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 BRIEF ON APPEAL

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The Supreme Court of the Virgin Islands has jurisdiction over this matter pursuant to 4 V.I.C. § 33(a) and V.I.S.CT.R .5(b) as a final appealable order. Appellant Devindra Jaglal ("Appellant" or "Jaglal") appeals from the July 20, 2022 Judgment and Commitment of the Superior Court, Hon. Renee Gumbs-Carty. (4-6)[1]. On May 26,

[1] Numbers in parenthesis in this brief shall refer to the page number of the document as contained in the Joint Appendix, listed as JA-000001, JA-000002, etc.

2022, following trial, a jury returned a verdict of guilty to second degree assault (domestic violence) and simple assault (domestic violence), and a verdict of "not guilty" to false imprisonment (domestic violence). (730-731). On June 30, 2022, the Superior Court sentenced Mr. Jaglal seven (7) years' incarceration as to Count 2, second degree assault and $5,000 fine and six (6) months' incarceration (to run concurrently with Count 2) as to Count 3, simple assault. (781). On July 1, 2022, Appellant Jaglal filed his timely notice of appeal. (1-2).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the trial court erred in failing to instruct the jury of the *mens rea* of "willfully" for second degree assault and to the intent to harm, and whether the trial court erred in failing to instruct as to "unlawful violence" as an element for simple assault?

This issue was not raised below, but is contained at JA-000700-000703.

II. Whether the trial court erred in permitting the complaining witness to testify that Appellant's mother had tried to dissuade her from appearing and testifying at trial where there was no evidence Appellant had authorized such

contact?

Issue raised and addressed at JA-000266-000270, JA-000584-000586.

III. Whether the trial court erred at sentencing in considering the allegation that Appellant's mother had tried to dissuade the complaining witness from testifying at trial where there was no evidence Appellant had encouraged his mother to do so?

This issue was not raised below, but is contained at JA-000744-000749, JA-000775.

STATEMENT OF STANDARDS OF REVIEW

The standards of review are as follow: Point I, plain error. Point II, plenary. Point III, plain error.

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no related cases, appeals, or proceedings pending before (or previously decided by) any Court .

STATEMENT OF THE CASE

On December 2, 2020, the government filed a multi-count Information against Appellant Jaglal charging false imprisonment (Count I; 14 V.I.C. § 1051), second

degree assault (Count II; 14 V.I.C. § 296(3)) and simple assault (Count III; 14 V.I.C. § 292, 299(2)). Each count was charged as an act of domestic violence (16 V.I.C. § 91(b)(1)(2)). (14-15).

The government contended, *inter alia*, that on or about November 15, 2020 Appellant Jaglal had confined his girlfriend, Rocio Ramirez, to a hotel room at Sapphire Beach Resort and strangled her and struck her about her body. (14-15). The parties proceeded to trial between May 24-26, 2022, after which the jury retuned guilty verdicts to counts 2-3, and a not guilty verdict as to Count 1. (730-731). The Superior Court imposed sentence of seven years' incarceration (781), and Appellant, through counsel filed a timely notice of appeal. (1).

STATEMENT OF THE FACTS

On the evening of November 15, 2020, VITEMA received a 911 call about a woman screaming at Building F, Room 206 of Sapphire Beach Resort. (104). Bradley Thomas, a tourist staying at Sapphire Beach, testified that he heard a commotion coming from an adjacent room. (370-372). Mr. Bradley's friend, Davion Samples, also testified that he heard a commotion coming from the adjacent hotel room. (417-419). Samples called 911 to report the incident to VITEMA. (420). Officer Khalil Tatum responded to the 911 call at Sapphire. (463). Appellant Jaglal voluntarily opened the door to speak with the officer. (466). Jaglal exited the hotel room to speak with

Officer Tatum while VIPD Officer Claudio went inside to speak with Rocio Ramirez. (467-468). Officer Tatum then placed Jaglal under arrest. The People charged Jaglal with false imprisonment, second degree assault and simple assault, all charged as domestic violence.

Jaglal pleaded not guilty and elected to exercise his right to a jury trial. At trial, Ramirez testified that Appellant choked her during the altercation. (133, 207-208, 213). Jaglal also elected to testify in his own defense. Jaglal explicitly denied ever punching, choking or slapping Ms. Ramirez. (519-520, 595). Jaglal did testify that he had to shove Ms. Ramirez off of him. (520, 530, 573, 580).

As to the instruction for second degree assault, the trial court failed to advise the jury on the *mens rea* element that the government had to prove Jaglal acted willfully. (700-701). The court also advised the jury that it could convict Jaglal of second-degree assault if he acted recklessly or knowingly, despite the fact that those are lesser mental states than willfully, and that strangulation did not have to include an intent to kill or even harm. (701). Additionally, the trial court failed to instruct the jury that Jaglal had to engage in "unlawful violence" in order to be convicted of second-degree assault or simple assault. (700-703). The jury acquitted Jaglal of false imprisonment but convicted him of second-degree assault and simple assault. (730-731).

