IN THE SUPREME COURT OF THE VIRGIN ISLANDS
SCT-CRIM-2022-0033

DEVINDRA JAGLAL,
Appellant/Defendant,
v.
PEOPLE OF THE VIRGIN ISLANDS,
Appellee/Plaintiff

ON APPEAL FROM THE SUPERIOR COURT OF THE VIRGIN ISLANDS DIVISION OF ST. THOMAS AND ST. JOHN
CRIMINAL NO. ST-2020-CR-00338

APPELLEE'S BRIEF

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The Superior Court of the Virgin Islands had original jurisdiction over this matter pursuant to title 4 of the Virgin Islands Code ("V.I.C."), section 76(b).

The Supreme Court of the Virgin Islands has jurisdiction over this matter pursuant to 4 V.I.C. § 33(a) and V.I. R. APP. P. 5(b) as a final appealable order.

Appellant Devindra Jaglal filed a Notice of Appeal with the Supreme Court of the Virgin Islands on July 1, 2022, regarding the July 20, 2022, Judgement and Commitment. This appeal is timely pursuant to V.I. R. APP. P. 5(b)(1).

STATEMENT OF ISSUES PRESENTED

I. Whether the trial court properly instructed the jury that the elements of Count III, Simple Assault - Domestic Violence are unlawful violence coupled with an intent to injure.

II. Whether the trial court was obligated to give an instruction on "lawful violence" in Count III, Simple Assault – Domestic Violence, when the Appellant did not raise - or present any evidence of - lawful violence.

III. Whether the trial court properly instructed the jury on the mens rea of "willfully" for Second-Degree Assault – Domestic Violence.

IV. Whether the trial court properly excluded "an intent to injure" and "an intent to kill" from the instructions for Count II, Second-Degree Assault – Domestic Violence, because these are not elements of 14 V.I.C. § 296(3).

V. Whether the trial court was obligated to give an instruction on "lawful violence" in Count II, Second-Degree Assault – Domestic Violence, when the Appellant did not raise - or present any evidence of – lawful violence.

VI. Whether the Superior Court erred when it permitted the victim and the Government to present evidence regarding Jaglal's mother's attempts to contact the victim.

VII. Whether the trial court erred in imposing Jaglal's sentence when it gave no consideration to Jaglal's mother's contacts with the victim as an indicator of Jaglal's own guilt.

STANDARD OF REVIEW

Jaglal did not object to any of the issues now complained of. When issues are not objected to during trial and are raised for the first time on appeal, these issues are waived and not subject to review. *Bryan v. Gov't of the V.I.*, 56 V.I. 451, 457 (2012) ("Appellate courts generally refuse to consider issues that are raised for the first time on appeal …. Furthermore, on appeal to this Court, the scope of our review is restricted to those questions that were properly preserved for review in the trial court and further raised on appeal according to the rules of this Court.") (quoting *St. Thomas-St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 335-336 (V.I. 2007). If the Court chooses to address any of Jaglal's concerns, then the issues are only subject to a plain error review, *Ledesma v. Gov't of the V.I.*, 72 V.I. 797, 808 (2019), and in light of the vast evidence, any errors did not affect Jaglal's substantial rights. *Fahie*

v. People of the V.I., 59 V.I. 505, 511 (2013) ("To establish plain error, [Appellant] must show an error, which was plain, that affected his substantial rights.")

STATEMENT OF RELATED PROCEEDINGS

This case has not previously been before the Virgin Islands Supreme Court. The Appellee is not aware of any case or proceedings – past or present – that is related to this case.

STATEMENT OF THE CASE

Appellant Devindra Jaglal was arrested in November of 2020 for beating his pregnant girlfriend, Rocio Ramirez. (JA 128, 189, 233.) He was charged with Count I, False Imprisonment - Domestic Violence; Count II, Second-Degree Assault - Domestic Violence; and Count III, Simple Assault - Domestic Violence. (JA 14-15.) A jury found him guilty on Counts II and III, (JA 730-731), and he was sentenced to seven (7) years incarceration. (JA 3-4.) Jaglal argues for the first time that: the trial court erred in its instructions on Simple Assault – Domestic Violence; that the trial court erred in its instructions on Second-Degree Assault – Domestic Violence; against testimony involving actions taken by his mother; and that his sentence involved an abuse of discretion. Appellant's Brief, p. i. Jaglal timely filed his Notice of Appeal on July 1, 2022. (JA 1.)

