S.CT.CRIM.NO. 2022-0033

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

DEVINDRA JAGLAL,

Appellant/Defendant,

v.

PEOPLE OF THE VIRGIN ISLANDS,

Appellee/Plaintiff

ON APPEAL FROM THE JULY 20, 2022 JUDGMENT AND COMMITMENT OF THE HONORABLE RENEE GUMBS-CARTY, SUPERIOR COURT OF THE VIRGIN ISLANDS AT SUPERIOR COURT CRIMINAL NO. ST-2020-cr-00338

APPELLANT'S REPLY BRIEF ON APPEAL

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POINT I

APPELLANT DID NOT WAIVE ANY ISSUES FOR APPELLATE REVIEW

The People suggest that Jaglal waived the issues raised on appeal. Principally, the People contend that under V.I.R.Crim.P. 30(d), the failure to object to a jury instruction waives the issue from appellate review unless it meets the conditions under V.I.R.Crim.P. 52(b). (People's Brief at 8-9). Rule 52(b) provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." This Court considers the failure to properly instruct on the elements of a criminal offense as an error which affects substantial rights even if the defendant failed to object. *See Davis v. People*, 2018 WL 3695089, at *6 (V.I., 2018)("although a challenge to an instruction will rarely justify reversal where no objection has been made at trial, reversal may nonetheless be required if an instruction omits a required element of the offense and the omission is not proven to be harmless beyond a reasonable doubt."); *Francis v. People*, 2009 WL 4063796, at *5 (V.I.,2009)("[T]he omission of an essential element of an offense in a jury instruction *ordinarily* constitutes plain error.") As such, Jaglal did not waive any issues for appellate review.

POINT II

THE SIMPLE ASSAULT INSTRUCTION OMITTED AN ESSENTIAL ELEMENT

The People contend that the failure to instruct the jury on the definition of "lawful violence" was not erroneous because "[j]urors are expected-and instructed- to apply common knowledge and experience." (People's Brief at 9). The People argue that the "jury is capable of reaching a common-sense conclusion that any act of violence with the intent to cause injury without extenuating circumstances is in fact 'unlawful violence.'" (People's Brief at 11). The People also assert Jaglal was not entitled to an instruction on lawful violence because he never raised the issue at trial. (*Id.*) The People's argument is illogical and defies the principle that Jaglal was entitled to an instruction on every element of the offense.

The People charged Jaglal with committing simple assault and battery under 14 V.I.C. § 292, 299(2). (JA-15). Sections 292 and 299(2) are defined as follows:

> Whoever uses any **unlawful violence** upon the person of another **with intent to injure him**, whatever be the means or the degree of violence used, commits an assault and battery.

14 V.I.C. § 292. Whoever commits-

> (2) an assault or battery unattended with circumstances of aggravation- shall be fined not more than $250 or imprisoned not more than six months, or both the imprisoned and fined.

14 V.I.C. § 299. "Unlawful violence" is not defined in any statute in the Virgin Islands, but, as Justice Swan stated in his concurrence in *Wallace v. People*, 2019 VI 24, ¶ 2019 WL 3282736, at *36 (V.I., 2019) *citing* 14 V.I.C. § 293. "[u]nlawful violence is not defined explicitly, but it is defined by implication." The "implication" is that violence that is not considered lawful under § 293, is "unlawful violence." Otherwise, the statute is unconstitutionally vague. *See Codrington v. People*, Supreme Court of the Virgin Islands, 2012 WL 2949139 (2012)("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited… .") "Trial courts do not need to define terms in instructions that are self-explanatory or commonly understood, **but they must define technical words and expressions**." *Kurtz v. State*, 2021 WL 2809603, at *8 (Wash.App. Div. 1, 2021)(emphasis added). What constitutes unlawful violence is not self-explanatory nor common knowledge; it is a technical term that must be explained to a jury.

