

PEOPLE OF THE VIRGIN ISLANDS,)
)
Plaintiff,)
)
v.)
)
CLINT ESTICK,)
)
Defendant.)
)

CASE NO. SX-09-CR-376

**ASSAULT FIRST DEGREE, RECKLESS
ENDANGERMENT FIRST DEGREE;
UNAUTHORIZED POSSESSION OF A
FIREARM DURING THE COMMISSION
OF A CRIME OF VIOLENCE**

BEFORE THE COURT is Defendant Clint Estick's Defendant's Motion for Judgment of Acquittal or, in the Alternative, Motion for New Trial. For the reasons stated below, the Court will deny the motion for judgment of acquittal or, in the alternative, motion for a new trial.

Defendant Clint Estick was charged with one count of Assault in the First Degree, two counts of Reckless Endangerment in the First Degree, and one count of Carrying or Using a Dangerous Weapon during the Commission of a Crime of Violence on St. Croix in July 2009. (2d Am. Infor., filed Dec. 16, 2009.¹) Jury selection and trial commenced in June 7, 2010. At the close of the People's case-in-chief and then at the close of all evidence, Estick moved pursuant to Federal Rule of Criminal Procedure 29(a) for judgment of acquittal on each count.

¹ Both the original information and the amended version filed in June 2009 were captioned “Amended Information.” (*Compare* Am. Infor., filed Oct. 24, 2006, *with* Am. Infor., filed June 19, 2006.) Presumably “amended” was inadvertently add to the original charging document. At trial, the Court noted the potential for confusion if both the original and the amended charging documents had identical captions. (*See generally* Trial Tr. vol. III, 6-7, Dec. 16, 2009 (discussing different versions).) Accordingly, the People filed a third charging document captioned “Second Amended Information.” (2d Am. Infor., filed Dec. 16, 2009.) Except for the caption and the date, the Second Amended Information, i.e., the third charging document, mirrored the Amended Information, i.e., the second charging document filed in June 2009, identically.

The Court denied his motion after the People closed their case-in-chief. (Trial Tr. Vol. III: 121.) After the close of all evidence, the Court again denied Defendant's motion. (Tr. Transcript, Vol. III: 222.)

The jury found Estick guilty of all counts on June 10, 2010. (Jury Verdict Form, filed June 10, 2010.)

Estick filed his Motion for Judgment of Acquittal and/or New Trial, per Federal Rule of Criminal Procedure 29(c)(1), to renew his argument for judgment of acquittal as to First-degree Assault, Reckless Endangerment, and Unauthorized Possession of a Dangerous Weapon during the Commission of a Crime of Violence. (Mot. for J. of Acq., filed Nov. 19, 2010.) Defendant then filed his Amended Motion for Judgment of Acquittal and/or New Trial alerting the Court to victim Kaleed Ferdinand's Affidavit alleging he misidentified Clint Estick and Clint Estick did not assault him. (Am. Mot. of J. of Acq., filed Dec. 14, 2010). Defendant then filed his Second Amended Motion for Judgment of Acquittal and/or New Trial alleging that juror Inez James was a friend of the Ferdinand family, which he surmised from publications in the *Avis Newspaper*. (2d. Am. Mot. of J. of Acq., filed Aug. 17, 2011). Although the People were ordered to respond to Defendant's motions, the People failed to do so.

An evidentiary hearing was held on November 14, 2012 in which Kaleed Ferdinand testified that he did not sign the Affidavit dated November 22, 2010 alleging that Clint Estick did not assault him. This hearing was continued on March 19, 2013, in which Ram Bansal, the notary who notarized the affidavit, Kimo Inniss, Police Officer Michael Simmonds, and Kaleed Ferdinand testified. Defendant's counsel stated during the hearing that he had determined the juror, Inez James, was not connected to the Ferdinand Family. He withdrew his argument

stating that a new trial should be held because of Inez James' connection to the victim's family as it was without basis.

II. FACTUAL BACKGROUND

Of the testimony presented at trial, the relevant portions were as follows:

Rafael Leyton lives at 17 Estate Profit. (Trial Tr. 19:25-20:1 June 8, 2010.) He was at home on the afternoon of July 18, 2009. (Trial Tr. vol. II 20:14-17.) A gunshot caught his attention. (Trial Tr. vol. II 22:17-20.) He looked outside and saw a dark car being followed by a purple car heading in a south to north direction on Profit Road. (Trial Tr. vol. II: 23-24.) Mr. Leyton testified that the driver of the purple car was shooting at the dark car while holding a gun in his left hand out of the driver's side front window. (Trial Tr. vol. II: 24). Leyton indicated that the purple car looked like a Honda. (Trial Tr. vol. II: 41.) While Leyton said the cars were firing at each other, he later contradicted himself saying that he did not see the dark car firing shots at the purple car. (Trial Tr. vol. II: 42, 43.) Nevertheless, the witness heard three (3) shots from what sounded like a .45 caliber gun and later heard two (2) to three (3) more shots farther away after the vehicles passed his range of vision. (Trial Tr. vol. II: 22, 44). On cross-examination, Defendant elicited the fact that Leyton did not identify the purple car was a Honda to the police in his July 18, 2009 statement. (Trial Tr. vol. II: 57). In the statement given on July 25, 2009, Leyton first identified the purple car as a Honda (Trial Tr. vol. II: 58).

