

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX AT KINGSHILL**

GOVERNMENT OF THE VIRGIN ISLANDS,)

Plaintiff,)

vs.)

ALAN MOTTA,)

Defendant.)

CRIMINAL NO. 260/2001

**ROBBERY IN THE FIRST
DEGREE/PRINCIPALS;
ATTEMPTED RAPE IN THE
FIRST DEGREE/PRINCIPALS
POSSESSION OF A
DANGEROUS WEAPON
DURING THE COMMISSION
OF A CRIME OF VIOLENCE.**

NOT FOR PUBLICATION

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CABRET, P.J.

MEMORANDUM OPINION
(September 20, 2002)

THIS MATTER is before the Court on the Defendant's post-trial motion for Judgment of Acquittal or, alternatively, for a New Trial and the Government's opposition. For the reasons more fully stated below, the defendant's motion will be denied in every respect.

I. FACTS AND PROCEDURAL POSTURE

On September 12, 2001, Kimberly Urgent ("Urgent" or "Victim"), an employee of the Virgin Islands Water and Power Authority, was accosted at gunpoint by two individuals as she attempted to read the meters in Estate Mary's Fancy. Urgent alleges the two men first searched her vehicle and then attempted to rape her, tearing her blouse, bra and panties. However, they

were unsuccessful in fully removing her pants which, she testified, fit snugly to her body. The men stopped the attack only after Urgent's cellular phone rang and she warned them that her supervisor was on his way to the area to check her whereabouts.

Urgent described her attackers to police and, based on that description, the defendant and another individual were picked up and photographed. Urgent subsequently identified the Defendant, Alan Motta ("Motta"), as the perpetrator who had held her at gunpoint while his accomplice searched her vehicle and then attempted to remove her clothing. Motta was charged, *inter alia*, with first degree robbery and attempted rape under the Virgin Islands aiding and abetting statute. At the time of his trial, the other perpetrator had not yet been charged.

Motta now challenges his conviction on the following grounds: 1) that there was an impermissible variance in the elements of the crime charged in Counts I and II of the Information and the jury instructions; 2) there was insufficient evidence to sustain the charge of attempted rape; 3) statements of the second perpetrator were improperly admitted against the defendant, where no conspiracy was charged; 4) a mistrial should have been declared after the victim collapsed during trial; and 5) the court erred in permitting the government to amend its Information two weeks prior to trial. Each argument will be addressed in turn.

II. DISCUSSION

In reviewing a motion for judgment of acquittal, the Court must determine, after viewing the evidence in the light most favorable to the Government, whether a rational trier of fact could have found from the evidence presented that the government proved each essential element of the crimes charged beyond a reasonable doubt. *See*, FED. R. CRIM. P. 29; *see also United States v. Anderson*, 108 F.3d 478 (3d Cir. 1997); *United States v. Koenig*, 40 V.I. 440 (D.V.I. 1990). In viewing the evidence, the court makes no differentiation between direct or circumstantial

evidence. *See, United States v. Charles*, 35 V.I. 306, 308-09 (D.V.I. 1996). Rather, the Court views the evidence as a whole and disturbs the jury's verdict only if it concludes, after considering the totality of the evidence, that the jury would have had to have a reasonable doubt as to the defendant's guilt. *Id.*; *Government of the V.I. v. Greene*, 708 F.2d 113 (3d Cir.), *cert. denied*, 104 S. Ct. 1004 (1983).

Moreover, the Court may not judge the credibility of witnesses or the weight of the evidence or substitute its judgment for that of the jury in this regard. *See, Charles*, 35 V.I. at 309. Therefore, the fact that there was differing testimony on an issue is not a proper basis for granting a motion based on insufficiency of the evidence but, rather, raises a question of credibility reserved for the jury. *See, Government of the V.I. v. Isaac*, 50 F.3d 1175 (3d Cir. 1995).

A. Jury Instructions Were Proper

The defendant's first point of error is that the Court's jury instructions for Counts I and II were impermissibly at odds with the charging instrument, because they identified the defendant as one who "aided and abetted another," rather than one who "was aided and abetted by someone else."

