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VERONICA HANDY, ESQUIRE
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For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

KAMAL THOMAS,)	S. Ct. Civ. No. 2019-0002
Appellant/Defendant,)	Re: Super. Ct. Crim. No. 045/2016 (STX)
)	
v.)	
)	
GOVERNMENT OF THE)	
VIRGIN ISLANDS;)	
WYNNIE TESTAMARK,¹ DIRECTOR OF)	
THE V.I. BUREAU OF CORRECTIONS,)	
ET AL.)	
Appellee/Plaintiff.)	

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Kathleen Mackay

Considered: December 10, 2019
Filed: December 28, 2022

Cite as: 2022 VI 22

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

APPEARANCES:

Kamal Thomas
St. Croix, U.S.V.I.
Pro se,

Su-Layne Walker, Esq.
Assistant Attorney General
Department of Justice
St. Thomas, U.S.V.I.
Attorney for Appellee.

OPINION OF THE COURT

¹ Although Thomas originally named Rick Mullgrav as Director of the Virgin Islands Bureau of Corrections in his petition, Mullgrav is no longer in office. Accordingly, this Court automatically substituted him with his successor in office under Rule 34(c) of the Virgin Islands Rules of Appellate Procedure.

CABRET, Associate Justice.

¶1 After his March 24, 2010 conviction for third-degree assault, using a dangerous weapon during a third-degree assault, simple assault, and two counts of threatening a witness, Kamal Thomas filed a petition for habeas corpus with the Virgin Islands Superior Court, which dismissed the petition in part and granted it in part. Thomas appeals the court's partial dismissal. For the reasons discussed below, we affirm the Superior Court's memorandum opinion denying Thomas relief for insufficient evidence to sustain his conviction for third degree assault, but reverse its Order staying Count VI of his conviction for simple assault and direct the Superior Court, on remand, to dismiss count VI in accordance with the standard in *Titre v. People*, 2019 VI 3.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶2 On or about the night of June 18, 2007, James Cockayne was beaten and killed on St. John, U.S. Virgin Islands. (J.A. 0014.) Kamal Thomas was arrested along with Anselmo Boston and charged with first-degree murder, second-degree murder, third-degree assault, using a dangerous weapon during the commission of a crime of violence, and simple assault. (J.A. 0050.) On October 10, 2008, after a four-day jury trial, a jury acquitted Thomas of first and second-degree murder, but found him guilty of third-degree assault, using a dangerous weapon during a crime of violence, and simple assault. (J.A. 0014.)

¶3 Thomas later filed a motion for a new trial following the discovery of payments by Cockayne's family to witnesses in connection with the trial. (J.A. 0014.) After a hearing on the motion, the trial court ordered a new trial, and Thomas was tried for the second time in March 2010 on the charges of third-degree assault pursuant to 14 V.I.C. § 297(2), using a dangerous weapon during the commission of a crime of violence pursuant to 14 V.I.C. § 2251(a)(2)(B),

simple assault pursuant to 14 V.I.C. § 299(2) and two counts of threatening a witness, pursuant to 14 V.I.C. § 1510(a)(1) and (2). (J.A. 0051.). We have previously recounted certain relevant features of the second trial:

At Thomas's second trial the People presented evidence that on the evening of June 18, 2007, Anselmo R. Boston, Thomas's co-defendant, was involved in a heated altercation with Cockayne at a bar in St. John for supposedly kicking his girlfriend's jeep earlier that day, and that Boston struck him with a pool cue. At the time of this altercation, witnesses placed Thomas inside the bar with Boston. A few moments after the altercation was over a witness saw Thomas pick up a wooden stick outside the bar, and then run up the street with Boston after Cockayne. At around the same time that the witness from the bar saw Thomas and Boston chasing Cockayne up the street, Leann Oquendo, who was in her car several blocks away, saw three black males running up the road in the direction of a white male. She further stated that one of the individuals running up the road was carrying a wooden stick, and that when the three individuals reached the white male, they surrounded him in the street. The individual holding the stick then attempted to hit the white male with the stick, but stopped because Oquendo blew her car horn. After deterring him from hitting the white male twice by blowing her horn, Oquendo drove away to alert the authorities, leaving the white male in the street still surrounded by the three other individuals.