Kiera Paul also witnessed the shooting. Ms. Paul was a customer of the El Flamboyant restaurant on the afternoon of July 18, 2009. (Trial Tr. vol. III: 201 June 9, 2010.) She heard gunshots when she was paying for her food and looked out of the window and saw a black Dodge Caliber with a gun sticking out of the passenger side window. (Trial Tr. vol. III: 202).

Ms. Paul stated, however, that she did not see another vehicle and did not know another vehicle was involved. (Trial Tr. vol. III: 202.) A bullet landed in the El Flamboyant bar right next to Ms. Paul's hand. (Trial Tr. vol. III: 205.)

Kaleed Ferdinand was the People's main witness. Mr. Ferdinand testified that he was riding in the back seat of a black Dodge Caliber driven by Rasheeda Bell and accompanied by Derrick Liburd in the front passenger seat. (Trial Tr. Vol. II: 68, 71.) The trio were traveling from Sion Farm to Estate Profit. After they had exited Sion Farm and were traveling east to west down Queen Mary Highway, Ferdinand noticed Clint Estick traveling alone behind them in his blue car. (Trial Tr. Vol. II: 71-72). Ferdinand later testified that the back car window of the Dodge Caliber was tinted but that he could still clearly make out Estick. (Trial Tr. Vol. II: 154.) Clint was again behind their car when the trio reached Machuchal/Profit on Melvin Evans Highway. (Trial Tr. Vol. II: 74.) Kaleed Ferdinand testified that the defendant looked angry. (Trial Tr. Vol. II: 75.) After the trio had been driving up Profit Road, going south to north, for four to five seconds, Ferdinand heard one bullet. *Id.* Ferdinand testified that Clint Estick's car was approximately 2.5 – 3 feet away from their car when the first shot rang out. (Trial Tr. Vol. II: 77.) Ferdinand turned around in the back seat and started to hear the defendant and saw him with a gun in his left hand shooting out of the driver's window. *Id.* Ferdinand testified that he got shot in the hand near his wrist by defendant. (Trial Tr. Vol. II: 76, 80.) Ferdinand testified that he heard 4-5 shots in all. (Trial Tr. Vol. II: 79.) After the shooting, Rasheeda Bell sped up and turned around while Clint Estick turned down by the Vitran bus stop going west to east. (Tr. Transcript Vol. II: 78.) Ferdinand testified that the trio left the Profit area and headed back to Sion Farm to see Ferdinand's parents. (Tr. Transcript Vol. II: 86). Following their trip to Sion Farm, they went to the hospital for Ferdinand to be

treated for his wound to his hand. (Tr. Transcript Vol II: 83). Ferdinand testified that there was no doubt his assailant was Clint Estick. (Tr. Transcript Vol. II: 84). He recognized Estick and recognized his blue Honda (Tr. Transcript Vol. II: 88.)

On cross-examination of Kaleed Ferdinand, defense counsel elicited the tensions and history between Kaleed Ferdinand and the Estick Family as well as what transpired at Estick's mother's house when the trio stopped there before going to the hospital. Ferdinand testified that he had recently had some conflict with Markeal Smith, Clint Estick's brother, who hit him and caused him to go to the hospital on June 2, 2009, approximately six weeks prior to the shooting incident. (Tr. Transcript Vol. II: 151.) Ferdinand believed that Clint Estick was the enforcer² for the family and that he shot Ferdinand because Markeal hit him. (Tr. Transcript Vol. II: 153.) Months after this shooting incident, Ferdinand testified that Estick followed him again to his vocational school the day before his trial testimony. (Tr. Transcript Vol. II: 155-58.) Ferdinand described a fight at Clint Estick's mother's house that occurred right after he was shot in his hand. As stated previously, rather than going directly to the hospital to see about his injury, Ferdinand, Liburd, and Bell went back to Sion Farm and confronted the Estick family. Kaleed Ferdinand testified that his father, Michael Ferdinand, was pulled into the Estick house and attacked with a pipe when Michael Ferdinand was trying to find out from Estick's mother why these incidents against his son were occurring. (Tr. Transcript Vol. II: 164-65.) Kaleed Ferdinand denied attacking James Estick, Clint Estick's brother, with an iron pipe, although he admitted running after him because Clint Estick shot him. (Tr. Transcript

² When Kaleed Ferdinand was questioned about what he meant in describing Clint Estick as the family enforcer, he stated that "he's the enforcer because whatever happens between the family he is always the one to pick up on it." (Tr. Transcript Vol. II: 170.) Ferdinand testified, for instance, that Clint Estick showed up at the hospital after he was in a fight with Markeal Smith, Estick's brother. Ferdinand admitted, however, that Estick could have been there visiting his brother, who was also in the hospital. (Tr. Transcript Vol. II: 172.)