The People contend that "[a]ny violence that would be considered 'lawful' when accompanied with an intent to injure would qualify as one of the extenuating circumstances of § 293. 'Lawful violence, what constitutes, [] which, as discussed below, do not apply here." (People's Brief at 10). The People's reasoning is circular. Essentially, the People argue that the trial court did not need to instruct the jury on

unlawful violence because if Jaglal had engaged in lawful violence with an intent to injure, that would have qualified as a defense under § 293. But how would the jury know how to differentiate lawful from unlawful violence? "Unlawful violence" is an essential element of simple assault. *See Government of Virgin Islands v. Remak*, 1985 WL 1264353, at *2 (Terr.V.I., 1985)("The last element to be considered is unlawful violence. Lawful violence does not amount to an assault or assault and battery when the person is [acting pursuant to] 14 V.I.C. Section 293[]." By the People's admission, a person who assaults someone with an intent to injure could be engaged in lawful violence if an "extenuating" circumstance existed. As such, Jaglal was entitled to an instruction on what constitutes unlawful violence because "[t]he jury is to be instructed on each and every essential element of the offense charged." *Nanton v. People*, 52 V.I. 466, 479 (V.I. 2009).

Contrary to the People's contention, Jaglal was not required to raise any defense in order to have the jury instructed on "unlawful violence" because it is an element of the offense. Even if he had been, by admitting that he only caused the bruise on Ramirez' arm when he pushed her off of him, there was sufficient evidence on the record from which a jury could conclude he was engaged in lawful violence, as the charge against him it was he engaged in simply assault because he struck her about the body. *See Prince v. People*, 57 V.I. 399, 412 (V.I. 2012); *Jackson–Flavius v. People*, 2012

WL 6628316, at *6 (V.I., 2012)(once the defendant presents "some evidence" of self-defense, People must disprove it beyond a reasonable doubt.")

Because the trial court failed to instruction the jury on what constituted unlawful violence, and because unlawful violence is an element of simple assault, the trial court committed plain error requiring reversal. *See Nanton, supra*.

POINT III

KNOWINGLY IS A LESSER *MENS REA* THAN WILLFULLY AND RECKLESSLY IS A LESSER MENS REA THAN BOTH

The government contends that because some courts have equated knowingly and willfully this Court should too. But an appellate court exists to correct errors of law, not perpetuate them. *See Horton v. Dragovich*, 2010 WL 4008543, at *3 (E.D.Pa.,2010)("it is the purpose of the appellate courts to correct errors of law")

The People make two arguments regarding the *mens rea* under § 296(2); first, that it does not matter that the Court failed to advise the jury that it was required to prove Jaglal acted willfully because it included an instruction that strangulation requires proof of an intent to act "intentionally, knowingly, or recklessly[.]" (People's Brief at 14-15). Then the People switch gears and argue that "[i]t is irrelevant if the intent to strangle was "intentionally, knowingly, or recklessly,' []as long at the defendant intended to commit the act, regardless of the consequences." Thus, the People argue that the trial

court's failure to advise the jury as to the "willfully" *mens rea* was not error because it included an instruction that Jaglal had to act intentionally, knowingly, or recklessly in strangling Ramirez, but then the People argue that actually *no mens* rea is required at all.

What the government is asking that this Court read the *mens rea* of "willfully" out of the statute. Of course, the *mens rea* is an essential element of an offense and it cannot be read out of a statute.

