but only as to

her personal knowledge of the steps taken to locate Lerner and how she determined he was missing. The court further advised both the People and Defense counsel that Hollar was not to be referred to as “judge” but merely as Ms. Hollar.

At trial, Southwell, testified that he and Frett first met Lerner at the Midtown Guest house on October 26, 2008 at which time Lerner offered to give them a ride to Red Hook. Southwell stated that Frett told Lerner to stop the vehicle so that he could urinate just past Sapphire Beach. Southwell continues to tell his account of the events consistent to what he testified to during his the first trial.¹ On June 11, 2015 the jury found the defendant guilty of Count I, Murder First Degree/Principal in violation of Title 14, Sections 921, 922(a)(1)(2), and 11(a); Count III, Assault with Intent to Commit a Robbery First Degree/Principal in violation of Title 14, Sections 925(1)(3) and Count V, Kidnapping with the Intent to Commit a Robbery Third Degree/Principal in violation of Title 14, Section 1052(a);.

II. DISCUSSION

A. The Testimony of Judge Brenda Hollar was proper.

In Frett’s motion he first argues that the testimony of Judge Brenda Hollar (hereinafter referred to as Hollar) removed the ability for the jury to be impartial and detached. While the Virgin Islands has not established any laws applicable as to whether a judge should be able to testify as a witness, this court finds that based on the practices among other jurisdictions, and the instructions given by this court which instructed both the People and Defense counsel to refer to Hollar as “Ms. Hollar”, her testimony was proper.

¹ Southwell testified that Frett returned to the car and asked Lerner whether he had ever been robbed before. Lerner asked whether he was being robbed and was told yes. Lerner handed Frett his wallet and Frett ordered Lerner to get into the backseat of the vehicle. Southwell further testified that the three of them went to Friendly Grocery Store and they attempted to use his credit cards for gas and other items.

While we understand a *Banks*² analysis is not applicable to criminal cases, this court applied a similar analysis in determining whether the testimony of Hollar would be proper. This was done by looking at the practices of other jurisdictions. In doing so this court found that a majority of the courts have either not litigated this issue or have held that a judge may not testify as a character witness. In Texas, while the Supreme Court held that a judge should not testify as a character witness, they acknowledged that “a judge must, like anyone else, testify to relevant facts within his personal knowledge when summoned to do so.” *Joachim v. Chambers*, 815 S.W. 2d 239 (1991). The court further explains that to minimize the chance of improprieties, the court should refrain from revealing to the jury the fact that the judicial officer.³

When determining what was in the best interest of the Virgin Islands for deciding this issue, the court determined that it will follow the majority, as well as the rules provided in the Virgin Islands Code of Judicial Conduct, by not allowing the judge to testify as a character witness but only as to personal knowledge. Due to the smaller population in our territory, banning a judge from testimony regardless of the matter may serve as an injustice if the judge’s testimony is necessary or relevant in proving the commission of a crime. Additionally, this court considered whether the testimony of a judicial officer would be fair. We find that if the judicial officer is solely referred to as Ms. or Mr., and not by title, and the appropriate instructions are given, the status will not have a significant affect on the testimony. For these reason stated the court found that allowing the testimony of Hollar was proper.

² *Banks v. International Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011).

³ See *Catt v. State*, 749 N.E.2d 633, 645, 2001 Ind. App. LEXIS 963, *30 (Ind. Ct. App. 2001) stating “A judge must not testify voluntarily as a character witness because to do so may lend prestige of the judicial office in support of the party for whom the judge testifies. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness”.

This court also referred to the Virgin Islands Code of Judicial Conduct rule 3.3 in determining how to base its instructions to both the attorneys prior to allowing her to testify.⁴

Under Rule 3.3 of the Virgin Islands Code of Judicial Conduct, comment 27 provides a set of guidelines on how to approach this issue.⁵ This court used these guidelines to instruct both counsels on how to address Hollar prior to bringing the jury in the courtroom. Hollar was not allowed to testify as a character witness, but solely as a factual witness explaining the series of events leading to the search of Lerner. During the trial, despite the courts strict instructions on this issue, one of the counselors referred to Hollar as “judge”. This court immediately addressed this with the jury and advised them that they are to disregard that reference and to not base whether the testimony was true on her title but solely based on their opinions. Additionally, this court again addressed this matter during jury instructions to remind the jury that they are to base the testimony solely on what they perceive to be valid.

The court explained that a judge’s testimony “is not entitled to greater weight merely because the witness is a judge.”⁶ It is presumable that juror follow the court’s instructions and thus would not have relied on the title of Hollar to determine the validity of her testimony, if they had been so instructed. *Augustine v. People*, 55 V.I. 678, 686 (V.I. 2011).

⁴ Stating “A judge shall not testify as a character witness in a judicial, administrative or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.