Vol. II: 160, 168). Ferdinand also denied that there were guns in the black Caliber. (Tr. Transcript Vol. II: 162.)

Defense witness Markeal Smith also testified about the incident in Sion Farm on July 18, 2009. He stated that Kaleed Ferdinand's father, Michael Ferdinand, stabbed him in his hand with a screwdriver. (Tr. Transcript Vol. III: 167.) He described the chaos of seeing his brother James running, followed by Kaleed Ferdinand, and others running with weapons while he was outside washing his car. (Tr. Transcript Vol. III: 118.) Smith testified that David Liburd had a small gray and black gun in his hand, with which he saw him exit the black Dodge Caliber, and that Michael Ferdinand also had a gun, which he also retrieved from the Dodge Caliber (Tr. Transcript Vol. III: 169-70, 180-81). No one saw Clint Estick in the Sion Farm neighborhood when these commotions were happening. After the skirmish, Rasheeda Bell drove Kaleed Ferdinand to the hospital.

The law enforcement officers who testified that they responded to the scene of the shooting were Linda Pascal, a crime scene technician, Jose Silva of the Virgin Islands Police Department ("VIPD") Criminal Investigation Bureau, and Mario Christian, who investigated the shooting with the VIPD patrol division. Ms. Pascal took photographs of the eight .45 casings found on the scene and the exterior and interior of the El Flamboyant Bar, where a projectile was found in the interior dining area near a chair. (Tr. Transcript Vol II: 174, 178, 188.) She also collected the projectile. (*Id.* at 178.) Officer Pascal testified that the casings were found in both the northbound and southbound lanes on Profit Road. (Tr. Transcript Vol. II: 193.) Although she attempted to identify latent prints on the casings, she was unable to. (Tr. Transcript Vol. II: 191.) Detective Jose Silva met Officer Pascal at El Flamboyant Bar. He elicited information on the vehicle that was involved in the shooting and obtained

information on a possible shooting suspect. He then arrested Clint Estick based on Kaleed Ferdinand's identification of him as the shooter. (Tr. Transcript Vol. III: 13.) He impounded Estick's vehicle but did not find bullet holes in it nor empty casings. (Tr. Transcript Vol. III: 15.)

Defense witness Mario Christian stated that he spoke to both Rafael Leyton and Kiera Paul and included information they gave him in his 1-A report. (Tr. Transcript Vol. III: 124.) He testified that there was no mention of seeing a Honda or a .45 pistol or hearing a gunshot that sounded like a .45 in his report (see Leyton's testimony) but that such information would have been relevant to him and included in his report if he had heard it. (Tr. Transcript Vol. III: 126, 131.) He testified that no one told him whom they saw firing shots. (Tr. Transcript Vol. III: 133.) Furthermore, he turned his case over to Detective Michael Simmonds. Michael Simmonds confirmed that there was no statement of anyone seeing a .45 caliber firearm or a Honda or hearing a .45 caliber firearm shot in Mario Christian's report. (Tr. Transcript Vol. III: 143-44.) Detective Simmonds testified, however, that Clint Estick's stereo and cell phone were stolen from his car in the impound lot. (Tr. Transcript Vol. III: 148.)

People's witness Detective George Felix, forensic unit supervisor, testified he inspected the black Dodge Caliber on August 4, 2009 and found bullet holes to the back area that was in the rear hatch door. He also stated that there was a bullet hole in the rear glass. (Tr. Transcript Vol. II: 197.) He also collected a live .380 round in the rear passenger seat. (Tr. Transcript Vol. II: 201.) He also found a spent projectile in the vehicle. (Tr. Transcript Vol. II: 199.) No firearms were found in the Dodge Caliber. (Tr. Transcript Vol. II: 206.)

On July 18, 2009, People's witness Detective Al Lewit was called to the hospital to collect forensic evidence regarding the shooting. Detective Lewit took photographs of Kaleed

Ferdinand in the emergency room and captured the injury to his right hand, and right wrist. (Tr. Transcript Vol. III: 29.) Detective Lewit also photographed the exterior of the black Dodge Caliber, evincing one bullet hole in the back hatch and one in the back window. (Tr. Transcript Vol. III: 30.) He took a picture of the projectile which he surmised went through the window and lodged itself in the roof area of the vehicle. *Id.* Lewit also photographed the blood spatter in the rear ride side of the vehicle, on the interior door and seat area. *Id.* He also photographed the live round found on the front seat of the vehicle. *Id.* In addition, Detective Lewit collected a gun and clothing, which he found in a pile behind the Dodge Caliber. (Tr. Transcript Vol. III: 34-39.) Detective Lewit hypothesized that the bullet lodged in the interior roof came from the outside because of beveling on the glass around the bullet hole. (Tr. Transcript Vol. III: 51.) Detective Lewit testified that he did not find fingerprints on the gun and did not take DNA evidence from the gun so it could not be determined who handled the gun. (Tr. Transcript Vol. III: 52.)