Moreover, the Virgin Islands legislature defined knowingly and willfully as separate terms:

> As used in this Code or in any Act of the Legislature, unless it is otherwise provided or the context requires a different construction, application, or meaning-
> ...
>
> 'knowingly' imports a personal knowledge; **but it does not require any knowledge of the unlawfulness of an act or omission**;
> ....
>
> 'willful' or 'willfully', when applied to the intent with which an act is done or omitted, implies simply **a purpose or willingness to commit the act**, or make the omission referred to;

1 V.I.C. § 41. (emphasis added). In defining the term knowingly, the legislature specifically advised that such acts do not require knowledge of the unlawfulness of the act or omission, but when defining willfulness, the legislature removed that language, and included language that the act be "purpose[ful]." *Id.* By specifically stating that "knowingly" does not include knowledge of the unlawfulness of the act, and then

omitting that language and adding "purpose" to definition of "willful," the legislature was codifying a heightened mental state for willfully. *See Vineyard Properties of Utah LLC v. RLS Construction LLC*, 505 P.3d 65, 72, (Utah App., 2021)("Omissions are assumed to be purposeful.")

Had the legislature intended to have "willfully" read as not requiring knowledge of any unlawfulness, it would have included it in the definition as it did so with knowingly. *See Stebbins v. Wells*, 2001 WL 1255079, at *3 (R.I.Super.,2001)("to equate the meanings of the two terms would render the inclusion of separate definitions for these terms mere surplusage within the statute. Such a result would contradict the statutory tenet that words within a statute each have an independent meaning."); *State v. Keller*, 990 P.2d 423, 425, (Wash.App. Div. 1,1999)("when different words are used in the same statute to deal with related matters, **we must presume that the Legislature intended those words to have different meanings**"); *Parsons v. Associated Banc-Corp*, 893 N.W.2d 212, 219, 374 (Wis., 2017)("When the legislature chooses to use two different words, we generally consider each separately **and presume that different words have different meanings**.")(citation omitted).

This is consistent with this Court's decision in *Bryan v. Fawkes*, 2014 WL 4244046, at *16–17 (V.I., 2014) in which it concluded that the term "willfully" "require[d] existence of a **specific wrongful intent—an evil motive—**at the time the

crime charged was committed." *Bryan* at *16. (emphasis added). "Mere laxity, careless disregard of the duty imposed by law, or even gross negligence, unattended by 'evil motive' are not probative of 'willfulness'." *Government of Virgin Islands v. Allen*, 251 F.Supp. 479, 480 (D.C.Virgin Islands 1966). The U.S. Supreme Court explained:

> As a general matter, when used in the criminal context, a "willful" act is one undertaken with a "bad purpose."[] In other words, in order to establish a "willful" violation of a statute, "the Government must prove that the defendant acted with knowledge that his conduct was unlawful."
>
> ...the term " knowingly" merely requires proof of knowledge of the facts that constitute the offense.

Bryan v. U.S., 118 S.Ct. 1939, 1946 (U.S.N.Y.,1998). In criminal law, "knowing" describes a lower level of scienter than "willful." *United States v. Singh*, 979 F.3d 697, 727 (9th Cir. 2020). *See also U.S. v. Obiechie*, 38 F.3d 309, 315 (7th Cir. 1994)("willfully' must mean something more than 'knowingly,' as the government has conceded."); *In re B.K.B.P.*, 2011 WL 4357349, at *1 (N.C.App.,2011)("Willfulness denotes more than just intent; there must also be purpose and deliberation.")

As the Third Circuit explained in its model criminal jury instructions:

> The important difference between willfully as defined in this instruction and the definition of knowingly, as stated in Instruction 5.02, is that **willfully requires proof beyond a reasonable doubt that the defendant knew his or her conduct was unlawful and intended to do something that the law forbids; that the defendant acted with a purpose to disobey or disregard the law**.

3rd Cir. Model Criminal Instruction 5.05 (comment)(emphasis added). The People note that in *Wallace, supra,* Justice Swan stated that §296(2) did not require a specific intent to harm. (People's Brief at 16). Indeed, Justice Swan made the same contention in *Davis, supra* at *22, fn. 31, Swan J. *dissenting in part and concurring in the judgment only*. Notably, the majority did not join this Justice Swan's contention in either *Wallace* or *Davis,* but the People ignore his recognition that "[t]he plain text of section 296 makes clear that a *mens rea* of willful is applicable to each of the subsections. **In contrast**, sections 291 and 292 have a *mens rea* requirement of knowingly…" *Davis, supra* at *22, fn. 31 (emphasis added).