STATEMENT OF FACTS

Devindra Jaglal brought his pregnant girlfriend, Rocio Ramirez, from Florida to St. Thomas in November of 2020 to celebrate her 21st birthday. (JA 128, 189,

233.) Jaglal became angry with Ramirez when the parties returned to their rented condo after a day out. (JA 115 and 193.) Jaglal proceeded to chase, kick, slap, push, punch, and strangle Ramirez to the point of unconsciousness for an hour while she screamed for help. (JA 239 and 245.) Witnesses from a neighboring condo called 911. (JA 88.) The police arrived, the victim was taken to the hospital, and Jaglal was arrested. (JA 142, 211, and 476.) Jaglal was later charged with False Imprisonment - Domestic Violence (Count I);[1] Second-Degree Assault - Domestic Violence (Count II);[2] and Simple Assault - Domestic Violence (Count III).[3] (JA 14-15.)

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[1] Count I, False Imprisonment – Domestic Violence, in violation of 14 V.I.C. § 1051, ("Whoever without lawful authority confines or imprisons another person within this Territory against his will, … with intent to cause him to be confined or imprisoned in this Territory against his will…is guilty of kidnapping and shall be imprisoned for not less than one and not more than 20 years."), and 16 V.I.C. § 91(b)(12) ("'Domestic violence' means the occurrence of [false imprisonment] against … a person who is, or has been, in a sexual or otherwise intimate relationship with the victim."). (JA 14-15.)

[2] Count II, Second Degree Assault – Domestic Violence, in violation of 14 V.I.C. § 296(3) ("Whoever willfully strangle[s] or attempts to strangle any person in an act of domestic violence shall be imprisoned not more than 10 years and if the conviction results from an act of domestic violence, the person shall be fined no less than $1,000 and shall successfully complete certified mandatory Batters Intervention Program."), and 16 V.I.C. § 91(b)(1)(2) ("'Domestic violence' means the occurrence of [assault and battery] against … a person who is, or has been, in a sexual or otherwise intimate relationship with the victim."). (JA 14-15.)

[3] Count III, Simple Assault – Domestic Violence, in violation of 14 V.I.C. § 292 ("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. § 299(2) ("Whoever commits an assault or battery unattended with circumstances of aggravation shall be fined not more that $250 or imprisoned not more than six months, or both [] imprisoned and fined."), and 16 V.I.C. § 91(b)(1)(2) ("'Domestic violence' means the occurrence of [assault and battery]

A trial commenced on May 24, 2022; May 25, 2022; and May 26, 2022. (JA 19, 333, and 622.) Seven people testified for the People, including the victim. (JA 20 and 334.) Jaglal took the stand on his own behalf. (JA 334.) At trial, testimony was presented that Jaglal's mother had made attempts to contact the victim in an attempt to dissuade the victim from testifying. (JA 266, 267, 269-270, and 584-585.) The defense objected once that the testimony exceeded the scope of cross, and the trial court overruled the objection. After deliberations, the jury returned a guilty verdict on Count II, Second-Degree Assault – Domestic Violence and Count III, Simple Assault – Domestic Violence. (JA 730-731.) Jaglal was sentenced to seven (7) years incarceration. (JA 3-4.) At sentencing, the trial court referenced in passing the mother's attempts to contact the victim. (JA 775.)

Jaglal was sentenced to seven (7) years incarceration, which was within the statutory parameters. (JA 3-4.)

SUMMARY OF THE ARGUMENT

Because Jaglal raises each issue for the first time on appeal, these issues waived and are not properly before this Court. If this Court elects to address any of the issues, each issue is only subject to plain error review.

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against … a person who is, or has been, in a sexual or otherwise intimate relationship with the victim."). (JA 14-15.) "Circumstances of aggravation" are found within 14 V.I.C. § 298, Aggravated assault and battery.