First, the Court notes that the defendant raised no objection to the jury instructions at trial, despite being given ample opportunity to do so prior to delivery of the instructions, *See, Trial Tr. Vol. II* at 58-59, 50-71, 171-72, 176, to afford the Court an opportunity to correct any perceived errors prior to the verdict. *See, FED. R. CRIM. P. 30; see also United States v. Graham*, 758 F.2d 879 (3d Cir. 1985). Therefore, any error in the instructions would warrant an acquittal or new trial in this instance only if the Court determines such error resulted in "manifest

injustice.” *Graham*, 758 F.2d at 883; *see also United States v. Stansfield*, 101 F.3d 909 (3d Cir. 1996) (error must have affected the outcome of the trial or seriously affected the fairness or integrity of the proceeding).

Specifically, Defendant argues that because the Information charged him with committing the crimes “while aided and abetted by another person,” the language in the jury instructions that he must be found to have “aided and abetted another” introduced additional elements not charged, resulting in his conviction for uncharged crimes. Defendant’s semantic argument makes short thrift of the aiding and abetting statute and belies the purpose of accomplice liability.

In addition to the substantive robbery and rape statutes, Motta was charged in Counts I and II pursuant to Title 14, Section 11. That statute provides, in pertinent part:

Whoever commits a crime or offense or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. . .

Whoever willfully causes an act to be done which if directly performed by him or another person would be a crime or offense, is punishable as a principal. . .

Persons within this section shall be prosecuted and tried as principals, and no fact need be alleged in the information against them other than is required in the information against the principal.

V.I. Code Ann. tit. 14, §§ 11 (a), (b), (c) (1996) (emphases added). First, as the plain language of the statute makes clear, the law makes no distinction between the direct actor and the aider/abettor whose conduct helps to make the crime possible. Rather, the statute’s main import is to remove any such distinction and impose equal culpability on those who directly commit crimes themselves and those who, through their conduct, make it possible for another person to do so. Thus, for the purposes of criminal culpability, the actor and the aider/abettor stand in the same shoes, and both may be regarded as principals, as if each directly committed the crime, so

long as they share some common purpose or intent to have the crime committed. *See*, 14 V.I.C.

§ 11. So entwined are the acts of a principal actor and his aider/abettor, that the law sees no injustice in the conviction of one who merely assisted in the crime as an aider/abettor, even where the direct actor is never convicted – or even where he is acquitted of the crime. *See e.g.*, *United States v. Hodge*, 211 F.3d 74, 77 (3d Cir. 2000); *United States v. Standefer*, 610 F.2d 1076, 1090 (3d Cir. 1979), *aff'd*, 447 U.S. 10, 15-20 (1980).

In this regard, the jury was instructed that it could find the defendant guilty on Counts I and II if it found either that he committed the crime or aided and abetted another person who did so; the instruction mirrored the language of the statute.¹ The Court's instructions additionally

¹ The jury was instructed on aiding and abetting as follows:

A person may violate the law even though he or she does not personally do each and every act constituting the crime if that person aided and abetted in the commission of the offense. Section 11, of Title 14 of the Virgin Islands Code provides that whoever commits a crime or offense or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. Before the defendant may be found guilty of aiding and abetting others in the commission of a crime, the government must prove beyond a reasonable doubt that the defendant:

- 1) Knew that the crime was to be committed or was being committed;
- 2) Knowingly did some act for the purpose of aiding, counseling, commanding, encouraging, or procuring the commission of that crime, and;
- 3) Acted, with the intention of causing the crime to be committed.

Merely being present at the scene of the crime, or merely knowing that a crime is being committed, or is about to be committed, is not sufficient conduct for you to find that a defendant aided or abetted the commission of that crime. Rather, the government must prove that the defendant knowingly associated himself with the crime in some way as a participant - someone who wanted the crime to be committed - not as a mere spectator.