People's witness Maurice Cooper, forensic science consultant with the Virgin Islands Police Department, testified as an expert in firearms examination and analysis of firearms and shells and cartridges. (Tr. Transcript Vol. III: 82-85.) He concluded that all of the eight .45 cartridge cases he examined came from the same firearm. (Tr. Transcript Vol. III: 94.) However, he could not determine if the projectile he was asked to examine came from the same weapon as the casings because there was no cartridge casing on the bullet. (Tr. Transcript Vol. III: 101.) Nevertheless, he stated that the spent projectile and spent casings were consistent with being fired from a .45 caliber firearm. (Tr. Transcript Vol. III: 108.)

People's witness Karen Stout, firearms supervisor, testified that Clint Estick was not registered to carry a firearm on Saint Thomas, St. John or St. Croix on July 18, 2009. (Tr. Transcript Vol. III: 21.)

III. JUDGMENT OF ACQUITTAL

Estick moves for judgment of acquittal on his conviction for first degree assault, two counts of reckless endangerment, and one count of carrying or using a dangerous weapon during the commission of a crime of violence.. (See generally Def. 2d Am. Mot. for J. of Acq. And/or New Tr.) A defendant's motion for judgment of acquittal should be granted where "the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a) (applicable via Super. Ct. R. 7). The court must evaluate the evidence at the stage of the proceeding when the motion was made. See Fed. R. Crim. P. 29(b). In evaluating a motion for judgment of acquittal, the court "considers the evidence as a whole, taken in the light most favorable to the government, together with all legitimate inferences to be drawn therefrom, to determine whether a rational trier of fact could have found guilt beyond a reasonable doubt." *Gov't of the V.I. v. Joseph*, 770 F.2d 343, 345 (3d Cir. 1985). The court is not called upon to assess witness credibility or weigh evidence. *Id.* at 348. Instead, if "the conclusion be reached that a reasonable doubt must exist in the mind of a reasonable juror, acquittal must be granted." *Id.* at 345 (citations omitted). The jury's verdict will be sustained, however, "if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Williams v. People of the V.I.*, No. S. Ct. Crim. 2007-0008, 2011 WL 4072738, *1, *7 (V.I. Sept. 12, 2011) (internal quotation omitted).

a. Count One: First Degree Assault

In Count One, Estick is charged with assaulting Kaleed Ferdinand with the intent to murder him by firing several shots at him, resulting in injuries to his wrist, in violation of sections 295(1) of title 14.

Section 295(1) provides:

Whoever –

- (1) With intent to commit murder, assaults another;
 - (2) With intent to kill, administers or causes to be administered to another, any poison or other noxious or destructive substance or liquid, and death does not result;
 - (3) With intent to commit rape, sodomy, mayhem, robbery or larceny, assaults another;
- Shall be imprisoned not more than 15 years. . .

Kaleed Ferdinand testified that Estick was following close behind the black Dodge Caliber in which he was traveling, driven by Rasheeda Bell, and firing shots into this vehicle. (Tr. Transcript Vol. II: 77). Bullet holes and a spent projectile were found in Bell's vehicle and documented in police reports. Detective Alan Lewit indicated that the bullet that was shot through the back window originated from the outside of Bell's vehicle, as indicated by the beveling of the glass. Rafael Leyton also witnessed a purple car following a dark car (Bell's vehicle) with the driver of the purple car shooting a gun from the outside of his driver's window at the dark car. Leyton later identified the purple car to be a Honda, the make of car that Clint Estick drives³. Kaleed Ferdinand was adamant that Estick was the one firing shots at him on July 18, 2009. He stated that there was no question in his mind who shot him: Clint Estick. (Tr. Transcript Vol. II: 84-85.) He stated that he had known Clint Estick for a couple

³ Clint Estick was said to drive a blue Honda; nevertheless, the colors purple and blue are close in the light spectrum and often times confused for each other.

of years and had been best friends with his brother; however, he admitted that he had fights with two of his brothers. (Tr. Transcript Vol. II: 67.) Furthermore, he was familiar with his blue Honda. (Tr. Transcript Vol II: 72-73.) Ferdinand also testified that Clint Estick was his assailant on November 14, 2012, at the hearing involving the affidavit in which he allegedly recanted his testimony. Ferdinand stated at that hearing that he did not recant his testimony.

