Not For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

RANDOLPH A. DUNLOP,	)	**S. Ct. Crim. No. 2008-037**
	)	Re: Super. Ct. Crim. No. 045/2008
Appellant/Defendant,	)	
	)	
v.	)	
	)	
PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	
Appellee/Plaintiff.	)	
	)	

Appeal from the Superior Court of the Virgin Islands
Argued: July 8, 2009
Filed: September 15, 2009

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

ATTORNEYS:

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OPINION OF THE COURT

Hodge, Chief Justice.

Appellant Randolph A. Dunlop (hereafter "Dunlop") appeals from the Superior Court's May 5, 2008 oral order, memorialized in a May 8, 2008 written judgment and commitment, adjudicating him guilty of simple assault. For the reasons that follow, we shall affirm Dunlop's conviction but remand the matter for re-sentencing.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case stems from a series of incidents that occurred on January 4, 2008, when Megal Brooks, Sr., (hereafter "Brooks")[1] and his baby daughter visited the basketball court at the Jane E. Tuitt School on St. Thomas. Upon arriving at the basketball court, Brooks observed his minor son, Megal "Lito" Brooks, Jr., (hereafter "Lito")[2] playing dominos with Ramond Percival (hereafter "Ramond"),[3] a high school student. Brooks, whose family had a history of conflict with Ramond's family, approached the table and demanded that Ramond stop playing with his dominos. Ramond stopped playing the game, but he and Brooks began to exchange threats and insults, which culminated in Ramond pushing Brooks while Ramond was attempting to retreat. (J.A. at 206.) During this confrontation, Brooks told Ramond that Ramond's mother, Etta Edwards (hereafter "Edwards"), "is an adult" and "if she messes with me, is she I will deal with." (J.A. at 49-50.) Ramond responded by stating "you goin' hit my mother," (J.A. at 50), and, together with his younger brother, Rafus Percival (hereafter "Rafus"), walked to a white van—where Edwards was seated as a passenger—and informed her of the incident. Edwards, along with Ramond and Rafus, approached Brooks while he was walking home from the basketball court, and began to threaten him with her cane, which she uses to walk.

While Brooks and Edwards argued in front of Brooks's home, Rafus brought Dunlop—his older cousin—to the scene. Dunlop approached Brooks and told him that "[y]ou ain't going to hit no woman here tonight." (J.A. at 53.) Edwards then began to swing her cane in Brooks's

[1] The parties' briefs, the People's criminal complaint, and the trial transcript are inconsistent as to whether the Brooks's first name is spelled "Megal" or "Miguel."

[2] The parties' briefs and the trial transcript are inconsistent as to whether the Lito's first name is spelled "Megal" or "Miguel."

[3] The parties' briefs, the People's criminal complaint, and the trial transcript are inconsistent as to whether the elder Percival brother's first name is spelled "Ramond" or "Raymond."

face, at which point Brooks told her "you swinging the cane, but don't make the mistake and hit me." (J.A. at 51.) Lito, concerned that the situation may escalate further, asked Dunlop to "hold it down," at which point Dunlop shoved Lito to the side. (J.A. at 152-53.) Dunlop, Brooks, and the witnesses to their altercation dispute what happened at this point, with Dunlop and his relatives stating that Brooks punched or pushed Dunlop, while Brooks and Lito contend that Brooks only asked Dunlop why he pushed his son. However, it is not in dispute that Dunlop subsequently attempted to kick Brooks and, in the process of evading Dunlop's kick, Brooks fell to the ground, at which point Dunlop began to punch him in the face. The participants and witnesses also disagree as to Ramond's involvement, with some stating that Ramond joined Dunlop in his attack on Brooks shortly after Brooks fell to the ground, while others contend that Ramond tripped and fell on top of Dunlop, who was on top of Brooks at the time. The altercation ended when Brooks's wife broke up the fight by pulling the men off of her husband. After getting up from the ground, Brooks realized that his leg was bleeding.