Court's Instruction No. 29. The jury was additionally instructed on the proof required to convict the defendant on Counts I and II:

ESSENTIAL ELEMENTS OF ROBBERY IN THE FIRST DEGREE/PRINCIPALS

In order to sustain its burden of proof for the crime of Robbery in the First Degree, as charged in Count I of the Information, the government must prove each of the following elements beyond a reasonable doubt:

- 1) That the defendant unlawfully took personal property from another by force or fear;
- 2) That the defendant had the specific intent to permanently deprive the individual of that property;
- 3) That during the alleged acts the defendant or another perpetrator of the crime displayed, used or threatened the use of a dangerous weapon;

made clear that the defendant may be found guilty, as charged, if the jury found from the evidence that he committed the alleged acts or aided another person in doing so. *See, supra* note 1. Given those instructions and the principles stated above, it is difficult to see the legal significance Defendant attempts to cast on the phrases “while aided and abetted by another person” versus “aided and abetted another.” Regardless of the application of each phrase, the jury would have had to find that the crime was carried out by the defendant or another individual who shared the same criminal intent and purpose.

4) That the act occurred on September 12, 2001 in the judicial district of St. Croix.

If you decide that the government has proved each element beyond a reasonable doubt, then you must find the defendant guilty. Otherwise you must find the defendant not guilty.

Court's Instruction No. 32.

**ESSENTIAL ELEMENTS OF ATTEMPTED RAPE IN THE FIRST DEGREE/
PRINCIPALS**

To sustain its burden of proof for the crime of Attempted Rape in the First Degree, as charged in Count II of the Information, the government must first prove each of the following elements beyond a reasonable doubt:

- 1) That the defendant intended to perpetrate an act of sexual intercourse against Kimberly Urgent, or aided and abetted another person who had such intent;
- 2) Thereafter, that the defendant, or another person whom he was aiding and abetting, did an act constituting a substantial step toward the commission of that crime;
- 3) That, Kimberly Urgent's resistance was prevented by fear of immediate and great bodily harm which she had reasonable cause to believe would be inflicted upon her;
- 4) That the defendant acted with specific intent, or aided and abetted another person who had such intent; and
- 5) That the act occurred on September 12, 2001, in the judicial district of St. Croix.

Court's Instruction No. 36 (emphasis added). The jury was additionally instructed on Specific Intent which must be proved for the crimes charged in this case:

The crimes charged in this case are serious crimes which require proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the Government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

More importantly, given the equal culpability attributed to both the actor and one who assists him in accomplishing the crime, this Court is unpersuaded that the phrasing of the challenged jury instructions introduced new elements against which the defendant was unable to defend, resulting in substantial prejudice to the defendant's fundamental right to a fair trial or otherwise infecting the verdict. It also comes as no surprise that the defendant has cited no authority to support his argument regarding the legal significance, if any, of the manner in which the relevant jury instructions were phrased.

This Court cannot conclude that a new trial or acquittal is warranted under these circumstances.

B. Sufficiency of the Evidence for Attempted Rape

The defendant next challenges his conviction for the charge of attempted rape in the first degree/principals, arguing there was insufficient evidence to establish the defendant's intent to rape the victim or to support the jury's finding that he attempted to rape the victim. In support of this argument, Defendant asserts that the co-perpetrator's suggestion that they "have fun" does not evidence an intent to rape the victim, even if viewed with the perpetrators' conduct. Defendant further argues that, given the statutory definition of sexual intercourse,² as required for proof of rape, the evidence supporting his conviction was insufficient where it failed to establish an attempt to penetrate the victim's "vagina, vulva or labia". These arguments are without merit.

Here, the defendant was charged with attempted rape/principals, pursuant to Title 14, Sections 1701(3) (Rape in the First Degree), 331 (Attempt statute) and 11 (Principals). In

² "Sexual intercourse" was defined, pursuant to the rape statute, as "vaginal intercourse or any insertion, however slight, of a hand, finger or object into the vagina, vulva, or labia." Court's Instruction No. 35.

addition to the essential elements outlined in footnote 1, *supra*, and accomplice liability as stated in 14 V.I.C. § 11, the jury was instructed on the proof required for an attempted rape as follows:

The defendant, Alan Motta, is charged in Count II of the Information with Attempted Rape in the First Degree, in violation of Title 14, sections 1701(3), 331 and 11 of the Virgin Islands Code. Title 14, Section 331 of the Virgin Islands Code provides that whoever unsuccessfully attempts to commit an offense shall be punished.

