

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX**

GOVERNMENT OF THE VIRGIN ISLANDS,	)	
	)	CRIM. NO. 01/2002
Plaintiff,	)	
	)	
vs.	)	ASSAULT FIRST DEGREE
	)	(4 COUNTS);
JIMMY DAVIS,	)	RECKLESS ENDANGERMENT;
	)	UNAUTHORIZED POSSESSION
Defendant.	)	OF A FIREARM DURING THE
	)	COMMISSION OF A CRIME
	)	OF VIOLENCE.
	)	
	)	<u>NOT FOR PUBLICATION</u>

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CABRET, P.J.

MEMORANDUM OPINION

(August ~~14~~ 2002)

THIS MATTER is before the Court on the defendant's Motion for Judgment of Acquittal or, in the alternative, for a New Trial. The Government opposes the Motion. For the reasons which follow, the defendant's motion will be denied.

STATEMENT OF FACTS

Defendant Jimmy Davis ("Davis") was charged with four counts of Attempted Murder in the First Degree, Reckless Endangerment in the First Degree, and Unauthorized Possession of a

Firearm During the Commission of a Crime of Violence. The Information was subsequently amended to charge Assault With the Intent to Murder, in lieu of Attempted Murder.

Testimony presented at trial established that on December 23, 2001, in the middle of the afternoon, shots were fired upon a small truck carrying four people: Shan Francis ("Francis"), Erica Parilla ("Parilla"), Shawn Petrus ("Petrus"), and four-month old Shanadalis Francis ("Shanadalis"), who was seated in a car seat in the middle of the front cabin. The three adult passengers testified that the truck in which they were traveling was stopped at the intersection of Estate Whim and Queen Mary Highway, Frederiksted during relatively heavy traffic, when an individual opened fire from the back of another truck traveling westward on Queen Mary Highway.

Francis, the driver of the truck carrying the victims, testified he was approaching Queen Mary Highway, waiting to turn right toward Christiansted, when he spotted the other truck. He identified Davis as the gunman sitting in the rear of that truck, and Hector Davis (the defendant's brother), as a passenger in the front cabin. He could not identify the driver. Both Francis and Petrus, who was seated in the bed of Francis' truck, testified they saw Davis holding a gun pointed in their direction. Francis further said he looked as Davis began firing shots, before forcing Parilla to duck and before managing to complete the right turn and pull over to the side of the road. Parilla testified she also saw Davis in the rear of the oncoming truck shortly before hearing the shots.

All of the victims knew the defendant prior to this incident and identified him as sole individual in the back of the passing truck. Although Parilla did not testify to seeing Davis fire the shots, both Francis and Petrus additionally testified that they saw Davis point the gun in their

direction and fire the shots into their vehicle. On photographs entered into evidence, Francis indicated that the truck in which Davis rode was moving east to west at a slow pace at the time of the incident. He also pointed out homes and a day care center in the surrounding areas, and testified that traffic was “tight” in that area on the day of the incident.

The Government also presented evidence at trial, through the testimony of Francis, Detective Luis Encarnacion and other police detectives, as well as photographs of the truck, establishing that three bullets struck the truck in which the victims were riding: one to the front, left windshield and two to the driver’s side fender and door, respectively. At least one spent round was recovered from the victims’ vehicle.

Davis took the stand and did not deny being seated in the rear of the approaching truck in the area on the day of the shooting. He also did not deny that there was a shooting and that the shots originated from the back of the truck in which he was riding. However, Davis testified that, contrary to the other witnesses’ account, he was not the only person seated in the truck bed. Rather, he said another individual, whom he knows only as “Goofy”, was seated with him and fired the shots. Davis told the jury he did not know Goofy’s real name and had never provided the identity of the shooter to police.

DISCUSSION

I. Motion For Judgment Of Acquittal

In support of his motion for judgment of acquittal, Davis argues the Government presented insufficient evidence to sustain the charges of assault, as to all four victims, reckless endangerment and possession of a firearm.