The Superior Court properly instructed the jury as to the elements of Count III, Simple Assault – Domestic Violence, because the jury instructions fairly and adequately inform the jury of the legal standard by which guilt is to be determined. Regarding Count II, Second-Degree Assault, Domestic Violence, the Superior Court properly instructed the jury as to the element of "willfully," and properly excluded an "intent to injure" and "an intent to kill" because these are not elements of the crime. Additionally, the Superior Court was not obligated to give an instruction on "lawful violence" on Jaglal's behalf for either Simple Assault or Second-Degree Assault. The trial court did not err when it permitted the Victim and the Government to present evidence regarding Jaglal's mother's attempts to contact the victim because in light of the substantial evidence of guilt, Jaglal's was not deprived of his right to a fair trial. And lastly, the trial court's passing comment about Jaglal's mother's attempts to contact the victim did not amount to plain error or deprive Jaglal of a fair trial.

Thus, this Court should either hold that each argument was waived, or, for each argument raised, conclude that Jaglal failed to meet his burden of establishing plain error.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY INSTRUCTED THE JURY AS TO THE ELEMENTS OF SIMPLE ASSAULT.

Appellant Devindra Jaglal was found guilty on Count III, Simple Assault, Domestic Violence, and sentenced to six (6) months incarceration to run concurrently with Count II, Second-Degree Assault – Domestic Violence. (JA 3.) Jaglal for the first time asks to vacate his conviction for Simple Assault. Jaglal does not challenge that the alleged act involved "domestic violence," 16 V.I.C. § 99(f) ("In criminal actions for domestic violence, the prosecuting attorney shall charge in the information that the alleged act is an act of domestic violence.") but argues that the trial court erred in failing to instruct as to "unlawful violence" as in element of simple assault. Appellant's Brief, pp. 2 and 23. Jaglal also argues that "the government was… required to prove beyond a reasonable doubt that Jaglal was not engaged in 'lawful violence.'" Appellant's Brief, pp. 14-15.

Because these issues were not raised in the trial court, these issues are waived. *Bryan*, 56 V.I. at 457. If the Supreme Court elects to review the issues, it reviews only for plain error. *Saldana v. People of the V.I.*, 73 V.I. 649, 656 (2020) (citations omitted); *see also Rodriguez v. People of the V.I.*, 71 V.I. 577, 594 (2019) ("Although generally we review the wording of a jury instruction for abuse of discretion, in the absence of an objection to an instruction, we review for plain error.")

"For this Court to reverse under a plain error 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.'" *Marsh-Monsanto v. Clarenbach*, 66 V.I. 366, 381 (2017) (quoting *Rawlins v. People*, 58 V.I. 261, 268 (V.I. 2013) (further citation omitted). *See also, Saldana,* 73 V.I. at 663 (where a jury instruction was not requested at the jury instruction conference or after the Superior Court instructed the jury, even after the judge inquired of the parties if the court needed to make modifications to the proposed jury instructions, defendant's claim that the Superior Court erred in failing to give such instruction is reviewed on appeal only for plain error), and Virgin Islands Rules of Criminal Procedure 30(d) and 52(b) (Pursuant to Rule 30(d), "[a] party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. … Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b)." Under Rule 52(b), "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Thus, a party seeking reversal must demonstrate that there was a plain error that affected the movant's substantial rights, and this error seriously impacted the fairness, integrity, or public reputation of the judicial proceedings. *See Fahie,* 59

V.I. at 511 ("Unlike harmless error analysis, under plain error analysis, the burden falls on the appellant to show how the error prejudiced him.")

"Jury instructions must fairly and adequately inform the jury of the legal standard by which guilt is to be determined and must contain accurate statements and explanations of any applicable legal principles," *Davis v. People of the V.I.*, 69 V.I. 619, 673 (2018), and "[t]he trial court's obligation is to correctly state the law so long as the instruction conveys the required meaning". *Davis*, 69 V.I. at 674 (citation omitted).