On January 28, 2008, the People of the Virgin Islands (hereafter "People") filed a criminal complaint against Dunlop and Ramond, which charged Dunlop and Ramond with misdemeanor simple assault in violation of title 14, section 299(1) of the Virgin Islands Code and further charged Dunlop with misdemeanor disturbing the peace in violation of title 14, section 622(1). The Superior Court invoked title 14, section 4 of the Virgin Islands Code[4] in a March 5, 2008 order and scheduled the matter for a bench trial, which was held on March 25,

[4] This statute reads, in its entirety:

> In misdemeanor cases only, trial judges are authorized to limit the term of imprisonment to six months in prison; in which event, the defendant may be tried by the court, except in cases where a mandatory sentence is imposed.

V.I. CODE ANN. tit. 14, § 4 (1996).

2008. After hearing the People's case, the Superior Court dismissed the disturbing the peace charge against Dunlop. At the end of the bench trial, the Superior Court acquitted Ramond, but found Dunlop guilty of simple assault. Dunlop filed a post-trial motion for judgment of acquittal or new trial on April 1, 2008, which the Superior Court orally denied at Dunlop's May 5, 2008 sentencing hearing. At the May 5, 2008 hearing, the Superior Court sentenced Dunlop to six months incarceration, with all but seven days suspended, and gave him credit for seven days time served. The Superior Court also sentenced Dunlop to serve eighteen months of supervised probation. Dunlop filed his notice of appeal on May 6, 2008, and the Superior Court memorialized its oral order in a May 8, 2009 written order.

II. DISCUSSION

A. Jurisdiction and Standard of Review

"The Supreme Court shall have jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law." V.I. CODE ANN. tit. 4 § 32(a) (Supp. 2007). The written order sentencing Dunlop was entered on May 8, 2008, and Dunlop's notice of appeal was filed on May 6, 2008. "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." V.I.S.CT.R. 5(b)(1). Accordingly, Dunlop's notice of appeal was timely filed. *See id.*

"When appellants challenge the sufficiency of the evidence presented at trial, it is well established that, in a review following conviction, all issues of credibility within the province of the [trier of fact] must be viewed in the light most favorable to the government." *Latalladi v. People*, S.Ct. Crim. No. 2007-090, 2009 WL 357943, at *5 (V.I. Feb. 11, 2009) (quoting *United States v. Gonzalez*, 918 F.2d 1129, 1132 (3d Cir. 1990)). "The appellate court 'must affirm the

conviction[] if a rational trier of fact could have found the defendant[] guilty beyond a reasonable doubt and the conviction[is] supported by substantial evidence.'" *Id.* (quoting *Gonzalez*, 918 F.2d at 1132). However, "[t]his evidence 'does not need to be inconsistent with every conclusion save that of guilt' in order to sustain the verdict." *Id.* (quoting *United States v. Allard*, 240 F.2d 840, 841 (3d Cir. 1957)). Thus, "[a]n appellant who seeks to overturn a conviction on insufficiency of the evidence grounds bears 'a very heavy burden.'" *Id.* (quoting *United States v. Losada*, 674 F.2d 167, 173 (2d Cir. 1982)).

The standard of review for this Court's examination of the Superior Court's application of law is plenary. *St. Thomas-St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007). However, the trial court's decisions regarding the admissibility of evidence is reviewed for abuse of discretion. *Corriette v. Morales*, S.Ct. Civ. No. 2007-075, 2008 WL 2998725, at *2 (V.I. July 14, 2008). Likewise, this Court reviews the trial court's denial of a motion for a new trial for abuse of discretion unless it is based on application of a legal precept, in which case this Court exercises plenary review. *Smith v. Holtz*, 210 F.3d 186, 200 (3d Cir. 2000).

B. The Evidence Was Sufficient to Sustain Dunlop's Conviction for Simple Assault

Dunlop argues that the evidence is not sufficient to sustain a conviction for simple assault because the People failed to prove beyond a reasonable doubt that Dunlop did not act in self-defense or defense of others during his confrontation with Brooks.[5] Specifically, Dunlop contends that the People never disproved his contention that he reasonably believed that Brooks was going to assault him or Edwards if he did not use force to prevent the attack, and thus failed

[5] Sections 41, 42, 43, 44, and 293 of title 14 of the Virgin Islands Code define the use of force in self-defense. *See* 14 V.I.C. § 41-43, 293 (1996); 14 V.I.C. § 44 (2008 Supp.).