Under Virgin Islands law, a person is guilty of first degree assault when he assaults someone with the intent to murder that person. 14 V.I.C. § 295(1). There is sufficient evidence for a reasonable juror to find that Estick assaulted Ferdinand with the intent to murder him. A feud had been occurring between the Estick family and the Ferdinand family. Kaleed Ferdinand had had altercations with Markeal Smith, Clint Estick's brother. A fight between the two men had landed both of them in the hospital. Following this fight, Kaleed Ferdinand received threats from the Estick family. (Tr. Transcript Vol. II: 168.) Kaleed Ferdinand viewed Clint Estick as the enforcer of the family and was threatened when he saw him at the hospital after his fight with Markeal Smith and at other times when he viewed Clint Estick as following him. (Tr. Transcript Vol II: 153, 156.) Ferdinand was thus alarmed when he saw Clint Estick following the vehicle he was in and shooting at it. The fact that Estick was seen shooting at the occupied vehicle and hit Kaleed Ferdinand in his wrist gave a reasonable juror sufficient evidence to believe he had committed first degree assault.

b. Counts Two and Three: Reckless Endangerment

In Count Two, Estick is charged with Reckless Endangerment in the First Degree for firing shots in a public street and hitting Kaleed Ferdinand while he was in a vehicle. In Count Three, Estick is charged with Reckless Endangerment for firing shots in the vicinity of El

Flamboyant Bar where patrons were gathered for enjoyment. Estick's acts are alleged to have violated sections 625(a) of Title 14 of the Virgin Islands Code.

Pursuant to section 625(a) of title 14 of the Virgin Islands Code,

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. Reckless endangerment in the first degree shall be considered a felony.

Section 625(c)(2) goes on to define what "public place" means in the reckless endangerment statute:

"public place" means a place to which the general public has a right to resort; but a place which is in point of fact public rather than private, and visited by many persons and usually accessible to the public.

There was sufficient evidence for a reasonable juror to find that Estick committed Reckless Endangerment under both counts. As stated previously, Kaleed Ferdinand witnessed Estick firing shots at him on Profit Road while Ferdinand was traveling in a car. Rafael Leyton also witnessed someone in a purple car firing shots at a dark car. Profit Road is a public road in Kingshill, St. Croix. By firing shots on this public road, Estick created a grave risk of death to Ferdinand and the other occupants of the Dodge Caliber. *See Augustine v. Virgin Islands*, S.Ct.Crim.No. 2010-0016, 2011 WL 3851407 *5 (V.I. Aug. 29, 2011) (stating that a public road is a public place under the reckless endangerment statute). Furthermore, "the act of firing a loaded gun at or near someone 'is, by definition, the epitome of reckless conduct creating a grave risk of death under circumstances evincing an extreme indifference to human life.'" *Augustine*, 2011 WL 381407 (citing *State v. Coward*, 972 A.2d 691, 702-03 (Conn. 2009)). Thus, a reasonable juror could have found Estick guilty under Count II.

Likewise, there was sufficient evidence for a reasonable juror to find that Estick committed Reckless Endangerment under Count III. The patrons heard the gunshots from the street inside the bar. (Tr. Transcript Vol. III: 202.) A spent projectile was fired or otherwise landed in El Flamboyant bar on July 18, 2009 at approximately the same time as the Honda was chasing the Dodge Caliber. Kiera Paul testified that a piece of lead landed right next to her hand and could have injured her. (Tr. Transcript Vol III: 205.) As Kaleed Ferdinand testified that Defendant had a gun and was firing it, there is sufficient evidence for a juror to believe the bullet came from his gun. Furthermore, Maurice Cooper testified that the spent projectile found in El Flamboyant and the spent casings were consistent with being fired from a .45 caliber firearm. (Tr. Transcript Vol III: 108.) Rafael Leyton's testimony indicated that the purple car was firing bullets from a .45, as the firearm that Leyton heard sounded like a .45. (Tr. Transcript Vol. II: 44.) Thus a jury had sufficient evidence to find Estick guilty of Count III.

Defendant makes an argument that he should not have been charged with more than one count of Reckless Endangerment for a single act. In a recent Virgin Islands Supreme Court case, *Tyson v. People*, 2013 WL 3817333 (V.I. July 18, 2013), the Supreme Court stated that a charge of reckless endangerment is based on the "conduct of the defendant in a place where the public has a right to be." The Court concluded that it is inconsequential if the defendant is charged with only one count or multiple counts for risking the lives of a number of people. *Tyson*, 2013 WL 381733 at *13. Therefore, Estick's conviction for two counts of Reckless Endangerment will stand.

c. Counts Four: Possession of a Firearm During the Commission of a Crime of Violence

Estick is charged with possession of a firearm during the commission of a crime of violence for allegedly possessing a .45 caliber firearm, which was utilized during the assault in the first degree of Kaleed Ferdinand in violation of sections 2253(a) of title 14 of the Virgin Islands Code. Title 23, section 451(e) specifies that assault in the first degree is a crime of violence for which unlawful possession of a firearm can be charged under this statute.

Section 2253(a) provides:

Whoever, unless otherwise authorized by law, has possesses, bears, transports or carries either, actually or constructively, openly or concealed any firearm, as defined in Title 23, section 451(d) of this code, loaded or unloaded, may be arrested without a warrant, and shall be sentenced to imprisonment of not less than one year nor more than five years and shall be fined not less than \$5,000 nor more than \$15,000, or both the fine and imprisonment, except that if such person shall have been convicted of a felony in any state, territory, or federal court of the United States, or if such firearm or an imitation thereof was had, possessed, borne, transported or carried by or under the proximate control of such person during the commission or attempted commission of a crime of violence, as defined in subsection (d) hereof, then such person shall be fined \$25,000 and imprisoned not less than fifteen (15) years nor more than twenty (20) years. The foregoing penalties provided for violation of this section shall be in addition to the penalty provided for the commission of, or attempt to commit, the felony or crime of violence.

