

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

GOVERNMENT OF THE VIRGIN ISLANDS,	)	
	)	
Plaintiff,	)	CRIMINAL NO. 532/1983
	)	
v.	)	
	)	
ROY ANDUZE,	)	
	)	
Defendant.	)	
	)	

LAURENCE H. SPIVACK, ESQUIRE
Assistant Attorney General
Department of Law
P.O. Box 1074
Christiansted, St. Croix
U.S. Virgin Islands 00820
(809) 773-0295
(Attorney for Plaintiff)

MARK L. MILLIGAN, ESQUIRE
No. 55-56 Company Street
P.O. Box 3031
Christiansted, St. Croix
U.S. Virgin Islands 00820
(809) 773-6907
(Attorney for Defendant)

PETERSEN, Judge

MEMORANDUM OPINION AND ORDER

July 16, 1984

On May 24, 1984, a jury found the defendant guilty of two counts of Negligent Homicide by Means of a Motor Vehicle in violation of 20 V.I.C. Section 504 (1977). After conferring with counsel, this Court declared a mistrial with respect to a third count of Driving While Intoxicated in violation of 20 V.I.C. Section 493(a) (1977) when the jury was unable to reach agreement on this charge. The defendant now

moves for entry of judgment of acquittal as to all counts pursuant to Rule 29 of the Federal Rules of Criminal Procedure, made applicable to this Court by 5 V.I.C. App. IV R.7 (1982). ^{1/} As grounds for his motion, the defendant contends that:

(a) the evidence was insufficient to sustain the charges and the verdicts of negligent homicide; and

(b) this Court erred in admitting an inflammatory and unduly prejudicial photograph into evidence.

For the reasons set forth below, the defendant's motion must be denied.

DISCUSSION

A. SUFFICIENCY OF THE EVIDENCE

The standard for considering a Rule 29 motion for judgment of acquittal is the same when the case is before a trial judge as when an appellate court reviews the matter. Burks v. United States, 437 U.S. 1, 17 (1978); United States v. Hazeem, 679 F.2d 770, 772 (9th Cir.), cert. denied, 103 S.Ct. 106 (1982); 2 WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2d Section 467 at 656 (1982). The test is whether, viewing the evidence in the light most favorable to the

^{1/} This Court addresses the defendant's arguments only with respect to Counts One and Two.

Government, there is substantial evidence from which the jury could find guilt beyond a reasonable doubt, Jackson v. Virginia, 443 U.S. 307, 319 (1979); Government of the Virgin Islands v. Bradshaw, 569 F.2d 777, 779 (3d Cir.), cert. denied, 436 U.S. 956 (1978); Government of the Virgin Islands v. Leycock, 83 F.R.D. 569, 570 (D.V.I. 1982) or, stated in the alternative, whether there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision. Burks, supra; United States v. Camiel, 689 F.2d 31, 35-36 (3d Cir. 1982); Government of the Virgin Islands v. Grant, Crim. No. 1983/87 (D.V.I. May 31, 1984) at 2-3. The alternate formulations of the test adopted in this Circuit have no apparent significance, as each emphasizes that the Court must not substitute its judgment for that of the jury. See WRIGHT, supra, at 660.

This Court must not weigh the evidence or assess the credibility of the witnesses, Burks, supra, at 16; Grant, supra, at 3, and all reasonable inferences must be drawn in favor of sustaining the verdict. United States v. Dickens, 695 F.2d 765, 779 (3d Cir. 1982), cert. denied, 103 S.Ct. 1792 (1983). Substantial evidence "is evidence that is adequate and sufficient to permit reasonable persons to find defendant's guilt beyond a reasonable doubt." Grant, supra, at 3. See also United States v. Nicoll, 664 F.2d 1308, 1316

(5th Cir.), cert. denied, 457 U.S. 1118 (1982).