to prove that his violent acts were both unlawful and made with the intent to injure Brooks.[6]

This Court disagrees that the evidence was not sufficient to sustain Dunlop's conviction. At trial, Brooks testified that Dunlop—who Brooks had not met prior to that day—approached him in front of his home after Edwards began swinging her cane at him. According to Brooks, Dunlop initiated physical contact by shoving Lito after Lito asked Dunlop to "hold it down." (J.A. at 55.) Brooks further testified that, after he asked Dunlop why he pushed Lito, Dunlop responded by "jump[ing] up in the air to kick [him]," resulting in Brooks stumbling and falling onto the ground, at which point Dunlop "jump[ed] on [him]" and "start[ed] fisting [him] in [his] face." (J.A. at 55-56; 58.) Lito corroborated Brooks's version of events through his testimony, explaining that Dunlop had pushed him after he told him to hold it down and then attempted to kick his father, with Ramond and Dunlop "beating [Brooks] up" after Brooks fell to the ground in the process of evading the kick. (J.A. at 84-86; 109-11.) Significantly, Lito testified that Brooks never punched Dunlop or anyone else prior to Dunlop's attempted kick and that Brooks was unable to hit anyone while Dunlop and Ramond were punching him in the face "because he trip[ped] and he couldn't do anything." (J.A. at 96-98.)

The trial transcript does reflect that some witnesses called by the defense described the incident in terms more favorable to Dunlop. For instance, Cinique Bonelli (hereafter "Bonelli")—Dunlop's fiancé—testified that she heard Brooks tell Edwards, "I am going to F you up," (J.A. at 131), and that she saw Brooks punch Dunlop after he "moved Lito to the side." (J.A. at 133.) Bonelli further testified that Dunlop responded to the punch by attempting to kick Brooks, and that Brooks, Dunlop, and Ramond struggled for about ten minutes, with the last five

[6] The Virgin Islands Code defines assault and battery as "any unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used." 14 V.I.C. § 292 (1996).

minutes consisting of Dunlop and Ramond being in a "pile" on top of Brooks. (J.A. at 134-36.) Likewise, Dunlop himself testified that he heard Brooks tell Edwards that he wanted to fight her, that he "pushed [Lito] on the side a little bit" after Lito told him to "hold it down," and that Brooks punched him in the face after he made contact with Lito. (J.A. at 152-53; 163.) Dunlop further testified that he "grabbed [Brooks] and push[ed] him on top of the step" when Brooks "stumble[d] back" after he attempted to kick him, that he "went on top of him" and "h[e]ld him," and that he "punched him twice so he can [sic] stay down." (J.A. at 153.) Dunlop also stated that he punched Brooks when he was down because he was attempting to grab the beads in Dunlop's hair while "trying to get back up." (J.A. at 154.) Moreover, Dunlop stated that Ramond had fallen on top of him while he was on the ground with Brooks. (J.A. at 154.)

Other defense witnesses, however, contradicted the testimony proffered by Dunlop and Bonelli. Notably, Rafus expressly stated at trial that Brooks did not punch Dunlop in the face, but had only "chucked off" him by putting his hand in his face and pushing after Dunlop had pushed Lito. (J.A. at 197.) Likewise, Edwards only testified that Brooks initiated physical contact by "c[oming] up to [Dunlop] and connect[ing] with his right hand against [Dunlop]'s left cheek," at which point "[Dunlop] start[ed] to throw and [Brooks] went down." (J.A. at 261-62; 275.) Furthermore, although Ramond testified to largely the same facts as Dunlop,[7] he also stated that it seemed that Brooks had punched Dunlop because it appeared that Dunlop intended to hit Lito instead of only pushing him. (J.A. at 243.)