The elements that the Government must prove to find Estick guilty of this charge are that "1) the defendant possessed, carried, etc. the item 'openly' or on or about the person and 2) that item is a firearm." *Gov't of Virgin Islands v. King*, Crim. 529/1994, 1995 WL 217613 (Terr. V.I. Mar. 3, 1995). Here, there is evidence from Kaleed Ferdinand and Rafael Leyton that Estick was firing a gun at the vehicle Kaleed Ferdinand was in on Profit Road. (Tr. Transcript Vol. II: 75, Tr. Transcript Vol. II: 22). Kaleed Ferdinand was later treated for injuries sustained to his hand by the gunshot wound. (Tr. Transcript Vol II: 83; Tr. Transcript

Vol. III: 29.) When police investigated the incident, they found casings along the road, blood spatter, bullet holes and a bullet in the Dodge Caliber that Ferdinand was riding in, as well as a spent projectile in El Flamboyant bar. (Tr. Transcript Vol. II: 174, 178, 182; Tr. Transcript Vol. III: 30-32.) Furthermore, the People proved that Estick was not licensed to carry a firearm on St. Croix, St. Thomas, or St. John on July 18, 2009. Firearms Supervisor Karen Stout testified that she performed a records search but did not find a firearm registration for Estick on the date in question. (Tr. Transcript Vol. III: 24.) Thus, a reasonable juror had sufficient evidence to find Estick guilty of this count.

IV. MOTION FOR NEW TRIAL

The Court may grant a new trial based on newly discovered evidence only where five requirements are met:

(a) the evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

Phillips v. People, 51 V.I. 258, 280 (2009) (quoting *United States v. Cimera*, 459 F.3d 452, 458 (3d Cir. 2006))

Although the decision to grant or deny a motion for a new trial lies within the discretion of the district court, the movant has a 'heavy burden' of proving each of these requirements.

a. Affidavit of Kaleed Ferdinand

Defendant submitted an Affidavit that was allegedly signed by Kaleed Ferdinand and dated November 22, 2010, in which he recanted his testimony that Clint Estick was his assailant. The affidavit states that Ferdinand's belief that Clint Estick was the shooter was a

case of mistaken identity and that Ferdinand testified so that the charges against him would be dismissed in "*People v. Michael Ferdinand, Derrick Liburd, Kalid (sic) Ferdinand and Rasheeda Bell, SX-09-CR-570.*" Defendant seeks to have a new trial based on this newly discovered evidence.

A hearing was held on November 14, 2012 in which Kaleed Ferdinand testified that he did not make such an affidavit. He stated that he never went to notarize the document at Mini-World by Ram Bansal. He further stated that it was not his signature affixed to the document and that his social security number on the document was incorrect. He stated that no one approached him to sign the affidavit and he did not write the contents of the affidavit nor draft it. He also confirmed that he has never told anyone what he testified to was not true.

This hearing was continued on March 19, 2013. Ram Bansal, who notarized the affidavit, testified about his procedure for notarizing an affidavit. Bansal stated that he requires either a drivers' license, passport, Virgin Islands Senior Citizen Card, or voter identification card before he will notarize a document. If someone does not have such identification, he will not notarize. In addition, Bansal keeps a log book of the people for whom he notarizes documents. Bansal asks his customers to record in his log book their printed name, their drivers' license number, and their signatures. Due to the length of time between the notarization in this case and the March 19, 2013 hearing, Bansal could not remember what the gentleman who approached him on November 22, 2010 looked like.

Kimo Inniss also testified on March 19, 2013 that he went to Mini-World with Kaleed Ferdinand, with whom he went to school, on November 22, 2010 to get a paper notarized. He stated he watched Kaleed sign the document and produce identification while Kamal paid the money for the notary. Inniss stated that Kamal, who passed away in 2011, asked Kaleed

Ferdinand to sign the paper and Ferdinand signed it at Mini-World. Kaleed Ferdinand testified that same date that he would never go anywhere with Kimo Inniss. Ferdinand insisted that he did not sign the affidavit. Ferdinand did admit that the criminal charges against him related to the incident on July 19, 2009 were dropped prior to his testimony in Clint Estick's trial.

