For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

HECTOR L. LEDESMA, Appellant/Defendant, v. **GOVERNMENT OF THE VIRGIN ISLANDS,** Appellee/Plaintiff.	)	**S. Ct. Civ. No. 2017-0001** Re: Super. Ct. Civ. No. 558/2007 (STX)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Robert A. Molloy

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

APPEARANCES:

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Appellate Public Defender
St. Thomas, U.S.V.I.
Attorney for Appellant,

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OPINION OF THE COURT

CABRET, Associate Justice.

¶ 1 Hector L. Ledesma appeals from the Superior Court's November 16, 2016 order denying his motion to reconsider the Superior Court's order denying his request for habeas corpus relief. Because Ledesma has failed to point to any reasons for this Court to reverse the Superior Court's order denying Ledesma's request for habeas relief, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶ 2 On February 19, 2004, a neighbor informed Maria Morales that her twelve-year-old daughter, B.T., was spending time with a man she later learned to be Hector Ledesma, instead of attending school. During that time, Morales also discovered that Ledesma had given B.T. a cell phone. Morales contacted the Virgin Islands Police Department based on her suspicion that B.T. was sexually active. Detective Naomi Joseph conducted interviews with Morales, Ledesma, B.T., and neighbors to determine the nature of the relationship between Ledesma and B.T. During an interview, B.T. admitted to having a sexual relationship with Ledesma. Subsequently, Morales took B.T. to Dr. Wilburt Williams for a medical examination to determine whether she was sexually active. Dr. Williams examined B.T. and concluded that he was clinically certain that B.T. was sexually active. On March 26, 2004, Ledesma was charged in a two-count information with aggravated rape in the first degree in violation of 14 V.I.C. § 1700(a)(1) and unlawful sexual contact in violation of 14 V.I.C. § 1708(2). A jury convicted Ledesma of both counts and the Superior Court sentenced him to serve fifteen years for aggravated rape in the first degree and five years for unlawful sexual contact in the first degree.

¶ 3 On August 2, 2004, Ledesma filed a timely appeal to the Appellate Division of the District Court of the Virgin Islands. On appeal, Ledesma argued that the evidence introduced against him at trial was insufficient and that a new trial was warranted because, in a post-trial affidavit, Morales

claimed that B.T. admitted that she never had sex with Ledesma, in contradiction to her testimony at trial. The Appellate Division determined that the evidence submitted at trial was sufficient and affirmed Ledesma's conviction, but declined to address whether Morales's affidavit warranted granting Ledesma a new trial since he never filed a motion for a new trial before the trial court.

¶ 4 But before the Appellate Division rendered its decision on Ledesma's appeal, he petitioned for a writ of habeas corpus on November 19, 2007, which the Superior Court stayed, pending disposition of his appeal. Following disposition of Ledesma's appeal, the Superior Court referred his petition for a writ of habeas corpus to the Magistrate Division pursuant to title 4, section 123 of the Virgin Islands Code for the limited purpose of submitting a recommendation to a Superior Court judge for final disposition. 4 V.I.C. § 123 (b)(2). In his motion for writ of habeas, Ledesma argued that B.T.'s recantation in Morales's post-trial affidavit was new evidence that warranted habeas relief. He also argued that prosecutors coerced B.T.'s testimony and that this prosecutorial misconduct triggered due process violations. The magistrate judge held an evidentiary hearing on November 21, 2011, where B.T., by that date an adult, recanted the testimony she gave as a minor and instead claimed that she never had sex with Ledesma. At the hearing, Ledesma argued that he had proven that he was factually innocent and therefore entitled to habeas relief. Ledesma subsequently argued in writing that he was factually innocent because he had proven by more than a preponderance of the evidence that he never had sex with B.T. Alternatively, he reargued that prosecutors pressured B.T. to lie at trial and told her what to say when she testified against Ledesma. The magistrate judge determined that B.T.'s testimony at the hearing was unreliable and her recantation unbelievable, and recommended to the Superior Court that Ledesma's motion for writ of habeas corpus be denied on the merits. In an October 13, 2016 memorandum opinion and

order, the Superior Court adopted the magistrate judge's recommendation and denied Ledesma's request for habeas corpus relief. The Superior Court agreed with the magistrate judge's findings and determined that B.T.'s recantation testimony was suspect and not credible, and that it failed to warrant a finding of actual innocence. Further, the court determined that Ledesma failed to prove that the Government violated his due process rights.