The evidence in the record indicates that the People introduced evidence that, when viewed in the light most favorable to the People, established each element of the crime of simple

[7] Ramond stated at trial that Brooks had punched Dunlop after Dunlop pushed Lito, that Brooks fell down after Dunlop attempted to kick him, and that Ramond fell on top of Dunlop after tripping on a step. (J.A. at 215-17; 241.)

assault beyond a reasonable doubt. While Dunlop, Bonelli, Rafus, Ramond, and Edwards all testified that Brooks had made some sort of physical contact with Dunlop before Dunlop attempted to kick Brooks, a reasonable trier of fact could deem Brooks's and Lito's testimony that Brooks did not hit Dunlop as more credible—particularly given the contradictions in the defense witnesses' testimony—and find that Dunlop, and not Brooks, was the initial aggressor. Additionally, it is well established that the mere fact that a greater number of witnesses testified to Dunlop's version of the facts does not require the trier of fact to lend greater credibility to their testimony. *See United States v. Handy*, 454 F.2d 885, 888 (9th Cir. 1971) ("The weight of the evidence is not determined by the number of witnesses who testify for either side, but by the quality of their testimony."); *Eaton v. United States*, 408 F.2d 525, 530 (5th Cir. 1969); *see also* 29A Am. Jur. 2d Evidence § 1363 (collecting cases). Furthermore, as the Superior Court correctly noted in its findings of fact, Dunlop's own admission that he responded to Lito's request to cool down by pushing him, allowed the trier of fact to reasonably infer that Dunlop had arrived at the scene with the intent to start a fight with Brooks. *See In re N.T.S.*, 528 S.E.2d 876, 878 (Ga. Ct. App. 2000). Consequently, we find the evidence sufficient to sustain Dunlop's conviction.

C. The Superior Court Did Not Relieve the People of its Burden of Proof

Dunlop contends that the trial judge, by prefacing her findings of fact and conclusions of law with the statement that "this is clearly a case of who to believe," (J.A. at 302), impermissibly relieved the People of their burden to prove all elements of the charged offense beyond a reasonable doubt. However, when she subsequently rendered her decision, the trial judge expressly stated that "the Court finds that the Government *has failed to prove beyond a reasonable doubt* Count 3 with respect to [Ramond]," that "with respect to Mr. Dunlop, the

Court does find that the Government *has proved beyond a reasonable doubt*[] that he was the aggressor," and that "the Court does find the defendant, Randolph Dunlop, *guilty beyond a reasonable doubt*. . . ." (J.A. at 308-10 (emphases added).) While Dunlop cites several cases in which courts have reversed convictions on the basis of judges making similar statements in their jury instructions, appellate courts apply a different standard to bench trials and disregard a judge's off-the-cuff remarks or oral misstatements when the record otherwise reflects that the judge applied the correct legal standard. *See United States v. Brobst*, 558 F.3d 982, 999-1000 (9th Cir. March 9, 2009) (notwithstanding the trial judge's statement to defense counsel during bench trial concerning the defendant's burden to produce evidence, in rendering decision, the judge expressly held that government proved charges beyond a reasonable doubt). Accordingly, it is not necessary for this Court to assess the appropriateness of the trial judge's comment, since it would, at worst, constitute a harmless error in this context.

D. The Superior Court's Evidentiary Decisions Do Not Warrant Reversal

Dunlop asserts, as an additional point of error, that the Superior Court erred in allowing, over his objection, the People's counsel to question Ramond and Edwards as to whether they believed certain other witnesses were telling the truth. Appellate courts, however, have consistently held that "a judge, sitting as trier of fact, is presumed to have rested his verdict only on the admissible evidence before him and to have disregarded that which is inadmissible." *United States v. Cardenas*, 9 F.3d 1139, 1156 (5th Cir. 1993). *See also Greiner v. Chicago & E.I.R. Co.*, 360 F.2d 891, 895 (7th Cir. 1966) (holding that erroneous admission of evidence at bench trial is, "[a]t worst . . . harmless error" when judge does not make findings of fact based on the evidence); *State v. Holiday*, 745 N.W.2d 556, 568 (Minn. 2008) (explaining that erroneous admission of hearsay testimony, while potentially requiring a new trial if case had been heard by

a jury, was harmless in a bench trial when court did not reference testimony in its findings of fact). Consequently, since the Superior Court's findings of fact and conclusions of law do not reference any of the purportedly inadmissible testimony, the trial judge's evidentiary rulings—whether erroneous or not—cannot form the basis for a new trial.