In reviewing a motion for judgment of acquittal, the Court must determine whether, based on the evidence, which is viewed in the light most favorable to the Government, a rational trier of fact could have found 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). The relevant inquiry is whether there was sufficient evidence -- either direct or circumstantial -- from which the jury could properly find or infer the defendant's guilt. *See, United States v. Charles*, 35 V.I. 306, 308-09 (D.V.I. 1996). Moreover, the fact that there was differing testimony does not raise a question of sufficiency of the evidence but, rather, raises a question of credibility for the jury, *see Government of the V.I. v. Isaac*, 50 F.3d 1175 (3d Cir. 1995), and the Court may not substitute its judgment for that of the jury or judge the credibility of witnesses or the weight of the evidence. *See, Charles*, 35 V.I. at 309.

A. Assault With Intent to Murder

Davis asserts the Government failed to prove he intended to murder the occupants of Francis' truck.

Davis first argues the government failed to prove he intended to murder Francis, and that such an inference is not supported by the evidence at trial. Davis grounds this argument on the fact that both Petrus and Francis testified Davis' truck was in close proximity to that of the victims when he fired the shots, and that Davis' truck had come to a stop. Davis appears to be arguing that the fact that he failed to strike or murder Francis, despite his close proximity and the clear opportunity to do so, compels the inference that the defendant did not intend to murder that victim. The defendant mounts a similar argument with respect to the charge of assaulting Petrus and Parilla with the intent to murder them. Davis contends that no intent is established, where

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Petrus was seated in the truck bed and Parilla on the passenger side of the vehicle, and where the bullets struck the driver's side of the vehicle. These arguments are utterly devoid of merit.

First, since the defendant's state of mind may not be directly observed, intent is a question of fact, to be determined after consideration of the surrounding circumstances. *See, Government of the V.I. v. Frett*, 14 V.I. 315 (Terr. Ct. 1978) (citations omitted). It is inferred from the facts and circumstances surrounding the act, the situation of the parties, the nature and extent of the violence, the acts and declarations of the parties at the time, and the objects to be accomplished. *Id.*; 6A C.J.S. *Assault & Battery* §§ 67, 71; *see also Davis v. State*, 595 N.W.2d 520, 525-26 (Minn. 1999) (noting that intent may be proved by circumstantial evidence, including drawing inferences from the defendant's conduct, the character of the assault, and the events occurring before and after the crime); *see also See Commonwealth v. Eaddy*, 614 A.2d 1203, 1205 (Pa.Super. 1992) (intent to injure, for the purpose of assault statute, was properly inferred from the fact that defendant fired shots through a drawn shade and into a residence he knew to be occupied, notwithstanding the fact that he could not see anyone inside; the defendant's indifference as to who might be shot inside did not eviscerate such intent); *Commonwealth v. Hunter*, 644 A.2d 763 (E.D.Pa. 1990)(rejecting defense argument that specific intent to injure not proved, where defendant fired shots into home, in drive-by incident, and holding that the nature of the defendant's conduct supported an inference of intent for aggravated assault); *Commonwealth v. Rosado*, 684 A.2d 605,608 (E.D.Pa. 1996) (holding the jury is free to infer that the defendant intended the natural and probable consequences of his actions and to make such inferences from the circumstances surrounding his actions); *Compare, Government of the V.I. v. Lake*, 363 F.2d 770, 775, 5 V.I. 594 (3d Cir. 1996) (holding that, for the purpose of

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proving the necessary *mens rea* for murder, malice may be inferred solely from the fact that a deadly weapon was used to accomplish the act). In that regard, this Court instructed the jury on the proof of intent, as follows:

Intent may be proved by circumstantial evidence. Indeed, it can rarely be established by any other means. We simply cannot look into the head or mind of another person. It is physically impossible to do that. So, while witnesses may see and hear and so be able to give direct evidence of what a defendant does or fails to do, they cannot give an eye witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the particular offense charged.

In deciding the issue of what a person knew or what a person intended at a particular time, you may consider any statements made or acts done by that person and all other facts and circumstances received in evidence which may aid you to determine that person's knowledge or intent.

You may infer, but you certainly are not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts to find from the evidence received during this trial.

Court's Final Instruction No. 30. The jury was further instructed that it must find that Davis acted with specific intent.

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.

Court's Final Instruction No. 31. The jury was additionally instructed that "malice aforethought," which must be proved for murder or intent to murder, "does not simply mean hatred or particular ill will, but extends to and embraces generally the state of mind with which one commits a wrongful act. It may be inferred from circumstances which show a wanton and

depraved spirit, a mind bent on evil mischief without regard to its consequences.” Court’s Final Instruction No. 34 (emphasis added).