Defense counsel participated in the preparation and approval of the jury instructions, and when asked by the trial court whether there were any objections to the jury instructions as presented, counsel only objected that the element of domestic violence was not in Count III, Simple-Assault – Domestic Violence. (JA 709-710.)

a. The trial court properly instructed the jury that the elements of simple assault are unlawful violence coupled with an intent to injure.

The trial court instructed the jury that the "unlawful violence" included "whatever means or degree of violence used…. with the intent to injure." Jury Instructions, 81:16-18 and 82:3-4 (JA 702-703.). Jurors are expected – and instructed – to apply common knowledge and experience to the testimony. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 344, 99 S. Ct. 645, 658 (1979) (Justice Rehnquist, dissenting) ("[J]uries represent the layman's common sense, the passional elements in our nature, and thus keep the administration of law in accord with the wishes and feelings

of the community.") (citation omitted); *Braithwaite v. K-Mart Corp*., No. 628/1998, 2000 V.I. LEXIS 35, at *18 (Mar. 6, 2000) (quoting *Getter v. Wal-Mart Stores, Inc*., 66 F.3d 1119, 1124 (10th Cir. 1995) ("[T]he normal life experiences and qualifications of the jury would permit it to draw its own conclusions"). Any 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,"[4] which, as discussed below, do not apply here.

The elements of simple assault are: unlawful violence and an intent to injure. *Pichierri v. People of the V.I.*, 58 V.I. 516, 523 (2013) (citing *Boston v. People*, 56 V.I. 634, 641 (V.I. 2012), which interpreted 14 V.I.C. § 299(2)). The Superior Court instructed the jury that "[i]n order to sustain its burden of proof for the crime of simple assault as set forth in Court III of the Information against Defendant, the

[4] 14 V.I.C. § 293(a). Violence used to the person does not amount to an assault or an assault and battery—

> (1) in the exercise of the right of moderate restraint or correction given by the law to the parents over the child, the guardian over the ward, the master over his apprentice or minor servant, whenever the former be authorized by the parent or guardian of the latter so to do;
> (2) for the preservation of order in a meeting for religious or other lawful purposes, in case of obstinate resistance to the person charged with the preservation of order;
> (3) the preservation of peace, or to prevent the commission of offenses;
> (4) in preventing or interrupting an intrusion upon the lawful possession of property, against the will of the owner or person in charge thereof;
> (5) in making a lawful arrest and detaining the party arrested, in obedience to the lawful orders of a magistrate judge or court, and in overcoming resistance to such lawful order; or
> (6) in self defense or in defense of another against unlawful violence offered to his person or property.

People of the Virgin Islands must prove beyond a reasonable doubt that …the defendant … used unlawful violence on … Rocio Ramirez, with whom he had an intimate relationship with intent to injure Rocio Ramirez." (JA 702-703.) The jury instructions on Count III include both the use of unlawful violence and the intent to injure. Because the jury instructions properly advised the jury of the legal standard by which guilt is to be decided, this Court should find that the jury instructions were not made in error. Additionally, Jaglal waived this argument because it was not brought up to the Superior Court at or even after trial.

If this Court finds that there was error in the jury instructions as to Count III, this Court should conclude that a failure to instruct as to "unlawful violence" did not affect the "fairness, integrity or reputation of the judicial proceedings." *Saldana*, 73 V.I. at 663. 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." *See Williams v. People of the V.I.*, 55 V.I. 721, 732 (2011) ("[W]e conclude that there was no error… because the instructions that were given by the court… intrinsically and adequately addressed the issue".)

b. The trial court was not obligated to give an instruction on "lawful violence" in Count III, Simple Assault, because Jaglal never raised the issue or evidence of lawful violence.

Jaglal argues that because 14 V.I.C. § 293 provides that "[v]iolence used to the person does not amount to an assault or an assault and battery' under certain enumerated circumstances, the government was also required to prove beyond a

reasonable doubt that Jaglal was not engaged in 'lawful violence.'" Appellant's Brief, pp. 14-15.