The People contended that the white male Oquendo saw was Cockayne, and that the individual with the stick was Thomas. The People further contended that after Oquendo drove away to alert the authorities, Thomas and the other two individuals assaulted Cockayne. To support the People's theory that Cockayne was assaulted after Oquendo drove away, the People called Dr. Francisco Landron, a forensic pathologist and medical examiner, who testified that an external examination of Cockayne's body revealed that he had sustained a substantial amount of blunt force injuries. These injuries manifested themselves in the form of contusions and abrasions, and were visible on Cockayne's face, arms, neck, shoulder, and legs. Dr. Landron further stated that these injuries were consistent with the type of injuries a person could have gotten from being struck with a stick or a piece of wood. Dr. Landron, however, did not testify concerning Cockayne's cause of death. Nor did he suggest that his cause of death was related in any way to his blunt force injuries.

Thomas v. People (Thomas I), 56 V.I. 647, 656 (V.I. 2012). Based on this evidence, Thomas was found guilty on all counts. Thomas then filed a motion for a new trial and subsequently, a supplement to that motion. In Thomas's supplement to his motion for a new trial, he alleged that

juror misconduct had deprived him of his right to a fair trial and requested a hearing on the matter. The trial court denied Thomas's request for an evidentiary hearing. (J.A. 0015.) On appeal, we found the trial court's denial was an abuse of discretion and remanded with instructions for the trial court to conduct an evidentiary hearing on the matter. *Thomas v. People.*, 56 V.I. 647 (2012). After conducting an evidentiary hearing, the trial court found that no juror misconduct had occurred, and this Court upheld that finding. *Thomas v. People*, 60 V.I. 688 (2014).

¶4 Two years later, Thomas filed a petition for habeas corpus alleging that: (1) the jury at his trial lacked impartiality due to pretrial publicity and ineffective voir dire, (2) he had ineffective assistance of counsel, (3) there was insufficient evidence to sustain his assault convictions, and his sentence violated both (4) 14 V.I.C. § 104 and (5) 5 V.I.C. § 3672(a). (J.A. 0016.) The Superior Court issued the writ on March 19, 2018 and held a hearing on the matter on August 7, 2018. (J.A. 0009-11). The Superior Court, in its November 13, 2018 memorandum opinion, found that Thomas failed to show that he was convicted by a jury that was not impartial, that he received ineffective assistance of counsel, or that the evidence was insufficient to sustain a conviction. (J.A. 0047.) However, the Superior Court did find that Thomas's sentence was improper in that it violated 14 V.I.C. § 104² and 5 V.I.C. § 3672(a).³ To remedy these violations the court entered an order in the underlying criminal case formally staying the imposition of his sentence for simple assault and

²Section 104 provides that an “act or omission which is made punishable in different ways by different provisions of this Code may be punished under any of such provisions, but in no case may it be punished under more than one,” and that “[a]n acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.”

³ Section 3672(a) provides that “[a] judgment imposing a sentence of imprisonment shall specify whether the sentence is to be served concurrently with or consecutively to any other sentence imposed at the same time or prior thereto. If the sentences are to be served consecutively, the judgment shall specify when each sentence is, to begin with reference to the termination of any other sentence.”

further clarifying the nature of his sentence as required by the relevant statutes. Thomas filed a timely notice of appeal with this Court on December 19, 2018. (J.A. 0001.)

II. JURISDICTION AND STANDARD OF REVIEW

¶5 “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, § 32(a). “A final order is a judgment from a court which ends the litigation on the merits, leaving nothing else for the court to do except execute the judgment.” *Williams v. People*, 55 V.I. 721, 727 (V.I. 2011). Because the Superior Court’s November 1, 2018 memorandum opinion and order disposed of all the claims in Thomas’s petition for habeas corpus relief, it is an appealable final judgment. *Brooks v. Gov’t of the V.I.*, 58 V.I. 417, 422 (V.I. 2013).

¶6 The standard of review for this Court’s examination of the Superior Court’s application of the law is plenary, while findings of fact are reviewed for clear error. *Heyliger v. People*, 66 V.I. 340, 348 (V.I. 2017) (citing *St. Thomas–St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007)). The standard of review for a claim of insufficiency of the evidence regarding a criminal conviction is whether there is substantial evidence, when viewed in the light most favorable to the government, to support the jury’s verdict, such that a rational trier of fact could have found the presence of the essential elements of the crime beyond a reasonable doubt. *Ritter v. People*, 51 V.I. 354, 359 (V.I. 2009); see also, *Rodriguez v. Bureau of Corrections*, 58 V.I. 367, 371 (V.I. 2013). This Court reviews the trial court’s grant of a petition for habeas corpus de novo. *George v. Wilson*, 59 V.I. 984, 989 (V.I. 2013).