Given the evidence at trial, there was no real dispute that a shooting occurred; that several shots originated from the back of the truck carrying Davis; and that at least three of those shots struck the victims’ vehicle. The only dispute surrounded the identity of the shooter and which individuals were in Francis’ truck. This rested on the jury’s credibility determinations regarding Davis’ testimony that there was another person seated with him who was the real shooter and that Parilla and Shanadalis were not in the truck during the shooting, versus the victims’ account of events that Davis was the lone person in the back of the truck and that he did the shooting.

Here, the jury obviously believed that Davis fired three to four shots at the victim’s truck, at least three of which pierced that truck. Additionally, given the undisputed testimony that Petrus was seated in the bed of Francis’ truck, rather than the interior cabin, and the details of the incident which Parilla provided -- consistent with all of the other testimony -- the jury obviously accepted as more logical the evidence that the victims’ truck contained Francis, Parilla, Petrus and Shanadalis at the time of the shooting. These facts -- coupled with the fact that all four victims were contained in a small truck, the shots were all directed at that truck, three bullets struck the small truck, and the fact that the assault was accomplished with a deadly weapon, posing a very real likelihood that a death would result -- are sufficient evidence from which a jury could infer that the defendant intended to murder the victims in that truck. The mere fact that Davis may have intended to aim only at Francis in that truck, that he may have had poor aim, *see* 6A C.J.S. *Assault and Battery* § 67, or that some higher power may have intervened to prevent a murder, do not preclude a finding of intent, particularly where the

manner in which the assault was committed demonstrates a disregard for the safety of the other occupants of the truck.

Davis additionally attacks the sufficiency of the evidence with respect to Parilla and the infant girl, claiming the evidence did not establish that Davis knew either Parilla or Shanadalis were in the truck at the time of the shooting. He additionally argues that the evidence did not establish that Parilla or Shanadalis were put in fear of imminent harm.

The statute under which Davis was charged provides that a “whoever (1) attempts a battery; or (2) makes a threatening gesture showing in itself an immediate intention coupled with an ability to commit a battery” commits the crime of assault. 14 V.I.C. § 291 (2). An assault, committed with the intent to commit murder, constitutes an assault in the first degree. *See*, 14 V.I.C. § 295 (1). Though not specifically enumerated therein, case law construing the assault statute has required a finding that the defendant’s acts resulted in the victim being put in fear of an immediate battery. *See e.g., Rivera v. Government of the V.I.*, 42 V.I. 203, 209 (D.V.I. App. 2000). Whether defendant’s conduct put one in fear of bodily harm is determined based on an objective standard of whether the acts would induce fear in a reasonable person. *See e.g., 6A C.J.S. § 69.*

Here, the evidence at trial was that several shots were fired into Francis’ small truck, one of which pierced the windshield of the cabin where both Parilla and Shanadalis sat. The Court first rejects Davis’ assertion that the fact that Parilla only heard the bullets, but never saw the gun pointed in her direction, precludes a finding of assault. Parilla heard a shot fired and, immediately thereafter, Francis pushed her head down and told her to duck. Several more shots followed the first, and the truck was struck by at least three bullets. One bullet pierced the front

windshield. Parilla also testified that, during the incident, she feared for her own and her baby's life. Under these facts and circumstances, it is not unreasonable for the jury to infer that Parilla – indeed, any reasonable person in her place – was aware that shots were being fired into the truck, from which she had no escape, and feared that she was about to be shot. The defendant has pointed to no authority that would support an argument that Parilla was unaware of the assault and could have experienced no fear, simply because she did not see the gun aimed in her direction or see Davis pull the trigger. For similar reasons, the Court rejects the defendant's argument that Shanadalis – or any reasonable person in her place, for that matter – could not have experienced fear under the circumstances, merely because of her tender years.

B. Reckless Endangerment

Davis additionally argues there was insufficient evidence of reckless endangerment, because the Government did not prove the buildings in the area were occupied at the time the shots were fired. Significantly, the defendant cites to no authority that requires proof that there were other individuals in nearby homes and buildings, or in the general area, to sustain a charge of reckless endangerment. Indeed, Title 14, Section 625 of the Virgin Islands Code, under which Davis was charged, does not compel that result. That Section provides, in pertinent part:

(a) A person is guilty of reckless endangerment in the first degree when, under the circumstances evidencing a depraved indifference to human life, he recklessly engages in conduct in a public place which creates a grave risk of death to another person. . . .