In *Davis*, 69 V.I. at 633, this Court clarified that a trial judge "is required to instruct the jury regarding self-defense if the defendant places self-defense in issue." Citing *Fahie*, 59 V.I. at 512 (further citation omitted). But although Jaglal testified that he shoved the victim away and off of himself, (JA 520 and 592), he never testified to, presented evidence of, or raised the issue of "violence… permitted to effect a lawful purpose". 14 V.I.C. 293(b). A defendant is "entitled to an instruction under title 14, sections 41, 43, and 293(a)(6), 'only if the trial record contained evidence sufficient for a reasonable jury to find these defenses.'" *Davis*, 69 V.I. at 633, quoting *Prince v. People*, 57 V.I. 399, 412 (V.I. 2012) (further citation omitted).

That Jaglal admitted to shoving Ramirez, without more, does not warrant a sua sponte defense on Jaglal's behalf, and he cannot for the first time raise a "lawful violence" defense on appeal. "When a legal rule has been waived, an appeal based upon the nonadherence to that legal principle is precluded," but "[i]f … the correct application of the rule merely was forfeited, then an appellate court may nevertheless review for plain error." *Murrell v. People*, 54 V.I. 338, 361-362 (V.I. 2010) (citations omitted). And "an active inducement, acquiescence, or other affirmative act demonstrates an intentional waiver of an issue or right that this Court will not notice even under plain-error review." *Pickering v. People of the V.I.*, 64 V.I. 356, 365 (2016). Because the onus is on the Appellant to bring any defenses up at trial, and he chose

not to do so, this issue should be considered waived and not simply forfeited. *See Saldana,* 73 V.I. at 663-64 ("[B]y not raising the issue of intoxication as a defense in the trial court, [Appellant] waived the issue.")

Additionally, the elements of simple assault already include "unlawful violence" – and not simply "violence" – to indicate that there are times a violent act may be lawful. If the Court chooses to address this issue, it should find that the instruction of "lawful violence" was not warranted. Therefore, the Court should affirm the jury's finding of guilt for Count III, Simple Assault, because the instruction was sufficient, and the Superior Court was not obligated to present defenses on Jaglal's behalf.

II. THE SUPERIOR COURT PROPERLY INSTRUCTED THE JURY AS TO THE ELEMENTS OF SECOND-DEGREE ASSAULT-DOMESTIC VIOLENCE.

Jaglal was found guilty on Count II, Second-Degree Assault, Domestic Violence, and sentenced to seven (7) years incarceration with a fine of Five Thousand Dollars ($5,000.00). (JA 3.). Jaglal argues that the trial court erred in failing to instruct the jury of the mens rea of "willfully" for second degree assault; that the Government was required to prove Jaglal acted with an intent to injure or kill; and that the trial court should have instructed the jury on "lawful violence." Jaglal does not challenge the element of "domestic violence". Jaglal asks that this Court vacate his conviction and remand the case for a new trial.

Because these issues were not raised in the trial court, the issues are either subject to waiver or, at most, plain error review. *Saldana*, 73 V.I. at 656 (citations omitted).

a. The trial court properly instructed the jury as to the element of "willfully."

The elements of Second-Degree Assault, Domestic Violence under 14 V.I.C. § 296(3) are: the defendant, willfully, strangled or attempted to strangle another person in an act of domestic violence. *Wallace v. People of the V.I.*, 71 V.I. 703, 772 n. 42 (2019). No specific intent to injure is required. *Id*.

The trial court instructed the jury that assault in the second degree in violation of § 296(3) "is as follows: Whoever willfully strangles or attempt[s] to strangle any person in an act of domestic violence." (JA 700). The trial court then clarified that "[s]trangling means intentionally, knowingly, or recklessly impeding the normal breathing or circulation of blood of the 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." (JA 700-701.) Jaglal argues that because the trial court did not specifically list "willfully" as the mens rea in its recitation of the People's burden – even though the trial court had mentioned "willfully" in the trial court's recitation of the charge – the trial court left out an essential element of second-degree assault. Appellant's Brief, p. 9. This is incorrect.