¶ 5 On October 21, 2016, Ledesma filed a motion for reconsideration of the Superior Court's memorandum opinion and order, arguing that a 57 second video of B.T. recanting her earlier trial testimony was new evidence of Ledesma's innocence. Ledesma did not indicate when the video was produced or when or how it came into his possession. The Superior Court determined that Ledesma had merely rehashed his previous arguments and presented no new argument warranting its reconsideration; it therefore denied Ledesma's motion. Ledesma filed a timely notice of appeal on January 3, 2017.

II. JURISDICTION AND STANDARD OF REVIEW

¶ 6 "The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law." V.I. CODE ANN. tit. 4, V.I.C. § 32(a). Because the Superior Court's order denying reconsideration of the denial of habeas relief was a final order, this Court possesses jurisdiction over Ledesma's appeal. *Pollara v. Chateau St. Croix, LLC.*, 58 V.I. 455, 468 (V.I. 2013).

¶ 7 We generally review denials of motions for reconsideration for abuse of discretion. *Martin v. Martin,* 58 V.I. 620, 625 (V.I. 2013) ("The appropriate standard of review for the denial of a motion to reconsider is generally abuse of discretion but, if the trial court's denial was based upon the interpretation or application of a legal precept, then review is plenary.") (quoting *Worldwide*

Flight Servs. v. Gov't of the V.I., 51 V.I. 105, 108 (V.I. 2009)). "However, because an appeal from a denial of a motion for reconsideration necessarily raises the underlying judgment for review, the standard of review varies with the nature of the underlying judgment." *Pollara*, 58 V.I. at 468. "The trial court's denial of [a] habeas corpus petition is reviewed de novo." *George v. Wilson*, 59 V.I. 984, 989 (V.I. 2013) (citing *Ibrahim v. Gov't of the V.I.*, S. Ct. Civ. No. 2007-0076, 2008 V.I. Supreme LEXIS 20, *2-3 (V.I. Jan. 18, 2008) (unpublished)).

III. DISCUSSION

¶ 8 Virgin Islands law provides that "[e]very person unlawfully imprisoned or restrained of his liberty, under any pretense whatsoever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint." 5 V.I.C. § 1301. In reviewing a petition for writ of habeas corpus, the court must "grant [a writ of habeas corpus] without delay" if the petition states a prima facie case for relief—alleging facts that, if true, entitle the petitioner to relief—and the petition is not procedurally barred, which may occur when a petitioner attempts to re-litigate an issue that was already raised in this Court on direct appeal. *Blyden v. Gov't of the V.I.*, 64 V.I. 367, 376-77 (V.I. 2016). Significantly, granting the writ of habeas corpus is an intermediate step in the statutory procedure and "only requires the Government to produce the petitioner for a hearing." *Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 311 (V.I. 2014). Once the writ is issued to the governmental body charged with producing the petitioner for a hearing, the respondent must file a "return,' which responds to the allegations in the petition for habeas corpus and becomes the principal pleading in the proceeding. 5 V.I.C. § 1308; *Rivera-Moreno*, 61 V.I. at 312; *see also* V.I. H.C.R. 2(e). The petitioner may then file a traverse, which is akin to an answer in a civil proceeding. *Id.* at 313; *see also* V.I. H.C.R. 2(f). Next, "the Virgin Islands habeas corpus statutes

generally require that the Superior Court hold an evidentiary hearing after it has concluded that a petitioner has established a prima facie case for relief and the respondent has filed a return." *Id.* at 314 (citing 5 V.I.C. § 1311); *see also* V.I. H.C.R. 2(d). Here, the magistrate judge considered Ledesma's petition and determined that he had made a *prima facie* showing that he might be entitled to habeas relief. Accordingly, the magistrate judge appointed an attorney to represent Ledesma, held an evidentiary hearing and recommended to the Superior Court that it deny Ledesma's request for habeas relief. *Id.* The Superior Court agreed with the magistrate judge's recommendation and denied Ledesma's request.