This Court finds that Kaleed Ferdinand's testimony as far as not authoring or signing the affidavit to be credible. The social security number which the person who signed the affidavit wrote contains an incorrect social security number for Kaleed Ferdinand. Also, it is clear that Kaleed Ferdinand did not author the affidavit as his name is spelled wrong in the criminal case name. Comparing the signatures on the affidavit and in the notary's log book with the signatures on the police report taken by Detective Michael Simmonds, dated July 18, 2009, and the signature on the driver's license shows inconsistencies. Whereas the Court can be sure that the signature on the driver's license and that given on the police report to Detective Simmonds were genuine, the Court must question the signature on the affidavit and that given to the notary. Kaleed Ferdinand signed his driver's license and the police report with his middle initial, "M"; however, the "M" is left off of the affidavit and the log. Based on the foregoing analysis, the Court finds that it is more likely that Kaleed Ferdinand did not author or sign the affidavit clearing Clint Estick of assaulting him. Kaleed Ferdinand has consistently testified that Clint Estick was shooting at him from his vehicle and the Court sees no reason to disturb such testimony based on this affidavit.

Defendant cites to *Government of the Virgin Islands v. Jimmy Davis*, 561 F.3d 159 (3d Cir. 2009) to caution the Court about relying on the testimony of a small number of eyewitnesses in affirming a jury's conviction. Indeed, the only eyewitness to specifically and directly identify Clint Estick himself as the shooter was Kaleed Ferdinand. The jury was

instructed that they are to weigh the credibility of each witness. (Tr. Transcript Vol. IV: 79.) They were further instructed that they could “disregard all or any part of [a witness’ testimony] or accept all or any part of it.” *Id.* Kaleed Ferdinand’s testimony did contradict some of the other testimony heard in this case. Specifically, Ferdinand testified that there were no live rounds or guns inside the Dodge Caliber. (Tr. Transcript Vol. II: 166.) Meanwhile, Detective Al Lewit took photographs of a live round in the front seat of the Caliber and a gun underneath a pile of clothes behind the Caliber while the vehicle was parked at the hospital. (Tr. Transcript Vol. III: 30, 34.) Furthermore, Markeal Smith saw David Liburd come out of the Caliber and run to the Estick house with a gun and Kiera Paul noticed a gun in someone’s hand in the Caliber. (Tr. Transcript Vol. III: 169, 180, 202.) Markeal Smith also testified that he saw Michael Ferdinand, Kaleed Ferdinand’s father retrieve a gun out of the black Caliber and enter the Estick house. (Tr. Transcript Vol. III: 181.) Perhaps the jury discounted these contradictions about weapons because Kaleed Ferdinand testified the way he did to avoid incriminating himself and his friends and family under the charges that were pending.⁴ Alternatively, Kaleed Ferdinand was never seen with a gun and may not have known about guns in the vehicle. What Ferdinand never wavered on, however, and said with conviction was that Clint Estick shot him: he made the statement to the police, he made the statement at trial, he made the statement at the March 19, 2013 hearing. Although there may have been inconsistencies in Ferdinand’s testimony, the jury was asked to determine the weight and the

⁴ For the incident that happened at Clint Estick’s mother’s house after Kaleed Ferdinand was shot, Kaleed Ferdinand was charged with assault in the third degree and destruction of property. Michael Ferdinand was charged with burglary in the first degree, assault in the third degree, and using a deadly weapon during the commission of a crime of violence. These charges were dropped against the Ferdinand family before Kaleed Ferdinand testified. (Tr. Transcript Vol. II: 135-141.) Derrick Liburd and Rasheeda Bell, however, were still facing prosecution.

credibility and believed Ferdinand that Estick shot him. Therefore, this Court will not order a new trial based on the testimony of Kaleed Ferdinand.

Defendant also raises an objection to the testimony of Rafael Leyton. Defendant theorizes that Leyton gave the police officer one version of his story, identifying a purple car rather than a Honda as the shooting vehicle and failing to mention that the gunshots he heard sounded like they came from a .45 caliber firearm. Defendant argues that one week later, Leyton changed or embellished his story as he received more information about the car that was impounded and the casings found on Profit Road. Defendant gives no evidence to support his theories. Leyton may have recalled more of what he saw and heard after the police had taken his initial statement. The jury found Leyton's testimony credible and the Court sees no reason to disturb its finding.

b. Statements of Prosecutor during Closing Arguments

Although Defendant did not object to the Prosecutor's statements during closing argument, Defendant raises an objection to his statement in his Judgment of Acquittal/ Motion for a New Trial. Defendant argues that the Prosecutor's closing argument contained impermissible references that violated his Fifth Amendment Privilege to refuse to testify.

Defendant objects to the following:

Now, when we talk about blowing smoke, when we talk about all the other things that were said, in other words, to try to discredit, I'm sorry, I was not there. I was not there on July 18, 5 o'clock. I was not there. I was not there. Not El Sol Bar but El Flamboyant Bar. Neither was the defense counsel Webster. Neither were any of you, neither were the Judge or any Court personnel.

But who was there and who have sworn to tell the truth? And who got up there and told you saw Clint Estick? Not the man who's sitting next to Clint Estick. He wasn't there. But the man in the middle, Clint Estick, is who was there. He was there. That's who was there.