Finally, during the trial (and over objection) the court permitted the government

to introduce evidence that Appellant's mother had called Ms. Ramirez to convince her not to testify at trial. (266-270; 584-586). There was, however, no evidence that these calls were made at the direction of Appellant and, therefore, it was irrelevant and was highly prejudicial. The government relied on this contention during its closing (639) and at sentencing. (744). This evidence played such a role at trial that the court relied on it in imposing the seven-year sentence. (775).

Because of these errors at trial, this Court should, respectfully, vacate Appellant's convictions and remand the case to the Superior Court.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO PROPERLY INSTRUCT THE JURY ON THE ELEMENTS FOR SECOND-DEGREE ASSAULT AND SIMPLE ASSAULT

A defendant has an unmitigated right to have the jury properly instructed on the elements of an offense. The jury instructions alleviated the government of its burden by eliminated numerous elements of the offenses. For matters concerning an alleged improper jury instruction, this Court has explained:

> A jury instruction will generally not be invalidated unless it is shown that the instruction substantially and adversely impacted the constitutional rights of the defendant and impacted the outcome of the trial. *See Gilbert v. People*, 52 V.I. 350, 361–62 (V.I.2009) (citing *Neder v. United States*, 527 U.S. 1, 7 (1999)). [...] When the issue concerns whether the jury

> instruction failed to state the proper legal standard, the review is plenary. *Gilbert,* 52 V.I. at 354.

Prince v. People, 2012 WL 8123139, 2 (V.I. 2012). Because there was no objection to this instruction, this Court reviews for plain error. *See Wallace v. People*, 71 V.I. 703, 711, 2019 VI 24, ¶¶ 12-13, 2019 WL 3282736, at *3 (V.I., 2019)("Wallace did not challenge the adequacy of the third-degree assault instruction before the Superior Court, so we review the instructions for plain error.") This Court has advised:

> For this Court to reverse under a plain error[2] standard of review, four conditions must be met. First, there must be an error; second, the error must be "plain"; third, the error must "affect substantial rights"; and finally, the error must "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *[]*

Wallace, supra at *3 (some citations omitted).

A. The (actual) elements of the offense.

Our legislature has defined second-degree assault as, *inter alia*, "[w]hoever willfully-...strangle or attempts to strangle any person in an act of domestic

[2] This Court has noted that it will not review for plain error where an appellant waived rather than forfeited an issue below. *See Rawlins v. People*, 58 V.I. 261, 268, 2013 WL 840218, at *3 (V.I., 2013) citing V.I.S.CT.R. 4(h). In this instance, there is nothing to indicate that the issue was waived, such as a tactical reason for not objecting. As such, the alleged error is reviewable as it was forfeited rather than waived. *See Joyce v. Government of Virgin Islands*, 2005 WL 5383593, at *4 (D.Virgin Islands,2005) ("there is not enough evidence to suggest that Joyce, or his counsel, were aware of a more appropriate instruction as to the *mens rea* element of rape, but affirmatively chose to stay silent. ... Therefore, the failure of the appellant to object to the intent instruction on rape did not waive his right to raise this issue on appeal.")

violence…shall be imprisoned not more than 10 years ….” 14 V.I.C. § 296(3). One Superior Court case has opined that to sustain a conviction under § 296(3) the government is required to prove beyond a reasonable doubt:

> (1) [on or about the date alleged] Defendant used unlawful violence upon [the alleged victim], to wit: strangled or attempted to strangle her; (2) that Defendant did so with the intent to injure [the alleged victim]; (3) that the assault was an act of domestic violence; and (4) that the act occurred in the jurisdiction [].

People v. Robles, 2017 WL 4082060, at *2 (V.I.Super., 2017). Here, the court instructed:

> In Count 2 of the information, defendant Jaglal is charged with assault in the second degree. This charge is based on his alleged violation of Title 14 VIC Section 296(3), and the relevant portion of that charge is as follows: Whoever willfully strangles or attempt to strangle any person in an act of domestic violence.
>
> In order to sustain its burden of proof for the crime of assault in the second degree, domestic violence, as set forth in Count 2 of the Information against the defendant, the People of the Virgin Islands must prove beyond a reasonable doubt that, on or about November 15, 2020, in St. Thomas, Virgin Islands, the defendant Devindra Jaglal strangled or attempted to strangle Rocio Ramirez, a person with whom he had an intimate relationship. **Strangling means intentionally, knowingly or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury, or whether there's any intent to kill or continuously injure the victim**. If you find from the evidence that each of these elements have been proven beyond a reasonable doubt, then it is your duty to find defendant Devindra Jaglal guilty of assault in the second degree, domestic violence.

(700-701).

i. *"Willfully" was not included in the elements of the offense.*

Undeniably, willfulness is an element of second-degree assault. *See* 14 V.I.C. § 296 ("Whoever willfully-...strangle or attempts to strangle any person... .") When the trial court advised the jury of the <u>*elements*</u> of the offense, it did not list the willfully *mens rea*.[3] Indeed, the trial court only included two elements in its recitation of the elements, first that Jaglal strangled or attempted to strangle Ramirez, and that he had an intimate relationship with her. (700-701).