¶ 9 Ledesma argues that the Superior Court should have granted him habeas relief for several reasons. He argues that: 1) because B.T. was not a qualified witness when she testified at Ledesma's criminal trial the magistrate judge erred by admitting that testimony at the evidentiary habeas hearing; 2) the Superior Court clearly erred when it found that B.T.'s recantation was not credible; 3) the Superior Court applied an improper standard for determining Ledesma's actual innocence; and 4) that the magistrate judge's credibility determinations violated B.T.'s constitutional right to privacy. We address each of Ledesma's arguments in turn.

A. B.T.'s Testimony at the Criminal Trial

¶ 10 Ledesma argues that the Superior Court never determined that B.T. was qualified to testify and that therefore her entire testimony at Ledesma's criminal trial should be stricken from our consideration on habeas review. The Government argues that Ledesma waived this argument because he did not raise the issue before the Superior Court. Although Ledesma's arguments would generally be deemed waived under Rule 22, in the interest of judicial economy, we apply a more lenient waiver standard in habeas proceedings with respect to pure questions of law on which this

Court owes no deference to the Superior Court. V.I. R. APP. P. 22(m); *see also Peters v. People*, 60 V.I. 479, 484-85 (V.I. 2014) (noting that a petitioner could simply refile the petition) (citing *Ramos v. Comm'r of Corr.*, 727 A.2d 213, 217 (Conn. 1999)). However, because these issues were not raised below, we review these arguments for plain error. Under this standard of review, (1) there must be an error, (2) that is plain, (3) that affects the defendant's substantial rights, and (4) that affects the fairness, integrity, or public reputation of judicial proceedings. *Frett v. People*, 66 V.I. 399, 408 (V.I. 2017); V.I. R. APP. P. 4(h) ("Only issues and arguments fairly presented to the Superior Court may be presented for review on appeal; provided, however, that when the interests of justice so require, the Supreme Court may consider and determine any question not so presented."); V.I. R. APP. P. 22(m) ("Issues that were . . . not raised or objected to before the Superior Court . . . are deemed waived for purposes of appeal, except that the Supreme Court, at its option, may notice an error not presented that affects substantial rights."); *Galloway v. People*, 57 V.I. 693, 709 n.8 (V.I. 2012) ("Rules 4(h) and 22(m), when read in tandem, simply adopt the plain error standard of review.").

¶ 11 Ledesma argues that the trial court erred by failing to conduct a *voir dire* of B.T. to determine whether she sufficiently understood that she had a duty to tell the truth when she testified as purportedly required by 5 V.I.C. § 831(b). Because the trial court never determined that B.T. was qualified, according to Ledesma, B.T. was legally disqualified from testifying as a witness and her entire testimony should be disregarded. However, Ledesma's argument fails for several reasons.

¶ 12 Under title 5, section 831(b) of the Virgin Islands Code, in effect at the time of Ledesma's trial, "[a] person is disqualified to be a witness if the judge finds that . . . the proposed witness is

incapable of understanding the duty of a witness to tell the truth." 5 V.I.C. § 831(b) (repealed). First, section 831(b) imposed no affirmative duty on the court to *voir dire* a witness *sua sponte*. Instead, section 831(b), when it was in effect between 1975 and 2010,[1] was a rule of evidence that governed disqualification of witnesses, and not the affirmative qualification of witnesses as Ledesma claims. *Phillips v. People*, 51 V.I. 258, 265 (V.I. 2009) (explaining that section 831 was "a provision of the Uniform Rules of Evidence ("URE") adopted by the Legislature."). Rather, at the time of the original trial in this action, as well as today, witnesses are generally assumed to be competent to testify. *Castillo v. Gov't of the V.I.*, 48 V.I. 519, 524 (D.V.I. 2006). ("The law . . . regards every person as 'qualified' to be a witness and holds that 'no person may be disqualified to testify in any matter,' except as otherwise provided in the rules.") (quoting 5 V.I.C. § 777); *Gov't of the V.I. v. Joseph*, 162 Fed. Appx. 175, 176 (3d Cir. 2006) ("In the courts of the Virgin Islands, a witness is disqualified as incompetent if she is unable to express herself or incapable of understanding her duty to tell the truth.") (citing 5 V.I.C. § 831). *See also* V.I. R. EVID. 601 ("Every person is competent to be a witness unless a statute of the Virgin Islands or these rules provide otherwise."). Here, while Ledesma had the opportunity to challenge B.T.'s qualifications to testify at his criminal trial under section 831(b), he did not do so. He cannot now maintain that the court erred in failing to consider B.T.'s qualifications as a witness when he made no relevant objection at trial, and when the court was under no obligation to conduct such an inquiry *sua sponte*.