The crime of Rape in the First Degree, as charged, is an act of sexual intercourse or sodomy with a person whose resistance is prevented by fear of immediate and great bodily harm which the person has reasonable cause to believe will be inflicted upon her. Therefore, an Attempted Rape in the First Degree occurs where there is an unsuccessful attempt to have sexual intercourse or sodomy with a person whose resistance is prevented by fear of immediate and great bodily harm which the person has reasonable cause to believe will be inflicted upon her.

Court's Instruction No. 33. The type of conduct which must be proved for an attempt crime was also additionally defined for the jury as follows:

A defendant may be found guilty of attempting to commit a crime even though he did not actually do all of the acts necessary in order to commit the crime. A defendant may not be found guilty, however, of attempting to commit any crime merely by thinking about it or even by making some plans or some preparation for the commission of a crime.

The difference between conduct which violates the law and conduct which does not violate the law, in this regard, is what is referred to as a "substantial step" towards the commission of a crime.

In determining whether or not the defendant took a "substantial step" towards the commission of a crime, you must consider all of the evidence admitted in the case concerning that defendant and the alleged commission of that crime.

In order to find the defendant guilty of committing the crime of attempted rape in the first degree, the government must prove beyond a reasonable doubt that the mental processes of the defendant, or another person whom the defendant aided and abetted, passed from the stage of thinking about the crime of rape in the first degree, to actually intending to commit that crime and that the physical process of the defendant, or another person whom the defendant aided and abetted, went beyond and passed from the state of mere preparation to some firm, clear, and undeniable action to accomplish that intent.

Court's Instruction No. 34. Therefore, the jury was fully apprised that a conviction for attempted rape, as charged, was supportable only by evidence beyond a reasonable doubt that the defendant intended to rape the victim and took a substantial step toward carrying out the intended crime, through some undeniable action, or knowingly did some act for the purpose of aiding or abetting another person in committing that crime.

The touchstone of an attempt crime is the absence of a completed crime which the defendant intended to commit and which he took steps toward committing. Intent may be proved by direct or circumstantial evidence from which the fact finder may draw reasonable inferences regarding the defendant's mental state, and the jury was so advised. There is no formula for determining what conduct sufficiently crosses the line for the purpose of attempt liability; rather, the determination of what constitutes a substantial step is to be made based on the facts and circumstances of each case and the crime. *See, e.g. People v. Childress*, 746 N.E.2d 783 (Ill.App. 2001). However, in the rape context, the determination of whether the defendant has taken a substantial step toward commission of the crime focuses "on what the person has done," or the course of conduct intended to culminate in the rape, rather than on "what remains to be done" to complete the crime. *Commonwealth v. Chance*, 458 A.2d 1311, 1374 (E.D.Pa. 1983). Thus, it has been said that:

The overt act that indicates a specific intent to commit rape must reach far enough toward accomplishing the desired result It need not be the last proximate act to the consummation of the offense attempted to be perpetrated, but must approach sufficiently near it to stand either as the first or some subsequent step in the direct movement towards commission of the offense.

75 C.J.S. *Rape* §§ 34, 35 (2002); *see also, Childress*, 746 N.E.2d 783 (a substantial step is one that puts the defendant in "dangerous proximity" to success).

This Court's research has uncovered no authority in this jurisdiction addressing the specific issue of whether a substantial step is shown for liability of an inchoate sexual offense under the facts presented here. However, cases decided by courts in other jurisdictions provide guidance for this Court's determination here. In *Commonwealth v. Pasley*, 743 A.2d 521 (Pa.Super. 1999), the defendant raised a similar challenge to the evidence of an attempted rape, where there was no evidence of a specific attempt to penetrate the victim. That court upheld the defendant's conviction, holding the fact that the defendant had thrown the victim on a bed, pushed her shirt and bra up to expose her breasts and attempted to unbutton her pants – amid strong resistance – was sufficient evidence that the defendant had taken a substantial step toward committing the rape. *Id.* (noting Defendant had stopped in his efforts only after the victim scratched and punched him until he bled).