The defendant contends that the Government must prove more than a "sudden swerve" of the defendant's vehicle into the victims' lane to establish that he acted in "disregard for the safety of others" as charged in Counts One and Two of the Information. Citing Government of the Virgin Islands v. Caines, 512 F.2d 311 (3d Cir. 1975), the defendant argues that "other incriminating circumstances" must also be proved. ^{2/} In Caines, the Court held that "other incriminating circumstances must be combined with excessive speed to sustain a charge of reckless driving." Id. at 315. Apparently, the defendant wishes to apply the Caines holding by analogy to the facts of this case since there was no evidence of excessive speed presented at trial. In any event, the record shows that, as was held in Caines, "other incriminating circumstances" were presented to the jury in the case at bar.

At trial, the jury heard Paulino Robles, an

^{2/} This Court feels compelled to point out that one of the propositions cited from Caines by the defendant is from the dissenting opinion, yet the defendant fails to so specify. See defendant's Memorandum, p. 4. Note Rule 3.3(a)(1) of the Model Rules of Professional Conduct adopted by the American Bar Association House of Delegates on August 2, 1983, and made applicable to this Court by 5 V.I.C. App. IV R.7 and 5 V.I.C. App. V R.57(e) (2) (1982).

eyewitness, testify that on the night of the accident he was travelling forty to fifty feet behind the victims' automobile at thirty miles per hour. Mr. Robles stated that he then observed the defendant's pick-up truck swerve into the oncoming lane, first striking the victims' vehicle and then his own bus. Traffic Officer Lovegren, a nineteen year veteran of the police force, testified that his measurements taken at the scene of the accident indicated that the defendant's vehicle crossed over approximately four feet into the opposite northbound lane at the point of impact. He further stated that he saw no tire "skid" marks on the road surrounding the point of impact. John Richards, Forensic Chemist and Director of the Virgin Islands Government Crime Laboratory, testified that a test analysis of blood taken from the defendant immediately after the accident showed a blood alcohol level of .19 percent. 20 V.I.C. Section 493(d) (1982 Supp.) provides that a .19 percent blood level is prima facie evidence of intoxication. Mr. Richards expressed his expert opinion that an operator of a motor vehicle with .19 percent alcohol in his blood would be "severely impaired," possibly even experiencing short-term "blackouts". Additionally, the jury observed photographs of the damage and direction of the vehicles and heard medical testimony on the extensive bodily injuries sustained by the victims.

The defendant contends that since the jury was "hung" on the Driving While Intoxicated Count, it necessarily could not have considered the .19 percent of alcohol in the defendant's blood in finding the defendant guilty of Negligent Homicide. However, a reasonable jury could find a motor vehicle operator to be under the influence of or affected by alcohol but not intoxicated. See 20 V.I.C. Sections 504, 493(a); Government of the Virgin Islands v. Brown, 571 F.2d 773, 776-77, (3d Cir. 1978); Government of the Virgin Islands v. Grant, 19 V.I. 343, 347-48 (Terr. Ct. St. Croix, 1983).

Applying the above standards, it is clear that there was substantial evidence from which a reasonable jury could find the defendant guilty. See Government of the Virgin Islands v. Frederick, 17 V.I. 188, 190-91 (Terr. Ct. St. Croix, 1981) for a similar analysis and conclusion.

B. ADMISSION OF THE PHOTOGRAPH

The admission or exclusion of a photograph lies largely within the sound discretion of the trial judge. United States v. Holmes, 632 F.2d 167, 169 (1st Cir. 1980) (per curiam); United States v. Brady, 595 F.2d 359, 361 (6th Cir.), cert. denied, 444 U.S. 862 (1979); United States v. Fleming, 594 F.2d 598, 607-08 (7th Cir.), cert. denied, 442 U.S. 931 (1979); United States v. Moton, 493 F.2d 30, 32 (5th Cir. 1974); United States v. Leach, 429 F.2d 956, 962 (8th