⁵ V.I. Code of Judicial Conduct Rule 3.3 Testifying as a Character witness states:

When a judge testifies as a witness the examining attorney, the testifying judge, and the trial judge shall not refer to the fact that the judge-witness is a “judge” except when the judge’s testimony relates to the exercise of the judge’s judicial function.”

Also states

When a judge testifies as a witness before a jury and the testifying judge’s title is expected to be known by the members of the jury or is disclosed to the jury, the trial judge shall give a cautionary instruction advising the jury that a judge’s testimony is not entitled to greater weight merely because the witness is a judge.”

⁶ See *Hatcher v. McBride*, 221 W. Va. 5, 14, 650 S.E.2d 104, 113, W.Va LEXIS 121, *27-28 (W. Va. 2006).

B. There Was Sufficient Evidence for a Jury to Convict Frett of First Degree Murder

“The testimony of a single witness, if credited by the jury, is sufficient to sustain a conviction.” *Francis v. People*, 57 V.I. 201, 211-12 (V.I. 2012); *see also Connor v. People*, 59 V.I. 286, 290-91 (V.I. 2013). This speaks to both arguments presented in the Defendant’s Motion for a New Trial. The People presented eight witnesses and a video tape in order to support their case in chief. To prove Frett committed the crime of first degree murder, the People had to provide evidence establishing its elements of the crime. If the People found any of testimonies presented sufficient to sustain this conviction, then it is valid.

To support its case, the People presented the testimony of John Southwell, who testified that he was with Frett and Lerner in Estate Bordeaux, and it was there that Frett fired a gun and killed Lerner. Southwell also testified as to the stops made with both Lerner and Frett to Sapphire beach and Friendly Grocery Store. Southwell was the individual that accompanied police officers to Estate Bordeaux and showed them where Lerner’s body was located.

The testimony of John Southwell was enough to place Lerner at the scene of the crime. At the close of trial, the jurors were instructed based on the “great care and caution” instructions as prescribed by the Supreme Court in its prior ruling. The Court’s only concern is the sufficiency of the evidence. *People v. Fahie*, SX-2011-CR-448, 2014 WL 7186747 at *3 (V.I. Super. Ct. June 19, 2014) (unreported).

Frett acknowledges that the court did provide the “great care and caution” instruction however states that the trial court erred when advising the jury that all terms of punishment are determined by the court. This court advised the jury of the procedure in which sentencing takes place as to not confuse the jury. Frett was afforded the ability to cross examine the witness

during trial and address all concerns with any statements he made at that time and was afforded his right to confront his accuser as proscribed by the Sixth Amendment, thus, this argument is rejected.

C. Motion For a New Trial

The Court exercises its own judgment when considering a motion for new trial. See *Stevens v. People*, 52 V.I. 294, 306-7 (V.I. 2009). Pursuant to Rule 135 of the Rules of the Superior Court “[t]he court may grant a new trial to a defendant if required in the interest of justice.” Although the Court is permitted to weigh the evidence when considering a motion for new trial, it is not necessary for the Court to act as a thirteenth juror when deciding whether to grant a new trial. *Stevens*, 52 V.I. at 306. The Court may only order a new trial “if it believes that there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted.” *Id.* at 305 (quoting *United States v. Silveus*, 542 F.3d 993, 1004-05 (3d Cir.2008)). The Court’s discretion in considering a motion for new trial “should be exercised with extreme caution. In other words, the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.” *Gov’t of the V.I. v. Grant*, 19 V.I. 440, 445 (Terr. Ct. 1983).

Frett asserts that the Court should sit as the thirteenth juror when deciding whether to grant a new trial. However, as previously explained, the Supreme Court of the Virgin Islands has stated that it is not necessary for the Court to act as a thirteenth juror when making its determination. *Stevens*, 52 V.I. at 306. The proper test is to grant a new trial if the Court determines that: (1) the verdict is contrary to the weight of the evidence, and (2) an innocent person has been convicted. *Id.* at 305.

“In the case of a motion for a new trial premised on a challenge to the credibility of witnesses, ‘it remains the law that a trial court should weigh the evidence.’” *Percival v. People*, S. Ct. Crim. No. 2013-0083, 2015 WL 113300 at *6 (V.I. Jan. 7, 2015). In *Stevens*, the Supreme Court of the Virgin Islands determined that the Superior Court did not err in its denial of Stevens’ motion for new trial. In that case, Stevens was charged and found guilty of the shooting of Jahlil Ward.⁷

At trial, Ward testified against Stevens and identified him as the person who shot him. *Id.* at 299. In his defense, Stevens and three other witnesses took the stand to provide alibi evidence. *Id.* at 301. In reaching its decision regarding the motion for new trial, the Superior Court found that “Ward appeared certain and unwavering in his identification of Stevens as the perpetrator,” while “the alibi witnesses were impeached by inconsistencies.” *Id.* at 306-7. The Supreme Court affirmed the Superior Court’s decision to deny Stevens’ motion for new trial, finding that the Superior Court used the correct standard and clearly articulated that it was exercising its own judgment in assessing witness credibility and weighing the evidence. *Id.* at 306.