This Court has previously ruled that "willfulness" is an essential element of second-degree assault. "The plain text of section 296 makes clear that a *mens rea* of willful is applicable to each of the subsections." *Davis v. People*, 69 V.I. 619, 660, 2018 WL 3695089, at *22 (V.I., 2018). "[T]he elements of Second-Degree Assault under subsections 296(2) [is]: (1) the defendant; (2) willfully; (3) either strangled or attempted to strangle another person in an act of domestic violence []." *Davis, supra* at *22.

The omission of an essential element of an offense is so serious that "although a challenge to an instruction will rarely justify reversal where no objection has been made

[3] The trial court would have also been required to define "willfully" to the jurors. *See U.S. v. Krosky*, 418 F.2d 65, 67–68 (6th Cir. 1969)("Since 'willfulness' was an essential ingredient in the crime charged, we think that the jury was entitled to have the meaning of the word 'willful' explained. ...the failure of the District Judge to adequately explain to the jury the meaning of the word 'willfulness' was plain error... .")

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." *Davis* at *6. "[T]he omission of an essential element of an offense in a jury instruction *ordinarily* constitutes plain error." *Francis v. People*, 2009 WL 4063796, at *5 (V.I.,2009)

In *Nanton v. People of the Virgin Islands*, 2009 WL 5449226 (V.I.,2009) this Court addressed a failure of a trial court to include an essential element when instructing the jury. There, the appellants were charged with possessing a deadly weapon during a crime of violence under 14 V.I.C. § 2251(a)(2). *Nanton* at * 5. In its recitation of the elements of the offense, the trial court failed to include the words "with intent to use the same unlawfully against another[.]" *Id.* This Court reversed the convictions under a plain error standard even though the trial court had used that language elsewhere in its instruction, ruling:

> **when the jury was provided with specific instructions on the elements of Count Two which failed to correctly state the elements of the same crime**, it logically follows that the jury did not consider all elements of the crime in reaching its verdict. Therefore, we conclude that when a jury considers the elements of the crime, **the jury is required to be guided by the specific final jury instructions on the elements of the crime**, and not guided by reference to or reliance upon the elements of the crime being mentioned in a different context elsewhere in the trial record.

Nanton, at *8 (emphasis added). The failure to include that language in the recitation of the elements:

> created a fatal deficiency in the jury instructions, which adversely impacted the legitimacy of the jury's guilty verdicts on Count Two. [] Consequently, when the trial court instructed the jury on the elements of the crime that Appellee must prove to convict Appellants, and simultaneously omitted from the instructions the essential element of "with intent to use the same unlawfully against another," which is expressly enumerated in the language of § 2251(a)(2) and in the Third Amended Information, **the trial court committed an incorrectible error**, meriting reversal of the convictions on Count Two.

Nanton, supra at *5 (emphasis added). This Court explained that the failure to include that language in the recitation of the elements was a Constitutional[4] violation, ruling:

> It is well settled within the scope of the Fourteenth Amendment of the United States Constitution[] that "[t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." [] Additionally, the Sixth Amendment[] right to a speedy and public trial by an impartial jury "indisputably entitle [s] a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." [] "A defendant's due process rights are unquestionably implicated when his purported conviction rests on anything less than a finding of guilt as to all the elements of the crime." []
>
> Furthermore, "jury instructions that relieve the Government of this burden violate[s] a defendant's due process right." [] Importantly, jury instructions that relieve the prosecution of its burden of proving every element of an offense beyond a reasonable doubt "subvert the

[4] *See Ponce v. People*, 72 V.I. 828, 850, 2020 WL 1551324, at *11 (V.I., 2020)("constitutional defects are subjected to a greater scrutiny under the harmless error doctrine, which requires reversal unless the error is harmless beyond a reasonable doubt. When no objection is made at trial, however, this Court may affirm a conviction even when a constitutional error does not meet that standard. Nevertheless, 'the constitutional nature of the error certainly makes it easier to conclude that fundamental fairness requires reversal.")(emphasis added).

> presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases." *[]* Therefore, **whether requested or not, the jury is to be instructed on each and every essential element of the offense charged, [] and failure to do so constitutes error**. []

Nanton, supra, at *6 (some citations omitted)(emphasis added).

"Willfulness presented" a significant burden for the government.[5] *See U.S. v. Rodella*, 804 F.3d 1317, 1332 (10th Cir. 2015)("[t]he [government] is tasked with proving the **high burden** of willfulness"). By failing to advise the jury that it was required to find beyond a reasonable doubt that Jaglal acted willfully, the trial court committed an error which affected his substantial rights seriously affecting the fairness, and integrity of the trial. *See Wallace, supra*. The instruction violated Jaglal's Sixth and Fourteenth Amendment Rights and, as such, this Court should find plain error and vacate Appellant's conviction for second-degree assault. *See Nanton, supra*.

ii. <u>To "strangle" requires that the government prove Jaglal acted with an intent to kill (or at least an intent to injure)</u>

Our legislature never defined the word "strangle," and it is unclear from where the trial court found the definition given to the jury. There are varying definitions of