[1] The Virgin Islands Legislature repealed the Uniform Rules of Evidence (URE) in 2010 and replaced them with the Federal Rules of Evidence. *See, e.g., Simmonds v. People*, 59 V.I. 480, 500 (V.I. 2013) ("Act No. 7161 provides that chapter 67 of title 5, dealing with the admissibility of evidence, is 'hereby repealed and replaced with the Federal Rules of Evidence.'") (citing Act No. 7161, § 15(b)). Subsequently, we have adopted the Virgin Islands Rules of Evidence. *In re Adoption of Virgin Islands Rules of Evidence*, Promulgation Order No. 2017-002, 2017 V.I. Supreme LEXIS 21, at *1 (V.I. Apr. 3, 2017).

"Whether a person is competent to serve as a witness is a determination to be made within the discretion of the court." *United States v. Roebuck*, 334 F. Supp. 2d 833, 834 (D.V.I. 2004).

¶ 13 Finally, although the best practice is for the trial court to conduct a *voir dire* examination of any minor witness to determine whether he or she understands the duty to tell the truth and the consequences of lying under oath, the trial court's failure to conduct such an inquiry in this instance was not error. *See Malchanoff v. Truehart*, 236 N.E.2d 89, 93 (Mass. 1968) (explaining that, where the competency of the minor witness was not challenged, the trial court did not err as a matter of law by allowing the testimony without conducting such a *voir dire*); *State v. Morgan*, 509 N.E.2d 428, 433 (Ohio 1986) ("We reiterate that better judicial procedure requires a trial judge to *voir dire* child witnesses under age ten to determine their competence to testify. However, when on the record there appear indicia of a child's ability to receive just impressions of facts, to relate facts truthfully, and to understand the consequences of telling falsehoods, we do not find that an appellant is prejudiced when the child is permitted to testify without qualification by the trial judge and without objection by defense counsel."); *Commonwealth v. Wilson*, 244 A.2d 734, 739 (Pa. 1968) (explaining that "the safest course" of determining competency of a minor to testify is a formal voir dire but that the failure to conduct *voir dire* was not prejudicial based on the facts). Therefore, because the trial court possessed no duty to *sua sponte* conduct a *voir dire* of B.T., it was not error for the court to fail to do so.

¶ 14 Ledesma's alternate argument that B.T. was not qualified to testify at his criminal trial because she was a twelve-year-old minor[2] at the time is likewise unavailing. Ledesma offers no

[2] Although B.T. was twelve years old at the time of the crime, she was thirteen years old at the time she testified at Ledesma's trial.

factual or legal support to overcome the law articulated in formerly applicable title 5, section 777 of the Virgin Islands Code,[3] in effect at the time of Ledesma's criminal trial, which provided generally that "every person is qualified to be a witness" and "no person is disqualified to testify to any matter." *Castillo,* 48 V.I. at 524. Given that "there is no precise age which determines the question of competency," B.T.'s age alone did not render her incompetent to testify. *Kentucky v. Stincer*, 482 U.S. 730, 741–42 and n. 11 (1987). Because Ledesma failed to object to the introduction of B.T.'s testimony at the habeas hearing, we review this issue for plain error. *Monelle v. People,* 63 V.I. 757, 767 (V.I. 2015) (explaining that when a defendant fails to raise an evidentiary objection at trial, "this Court may review only for plain error"). Under this standard, Ledesma had the burden of pointing us to an error that was plain that substantially affected his rights. *Fontaine,* 59 V.I. at 654. Here, Ledesma has failed to provide any reason why the trial court erred when it allowed B.T. to testify when she was thirteen years old. Accordingly, Ledesma has failed to carry his burden, as the Superior Court committed no error when it considered in the present habeas corpus proceeding the testimony B.T. gave at Ledesma's criminal trial.