Similarly, in deciding an analogous issue of whether there was sufficient evidence of an attempted rape to invoke the aggravating factor provision of the murder statute, the court in *State v. Menter*, 680 A.2d 800 (D.N.J.1995), found the substantial step requirement met where the defendant had partially unclothed the victim, pulled her underwear to her ankles and revealed her breasts. *Id.* (noting the crime of rape was foiled when the victim's nephew surprised the attacker; the victim was subsequently killed).

These authorities reflect the view that an attempted rape “does not begin with the act of penetration, but with the primary attack on the female, made for the purpose of carrying out the intent and . . . this intent may be formed at the very moment of the attack.” *State v. Swan*, 34 A.2d 734, 735 (N.J. 1943)(finding an attempted rape of murder victim, where her was clothing removed)(citations omitted); *see also*, *State v. Gonzales*, 783 P.2d 1239, 1243 (1989)(holding no evidence of an attempt to penetrate the victim required for proof of an attempted rape);

Commonwealth v. Martin, 452 A.2d 1066 (E.D.Pa. 1982)(substantial step found even where defendant abandoned crime to avoid detection, where Defendant grabbed victim, threatened to kill her and told her she would be raped). Proof of an attempt to rape, therefore, does not require actual touching or attempted penetration of the victim's genitalia, as Defendant contends, in the face of other evidence of an intent to commit that crime. *See, e.g. Childress*, 746 N.E. 2d 783 (finding substantial step made toward rape, despite fact that defendant and victim remained clothed and fact that defendant did not attempt to touch victim's genitalia, where defendant ripped victim's shirt and bra, unzipped her pants and threatened to kill her).

Here, the jury heard evidence that the defendant first placed a gun to the victim's head, forcing her down the knoll where she was reading a meter. *See*, Trial Tr. at 80-81. The defendant also demanded that the victim turn over her money and jewelry, which she did. *Id.* The evidence also established that the defendant continued to hold the victim at gunpoint while the other perpetrator searched her car. *Id.* at 83. After returning from the car, the perpetrator reported to the defendant that he had found only a cellular phone, and then suggested that they "have some fun" with her since she looked "sweet." *Id.* at 88-89. Following that suggestion, the defendant commanded the victim, still held at gunpoint, to lie down. *Id.* She did so. It was also established at trial that the defendant then continued to hold the victim at gunpoint while his co-perpetrator ripped her blouse, bra and panties and unbuckled her pants, trying to remove them. *Id.* at 89, 92-94. This is more than sufficient evidence from which a reasonable jury could have inferred that the defendant intended to rape the victim and took the necessary steps toward carrying out that crime or facilitating its commission.

C. Admissibility of Co-Conspirator's Statements

Defendant contends that statements made by his accomplice during the crime were improperly admitted at trial, where the accomplice was not charged and where no conspiracy was charged. The Government opposes this assertion, arguing the defendant need not be specifically charged with a conspiracy to invoke Federal Rule of Evidence 801(d)(2)(E). The Court agrees.