[5] *Bryan v. Fawkes*, 61 V.I. 201, 237, 2014 WL 4244046, at *16 (V.I., 2014)("willfulness … "require[d] existence of a specific wrongful intent—an evil motive—at the time the crime charged was committed."); *Government of Virgin Islands v. Allen*, 251 F.Supp. 479, 479–80 (D.C.Virgin Islands 1966)("'Willfulness [...] requires existence of a specific wrongful intent— an evil motive— at the time the crime charged was committed")

"strangle" in the legal lexicon. *See Akbar v. State*, 660 S.W.2d 834, 836 (Tex.App. 11 Dist.,1983) ("'strangle' is defined in Webster's Third New International Dictionary (unabridged) as: 'to compress the windpipe of until death results from stoppage of respiration: choke to death by compressing the throat with or as if with a hand or rope.'"); *Blackeagle v. United States*, 2017 WL 442774, at *7 (D.Idaho, 2017)("choking is less culpable than attempting to strangle, because attempting to strangle 'by its very definition, involves **an intent to injure or kill**.'").

While the legislature's failure to define a term, standing alone, does not require employment of the rule of lenity[6] where, as here, the undefined term has multiple meanings in common usage, the Court must use the narrowest definition. *See State v. Bright*, 465 P.3d 611, 613, 147 Hawai'i 164, 166 (Hawai'i, 2020)("The rule of lenity requires any ambiguous terms to be construed in favor of the defendant. Because 'neutral location' is not defined by the order for protection and reasonable minds could disagree about its definition, it is ambiguous and therefore must be interpreted narrowly.")

Here it is plain that the word "strangle" is undefined and susceptible to multiple

---

[6] *Francis v. People*, 63 V.I. 724, 739, 2015 WL 6460074, at *6 (V.I., 2015)("the Legislature's failure to define a term in a statute does not, without more, make a statute ambiguous. Instead, we construe an undefined term based on its 'common and approved usage.'")

definitions. Tellingly, the trial court in *Robles* and the trial court here case gave two different definitions when describing the elements of the offense. In *Robles, supra*, the Court instructed the jury that strangulation required the jury to conclude that the defendant intended to harm the victim. *Id.* at *2. In the instant case, the trial court advised the jury that the jury could convict so long as Jaglal impeded Ramirez's normal breathing regardless of whether there was an intent to injure. (700-701). The two instructions cannot be reconciled. While the differences in these descriptions establish that the word strangle is ambiguous, neither of them employs the narrowest definition of the word, which requires either death or an attempt to cause death. *See Akbar, supra; Blackeagle, supra.* That causing death or an intent to cause death is an element of the offense is buttressed by the fact that the legislature required proof that the Appellant acted "willfully," which necessitates a finding that he acted with evil motive. See *Bryan, supra; Allen, supra.* As such, the government should have been required to prove that Jaglal caused or intended to cause Ramirez's death (or, at a minimum, an intent to injure) to sustain a conviction on Count II.

iii. The Court failed to instruct on "lawful violence" or the People's burden to disprove it beyond a reasonable doubt.

Further, our legislature has provided that "[v]iolence used to the person does not amount to an assault or an assault and battery" under certain enumerated circumstances. 14 V.I.C. § 293. Accordingly, the government was also required to

prove beyond a reasonable doubt that Jaglal was not engaged in "lawful violence." While this Court has not yet determined who bears the burden of proof as to a claim of *lawful violence*, it has noted our statutes on "self-defense" and "lawful violence" both "define the use of force in self-defense." *Dunlop v. Virgin Islands*, 2009 WL 2984052, at *3 (V.I.,2009). This Court has ruled that self defense must be disproven beyond a reasonable doubt. *See Phipps v. Virgin Islands*, 54 V.I. 543, 548, 2011 WL 1239863, at *3 (V.I.,2011)("we agree with the majority of appellate courts that have found that jury instructions that do not explicitly state that the government bears the burden of disproving self-defense [] require reversal under the plain error standard of review even if the jury was instructed that the government must prove beyond a reasonable doubt that the violence was unlawful.") It logically follows then, that the government bears the same burden when it comes to lawful violence.

As such, the actual elements then of second-degree assault under 14 V.I.C. § 296(3) are:

1. That the defendant willfully strangled the alleged victim;
2. with an intent to kill (or an intent to injure);
3. during an act of domestic violence; and
4. the defendant was engaged in unlawful violence.

The trial court's instructions here, however, included only two elements, first

that the defendant strangled Ramirez, and second that he was involved in an intimate relationship with her. Because the trial court failed to include the actual elements of the offense, the trial court committed plain error. *See Nanton, supra; Wallace, supra*. Accordingly, this Court must, respectfully, vacate Jaglal's conviction on Count II (second degree assault) and remand for a new trial.

iv. The Court's definition of "strangle" was in contravention of the "willfulness" requirement of 14 V.I.C. § 296(3)

a. Willfulness requires bad motive and intent to break the law, and is a higher standard than knowingly, or recklessly.