Like in *Stevens*, this court finds that the verdict is consistent to the weight of the evidence. While the People’s key witness was Southwell, a witness who on cross-examination admitted that he cooperated with the People in exchange for a plea on the murder charges against him, the People also presented sufficient evidence and testimony that this court finds consistent with the verdict. Southwell stated during his testimony that while he, Frett and Lerner walked on

⁷ Specifically, Stevens was convicted of attempted first degree murder; possessing an unlicensed firearm during the commission of a crime of violence, attempted first degree murder; first degree assault with intent to commit murder; possessing an unlicensed firearm during the commission of a crime of violence, first degree assault; and unauthorized possession of ammunition.

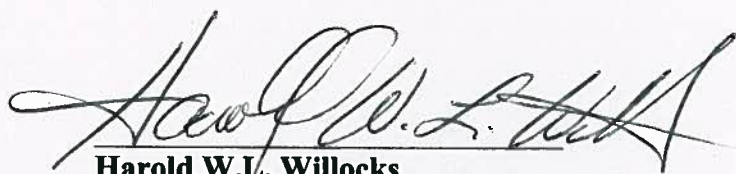
the trial for less than five minutes, Frett stated once or twice that there could be no witnesses. Southwell further stated that when Lerner asked Frett if he was going to kill him, Frett responded by telling him to shut up, to turn around, and then Southwell saw Frett fire one shot at Lerner killing him.

Based on the testimony provided during trial, the Court is confident that justice has been properly served. Given the aforementioned, Court finds it necessary to deny Frett's motion for a new trial.

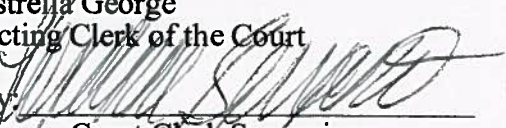
CONCLUSION

In conclusion, for the aforementioned reasons the Court finds that the testimony of Judge Hollar was proper; that there was sufficient evidence to sustain the conviction of Frett on Counts I, III and V; that the interest of justice does not require a new trial; and shall deny Frett's Motion for a New Trial. The court will issue an Order consistent with this Opinion.

Dated: 9-4-15


Harold W.L. Willocks
Administrative Judge of the Superior Court

ATTEST:
Estrella George
Acting Clerk of the Court

By: 
Court Clerk Supervisor

Dated: 9/4/15

CERTIFIED A TRUE COPY

DATE: Sept. 4, 2015
ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT
BY: 
COURT CLERK

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

PEOPLE OF THE VIRGIN ISLANDS,

PLAINTIFF,

ST-08-CR-452

v.

AURIEL FRETT,

DEFENDANT.

ORDER

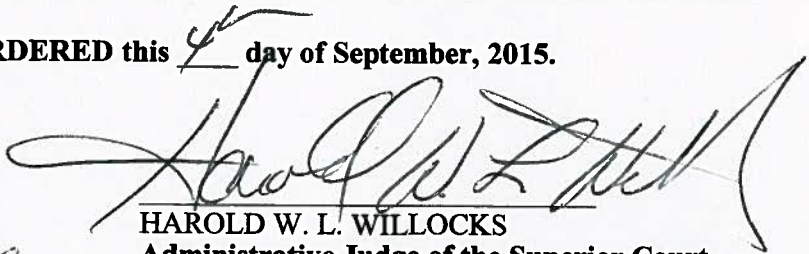
THIS MATTER is before the Court on Defendant Auriel Frett's (hereinafter "Defendant") Motion for a New Trial, filed on June 24, 2014. The Court finds that the testimony of Judge Hollar was proper; that there was sufficient evidence to sustain the conviction of Frett on Counts I, III and V; that the interest of justice does not require a new trial; and shall deny Frett's Motion for a New Trial. In accordance with the Memorandum Opinion of even date, it is hereby:

ORDERED that Defendant's Motion for New Trial is **DENIED**; and it is further

DONE and so **ORDERED** this 4th day of September, 2015.

ATTEST:

Estrella George
Acting Clerk of the Court


HAROLD W. L. WILLOCKS
Administrative Judge of the Superior Court

By: 

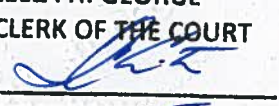
Court Clerk Supervisor

Dated: 9/4/15

CERTIFIED A TRUE COPY

DATE: Sept. 4, 2015

ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT

BY: 
COURT CLERK II