B. Credibility of Recantation

¶ 15 Ledesma also argues that the Superior Court's rejection of B.T.'s recantation is a manifest injustice because her testimony as an adult at the habeas hearing was subject to the penalty of perjury while her testimony as a thirteen-year-old minor was not subject to the penalty of perjury.

[3] "Except as otherwise provided in this chapter, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible." 5 V.I.C. § 777 (2006) (repealed). See Virgin Islands Rule of Evidence 601 ("Every person is competent to be a witness unless a statute of the Virgin Islands or these rules provide otherwise.").

As an initial matter, manifest injustice is a reason for a court to grant a motion for reconsideration but is not a reason for this court to overturn a ruling based on an issue that is raised for the first time on appeal.[4] *Cabrita Point Dev., Inc. v. Evans,* 52 V.I. 968, 975 (D.V.I. 2009) ("Such motions are not substitutes for appeals, and are not to be used as 'a vehicle for registering disagreement with the court's initial decision, for rearguing matters already addressed by the court, or for raising arguments that could have been raised before but were not.'") (quoting *Bostic v. AT&T of the V.I.*, 312 F. Supp. 2d 731, 733, 45 V.I. 553 (D.V.I. 2004)). Instead, because Ledesma raises this issue for the first time on appeal, we review for plain error. In response, the Government argues that the testimony B.T. gave when she was thirteen was subject to the penalty of perjury because "[n]either age nor incompetence serves as defense to the crime of perjury" and that preventing children who are not subject to the penalty of perjury from testifying would make minor victims especially vulnerable.

¶ 16 We have previously noted that "recantation is suspect and therefore unreliable." *Phillips v. People*, 51 V.I. 258, 281 (V.I. 2009). And, particularly in cases involving the sexual abuse of a child, recantation testimony is viewed with skepticism. *Mulholland v. Cty. of Berks, Pa.*, 706 F.3d 227, 240 n.18 (3d Cir. 2013) (explaining that skepticism for recantation testimony is particularly warranted "in cases of child sexual abuse where recantation is a recurring phenomenon."). Furthermore, "it is the unique role of the factfinder to make the necessary credibility determinations." *Chestnut v. Goodman*, 59 V.I. 467, 474 (V.I. 2013). Requiring testimony under

[4] Manifest injustice may serve as a reason for granting a motion for reconsideration but is not a reason for this court to overturn an issue raised for the first time on appeal. *In re Hartlage*, 54 V.I. 446, 452 (V.I. 2010) ("The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence.") (quoting *Lazaridis v. Wehmer*, 591 F.3d 666, 669 (3d Cir. 2010)). Furthermore, Ledesma does not make an argument or cite any law for why the Superior Court's rejection of B.T.'s recantation testimony is manifest injustice.