(1) "reckless endangerment" means when a person consciously and knowingly engages in conduct or behavior that may pose intentional harm or physical injuries to another human being or property.

- (2) “public place” means a place to which the general public has a right to resort; but a place which is in point of act public rather than private, and visited by many persons and usually accessible to the public.

V.I. Code Ann. tit. 14, § 625 (a), (c)(1), (2) (1997) (emphasis added). The statute, therefore, requires only that it be proven that the defendant recklessly engaged in conduct in a public place, thereby creating a grave risk of death to another person. The plain language of the statute does not compel the conclusion that a “public place” is rendered private if nearby buildings are unoccupied at the time of the crime or if it is not shown that others were actually in the area. Indeed, the statute focuses on the “risk” of death to others, based on the fact that the defendant’s conduct occurred in a place which others are likely to frequent, thereby creating a risk that others would be unwittingly caught up in the gunfire.

Here, it was undisputed that the shooting incident took place on a highly traveled public highway, which is likely to be frequented or visited by the public, in the middle of the day. Additionally, the evidence at trial also established that the traffic was heavy at the time; therefore, other motorists were obviously in the area. Moreover, the government introduced photographs and aerial photographs of the area, showing homes immediately adjacent to the highway and in the nearby surrounding areas. There was also testimony that there was a day care center nearby. These facts are sufficient to establish the public nature of the scene, and the fact that the area is, indeed, one which is accessible to the public, thereby creating the risk that others could be harmed by flying bullets. Surely, the defendant is not asking that the Court disregard the fact that this was a public road filled with motorists, in a residential area likely to be frequented by the public, in the absence of proof that nearby homes were actually occupied at the time. Indeed, it is unlikely the defendant could have known – or bothered to confirm

before engaging in such conduct -- whether those homes, the day care center, or other vehicles in the area were occupied at the time of the shooting to ensure that others were not put in danger. This Court is simply not persuaded by the defendant's argument that the charge of reckless endangerment is predicated on a finding that nearby buildings were occupied, given the clear language of the statute, the evidence at trial, and the absence of authority to the contrary.

C. Unauthorized Possession of Firearm

Davis' final argument supporting his motion for acquittal is that the government failed to prove he possessed a firearm without authorization of law. At trial, the Government elicited testimony from Sgt. John Felicien ("Felicien"), firearm records custodian for the Virgin Islands Police Department, St. Croix District, that Davis was not licensed to carry a firearm in the St. Croix District. Felicien also testified that police regularly kept records of anyone licensed to carry firearms and utilized the same recordkeeping procedures territorywide. The Court admitted a report prepared by Cynthia Brown, firearm records custodian in the St. Thomas-St. John district, under Federal Rule of Evidence 803(10). That record showed that Davis also was not licensed to carry a firearm in that district. Davis now argues, as he did at trial, that the firearm record from the St. Thomas-St. John district was prepared for litigation purposes only and, therefore, improperly admitted under Rule 803(10). The Federal Rule of Evidence under which the certified report was admitted provides in pertinent part:

The following are not excluded by the hearsay rule . . . :

(10) **Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency,

evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

FED. R. EVID. 803 (10) (emphasis added). Here, Felicien testified the Police Department maintains records of all persons licensed to carry firearms in the regular course of its business. Therefore, the Court holds now, as it did at trial, that the certified report from the custodian of firearm records on St. Thomas-St. John was admissible to prove the absence of such a record on file for Davis, as proof of the fact he was not licensed to carry a firearm. *See e.g., United States v. Thompson*, 420 F.2d 536, 544-45 (3d Cir. 1970)(upholding, in prosecution for unlawful possession of a sawed-off shotgun, the admission of a custodian's certificate regarding the absence of a firearm licensing record for the defendant under the 803(10) exception, where such firearm licensing records were regularly kept); *United States v. Metzger*, 778 F.2d 1195, 1201 (6th Cir. 1988)(upholding admission of absence of record entry, from the Division of Alcohol, Tobacco and Firearms, that defendant was not licensed to manufacture explosives, where that agency routinely kept such records, and rejecting defendant's argument that such record was precluded as a police report under Federal Rule of Evidence 803(8)(collecting cases from the Second, Fifth, Sixth, Ninth, and Eleventh circuits which hold similarly).