E. The Superior Court Did Not Err in Denying Dunlop's Motion for a New Trial

Dunlop, as his final enumerated issue on appeal, argues that the Superior Court abused its discretion in denying his motion for a new trial pursuant to Superior Court Rule 135.[8] Dunlop correctly notes that, unlike a challenge to the sufficiency of the evidence, a trial court faced with a motion for a new trial is not required to view the evidence in the light most favorable to the People, but may weigh the evidence and order a new trial if it is in the interests of justice. *See United States v. Charles*, 949 F.Supp. 365, 367-68 (D.V.I. 1996). According to Dunlop, the Superior Court should have granted a new trial because the guilty verdict "was against the weight of the evidence and . . . constituted a miscarriage of justice." (Appellant's Br. at 22.) Specifically, Dunlop argues that "the trial court recognized that Megal Brooks was the person responsible for the events of that date," that "[t]he weight of the evidence clearly showed that Mr. Brooks, not Mr. Dunlop, was the aggressor," and that the trial court erred in crediting the testimony of defense witnesses to acquit Ramond but rejecting the testimony of those same witnesses to find Dunlop guilty. (*Id.*) However, because an order denying a motion for a new trial on this ground may only be reversed if the trial court has abused its discretion, appellate courts have "routinely affirm[ed] the denial of such new-trial motions once they have upheld the

[8] Rule 135 provides that "[t]he court may grant a new trial to a defendant if required in the interest of justice. The court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment." Super. Ct. R. 135.

sufficiency of the evidence." *See United States v. Cesareo-Ayala,*, No. 08-3201, 2009 WL 2450288, at *5 (10th Cir. Aug. 12, 2009) ("[W]e doubt that we could ever find an abuse of discretion by the district court in denying a new-trial motion based on the weight of the evidence when the evidence was sufficient to support the verdict."); *see also United States v. Andrews*, No. 08-1756, 2009 WL 2171227, at *2 n.5 (3d Cir. July 22, 2009) (unpublished) ("Andrews also contends that she is entitled to a new trial because the jury's verdict was against the weight of the evidence. We reject this argument on the same ground as the previous one—the evidence presented at trial supported the verdict."); *United States v. Awala*, 260 Fed.Appx. 469, 471 (3d Cir. 2008) (unpublished) (rejecting challenges to both weight and sufficiency of the evidence when "the evidence introduced [wa]s sufficient to support the verdict."); *United States v. Bullock*, 550 F.3d 247, 251 (2d Cir. 2008); *United States v. Hunt*, 526 F.3d 739, 744 n.1 (11th Cir. 2008); *United States v. Rodriguez*, 457 F.3d 109, 118-19 (1st Cir. 2006); *United States v. LeGrand*, 468 F.3d 1077, 1088 (8th Cir. 2006). *Cf. United States v. Davis*, 397 F.3d 173, 181 (3d Cir. 2005) ("Because the power to grant a motion for a new trial is broader than the court's power to grant a motion for a judgment of acquittal, our determination that defendants are not entitled to a new trial means that they are similarly not entitled to a judgment of acquittal.") Accordingly, because the evidence was sufficient to convict Dunlop of simple assault, the trial court did not abuse its discretion in denying Dunlop's motion for a new trial based on the weight of the evidence.

Nevertheless, Dunlop's contention that the Superior Court made a finding that Brooks was the aggressor, yet still found Dunlop guilty, represents a ground for a new trial that is distinct from challenging the weight of the evidence, and our review of this contention would not be subsumed in a sufficiency of the evidence analysis. However, based on the record before this

Court, we do not find that the Superior Court abused its discretion in denying Dunlop a new trial on this ground. Although the Superior Court did find that Brooks was an aggressor, it did so solely in the context of the altercation between Brooks and Ramond on the basketball court, in which Ramond pushed Brooks—who had been following him and "ke[pt] coming up in [his] face"—while attempting to retreat from the area. (J.A. at 205-06; 304-07.) Significantly, it was undisputed at trial that Dunlop was not present on the basketball court and that he did not become involved in the conflict until he confronted Brooks at his home. Consequently, the trial court's finding that Dunlop was the aggressor in his confrontation with Brooks is not inconsistent with its finding that Brooks was an aggressor to Ramond in their earlier encounter.[9]