oath simply works to aid the factfinder in assessing credibility by "impressing upon [a witness] the seriousness of telling the truth as against penalty of perjury, and [permitting] the [factfinder] an opportunity to observe the demeanor of the witness in making his statement." *State v. Fischer*, 459 N.W.2d 818, 820 (N.D. 1990). The Superior Court adopted the magistrate judge's recommendation that "found that B.T.'s testimony [at the habeas hearing] was unreliable and that her recantation was unbelievable." *Ledesma v. Gov't of the V.I.*, No. SX-07-CV-558, 2016 V.I. LEXIS 167, at *15 (V.I. Super. Ct. Oct. 13, 2016). The Superior Court also agreed with the magistrate judge's determination that B.T.'s adult testimony was "an attempt to right damage she feels her relationship with Ledesma caused him," noting that she still considers Ledesma a friend and that her recantation is tied up in the feelings of guilt and remorse she feels toward Ledesma. This point was further demonstrated by evidence that B.T. continued to communicate with Ledesma during his incarceration, through letters and suggestive photographs. Listing these reasons, together with the inconsistencies in B.T.'s testimony and her inability to recall details, the court agreed with and adopted the magistrate judge's determination that B.T.'s recantation was neither reliable nor credible. Furthermore, here, the Superior Court, through the magistrate judge's observations of B.T.'s testimony at the habeas evidentiary hearing, was in the best position to determine B.T.'s credibility and we will not upset that determination on appeal. *Moore v. Walters*, 61 V.I. 502, 508 (V.I. 2014) (explaining that "on appeal, the court must defer to the credibility decision made by the factfinder, whether it be the judge or the jury"); *James v. People*, 60 V.I. 311, 328 (V.I. 2013) ("We cannot usurp the role of the [factfinder]by re-analyzing, re-evaluating, or re-weighing the evidence presented at trial, or by determining the credibility of the witnesses."). *See John v. People*, 63 V.I. 629, 646 (V.I. 2015) (explaining that we do not "re-weigh the

credibility of witnesses") (quoting *Morton v. People*, 59 V.I. 660, 671 (V.I. 2013)). Therefore, because the magistrate judge—being in the best position to determine the credibility of B.T.'s recantation testimony—had valid reasons for concluding that B. T.'s testimony was unreliable, the Superior Court did not err when it adopted the magistrate judge's recommendation that B.T.'s recantation testimony was not credible.

C. Admission of B.T.'s Trial Testimony

¶ 17 Ledesma also argues that, because B.T.'s testimony at Ledesma's criminal trial was not subject to the penalty of perjury, as required for the admission of a witness's prior inconsistent sworn statements under Federal Rule of Evidence 801(d)(1)(A),[5] that testimony constituted inadmissible hearsay for the purposes of the habeas hearing and the magistrate division therefore erred when it allowed that testimony to be admitted. According to Ledesma, B.T.'s criminal trial testimony was not given under penalty of perjury because, while she was duly sworn in as a witness, B.T. was thirteen years old at the time of the trial, and therefore statutorily exempt from prosecution for perjury. In response, the People argue that B.T.'s criminal trial testimony was, in fact, subject to penalty of perjury and did not constitute hearsay as there existed no bar to prosecuting B.T. for perjury and neither age nor incompetence serve as a defense to perjury.[6] We find Ledesma's argument unpersuasive.

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[5] While the Uniform Rules of Evidence were in effect at the time of Ledesma's criminal trial, the Virgin Islands Legislature adopted the Federal Rules of Evidence in 2010 and these rules governed the magistrate judge's habeas hearing in this matter. *Simmonds v. People of the V.I.*, 59 V.I. 480, 501 (V.I. 2013) (explaining that the Virgin Islands Legislature "adopted Rule 801(d)(1)(A) in 2010"). Since that time, as we have previously noted, see *supra* note 1, the Virgin Islands Rules of Evidence have been adopted, which supersede the Federal Rules of Evidence.

[6] Federal Rule of Evidence 801(d)(1)(A) provides that:

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
(1) A Declarant–Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

¶ 18 In relevant part, 14 V.I.C. § 14 provides that: "All persons are capable of committing crimes or offenses except . . . (2) children over the age of seven years and under the age of fourteen years, in the absence of clear proof that at the time of committing the act charged against them they knew its wrongfulness." *See also* 14 V.I.C. § 1545 ("It is no defense to a prosecution for perjury that the accused was not competent to give the testimony, deposition or certificate of which falsehood is alleged."). Thus, under 14 V.I.C. § 14, at the age of thirteen, B.T. was subject to prosecution for perjury; albeit conditioned upon a showing of "clear proof that at the time of committing the [perjury she] knew its wrongfulness. And while Federal Rule of Evidence 801(d)(1)(A) requires that a statement be "given under penalty of perjury" to qualify as non-hearsay, nothing in the text of the rule requires a showing that any resulting prosecution for perjury would necessarily, or even likely, succeed. Here, B.T. testified in open court after being duly sworn. ("B.T. having been called as a witness for and on behalf of the Government, and having been first duly sworn by the clerk, was examined and testified as follows."). Accordingly, her testimony "was given under penalty of perjury" within the meaning of Rule 801, and the Superior Court did not err in admitting B.T.'s testimony at the habeas hearing.