Under Federal Rule of Evidence 801(d)(2)(E), a statement “offered by a coconspirator of a party during the course and in furtherance of the conspiracy” is not deemed hearsay and is, therefore, admissible at trial. Although the rule speaks in terms of a “coconspirator,” the advisory committee notes to the 1974 amendment make clear that the rule is to be applied to statements of a “joint venturer”, regardless of whether a conspiracy is charged. FED. R. EVID. 801(d)(2)(E), advisory committee notes; *see also*, *United States v. Ellis*, 156 F.3d 493, 496 (3d Cir. 1998)(noting “well-settled” law that out-of-court statements may be admissible under Rule 801(d)(2)(E) even if the defendant is not formally charged with any conspiracy in the indictment) (citations omitted). Though no conspiracy need be charged, the trial court must first determine, by a preponderance of the evidence, that a joint undertaking or conspiracy existed between the declarant and the defendant and that the statement was made in furtherance of that conspiracy. *See*, *United States v. Gambino*, 926 F.2d 1355, 1361 (3d Cir. 1991). This may be shown by circumstantial evidence. *See*, *United States v. McGlory*, 968 F.2d 309, 333 (3d Cir. 1992); *see also*, *Government of V.I. v. Brathwaite*, 782 F.2d 399 (3d Cir. 1984). Moreover, the trial court’s failure to make “explicit” findings in this regard is not the kind of error warranting post-trial relief, where the Court’s findings are implicit in its decision or where the record supports a finding of conspiracy. *See*, *McGlory*, 968 F.2d at 334 n. 15.

In the instant case, the Government attempted at trial to admit the statements by the defendant's accomplice, through testimony by the victim. The defendant objected to the admission of the statement at trial, arguing – as he does here – that the statement was impermissible hearsay where a conspiracy had not been charged. *See*, Trial Tr. Vol. I, at 84-86. The Court initially sustained the hearsay objection, *see, id.* at 84, 85, and permitted both counsel to make arguments at sidebar. *See, id.* at 84-86. There, the Government made a proffer regarding the substance of the testimony and argued the statements – which were immediately followed by the attempted rape -- were being offered to establish the perpetrators' joint intent to commit that crime. *Id.* The Court permitted the testimony, after finding that the statements were admissible to establish the intent of the perpetrators to commit the crime. *See, id.* at 86-87.

While the court acknowledges that it made no specific findings of fact in this regard, the defendant can hardly claim prejudice, because the facts tending to show a joint undertaking between the defendant and the declarant were readily discernible on the record. This was evident in the victim's testimony immediately preceding the hearsay challenge, in which she noted the existence of two perpetrators and recounted how the crime took place and the roles played by each perpetrator. *See, e.g.* Trial Tr. at 76-83. Indeed, the government's entire theory of the case, as reflected in the charging instrument and in the evidence presented at trial, rested on the existence of two perpetrators – among them, the defendant – working in concert to commit the charged crimes. Moreover, a finding of conspiracy is inherent in the Court's ruling that the testimony was being admitted only as evidence of the perpetrators' intent to rape the victim. Under these circumstances, the co-conspirator's statements were admissible, and the defendant was not prejudiced by the court's failure to make specific findings on this issue.

D. Effect of Victim Collapsing Before the Jury

Defendant also argues the Court erred in failing to declare a mistrial after the victim collapsed before the jury.

Whether an incident occurring during the course of trial warrants a mistrial is a matter vested in the discretion of the trial judge. *See*, 88 C.J.S. *Trial* §§ 92, 135. However, a mistrial is a drastic remedy generally reserved only for the type of errors that are so prejudicial that “justice cannot be served by continuing the trial, or when fundamental fairness of the trial itself has been manifestly affected.” *Id.* at § 92. To warrant a mistrial based on incidents occurring during the course of trial, the trial judge must conclude that the incident precludes a “proper and impartial consideration of the case by the jury,” and such prejudice cannot be cured by an appropriate instruction. *Id.* at § 135; *See, e.g. Ellison v. Sinclair Refining Co.*, 190 N.E.2d 635, 639 (Ill.App. 1963) (where judge gave curative instruction, there was no error in denying mistrial where plaintiff fell out of chair and lay flat on floor; rejecting defense argument that incident affected damages verdict); *Lemond Const. Co. v. Wheeler*, 669 So.2d 855 (Ala.1995)(improper question by counsel); *Lee v. Chicago Transit Authority*, 605 N.E.2d 493 (Ill.1992) (spontaneous emotional outbursts by widow not basis for mistrial, where no improper motive or misconduct alleged).