III. DISCUSSION

¶7 On appeal, Thomas argues that the Superior Court erred by: (1) failing to address his argument concerning the insufficiency of the evidence and (2) by staying his conviction for simple

assault. The People contend that the Superior Court did address Thomas's insufficiency of the evidence argument and did not err in finding that there was sufficient evidence to sustain Thomas's assault convictions. The People also argue that the Superior Court properly resentenced Thomas under the then prevailing interpretation of 14 V.I.C. § 104, but agree that Thomas must nevertheless be resentenced in accordance with our decision in *Titre*. See *Titre*, 2019 VI 3, ¶¶ 17-20 (overruling a portion of *Williams v. People*, 56 V.I. 821, 834 n.9 (V.I. 2012)).

A. Sufficiency of the Evidence

¶8 Thomas argues that the People failed to present sufficient evidence to support his conviction for third-degree assault. This Court held in *Rivera–Moreno* that a habeas petitioner can raise purely legal questions through a habeas petition. *Rivera–Moreno v. Gov't of the V.I.*, 61 V.I. 279, 303 (V.I. 2014). “This would include challenges to the sufficiency of the evidence when not otherwise procedurally barred, since a conviction based on insufficient evidence presents an error of constitutional dimension that must be remedied.” *Blyden v. Gov't of the V.I.*, 64 V.I. 367, 376 (V.I. 2016) (citing *Jackson v. Virginia*, 443 U.S. 307, 316 (1979)).

¶9 To obtain a conviction for third-degree assault under 14 V.I.C. § 297(a)(2), the People must prove, beyond a reasonable doubt, that the defendant committed an assault, and that the assault was committed “with a deadly weapon.” See *Cascen v. People*, 60 V.I. 392, 407 (V.I. 2014) (quoting *Phipps v. People*, 54 V.I. 543, 550 (V.I. 2011)); 14 V.I.C. § 297(a)(2). An assault is “any unlawful violence upon the person of another with an intent to injure him, whatever be the means or degree of violence used.” 14 V.I.C. § 292. “When [an] appellant[] challenges the sufficiency of the evidence presented at trial... all issues of credibility within the province of the jury must be viewed in the light most favorable to the government.” *Latalladi v. People*, 51 V.I. 137, 145 (V.I. 2009) (quoting *United States v. Gonzalez*, 918 F.2d 1129, 1132 (3d Cir. 1990)). “The reviewing

court must be particularly deferential when determining whether a jury verdict rests on insufficient evidence [and] may not usurp the role of the jury by re-weighing the evidence and re-assessing the credibility of witnesses.” *Todman v. People*, 59 V.I. 675, 681 (V.I. 2015) (citing *United States v. Boria*, 592 F.3d 476, 480 (3d Cir. 2010)). A reviewing court must affirm a jury's verdict as long as substantial evidence was presented at trial to allow a rational trier of fact to convict when the evidence is viewed in a light most favorable to the government. *Webster v. People*, 60 V.I. 666, 678–79 (V.I. 2014); *Cascen*, 60 V.I. at 401; *Stevens v. People*, 52 V.I. 294, 304 (V.I. 2009). Therefore, “[a]n appellant who seeks to overturn a conviction on insufficiency of the evidence grounds bears a very heavy burden.” *Id.* (quoting *United States v. Losada*, 674 F.2d 167, 173 (2d Cir. 1982)) (internal quotation marks omitted). Moreover, a finding of insufficiency of the evidence should be confined to those cases in which the prosecution's failure to establish the elements of the crime is clear. *James v. People*, 60 V.I. 311, 318 (V.I. 2013); *Todmann v. People*, 59 V.I. 926, 934 (V.I. 2012).

¶10 After reviewing the evidence presented at Thomas’s trial, the Superior Court concluded that a rational jury could have found that the prosecution proved the elements necessary to convict Thomas on all the assault-related charges beyond a reasonable doubt. Specifically, the Court reasoned that,

Rawlins and Sprauve both testified to seeing Thomas chase Cockayne down the street with another individual. Oquendo testified to seeing Thomas chase a white male down the street. Rawlins testified to seeing Thomas pick up a wooden stick. Oquendo saw one of three individuals preparing to hit a fourth, white male with a stick as they stood surrounding him. Cockayne was later found with multiple blunt force injuries that were consistent with injuries from being beaten with a stick or wooden object. A rational jury could have concluded that Thomas, after grabbing a stick, ran after Cockayne, and then assaulted Cockayne with the stick or aided and abetted another in Assaulting Cockayne. A rational jury could also have concluded that, because of the manner in which the stick was used, it was a deadly weapon.