D. Actual Innocence

¶ 19 The United States Supreme Court has explained that "'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States,* 523 U.S. 614, 623-24 (1998). The "prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime." *Sawyer v. Whitley,* 505 U.S. 333, 340 (1992). But a

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition[.]

petitioner claiming actual innocence must do more than allege that the People provided insufficient evidence of guilt; he must affirmatively prove his innocence. *Herrera v. Collins,* 506 U.S. 390, 443 (1993) (Blackmun, J., dissenting) ("The government bears the burden of proving the defendant's guilt beyond a reasonable doubt, but once the government has done so, the burden of proving innocence must shift to the convicted defendant.").

¶ 20 In the federal courts, instead of providing an independent reason for relief from custody, actual innocence typically acts merely as a gateway to provide relief for otherwise constitutionally barred claims. *Schlup v. Delo,* 513 U.S. 298, 315 (1995) (explaining that a "claim of innocence is thus 'not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'") (citing *Herrera,* 506 U.S. at 404); *De Altier Pickard v. United States,* 312 F. Supp. 2d 735, 741 (D.V.I. 2004) ("Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' for the failure to comply with the procedural requirement and that actual 'prejudice' would result from the alleged constitutional violation, or that he is 'actually innocent.'") (quoting *Bousley,* 523 U.S. at 622 (1998)).

¶ 21 However, some jurisdictions have also recognized freestanding claims of actual innocence. *Miller v. Comm'r of Corr.,* 700 A.2d 1108, 1110 (Conn. 1997) (espousing Connecticut's standard for proving a freestanding claim of actual innocence.). A freestanding claim of actual innocence requires "no claim of an antecedent constitutional violation that affected the result of his criminal trial." *Miller v. Comm'r of Corr.,* 700 A.2d 1108, 1129 n.28 (Conn. 1997). Instead, a freestanding claim of actual innocence is where the petitioner's innocence itself provides habeas relief. *Givens*

v. Kelly, Civil Action No. 12-365, 2013 U.S. Dist. LEXIS 36672, at *28-29 (W.D. Pa. Mar. 18, 2013) (explaining that a freestanding claim of actual innocence is one where petitioner claims "that he is actually innocent and therefore, on that ground alone, quite apart from any errors that may have occurred in his criminal proceedings, he should be granted habeas relief, essentially implying that it is constitutionally intolerable for an actually innocent person to be convicted.") (citing *Herrera v. Collins*, 506 U.S. 390 (1993)). "Such a freestanding claim is to be contrasted with what has come to be known in federal habeas jurisprudence as a 'gateway' claim of actual innocence." *Miller*, 700 A.2d at 1129.

¶ 22 Ledesma correctly recognizes that this Court has not spoken to whether a freestanding claim of actual innocence is cognizable in the Virgin Islands, and if such a claim is cognizable, what the appropriate standard for granting relief for such a claim might be.[7] However, we need not make this determination in this case, because Ledesma has failed to present any meritorious argument to establish his factual innocence even by a preponderance of the evidence—the least exacting standard of proof that might conceivably apply. *See In re Lambrix*, 624 F.3d 1355, 1367 (11th Cir. 2010) ("[E]ven assuming Lambrix can make a freestanding actual innocence claim, the facts Lambrix proffers in support of this claim are the same facts alleged elsewhere in his Application. . . . For the same reasons Lambrix has not satisfied the requirements… as to his other claims, he likewise has not as to his actual innocence claim."); *Cotton v. Schriro*, 360 Fed. Appx. 779, 781 (9th Cir. 2009) ("Because Cotton has not come close to making the 'extraordinarily high'

[7] Nor has the Legislature, to date, adopted any statutory provisions to govern actual innocence claims, whether based on biological evidence, or otherwise. Yet, other jurisdictions have addressed this topic. *See, e.g.*, VA. CODE ANN. § 19.2-327.2 (addressing claims of actual innocence based on biological evidence); VA. CODE ANN. § 19.2-327.10 (addressing claims of actual innocence based on nonbiological evidence).

showing required to establish a freestanding claim of actual innocence we need not decide whether such a claim is cognizable in a non-capital case[.]").