In addition to failing to instruct on each of the required elements for second degree assault, the trial court also gave an erroneous instruction for "strangle," saying it means **intentionally, knowingly or recklessly** impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, **regardless of whether that conduct results in any visible injury, or whether there's any intent to kill or continuously injure the victim**." (700-701)(emphasis added). Counsel has found only one other case in which our Courts have defined the word "strangle." In *Robles, supra* the Superior Court had instructed the jury on strangulation under 14 V.I.C. § 296(3), instructing: "[s]trangulation means to compress a person's neck, thereby obstructing the person's blood flow or ability to breath, or doing so with the intent to obstruct the person's blood flow or ability to breathe.... with the intent to injure [the

alleged victim.]" *Robles* at *2. The strangulation instruction in *Robles* and the case as bar are wildly different. Here, the trial court advised the jury that it could convict even if it determined that Jaglal had acted only "recklessly... regardless of whether ... there's any intent to kill or continuously injure the victim."

Thus, in *Robles* the trial court correctly instructed that the act had to be willful with the intent to cause harm, but here the trial court instructed that the act could be intentionally, knowingly, or recklessly, without any intent to cause harm. Recklessness and willfulness are not fungible terms. *See Williams v. Int'l Bhd. of Elec. Workers (In re Williams),* 337 F.3d 504, 509 (5th Cir.2003) (a finding of willfulness requires a subjective intent to cause harm or an objective substantial certainty of harm); *State v. Ridgley*, 174 P.3d 105, 111, 141 Wash.App. 771, 782 (Wash.App. Div. 2,2007)("'willful or wanton' is a 'higher mental state' than 'reckless."); *Joseph v. Virgin Islands*, 60 V.I. 338, 350, 2013 WL 6795161, at *6 (V.I., 2013)("the reckless endangerment statute does not require proof of intent to injure, but the lesser intent of recklessness."); *Allen*, *supra* at 479–80 ("'Willfulness [...] requires existence of a specific wrongful intent— an evil motive— at the time the crime charged was committed.")

The trial court also advised that the jury could convict if it found that the alleged strangling was conducting "knowingly." Knowingly, however, is a lesser burden than willfully as required by the §296(3). *See U.S. v. Cheeseman*, 600 F.3d 270, 281 (3rd Cir.

2010)("Congress used the term 'knowing' and not 'willful,' clearly indicating its preference for the lower scienter.")

"One acts knowingly when he is aware that it is practically certain his conduct will cause the prohibited result." *Spears v. State*, 727 P.2d 96, 98 (Okla.Crim.App., 1986). "Willfully" requires a heighten mental state that shows defendant's knowledge that the act was illegal. See *Comment to Third Circuit Model Jury Instruction 5.05* ("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."); *Cheeseman*, *supra* at 281 (knowing requires "only that the act be voluntary and intentional and not that a person knows he is breaking the law," while "a willfulness requirement . . . would require him to have had actual knowledge that his prohibited conduct was illegal."); *United States v. Stadtmauer*, 2010 WL 3504321 (3d Cir. 2010) ("'Willfulness' thus requires more than a general intent to accomplish an act; it requires proof that the act was done with the specific intent to do something that the law forbids." (citations omitted)).

Thus, by instructing the jury that it could convict based if it determined that Appellant acted knowingly or recklessly (without an intent to harm), it alleviated the government of its burden of proof and committed plain error in doing so. *See Nanton, supra; Wallace, supra.*

v. The Court failed to instruct the jury on "lawful violence" as to Count III.

In instructing the jury on simple assault, the trial court instructed:

> In order to sustain its burden of proof for the crime of simple assault as set forth in Count 3 of the Information against defendant, the People of the Virgin Islands must prove beyond a reasonable doubt that, on or about November 15, 2020, in St. Thomas, Virgin Islands, the defendant Devindra Jaglal, used unlawful violence on the person of another, Rocio Ramirez, with whom he had an intimate relationship with intent to injure Rocio Ramirez.
>
> If you find from the evidence that each of these elements have been proven beyond a reasonable doubt, then it is your duty to find defendant Devindra Jaglal guilty of simple assault, domestic violence. However, if you find that the People have failed to prove any one of the elements beyond a reasonable doubt, then you must find defendant Devindra Jaglal not guilty of simple assault, domestic violence.

(701-703).

The legislature has defined simple assault under 14 V.I.C. § 299(2) as follows:

> Whoever commits-
>
> (1) a simple assault; or
>
> (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. The legislature further defined assault and battery 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. In *Government of Virgin Islands v. Frett*, 1978 WL 444368 (Terr.V.I.,1978) the Court explained:

> to sustain a conviction [for simple assault], the statute requires proof of three independent elements:
>
> 1. That violence is perpetrated by the defendant upon the person of another;
> 2. That said violence is unlawful; and
> 3. That said violence is accompanied by an intent to injure. The first two factors constitute the actus reus, or the guilty act or deed of the crime, while the last factor encompasses the *mens rea*, which is the mental state or intent to do the guilty act.