In *Rodriguez*, 71 V.I. at 634-635, this Court explained that "a number of courts equate ["willful"] with ["knowing"]" and "'knowing' conduct … merely [requires]

an awareness that the result is practically certain to occur." As explained above, "[t]he trial court's obligation is to correctly state the law so long as the instruction conveys the required meaning". *Davis*, 69 V.I. at 674 (further citation omitted). Although the trial court's explanation of strangulation does not include the specific term "willfully," the explanation does indicate that the act of strangulation must be done "intentionally, knowingly or recklessly."

Because "willfully" is synonymous with "knowing," a finding by the jury that Jaglal strangled the victim knowingly would essentially be the same as finding the act was committed willfully. *See Williams*, 55 V.I. at 732 (concluding that because "[t]he words 'when his resistance was prevented by fear of immediate and great bodily harm' are synonymous with and functionally equivalent to a lack of consent," "the trial court's failure to use the word 'consent' in its final instructions did not result in prejudice or influence on the verdicts, nor did such failure constitute a violation of [Appellant's] constitutional rights.") Thus, this Court should conclude that the jury instruction on second-degree assault, domestic violence, was not given in error and affirm the jury's verdict.

b. The trial court properly excluded an "intent to injure" and "an intent to kill" because these are not elements of 14 V.I.C. § 296(3).

Jaglal argues that the Government is required to prove that he acted with an intent to injure or kill, (Appellant's Brief, pp. 12-14 and 16-17), citing *People of the V.I. v. Robles*, No. SX-14-CR-024, 2017 V.I. LEXIS 145, at *6 (Super. Ct. Sep. 11, 2017), in which the Superior Court instructed the jury that "[t]o sustain its burden of

proof for the charge of assault in the second degree, an act of domestic violence, the People had to show that: … Defendant used unlawful violence upon [the victim], to wit: strangled or attempted to strangle [the victim] … with the intent to injure [the victim]".

However, the trial court in *Robles* – just as the trial court here – was not required to instruct the jury that the Defendant intended to kill or even injure the victim because these are not elements of § 296(3).

In *Wallace*, 71 V.I. at 772 n. 42, Associate Justice Swan clarified in his partial concurrence that the elements of second-degree assault, domestic violence, are: (1) the Defendant, (2) willfully, (3) strangled or attempted to strangle another person in an act of domestic violence – and no specific intent to injure, let alone kill, is required. This analysis comports with the plain language of 14 V.I.C. § 296(1) ("Whoever willfully mingles any poison with any food, drink, or medicine, *with intent that the same shall be taken by any human being, to his injury*") (emphasis added); 14 V.I.C. § 296(4) ("Whoever willfully places or throws, or causes to be placed or thrown, upon the person of another, any vitriol, corrosive acid, pepper, hot water, or chemical of any nature *with intent to injure the flesh or disfigure the body* or clothes of such person"); and 14 V.I.C. § 295(1) ("§ Assault in the first degree: Whoever, *with intent to commit murder*, assaults another") (emphasis added). *See also Glob. Outreach, S.A. v. YA Glob. Invs., L.P. (In re Glob. Outreach, S.A.)*, Nos. 09-15985 (DHS), 09-01415 (DHS), 09-01712 (DHS), 2010 Bankr. LEXIS 6306, at *47

(Bankr. D.N.J. Oct. 6, 2010) ("[T]he structure and language of [the section] clearly and unambiguously indicate that intent is not necessary…. Significantly absent from [the section] is a qualifier such as 'knowingly' or 'intentionally,' which would indicate intent as an element. The presence of the term 'knowingly' elsewhere in the statute further supports the conclusion that the … legislature purposely omitted intent as an element of this crime.")