Also, the People contend that assault under §296(2) does not require an intent to injure but such a contention flies in the face of the legislature's definition of what constitutes an assault. "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**." *Wallace, supra* at *3 (emphasis added) Thus, if second degree assault is an "assault" it must, by definition, include an intent to injure, especially if the "means" was strangulation. *See Vineyard Properties of Utah LLC, supra* at * 72("Where the legislature provides a statutory definition of a term, we apply that definition.")

In *People v. Robles*, 2017 WL 4082060, at *2 (V.I.Super., 2017) the court recognized this fact and properly instructed that the jury needed to find an intent to injure.

Next, the People point to this Court's decision in *Rodriguez v. People*, 2019 VI 19, ¶ 74, 2019 WL 2462630, at *24 (V.I., 2019) for the proposition that knowing and willfully connote the same *mens rea*. That cannot be the case, however. First, as previously discussed, the Legislature provided distinctive definitions for the two words (1 V.I.C. § 41). Also, in *Bryan, supra*, the Court acknowledged that willfulness required an evil intent and bad motive. In *Rodriguez* the Court concluded that the omission of willful and inclusion of "purposeful" actually increased the burden on the People. The Court, however, failed to recognize that the legislature included a requirement of "**a purpose** or willingness to commit the act" in defining willfulness. 1 V.I.C. § 41.(emphasis added). Also, "[w]illful" means acting intentionally and purposely[.]" *State v. Smith*, 2007 WL 2183115, at *2 (Wash.App. Div. 2,2007)

Moreover, the statute in question in *Rodriguez* dealt with a charge of interfering with an officer in the discharge of duties under 14 V.I.C. § 1508. Here, assault, by definition, requires an intent to cause harm, which differentiates it from the criminal charge under consideration in *Rodriguez*. Also:

> Knowing conduct, or to do something knowingly, requires that the defendant knew the fact at issue when he acted, e.g., that the firearm was

> in the car. *See Duggins v. People*, 56 V.I. 295, 304 (V.I. 2012); ***cf.***[1] **1 V.I.C. § 41 (defining "willful" and "willfully")**. To act knowingly only requires that an act be committed with an awareness, by the defendant, of what he is doing. *Duggins*, 56 V.I. at 304; 1 V.I.C. § 41 ("'[K]nowingly' imports a personal knowledge; but it does not require any knowledge of the unlawfulness of an act or omission.").

Ponce v. People, 2020 WL 1551324, at *35 (V.I., 2020), *Swan J. concurring in part.*

Willful connotes a higher burden than knowing because knowingly does not require any knowledge of the unlawfulness of the act or omission, but willfully does.

Because the trial failed to include the proper *mens rea* for second degree assault, and failed to define any *mens rea*, it committed plain error requiring reversal.

a. The People ignore that the trial court also advised the jury it could convict Jaglal if he acted "recklessly."

The People failed to address the fact that the trial court also instructed the jury that it could convict Jaglal if he acted "recklessly." (JA-700-701).

> In the general hierarchy of mental states, the "descending order of culpability" runs as follows: Purpose (i.e., specific intent), knowledge, recklessness, and negligence. *United States v. Bailey*, 444 U.S. 394, 404, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980). **Willfulness occupies a place near the top of this hierarchy.**

Hayes v. McDonough, 35 Vet.App. 214, 219 (Vet.App., 2022). "[T]he term 'willful' employs a higher state of culpability than the word 'intentional,' one that requires that