F. Dunlop's Sentence Constitutes an Illegal Split Sentence

The record indicates that the trial judge sentenced Dunlop to six months of incarceration, with all but seven days suspended, and eighteen months of supervised probation, even though it had previously invoked title 14, section 4 of the Virgin Islands Code to limit Dunlop's maximum potential punishment to six months incarceration. While Dunlop has not raised the legality of his sentence as an issue on appeal,[10] it is well established that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed R. Crim. P. 52(b). "Plain error is defined as those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *Phillips v. People*, S.Ct. Crim. No. 2007-037, 2009 WL 707182, at *3 (V.I. Mar. 12, 2009) (quoting *Sanchez v. Gov't*, 921 F.Supp. 297, 300 (D.V.I.

[9] Furthermore, appellate courts have held that, although it is "improper" for a judge sitting in place of a jury in a criminal case to display leniency towards a particular defendant in a multi-defendant prosecution through inconsistent findings of fact, such a result is not so irrational as to entitle the defendants who were not shown leniency to a new trial. *See Commonwealth v. Gonzalez*, 892 N.E.2d 255, 265 n.11 (Mass. 2008).

[10] The record indicates that Dunlop's counsel brought this issue to the attention of the trial judge, but was told that "probation . . . has nothing to do with the maximum sentence, incarcerative sentence." (J.A. at 362-63.)

App. Div. 1996)). *See also Johnson v. United States*, 520 U.S. 461, 466-67, 117 S.Ct. 1544, 1549, 137 L.Ed.2d 718 (1997).

This Court has consistently characterized a sentence in which the combined period of incarceration and probation exceeds the maximum period of incarceration authorized by law as an illegal split sentence. *See Cheatham v. People*, S.Ct. Crim. No. 2008-026, 2009 WL 981079, at *2-3 (V.I. Mar. 27, 2009) (holding that sentence imposing six months incarceration and six months probation after trial court had invoked 14 V.I.C. § 4 is illegal); *St. Louis v. People*, S.Ct. Crim. No. 2007-086, 2008 WL 5605712, at *3-4 (V.I. Oct. 10, 2008) (holding that sentence ordering four years of incarceration followed by two years of probation is illegal when maximum sentence for offense is statutorily set at five years). Furthermore, appellate courts have consistently held that illegal sentences, by their very nature, fulfill the requirements of the plain error test in that they both affect a criminal defendant's substantial rights and "seriously affect the fairness, integrity or public reputation of judicial proceedings." *See United States v. Moyer*, 282 F.3d 1311, 1319 (10th Cir. 2002) (quoting *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)); *United States v. Sias*, 227 F.3d 244, 246 (5th Cir. 2000); *United States v. Barajas-Nunez*, 91 F.3d 826, 833 (6th Cir. 1996); *United States v. Rodriguez*, 938 F.2d 319, 322 (1st Cir. 1991). Consequently, this Court shall *sua sponte* vacate Dunlop's sentence and remand the matter to the Superior Court so that it may impose a lawful sentence.

III. CONCLUSION

Since evidence was introduced at Dunlop's trial that, when viewed in the light most favorable to the People, established beyond a reasonable doubt that Dunlop was the aggressor in his fight with Brooks, the evidence was sufficient to sustain Dunlop's conviction for simple assault. Furthermore, since Dunlop was tried in a bench trial rather than before a jury, any off-

the-cuff statements or erroneous evidentiary rulings made by the trial judge cannot form the basis for a new trial when the record indicates that the judge applied the correct legal standard and did not base her findings of fact on the challenged testimony. In addition, this Court shall not reverse the trial court's order denying Dunlop's motion for a new trial premised on a challenge to the weight of the evidence when the record demonstrates that the evidence was sufficient to sustain Dunlop's conviction. However, because the trial court committed a plain error when it sentenced Dunlop to a combined period of incarceration and probation greater than the maximum sentence authorized by statute, this Court shall *sua sponte* remand the matter for re-sentencing.

Dated this 15th day of September, 2009.

FOR THE COURT:

_____/s/_____
RHYS S. HODGE
Chief Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court