Thomas v. Gov't of the V.I., No. ST-16-MC-45, 2018 WL 6012539, at *13 (V.I. Super. Nov. 13, 2018) (unpublished).⁴

¶11 According to Thomas, the People's evidence was insufficient because “being placed at the scene of a crime does not prove [his] guilt”. (Appellant’s Brief 6.) Specifically, Thomas argues that neither Kenneth Rawlins nor any of the other witnesses, (Kaitlyn Bertolino, Thomas Debelek, or Anselmo Boston) placed him inside the bar during the altercation and that there is no other evidence to prove he was involved in the bar fight or aided and abetted an assault. (Appellant’s Brief 6.) Thomas focuses the majority of his argument on the contention that the People did not prove that Thomas associated himself with the venture, that he participated in it as something he wished to bring about, or that he sought by his words or actions to make it succeed and therefore the People did not prove he aided and abetted the assault. (Appellant’s Brief 7.)

¶12 We hold that Thomas has failed to meet the very heavy burden in advancing an insufficiency of the evidence claim. *Latalladi*, 51 V.I. at 145. First, Thomas argues that there was not enough evidence of his involvement in an altercation in the bar to sustain his conviction for third-degree assault, however, Thomas's third-degree assault conviction was for the altercation in

⁴ In a direct appeal following Thomas and his co-defendant Boston's first trial, this Court reviewed a challenge by Boston to the sufficiency of the evidence to convict him. The Court, on that appellate review, considered the testimony from the trial and "recapitulate[d] the facts in the light most favorable to the People." *Boston v. People*, 56 V.I. 634, 636 (2012). In the instant action, the Superior Court used these facts from our opinion in Boston's appeal in its analysis of the sufficiency of the evidence to convict Thomas, who was not a party to that appeal. However, while the Superior Court erred when it relied on a summary of facts from a case to which Thomas was not a party, reversal is not required if such error was nevertheless harmless. A "[h]armless error is '[a]ny error, defect, irregularity, or variance that does not affect substantial rights,' and thus 'must be disregarded.'" *Phillips v. People*, 51 V.I. 258, 278 (V.I. 2009) (quoting Fed.R.Crim.P. 52(a)). Because Boston and Thomas were tried together, all the same testimony and evidence was presented during their combined trial. Therefore, the evidence and testimony on which the Superior Court should have based its analysis are identical to the evidence and testimony that was summarized by this Court in *Boston v. People of V.I.*, and the error did not affect the court's analysis.

the street, not the one in the bar. (Second Amended Complaint 3).⁵ Though no one directly observed Thomas assault Cockayne, Kenneth Rawlins unequivocally identified Thomas and testified that he saw Thomas pick up a wooden stick outside the bar, and then run up the street with Boston after Cockayne. *Thomas I*, 56 V.I. at 650. Also, Leann Oquendo testified that she saw three black males running up the road in the direction of a white male and that one of the individuals running up the road was carrying a wooden stick. *Id.* She also testified that when the three individuals reached the white male, they surrounded him in the street and the individual holding the stick then attempted to hit the white male with the stick but stopped because she blew her car horn. *Id.* After deterring him from hitting the white male twice by blowing her horn, Oquendo drove away to alert the authorities, leaving the white male in the street still surrounded by the three individuals. *Id.* The People also introduced evidence via a forensic pathologist and medical examiner that Cockayne's body revealed that he had sustained a substantial amount of blunt force injuries that manifested themselves in the form of contusions and abrasions, and were visible on Cockayne's face, arms, neck, shoulder, and legs. *Id.* at 650-51. This witness also testified that these injuries were consistent with the type of injuries a person could have received from being struck with a stick or a piece of wood. *Id.* at 651.