II. Motion For New Trial

Davis argues, alternatively, that a new trial is warranted because his brother, Hector Davis ("Hector"), was prevented from entering this Court to give testimony as a "rebuttal" witness, depriving him of the right to present witnesses in his defense. Hector was a passenger in the truck carrying Davis.

Davis alleges he intended to call Hector as a rebuttal witness, to refute testimony that Parilla and Shanadalis were in the truck at the time of the assault and that Davis was the shooter. However, he asserts he was prevented from calling Hector because the Court's marshals and security officers prevented Hector from entering the building. Davis asserts he did not initially know why Hector failed to show up to testify, as scheduled, and could not locate him. Defense counsel also claims he did not learn what prevented Hector from appearing in Court until after the jury's verdict, after meeting Hector at the home of the defendant's mother.

A defendant has a right to present witnesses "material or favorable to this defense," and that right may not be abridged by the court or the government. *Rock v. Arkansas*, 483 U.S. 44, 51, 107 S.Ct. 2704, 2709 (1987); *see also, Government of V.I. v. Mills*, 956 F.2d 443 (3d Cir. 1992) (noting that this right protects the defendant from unwarranted interference by the judge or prosecutor, either in the form of unnecessary evidentiary rulings or arbitrary rules by the trial judge, or any other manner). That right has been read into the Sixth Amendment and the due process clause of the Fourteenth Amendment to the U.S. Constitution. *Rock*, 483 U.S. at 52-56; *see also, Mills*, 956 F.2d at 443 (To establish a violation, defendant must show: 1) that he was deprived of the opportunity to present evidence in his favor; 2) that testimony would have been both *material* and *favorable* to his defense, meaning the testimony could have affected the judgment; and 3) that the deprivation was arbitrary or disproportionate to any legitimate evidentiary or procedural purpose.) (citations omitted). However, where the defendant perceives that he is impaired from presenting a full defense because of the unavailability of a witness at trial, it is his responsibility to alert the trial judge and seek a continuance or any other remedy he deems appropriate. *See e.g., Ford ex rel. Estate of Ford v. Garcia*, 2002 WL 799580 (11th Cir.

2002); *United States v. Desena*, 287 F.3d 170 (2d Cir. 2002) (rejecting defendant's argument that his right to present witnesses for his entrapment defense was violated, because the detective failed to appear to testify, where the defendant requested only a "missing witness" instruction and failed to request a continuance to locate the witness; reasoning that it is the defendant's responsibility to call "the trial court's attention to a perceived error so as to afford the court an opportunity to remedy the problem at that time."); *Kinard v. United States*, 418 F.2d 453, 456 (D.C.Cir. 1969)(where the government decided to proceed without the assault victim, where that witness had suffered a seizure and defendant did not request a continuance or a mistrial but opted to proceed with his case, the defendant could not later complain that he was kept from presenting a full defense, based on a theory of self-defense, because the jury did not get to see the large size of the victim).

This Court is unaware of the facts surrounding Hector's failure to appear in Court.¹ However, a new trial is not warranted, even if the Court accepts the defendant's assertions as true. The defense asserts that Hector would have been offered as a "rebuttal" witness, and would have contradicted the victims' version of events by testifying that Parilla and Shanadalis were not in the victims' truck and that there was another individual seated in the truck bed with Davis, who was the actual shooter. The Court rejects the defendant's assertions that this proffered testimony would have constituted proper rebuttal.

First, the Court notes that the Government offered no rebuttal witnesses and, therefore, the defendant was not entitled to and, indeed, could not present any surrebuttal witnesses. *See*,

¹ The Court notes, however, that it was forced to ask Hector Davis, through defense counsel, to calm down or leave the courtroom during its *voir dire* examination of the jury panel, after it was brought to the Court's attention that he was seen making threatening gestures at the witnesses in this case and exhibiting other disruptive behavior. As the trial in this case commenced, the undersigned instructed marshals not to permit anyone who became disruptive to remain in the courtroom.