Frett at *1. Here, the trial court did not advise the jury in any way how it was to ascertain whether the People had proven the element of "unlawful violence" beyond a reasonable doubt. "Unlawful violence' encompasses a wide variety of conduct." *Simmonds v. Virgin Islands*, Criminal Action No. 2008-0029, 2020 WL 1676927, at *4 (D.V.I. App. Div. Apr. 3, 2020), *aff'd in part, appeal dismissed in part*, 837 F. App'x 109 (3d Cir. 2020), *cert. denied*, 142 S. Ct. 268 (2021). "Unlawful violence is not defined explicitly, but it is defined by implication." *Wallace v. People*, 71 V.I. 703, 769, 2019 VI 24, ¶ 118, 2019 WL 3282736, at *36 (V.I., 2019) citing 14 V.I.C. § 293, Swan, J., *concurring in part*. In discussing these elements, the (then) Territorial Court explained:

> 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 "preventing or interrupting an intrusion upon the lawful possession of property, against the will of the person in charge". 14 V.I.C. Section 293(a)(4).

Government of Virgin Islands v. Remak, 1985 WL 1264353, at *2 (Terr.V.I., 1985). The legislature specifically laid out that there are certain circumstances under which a person employing violence is not engaged in "unlawful violence." *See* 14 V.I.C. § 293. The trial court here, however, gave the jury no guidance as to what constituted lawful violence versus unlawful violence. As such, the jury was left to insert its own definition of what would constitute unlawful violence. Without any guidance on this issue, however, Appellant Jaglal was deprived of having a jury that was cognizant of the full range of the burden on the People. For instance, lawful violence includes, *inter alia*:

> (a) Violence used to the person does not amount to an assault or an assault and battery-
> ...
> (3) the preservation of peace, or to prevent the commission of offenses;
> ...
> (6) in self defense or in defense of another against unlawful violence offered to his person or property.

14 V.I.C. § 293. At trial, Jaglal took the stand and testified that his physical interaction with Ms. Ramirez was limited to the following:

> Q Did you shove Miss Ramirez?
>
> A At one point I did shove Mrs. Ramirez off of me, yes, correct.
>
> Q Okay. Did you ever grab her arm or her elbow?

A I definitely grabbed her arm, which I believe there's a bruise on her arm, to shove her away from me, yes, correct.

Q Okay. Have you ever pushed Miss Ramirez?

A I shoved her off of me, correct, yes, sir.

(520). On cross examination Appellant Jaglal further explained:

Q So, on the other side, the other photo, People's Exhibit Number 11, you said that you pushed her and that's how she got that one?

A Correct, yes. I said I shoved her.

Q You shoved her.

A Shoved her.

(592).

In Count III of the Information, the People alleged that Appellant Jaglal had committed simple assault because he "struck [Ramirez] about her body, and this act was committed during an act of domestic violence." (15). Appellant Jaglal admitted to shoving Ms. Ramirez and even causing a bruise by grabbing her arm, but the jury was deprived of the ability to consider whether this constituted lawful violence or unlawful violence, that is whether he committed those acts to preserve the peace or prevent the commission of an offense, or whether he was acting in self-defense. *See* 14 V.I.C. § 293(3) and (6). The legislature specifically required that the government prove that a defendant engaged in "unlawful violence" to sustain a simple assault conviction.

Without any guidance as to what constitutes "unlawful violence," the jury was left to speculate, thus depriving Appellant Jaglal of his constitutional right to have the jury instructed on every essential element of the charge against. *See Commonwealth of the Northern Mariana Islands v. Muna*, 2016 WL 4398973, at *5 (N. Mariana Islands, 2016)("We have also found reversible error when instructions failed to define terms of art relating to elements of offenses… ."); *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa,1996)("In criminal cases, the court is required to instruct the jury on the definition of the crime. [] Generally understood words of ordinary usage need not be defined; however, technical terms or legal terms of art must be explained.") Because the trial court did not define "unlawful violence" it committed an error which affected the substantial right of Appellant Jaglal to have the jury instructed on the elements of the offense. As such, this Court should vacate his conviction under Count III and remand this case for a new trial. *See Nanton, supra; Wallace, supra*.

POINT II

THE TRIAL COURT ERRED IN PERMITTING THE GOVERNMENT TO ELICIT EVIDENCE THAT DEFENDANT'S MOTHER CONTACTED ROCIO RAMIREZ IN AN ATTEMPT TO INFLUENCE HER NOT TO TESTIFY

During the trial, the People repeatedly introduced evidence that Appellant Jaglal's mother contacted Rocio Ramirez to convince her not to appear at trial. Not

only was this evidence irrelevant, but it was also extremely prejudicial to Jaglal despite the fact that there was absolutely no evidence that Appellant had coordinated these contacts or that he even acquiesced to them.[7] For instance, during her direct examination, the People elicited testimony from Ramirez about her pretrial meetings with the prosecutors. Over the defense objections Ramirez's testimony went as follows:

> Q And you said his mom was calling you, when did that happen?
>
> A I was in your office when his mom called me.
>
> Q And can you tell me what happened when his mom called you?
>
> A He picked up the phone.
>
> Q When you say he picked up – without saying what he said, when you say he picked the phone, do you mean someone in this courtroom?
>
> A The lawyer.
>
> Q If I say to my right, Attorney McRae; is that correct?
>
> A Yes.
>
> ATTORNEY JOHNSON: Your Honor, this is beyond the scope of cross.
>
> **THE COURT: Overruled.**
>
> BY ATTORNEY RILEY:
>
> Q Is that the first time that –when you said his mother, whose mother

[7] *See Billu v. People*, 2012 WL 8123138, at *3 (V.I., 2012)(evidentiary decisions involving legal precents subject to plenary review)

called you?