Here, the defendant argues the fainting episode, in the presence of the jury, “emphasized the fear and horror of the victim,” thereby inviting juror sympathy and impairing his right to a fair trial. Defendant additionally argues the Court’s recess following the incident and the fact that the curative instruction was not immediately given added to the prejudicial effect of the incident by permitting jurors to speculate on the incident during lunch. This Court rejects the defendant’s argument that the single incident of the victim fainting, under the circumstances and

the context in which it occurred, incurably stirred the passions of jurors and infected their verdict.

After the Government concluded its direct examination of the victim, the jury was instructed that the Court would recess for lunch, and the victim – Kimberly Urgent (“Urgent”) -- was then instructed to leave the witness box. *See*, Tr. at 108. Urgent fainted as she rose from her seat. *Id.* The jury was immediately excused after the incident occurred and did not witness the victim’s state for any prolonged period. *See*, Tr. at 108. The witness subsequently left the courtroom of her own accord. The jury was returned to the courtroom within five minutes for the routine instruction prior to leaving for the planned lunch recess. *See, id.* at 108-09 (reflecting the time period that elapsed). Additionally, the fact that the recess immediately followed the incident added no significance, because the jury had previously been instructed that was the course the Court intended to follow. *Id.* at 108.

Moreover, it must be noted that the Government’s direct examination was largely uneventful; in fact, the witness was restrained during her testimony, exhibiting little or no emotion. *See, id.* at 113 (in denying motion for mistrial, court noted that there was no indication by the witness that she was ill; noting it was just an “unfortunate, unexpected incident”). Therefore, there was no indication that she was so affected or emotionally stirred -- or anything else, for that matter -- to support the inference that there was a nexus between the fainting episode and the “fear and horror of the victim”.

Finally, any suggestion of such a nexus was dispelled by the curative instruction, which included the victim’s medical explanation for her fainting. Through counsel for the government, the victim indicated that she suffers from anemia and tends to faint when stressed out. *See, id.* at 111. Following the lunch recess and before resuming trial, each party was afforded an

opportunity to review the court's proposed curative instruction, which would have briefly instructed the jury not to consider the witness' fainting or to permit sympathy to affect its decision. The defendant, over the government's disapproval, urged the court to deliver a more detailed instruction which included an explanation for what occurred. *See, id.* at 114-117. Following discussions with counsel, the Court delivered the following instruction, to which the defendant raised no objection:

Members of the jury, you will recall that shortly before the recess, Kimberly Urgent fell as she was leaving the witness stand. Ms. Urgent has explained that this was the result of anemia, coupled with stress. The law does not permit jurors to be influenced by sympathy, bias, prejudice, or any similar fact or factor, for or against either side. Therefore, when you are considering the evidence, sympathy, bias or prejudice must play no party in your deliberations.

See, Trial Tr. at 121-22. Following this instruction, the witness again took the stand, and the defense was able to conduct an uneventful cross-examination. The Court is as convinced now, as it was then, that the above instruction was sufficient to ensure that the jury did not consider the incident in reaching its verdict.

E. The Amended Information was Proper

Defendant's final argument is that the Court improperly permitted the government to amend its Information to add accomplice liability ten days prior to trial. This, Defendant argues, prejudiced his defense and forced him in the untenable position of having to choose between seeking a continuance, thereby waiving his right to speedy trial, or moving forward with trial and defending against the new Information.

The rules provide that an Information may be amended at any time prior to a verdict, provided "no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced." FED. R. CRIM. P. 7(e) (emphasis added). Additionally, the rules