¶13 From this testimonial evidence, the jurors could reasonably infer that Thomas was the man with the wooden stick whom Leann Oquendo observed standing over Cockayne and attempting to

⁵ The Second Amended Complaint, as it pertains to count four, third-degree assault, charged Thomas with striking James Cockayne “over his body with a wooden stick,” in violation of V.I. CODE ANN. tit. 14 § 11(a). This is notably different from count one of Second Amended Complaint which charged Anselmo Boston with third-degree assault for striking Cockayne over his body with a “pool stick” and count six which charged Thomas with simple assault for striking Cockayne “several times about his body” with no mention of a weapon. Because witnesses Rawlins and Oquendo testified to seeing Thomas pick up the stick directly outside of the bar and to seeing him in the middle of the street standing over Cockayne with the wooden stick in his hand, it is evident that the third-degree assault in count four is referring to the altercation that took place in the street and not the one inside the bar.

hit him. Additionally, based upon the forensic pathologist's testimony describing Cockayne's injuries, the jury could reasonably have inferred that, after Oquendo drove away, Thomas hit Cockayne with the stick. This evidence, when viewed in the light most favorable to the People, was more than sufficient to allow the jury to find beyond a reasonable doubt that Thomas, with a deadly weapon,⁶ committed "unlawful violence upon the person of another with an intent to injure him," and therefore, to sustain Thomas's conviction for third-degree assault. Accordingly, we reject Thomas's argument that there was insufficient evidence to sustain his conviction for third-degree assault.

B. The Double Jeopardy Clause of the Fifth Amendment and 14 V.I.C. §104.

¶14 Thomas argues that the Superior Court erred by failing to "stay the [sentence for] third-degree assault and re-sentence [Thomas]" in accordance with 14 V.I.C. § 104. (Appellant's BR. at 10.) However, § 104 provides that "[a]n act or omission which is made punishable in different ways by different provisions of this Code *may be punished under any of such provisions*, but in no case may it be punished under more than one." (emphasis added). In its January 28, 2019 order amending sentence, the Superior Court stayed the imposition of Thomas's six-month sentence for simple assault, treating the simple assault conviction as a lesser included offense and leaving Thomas to serve only a single sentence for third-degree assault. (J.A. 0061) Therefore, the Superior Court satisfied the requirements of 14 V.I.C. § 104 by imposing punishment upon Thomas under only one statute and did not err in declining to stay Thomas's conviction and sentence for third-degree assault.

⁶ "A deadly weapon is generally described as any firearm or other device, instrument, material, or substance that, from the manner in which it is used or is intended to be used, is calculated or likely to produce death. In some states the definition encompasses the likelihood of causing either death or serious physical injury." *Prince v. People*, 57 V.I. 399, 409 (V.I. 2012) (quoting Black's Law Dictionary 1731 (9th ed. 2009)).

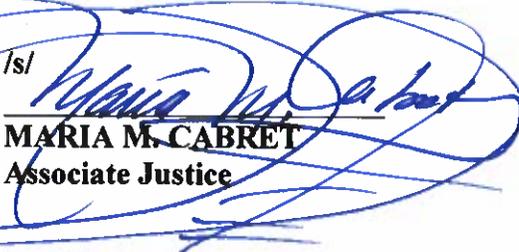
¶15 However, as the People concede, in the time since the Superior Court issued its order amending Thomas's sentence, this Court has altered the merger-and-stay procedure adopted in *Williams. Titre v. People*, 2019 VI 3, ¶¶ 17-20 (discussing *Williams*, 56 V.I. at 832). In *Titre* this Court explained that not only did the merger-and-stay doctrine cause “significant confusion,” but no legitimate purpose is served by having the remedy for a section 104 violation be different from the remedy for a violation of the Double Jeopardy Clause. *Titre*, 2019 VI 3, ¶ 20. This Court thus held in *Titre* that vacatur shall instead be the remedy in cases in which section 104 is implicated. *Id.*

IV. CONCLUSION

¶16 We agree with the Superior Court that the evidence presented at Thomas’s trial was sufficient to sustain his conviction for third-degree assault. Accordingly, we affirm the Court’s November 13, 2018 Order denying Thomas’s petition for habeas corpus relief based upon insufficiency of the evidence. However, we remand this matter to the Superior Court with instructions to vacate Thomas’s conviction and sentence for simple assault in accordance with this Court’s decision in *Titre*.

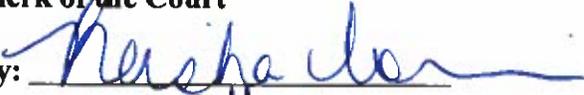
Dated this 28th day of December, 2022.

BY THE COURT:

/s/ 
MARIA M. CABRET
Associate Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: 

Deputy Clerk II

Dated: 12/28/22