A Devindra's mom.

Q And how do you know it was his mom?

A Because I have her phone number and her name pop up.

Q And is that the first time she's done that since this incident happened?

A No. She also send me a message asking if I was coming to the island.

(266-268). Despite having produced no evidence that Jaglal had directed or even acquiesced to his mother calling Ramirez, the government continued along this line of questioning:

> Q Going back to when we met on Sunday and you stated that the defendant's mother had messaged you and asked you if you were coming to island, was his mom encouraging you to testify?
>
> A No. She asked me for a letter to deny -- to dismiss this.
>
> Q And after Chief McRae spoke to the defendant's mother, what happened?
>
> A That Sunday?
>
> Q Yes.
>
> A They didn't call me again after he spoke with her.

(270). This line of inquiry continued during the cross examination of Jaglal:

> Q And you listened to the witness of Mrs. Ramirez, correct?
>
> A Yes, that's correct.

Q And she told you that on Sunday right before jury selection your mother contacted her to try to get her to drop this case, correct?

A That's not correct.

Q Isn't it true that your mother's number is 954-663-[XXXX]?

A That is correct.

Q This is correct. So if that number contacted her on a Sunday, because you saw Mrs. Ramirez said that she spoke to me, correct?

A Repeat the question. You're going a little fast.

Q As far as on Sunday –

A Um-hum.

Q You sat here during the testimony of Mrs. Ramirez and she said that while she was in my office, your mother contacted her, correct?

A That's correct.

Q And I just read you the number and you said that is your mother's number, correct?

A That's correct.

Q And she stated that your mother was trying to get her to drop this case?

A That's not correct.

(584-586).

Even during closing the government continued to harp on the contention that Jaglal's mother had attempted to dissuade Ramirez from testifying at trial:

> Mrs. Ramirez has told you that when she was meeting with me on Sunday before coming here for jury selection on Monday, the defendant's mom contacted her while she was in my office and tried to discourage her from coming forward in this matter. The defendant took the stand and tried to deny it. Whenever I asked about this number, he said, yes, that's his mother.

(639). The government continued this line of argument at sentencing asking for a significant incarcerative sentence because, "It wasn't easy because she was scared of the defendant. **It wasn't easy because his mother called her and asked her not to**." (744). So pervasive was the People's reliance on the contention that Jaglal's mother sought to dissuade Ramirez from coming forward and testifying that the trial court relied on that contention in imposing its seven-year term of incarceration on Appellant, stating:

> She testified to the fear that she felt, and not one family member, especially **Mr. Jaglal's mother who gave birth to him I presume, not even a shred of sympathy for this young girl. The same mother who she testified called her on the phone, was it the Sunday before the trial? Yes, the Sunday before the trial to get her to not move forward. Like Attorney Scott said. That's what he was banking on.**

(775)(emphasis added). Putting aside the impropriety of the statement that she "presumes" that Appellant Jaglal's mother gave birth to him, the government's contention that Jaglal's mother attempted to convince Ramirez to not testify was so important that the government relied on it at closing to get a conviction, and then again at sentencing to secure its lengthy term of incarceration, but there was nothing to suggest that Jaglal told his mother to try and dissuade Ramirez from testifying.

While a defendant's attempts to dissuade a witness from testifying would be relevant to show consciousness of guilt, such attempts are irrelevant when those attempts are made by a third party (even a relative) unless the defendant actually acquiesced or encouraged such behavior. "Generally, evidence of an attempt by a third person to fabricate evidence is not admissible on the issue of the defendant's guilt, unless there is evidence connecting the defendant with that attempt. [] **A mere family relationship between the defendant and the third person is not adequate proof of this connection**." *Roby v. State*, 587 P.2d 641, 645 (Wyo., 1978) citing Annot., "Third Person's Attempt to Influence Witness," 79 A.L.R.3d 1156, 1162, s 3 (1977). Numerous other Court have come to the same conclusion, that is, evidence of attempts to intimidate or dissuade a witness from testifying is inadmissible unless there is evidence connecting the defendant with that attempt. *People v. Abel*, 271 P.3d 1040, 1068, 138 Cal.Rptr.3d 547, 580, 53 Cal.4th 891, 924 (Cal., 2012)("evidence of a third party's attempt to intimidate a witness is inadmissible against a defendant unless there is reason to believe the defendant was involved in the intimidation."); *People v. Perez*, 337 P.2d 539, 542, 169 Cal.App.2d 473, 477–78 (Cal.App. 1959)("it is not denied that the person identified by the complaining witness as the person making the offer was defendant's brother. **But mere relationship, of itself, has never been held sufficient**."); *State v. Price*, 491 So.2d 536, 536–37 (Fla.,1986)("A third person's attempt to influence