[1] https://www.law.cornell.edu/wex/cf. ("Cf. is an abbreviation for the Latin word *confer*, meaning 'compare.' Cf. is a signal indicating that the cited source supports a different claim (proposition) than the one just made, that it is worthwhile to compare the two

an actor have actual knowledge that her conduct violates the law." *Hayes* at *219. A crime committed "willfully" must be done with the purpose to commit that crime, it is a higher *mens rea* than recklessly because recklessly requires only a disregard to a risk. The U.S. Supreme Court recently reiterated that recklessness is a lower mental state than knowingly:

> A person who injures another knowingly, even though not affirmatively wanting the result, still makes a deliberate choice with full awareness of consequent harm. []
>
> **Recklessness and negligence are less culpable mental states because they instead involve insufficient concern with a risk of injury**. A person acts recklessly, in the most common formulation, when he "consciously disregards a substantial and unjustifiable risk" attached to his conduct, in "gross deviation" from accepted standards. Model Penal Code § 2.02(2)(c); see *Voisine* v. *United States*, 579 U. S. 686, ––––, 136 S.Ct. 2272, 2277, 195 L.Ed.2d 736 (2016). **That risk need not come anywhere close to a likelihood.**

Borden v. United States, 141 S.Ct. 1817, 1823–24 (U.S., 2021)(emphasis added). It has long been commonly understood that recklessness is a lower scienter than knowing or willful. *See Cleveland v. Smith*, 2009 WL 2186755, at *2 (Ohio App. 8 Dist.,2009)("and recklessly is a lesser mental state than knowingly"); *State v. Jefferies*, 446 S.E.2d 427, 430, 316 S.C. 13, 18 (S.C.,1994)("The required *mens rea* for a particular crime can be classified into a hierarchy of culpable states of mind in descending order of culpability, as purpose, knowledge, recklessness, and negligence"); *Rook v. Holbrook*, 2019 WL

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claims and assess the difference.")(emphasis added).

7606077, at *11 (W.D.Wash., 2019)("recklessness is a lower *mens rea* than that of crimes committed intentionally or knowingly"); *State v. Zapata-Grimaldo*, 2018 WL 6071478, at *8 (Kan.App., 2018)("Recklessness is a lower culpable mental state than intentionally and knowingly").

Thus, even if knowing and willful constituted the same *mens rea* (which they do not), both would be higher than "recklessly." When the Court advised the jury it could convict Jaglal for second degree assault if the strangulation was "reckless," it had reduced the government's burden for *mens rea* by two iterations on the hierarchy of mental states. As one court aptly explained:

> Indeed, there is a difference between the mental states of intentional and knowing as distinguished from reckless and criminal negligence. *[]* **The *mens rea* of both intentional and knowing involve a level of conscious awareness and volitional, affirmative conduct, whereas, the mental states of reckless and criminally negligent contemplate a disregard of the situation and unintentional conduct or failure to act**.

State v. Vaughn, 1999 WL 1531346, at *2 (Tenn.Crim.App.,1999).

Because the trial court instructed the jury it could convict if Jaglal acted with a lesser mental state than willfully (or even knowingly) it committed plain error.

POINT IV

APPELLANT, NOT HIS MOTHER, WAS ON TRIAL, AND THE COURT COMMITTED PLAIN ERROR BY PERMITTING HER ACTIONS TO AFFECT THE TRIAL AND SENTENCING

In alleging that the evidence regarding Jaglal's mother's calls to Ramirez was permissible, the People contend that:

> A third-party's attempt to improperly influence testimony has been found to be admissible if the prosecution has already established through direct or circumstantial evidence that the defendant was involved with or consented to the third- party's actions; the defendant and the third-party were conspirators in the underlying crime; if the testimony helps establish the credibility of the witness, [] in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a witness not to testify or to testify falsely[.]