75 AM.JUR.2D *Trials* § 377 (a defendant has no right to introduce evidence in surrebuttal, unless new facts were introduced in the case for the first time on rebuttal; moreover, there is no entitlement to presenting surrebuttal testimony); *Compare*, §§ 372-74 (scope of rebuttal testimony limited to responding to new evidence or testimony introduced for the first time by the opposing party; it is not a vehicle for introducing testimony that could have been offered in the case in chief, to merely corroborate testimony by previous witnesses, or to bolster or supplement a party's version of events).

Secondly, in determining whether rebuttal testimony may be permitted, the Court considers whether the "testimony sought to be rebutted could reasonably have been anticipated prior to trial." *Id.* at § 371. Here, the defendant knew from the inception of this case that the Government was alleging he fired shots into a small truck carrying four victims. Therefore, the defense could hardly claim to be surprised by evidence presented in that regard and could have offered contradictory testimony in its case in chief.

Given the absence of unanticipated rebuttal testimony by the Government, the defendant's characterization of Hector as a "rebuttal" – or, more appropriately, surrebuttal -- witness, is without merit. Rather, the defense would have been required to elicit Hector's testimony as part of its case-in-chief. As such, the defendant was required to list Hector as a potential witness, as required under the rules governing pre-trial procedure. *See*, FED. R. CIV. P. 26(a)(3)(A); *see also*, LRCi 16.1(c) and Appendix I; *see, Berroyer v. Hertz*, 672 F.2d 334 (3d Cir. 1982) (noting that court may, in its discretion, preclude a party from presenting testimony of

witness who was not disclosed prior to trial). This, the defendant failed to do.² The Court, therefore, finds unavailing the defendant's argument that Hector was a scheduled witness in this case, who was precluded from testifying by this Court.

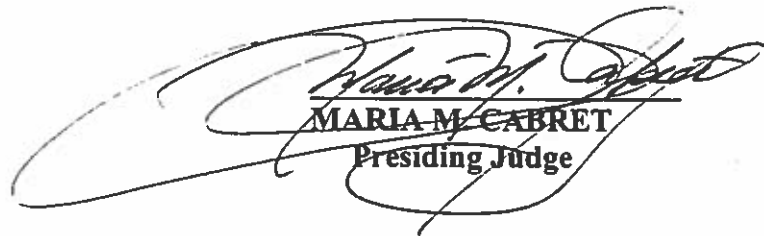
Moreover, even if the Court accepts the defendant's assertions that he intended to present Hector as a witness, Hector's unavailability is not a sufficient basis for granting a new trial under the circumstances of this case for the following reasons. Importantly, defense counsel admits that he assumed Hector's failure to appear resulted from an argument between that witness and counsel the previous day. Additionally, the defendant failed to notify the Court that he needed Hector's testimony and could not locate him, or request a continuance to attempt to locate him. Had he done so, the Court could have taken action prior to the verdict – such as granting a brief continuance -- to afford the defendant an opportunity to locate the witness and have him appear.

Furthermore, the Court notes that the defendant's (and Hector's) family members were in Court during the trial; their father was in Court throughout the entire trial. It is clear that Hector maintained some contact with his parents. Even more telling is the fact that counsel was able to subsequently meet Hector at his mother's home following the verdict. Therefore, Defendant's assertion that he could not, with some amount of diligence, locate Hector is unpersuasive. *See, Desena*, 287 F.3d 170 (noting that the detective defendant sought to have testify had been present in the courtroom intermittently during the trial, and the defendant failed to show that the detective could not have been located after he failed to appear on the day he was to testify, had the defense requested a continuance). Indeed, the facts support the inference that, had he sought a brief continuance, the defendant could have -- with minimal effort -- located Hector before the

² Defendant's witness list indicated his intent to call: Detective Raymond Kean, Diana Parilla and Sashi Jahdooram. Additionally, there is no indication in the record that Hector was served to appear at trial.

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verdict. Having failed to do so, and having apparently made a conscious trial decision to proceed without that witness, the defendant cannot now secure a new trial on these grounds. An appropriate order follows.


MARIA M. CABRET
Presiding Judge

ATTEST:

DENISE D. ABRAMSEN

Clerk of the Court

By:


Deputy Clerk

Dated:

Aug. 14, 2002