a witness is inadmissible on the issue of the defendant's guilt unless the defendant has authorized the third party's action."); *State v. Carter*, 2007 WL 1976666, at *5 (Ohio App. 7 Dist.,2007)("an attempt by a third-party to bribe or otherwise influence a witness is generally inadmissible against a defendant."); *Saunders v. State*, 346 A.2d 448, 450–51, 28 Md.App. 455, 459 (Md.App. 1975) *citing* 29 Am.Jur.2d, Evidence, Sect. 293 (1967)("Evidence of such attempts by another is not admissible, however, where there is no evidence to connect the accused therewith. In order to make admissible evidence of attempts by a third person to influence a witness not to testify or to testify falsely, it must be established that such attempts were done by the authorization of the accused."); *Cano v. State*, 2007 WL 2872418, at *6 (Tex.App.-Houston [14 Dist.],2007)("third parties' attempts to persuade a witness to avoid testifying are inadmissible absent a showing the defendant directed such attempts.")

Here, the trial court permitted the government to repeatedly elicit testimony that Jaglal's mother attempted to dissuade Ramirez from testifying. This evidence was extremely prejudicial in that it tended to show consciousness of guilt on the part of Appellant despite the complete lack of evidence that he authorized his mother's communications. The prejudicial nature of the evidence is illustrated by the government's reliance on it throughout the trial and at sentencing and the court's reliance thereon in imposing the lengthy sentence. Because this evidence was highly

prejudicial, this Court should reverse Jaglal's convictions and remand this case for a new trial. Otherwise, one must ask, "[a]re the sins of the mother to be laid upon the son?" *Matter of Adams v Franco*, 1996 WL 72417 (N.Y. Sup Ct, Jan. 19, 1996)

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION IN CONSIDERING APPELLANT'S MOTHER'S CONTACTS WITH RAMIREZ IN IMPOSING A SEVEN YEAR TERM OF INCACERATION

Admittedly, this Court has granted broad discretion to the Superior Court in its sentencing determinations and has advised that it "will not review a sentence which falls within the bounds prescribed by the applicable statute. In that regard, the trial court's sentencing determination will be interfered with only upon a showing of illegality or abuse of discretion." *Brown v. People*, 56 V.I. 695, 699, 2012 WL 1886443, at *2 (V.I., 2012)(citations omitted). As noted, in imposing this undeniably harsh sentence, the Court emphasized that Jaglal's mother had tried to dissuade Ramirez from testifying. (775).

As noted in Point II, however, there was no evidence that Jaglal had put his mother up to contacting Ramirez to have her not testify. "Although the trial court may consider a range of factors when sentencing, 'the due process clause imposes some significant restraint to assure the essential fairness of the procedure by which a judge shall exercise discretion in fixing punishment within permissible limits." *Miller v.*

People, 67 V.I. 827, 838, 2017 WL 3420786, at *4 (V.I., 2017). "It is an abuse of discretion, as a denial of due process of law, for the sentencing court to consider irrelevant factors during sentencing." *Commonwealth v. Smithton*, 631 A.2d 1053, 1056, 429 Pa.Super. 55, 62 (Pa.Super.,1993) A "court abuses its discretion when 'it fails to consider a relevant and significant factor, **gives significant weight to an irrelevant or improper factor**, or considers the appropriate factors but commits a clear error of judgment in weighing those factors.' " *United States v. Powers*, 828 F.3d 731, 734 (8th Cir. 2016)(emphasis added).

As discussed, *supra,* the trial court erred in permitting the jury to consider the acts of Jaglal's mother as evidence of his guilt. *See Roby; Abel, supra; Perez, supra.* The government and the trial court put much weight on this "evidence" at the guilt phase and then exacerbated that error by again relying on Appellant's mother's actions in imposing a seven-year sentence. Considering Mrs. Jaglal's actions, in the absence of any evidence that Appellant Jaglal had authorized or sought such conduct was improper and irrelevant. *See Smithton, supra; Powers, supra*. The trial court's error in considering these irrelevant and improper issues at sentencing affected Appellant's right to be sentenced for his actions, not those of his mother, and by giving such weight to the unsolicited actions of Jaglal's mother, the error seriously affected the fairness and public reputation

of the proceedings. *See Wallace, supra.* For the foregoing reasons, this Court should vacate Appellant's sentence and remand this case for further proceedings.

CONCLUSION

For the reasons outlined in Points I, II this Court should vacate Appellant's convictions for second degree assault and simple assault and remand this case for a new trial. For the reasons stated in Point III, this Court should vacate Appellant's sentence and remand this case for a new sentencing hearing, if it does not remand for a new trial on Points I and II.

Respectfully submitted,

DATE: January 31, 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.

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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 7,578 words.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 31, 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 31st day of January 2023, I caused:

- Seven (7) copies of the foregoing Appellant's appellate brief and four (4) copies of the joint appendix on appeal to be filed with the Clerk of the Court for the Virgin Islands Supreme Court.

- One (1) copy of the foregoing Appellant's appellate brief and one (1) copy

of the joint appendix on appeal to be filed with Appellant at Golden Grove Correctional Facility

- One (1) copy of the foregoing Appellant's appellate brief and one (1) copy of the joint appendix on appeal to be filed with Tracy Myers, Esq., Assistant Attorney General, Department of Justice, GERS Bldg.

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