(People's Brief at 20-21). The People, however, do not contend that any of these factual predicates existed in this case. Instead, the People are limited to claiming that the issue was waived. First, Jaglal's attorney did object to this line of inquiry, albeit on different grounds. (JA-266-268). Regardless, the constitutes plain error here because it was error, which was plain, that affected his substantial right to be judged on his actions, not those of his mother. *See Francis v. People*, 2009 WL 4063796, at *5 (V.I.,2009). This error seriously affected the fairness of the trial as Jaglal was judged not on his actions, but those of his mother, when there was no evidence that he directed or consented to his mother's actions. *Id.*

The allegations regarding Jaglal's mother were an essential part of the People's case, used to convince the jury that Jaglal must have been guilty because his mother tried to dissuade the complaining witness from appearing at trial. Not only was the issue raised during the testimony of both Ramirez and Jaglal, but it was also raised in

closing (JA-639), and discussed by both the People (JA-744) and the Judge (JA-775) at sentencing.

The People contend that the testimony regarding Jaglal's mother's attempts to deter Ramirez was not prejudicial, but there can hardly be more prejudicial evidence to introduce at trial than evidence that a defendant or his family tried to get the alleged victim not to testify at trial. *See State v. Price*, 491 So.2d 536, 537 (Fla.,1986)("We find that that the probative value of the third-party threats to Miller, introduced by the state on direct examination, is far outweighed by its prejudicial impact"); *State v. Clifton*, 701 N.W.2d 793, 797 (Minn.2005) (observing that evidence of third-party threats against witnesses could be extremely prejudicial if viewed as coming from defendant).

An attempt to dissuade a witness from testifying is indicative of a consciousness of guilt, almost akin to an admission. Thus, it is highly prejudicial. Because there was no evidence linking Jaglal to the attempt, it was of no probative value.

The evidence regarding Jaglal's mother attempts was raised every stage of the trial and sentencing, and the evidence misled the jury into thinking that Jaglal was guilty because his mother attempted to deter Ramirez from testifying. Also, there was no curative instruction. The case basically came down to a she said/he said battle with Jaglal denying that he assaulted Ramirez. This was hardly a trial with overwhelming evidence of guilt, such that this Court could disregard the extremely prejudicial

evidence regarding Jaglal's mother. Indeed, the mother's alleged attempts cast a shadow on Jaglal's testimony. In the end, the jury had to pick between two competing witnesses, Ramirez and Jaglal, and they chose to believe the person whom Jaglal's mother allegedly sought to dissuade from testifying.

Finally, the evidence shows that the Court did strongly consider Jaglal's mother actions in sentencing him. The trial court made a point to reference Jaglal's mother's action in imposing the sentence after the People raised it in asking for a lengthy sentence. To contend that it was not a factor at sentencing is belied by the record.

CONCLUSION

For the reasons outlined Appellant's briefs, this Court should vacate Appellant's convictions for second degree assault and simple assault and remand this case for a new trial and should vacate his sentence.

Respectfully submitted,

DATE: March 14, 2023.

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CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the Bar of the Supreme Court of the Virgin Islands.

/s/David J. Cattie
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CERTIFICATON OF COMPLIANCE WITH WORD LIMITATIONS

I HEREBY CERTIFY that the foregoing brief complies with the limitations on the number of words as provided in the V.I.R.APP. 22(f) in that the brief, exclusive of pages containing the table of contents and the table of authorities, contains 3,762 words.

/s/David J. Cattie
David J. Cattie, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 14, 2023, I served a true and correct copy of the foregoing documents to the person(s) listed below by causing a copy of the foregoing document to file filed using the Electronic Service to the Filer pursuant to V.I.S.CT.R. 15(d):

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I further certify that on this 14th day of March 2023, I caused:

- Seven (7) copies of the foregoing Appellant's reply brief to be filed with the Clerk of the Court for the Virgin Islands Supreme Court.

- One (1) copy of the foregoing Appellant's reply brief be filed with Appellant at Golden Grove Correctional Facility

- One (1) copy of the foregoing Appellant's reply brief to be filed with Tracy Myers, Esq., Assistant Attorney General, Department of Justice, GERS Bldg.

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