And you know who else was there? Kaleed Ferdinand was there, that's the testimony you have to rely upon and evaluate whether it's true or not. That's the testimony you have to rely upon to make a determination as to what happened there. (Tr. Transcript Vol. IV: 60-61.)

And defense – Defendant's brother, Defendant's other brother, Defendant's family who may be sitting in the back of the courtroom, you know what, none of them can point and can come up here and testify. And those who did testify, not one of them could say they were there. And you know what else, not one of them can say they knew where Clint was. (Tr. Transcript Vol. IV: 61).

The Court fails to discern how this portion of the Prosecutor's closing argument referenced Defendant's right not to testify. The Prosecutor is stating that Kaleed Ferdinand testified that Clint Estick was at the scene of the shooting but that none of Estick's family witnesses were at the scene or provided information as to the whereabouts of Estick. Nothing is said at all about Clint Estick not testifying or that he was guilty for being silent. The Court finds that this comment does not violate Defendant's Fifth Amendment rights because it was not "manifestly intended" to comment on Defendant's failure to testify. *See e.g., U.S. v. Jones*, 600 F.3d 847, 856 (7th Cir. 2010) (finding prosecutor's comment that "there has been zero testimony to contradict" prosecution's evidence not Fifth Amendment violation); *U.S. v. Brown*, 508 F.3d 1066, 1072 (D.C. Cir. 2007) (finding prosecutor's statement that government's evidence was "unquestioned" did not violate Fifth Amendment because statements did not directly implicate defendant's right not to testify); *U.S. v. Brennan*, 326 F.3d 176, 188 (3d Cir. 2003) (prosecutor's comments on defendant's failure to call knowledgeable witnesses to testify not Fifth Amendment violation because comments did not direct jury to consider defendant's decision not to testify); *Cook v. Schiriro*, 538 F.3d 1000, 1020-23 (9th Cir. 2008) (prosecutor's various comments not Fifth Amendment violations because comments aimed at rebutting defendant's arguments, and not reference to decision not to testify).

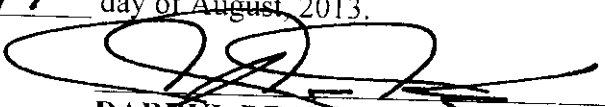
Furthermore, the Court instructed the jury that the law does not compel the Defendant to testify and that no inference may be drawn from the fact that Clint Estick did not testify. (Tr. Transcript Vol. IV: 81.) The Court forbade the jury from discussing the fact that Estick did not testify and instructed them that this should not take any part in their deliberation. *Id.* As such, the Court will deny Defendant's request for a new trial on these grounds.

V. CONCLUSION

For the reasons discussed above, the Court finds that the evidence, taken as a whole and viewed in the light most favorable to the People, supports the verdict.

Accordingly, the Court will deny Estick's motion for judgment of acquittal, or in the alternative, motion for a new trial. An appropriate order follows.

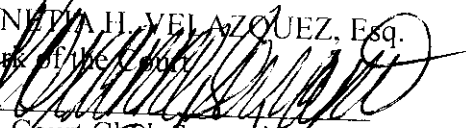
DONE AND SO ORDERED this 14th day of August 2013.


DARRYL DEAN DONOHUE, SR.
Presiding Judge of the Superior Court

ATTEST:

VENETIA H. VELAZQUEZ, Esq.

Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 8/16/13

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

PEOPLE OF THE VIRGIN ISLANDS,	)	CASE NO. SX-09-CR-376
	)	
Plaintiff,	)	
	)	
v.	)	ASSAULT FIRST DEGREE, RECKLESS
	)	ENDANGERMENT FIRST DEGREE;
CLINT ESTICK,	)	UNAUTHORIZED POSSESSION OF A
	)	FIREARM DURING THE COMMISSION
Defendant.	)	OF A CRIME OF VIOLENCE
	)	

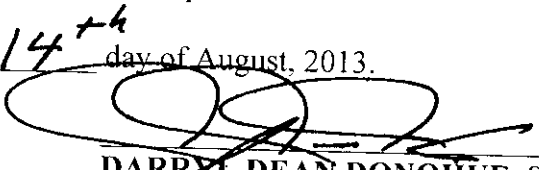
ORDER

THIS MATTER came before the Court on Defendant's Second Amended Motion for Judgment of Acquittal and/or New Trial. For the reasons fully explained in the accompanying Memorandum Opinion, it is hereby

ORDERED that Defendant's Second Amended Motion for Judgment of Acquittal and/or New Trial is **DENIED**; it is further

ORDERED that a copy of this Order be served on the parties.

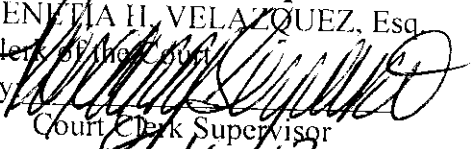
DONE AND SO ORDERED this 14th day of August, 2013.


DARRYL DEAN DONOHUE, SR.
Presiding Judge of the Superior Court

ATTEST:

VENUEA H. VELAZQUEZ, Esq.

Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 8/16/13