Cir. 1970), cert. denied, 402 U.S. 986 (1971); Jackson v. United States, 395 F.2d 615, 619 (D.C. Cir. 1968); Talbot v. Nelson, 390 F.2d 801, 803 (9th Cir.), cert. denied, 393 U.S. 868 (1968); United States v. Wolk, 398 F. Supp. 405, 414 (E.D. Pa. 1975). Moreover, it is well-settled in this jurisdiction that a trial judge has "broad discretion" under Rule 403 of the Federal Rules of Evidence in balancing the probative value against the potential prejudicial effect of relevant evidence. United States v. Hans, No. 83-5447 (3d Cir. March 5, 1984) at 5; United States v. Clifford, 704 F.2d 86, 89 (3d Cir. 1983); Grant, supra, at 4.

The point of vehicle impact was in dispute at trial. The photograph entitled "Government Exhibit Three" featured a "manhole" which was specifically referred to as a point of impact reference by an investigating police officer and it therefore contained significant probative value. Moreover, the photograph was relevant to the jury's determination of whether or not the defendant acted in "disregard for the safety of others" by its close depiction of the full extent of damage to the victims' vehicle.

The defendant cites United States v. Brady, 579 F.2d 1121 (9th Cir. 1978), cert. denied, 439 U.S. 1074 (1979) and Ryan v. United Parcel Service, 205 F.2d 362 (2d Cir. 1953) in support of his argument that admission of the photograph was

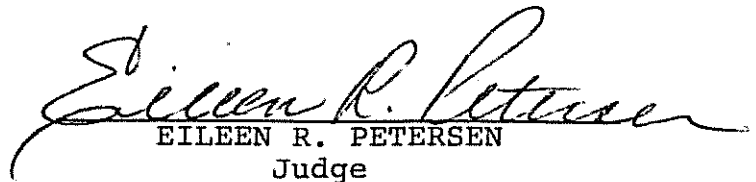
unduly prejudicial and inflammatory. However, neither of these cases support the defendant's contention. In Brady, supra, at 1129, a voluntary manslaughter case, the Court held that a photograph of a body "is inadmissible only when it is of such gruesome and horrifying nature that its probative value is outweighed by the danger of inflaming the jury." The Court concluded that the trial judge did not abuse his discretion in admitting into evidence photographs of the decedent lying on the floor with a "recently battered, bloodied and bruised" face. See also Holmes, supra, at 169 (admission of color photograph showing bloody condition of victim upheld); Brady, supra, at 361-62 (admission of photographs depicting three victims lying on the floor in pools of their own blood upheld); United States v. Odom, 348 F.Supp. 889, 894 (M.D. Pa. 1972), aff'd without opinion, 475 F.2d 1397 (3d Cir.), cert. denied, 414 U.S. 836 (1973) (color photographs of victim's body depicting stab wounds admissible).

The Ryan case involved a wrongful death action where the issues were negligence and contributory negligence. Two photographs "show[ing] clearly" the damage to the plaintiff's vehicle were admitted into evidence. The Court ruled that it was error for the trial judge to admit a third photograph showing the plaintiff's body, "hanging out of the doorway of

the car, with his head below the runningboard and almost on the ground, and a condition of the head which was either blood or an opening of the skull." It is apparent that the Court based its decision on the absence of any probative value of the photograph and on its overly inflammatory nature.

In the case at bar, the admitted photograph was not so gruesome or horrifying as to be unduly prejudicial and inflammatory. The photograph does show the slumped heads of the victims inside of the vehicle with trickles of blood on the face of one of them. However, the photograph is in black and white and it depicts only the head of one victim and one-half of the head of the other victim (not their full bodies). Moreover, the amount of blood shown is relatively slight.

Accordingly, this Court finds that the probative value of the photograph is outweighed by any slightly prejudicial effect it may have had on the jury.


EILEEN R. PETERSEN
Judge