require that an Information contain “[A] plain, concise and definite written statement of the essential facts constituting the offense charged” FED. R. CRIM. P. 7(c). However, it need not include details as to how the crime was committed, so long as it sufficiently puts a defendant on notice of the crimes charged and what he must defend against so as to afford him an opportunity to mount a full defense. *See, Government of the V.I. v. Lewis*, 38 V.I. 101 (Terr. Ct. 1998); *see also*, 42 C.J.S. *Indictment and Information* § 92; 1 CHARLES A. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 127, at 643-44 (1999); *compare, Government of V.I. v. Bedford*, 671 F.2d 758 (3d Cir. 1982)(discussing amendment during trial; noting that the inquiry focuses on the issue of prejudice and not solely on whether the charge may, technically, be considered a different offense); *United States v. Smith*, 107 F. Supp. 839 (E.D.Pa. 1952); *Tague v. Richards*, 3 F.3d 1133, 1141-42 (7th Cir. 1993) (holding amendment to charges on day of trial did not prejudice the defense, where it had prior notice of allegations in earlier affidavit and no new defense issues could have been raised); *see also, State v. Alvarado*, 871 P.2d 663, 665 (Wash. 1994) (upholding amendment to Information to add charges of burglary and second-degree theft, in addition to possession originally charged, and noting that an Information may be amended to add new charges if made pretrial and no specific prejudice to the defendant is shown; defendant’s remedy is to seek a continuance if he deems it necessary for an effective defense).

Here, the original Information in this case charged the defendant as a principal. The Amended Information included accomplice liability to Counts I and II, under Title 14, Section 11 and, additionally, omitted Count IV which charged unauthorized possession of a firearm. The sole fact added by this amendment was the involvement of another perpetrator acting in concert with the defendant. The defendant’s argument that his defense was impaired by the inclusion of accomplice liability is unpersuasive.

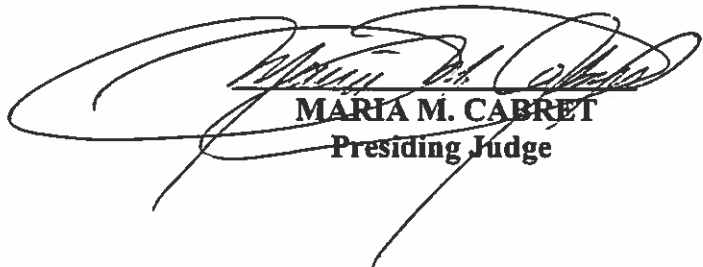
From the inception of this case, the government's theory centered around the existence of two perpetrators, including the defendant. This is reflected in the Affidavit filed with the Court along with the original Information on September 26, 2001. The defendant, therefore, had ample notice that he would be called to defend against the allegations that he committed the crime along with another perpetrator, as contained in the Amended Information. Moreover, the defendant has not indicated how the presence of a second perpetrator would have required a change in his defense strategy, given the absence of any distinction between a principal and an aider/abettor under Title 14, Section 11.

III. CONCLUSION

Because there is no distinction in the criminal culpability of a principal actor and his aider/abettor, as reflected in the local statute on the issue, the Court concludes there was no inconsistency in the instruction given to the jury on the aiding and abetting charge and that used in the charging instrument. The Court also concludes there was sufficient evidence on the record to sustain the defendant's conviction for attempted rape, as a principal or aider/abettor, having found that the defendant's act of holding the victim at gunpoint and forcing her to lie down while his accomplice ripped her clothing and attempted to remove her pants constituted a substantial step toward the commission of a rape, notwithstanding the absence of evidence that the defendant came in contact with the victim's genitalia or explicitly attempted to do so. The Court also rejects the defendant's argument that the statement of his co-conspirator was inadmissible hearsay, in the absence of a charge of conspiracy, because there was ample evidence of a joint undertaking on the record and the statement was admitted to establish the perpetrators' intent to commit the charged crimes. The Court additionally rejects as meritless

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the defendant's argument that the Court erred in failing to declare a mistrial after the victim fainted in the presence of the jury, because the circumstances surrounding the incident simply do not support the conclusion that the defendant was deprived a fair trial. Finally, the defendant can claim no surprise by the addition of accomplice liability in the Amended Information, where he was on notice from the inception of the case that he must defend against those allegations and where no new defenses were implicated. Therefore, in view of the foregoing, the defendant's motion for judgment of acquittal or, alternatively, for a new trial will be denied. An appropriate order shall issue.


MARIA M. CABRET
Presiding Judge

ATTEST:

DENISE D. ABRAMSEN

Clerk of the Court

By: 
Deputy Clerk

Dated: 9/30/02