¶ 23 Ledesma asserts that the Superior Court applied the incorrect standard when it evaluated his claim of actual innocence and further claims that this error alone warrants reversal. Specifically, he argues that the court applied a preponderance of the evidence standard when it should have adopted and applied the clear and convincing standard used in other jurisdictions. However, apart from the arguments already considered and rejected above primarily related to the recantation of B.T.'s criminal trial testimony, Ledesma fails to present any argument that the court erred in rejecting his actual innocence claim under the preponderance of the evidence standard, let alone under the more exacting clear and convincing evidence standard.

¶ 24 Ledesma's argument that he is factually innocent rests entirely upon his contention that the Superior Court erred in rejecting of B.T.'s recantation testimony as unreliable and not credible. However, for the reasons discussed above, we find no error with the Superior Court's determination that B.T.'s recantation testimony was not credible. Therefore, Ledesma's petition, whether considered as a gateway claim or freestanding claim of actual innocence, fails to establish Ledesma's right to relief under any standard— whether by clear and convincing evidence or by a mere preponderance of the evidence. Accordingly, the Superior Court did not err in rejecting Ledesma's claim of actual innocence.

E. B.T.'s Constitutional Right to Privacy

¶ 25 Ledesma also argues that the magistrate judge's credibility determination infringed on B.T.'s constitutional right to privacy. Because Ledesma did not raise this argument before the trial court, we again review this claim for plain error. *See Connor v. People*, 59 V.I. 286, 298 n.11 (V.I.

2013) ("Where a statute is violated—indeed, even where the Constitution itself is violated—an appellant must ordinarily establish each factor of the plain error test if he failed to raise his objection below."). As earlier indicated, Ledesma bears the burden of establishing an "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights." *Francis v. People*, 57 V.I. 201, 209-10 (V.I. 2012) (citations omitted). Here, Ledesma does not point us to a plain error. Further, he fails to identify any authority to support his argument that a witness's constitutional right to privacy is violated when a factfinder makes credibility determinations. *Brown v. People,* 56 V.I. 695, 703 (V.I. 2012) (explaining that "an error is 'plain' only if the error is clear under current law, and thus 'there can be no plain error where there is no precedent . . . directly resolving it.'") (citing *Murrell v. People*, 54 V.I. 338, 366 (V.I. 2010)). Instead, Ledesma cites cases that are not relevant to his argument and that do not support his claim that the court violated his or B.T.'s constitutional rights. Therefore, even assuming (without deciding) that a habeas petitioner has any standing to raise a purported violation of the privacy rights of another individual, because Ledesma has failed to carry his burden of pointing us to any error, his claim that the magistrate judge erred by infringing on B.T.'s constitutional right to privacy must and does fail. *Fontaine v. People,* 59 V.I. 640, 654 (V.I. 2013) ("In plain error review, the burden is on the appellant to show an error that is plain that affects substantial rights.").

IV. CONCLUSION

¶ 26 Because B.T. was a qualified witness who testified under oath, subject to penalty of perjury, at Ledesma's criminal trial, the Superior Court did not err in admitting that testimony at Ledesma's habeas evidentiary hearing. Nor did the Superior Court err in determining that B.T.'s inherently suspect recantation testimony was unreliable and incredible. In turn, because the court,

in its discretion, rejected B.T.'s recantation, the Superior Court did not err in concluding that Ledesma's claim of actual innocence failed under any applicable burden of proof. Accordingly, we affirm the Superior Court's November 16, 2016 order denying Ledesma's motion to reconsider the Superior Court's October 13, 2016 opinion and order denying habeas corpus relief.

Dated this 12th day of December, 2019.

BY THE COURT:

/s/ Maria M. Cabret
MARIA M. CABRET
Associate Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court