"[I]f the legislative intent is clear from the plain language of a statute, no further inquiry is necessary." *Greer v. People of the V.I.*, 74 V.I. 556, 584 (2021) (citing *In re Infant Sherman*, 49 V.I. 452, 456 (V.I. 2008)). Section 296(3) plainly states that "[w]however willfully strangle[s] or attempts to strangle any person in an act of domestic violence" is guilty of second-degree assault. The assailant's intent to cause injury or death is left out because the only intent required is the intent to strangle. *See State v. Tillem*, 127 N.J. Super. 421, 426 (N.J. Super. Ct. App. Div. 1974) ("There are areas where the evil or danger sought to be prevented is so great that the Legislature may, as a matter of public policy, declare an act unlawful without proof of a wrongful intent."). It is irrelevant if the intent to strangle was "intentionally, knowingly, or recklessly," (JA 701; 80:12-13), as long at the defendant intended to commit the act, regardless of the consequences. Thus, the plain language of the statute – and evaluation by this Court – indicate that Section 296(3) requires neither an intent to injure nor an intent to kill, and the Superior Court did not commit error by not instructing the jury otherwise.

c. The trial court was not obligated to give an instruction on "lawful violence" in Count II, Second-Degree Assault – Domestic Violence, because Jaglal never raised the defense or evidence of lawful violence.

Jaglal argues that because "the Legislature specifically laid out that there are certain circumstances under which a person employing violence is not engaged in 'unlawful violence,'… [he] was deprived of having a jury that was cognizant of the full range of the burden on the People." Appellant's Brief, p. 21. This argument was not brought up at trial, and is thus subject to waiver or, at most, plain error review. *Murrell*, 54 V.I. at 361-362 (citations omitted) ("[T]his Court must, in order to determine whether the remedy [requested] is appropriate, consider (1) whether [Appellant] waived, rather than forfeited, [the issue]; and (2) if [Appellant] merely forfeited this right, whether the Superior Court's errors rise to the level of plain error.").

Jaglal never testified to or raised the issue of "lawful violence," and although Jaglal states that "this Court has ruled that self-defense must be disproven beyond a reasonable doubt," (Appellant's Brief, p. 15), this obligation only befalls the People when a defendant first raises such an argument. *See Phipps v. People of the V.I.*, 54 V.I. 543, 547 (2011) (When a defendant argued that he had swung a machete at another man in self-defense, the trial court was held to have committed plain error when it did not instruct the jury that the People possessed the burden of disproving the self-defense claim beyond a reasonable doubt).

Because the Appellant failed to present evidence in support - or bring up the defense - of "lawful violence" up at trial, this issue is waived. *Davis*, 69 V.I. at 633

(explaining that the trial court has no obligation to *sua sponte* present a self-defense claim on a defendant's behalf if the defendant has never broached the subject); *Saldana*, 73 V.I. at 663-64 (explaining that because a defendant failed to bring up the issue of self-defense, he waived the issue upon appeal). Therefore, this Court should find that this issue is not properly before the Court.

If the Court chooses to address this issue, it should find that an instruction on violence used to preserve the peace, to prevent of commission of offenses, or for self-defense, Appellant's Brief, p. 21, was not warranted when no evidence or claims were presented at trial to support that the strangulation was a product of "lawful violence." *See Fahie*, 59 V.I. at 514 (explaining that the trial court did not err by failing to *sua sponte* instruct the self-defense when the evidence at trial did not warrant such an instruction).

In conclusion, the trial court properly instructed the jury on the elements of Count III, Second-Degree Assault -Domestic Violence, and was not obligated to address any mitigating circumstances on Jaglal's behalf. Additionally, any arguments in this regard have been waived. Thus, this Court should not vacate Jaglal's conviction on Count III and should affirm the jury's verdict.

III. THE TRIAL COURT DID NOT ERR WHEN IT PERMITTED THE VICTIM AND THE GOVERNMENT TO PRESENT EVIDENCE REGARDING JAGLAL'S MOTHER'S CONTACT WITH THE VICTIM.

Evidence was presented at trial that Jaglal's mother called Ramirez and that Jaglal's mother asked Ramirez to dismiss the case against her son. Jaglal argues that

this evidence was both irrelevant and extremely prejudicial because there was no evidence that Jaglal "had coordinated these contacts or that he even acquiesced to them." Appellant's Brief, p. 24.

Jaglal contends that attempts by a third-party to get a victim not to testify are only relevant when "the defendant actually encouraged such behavior," Appellant's Brief, p. 28, citing *Roby v. State*, 587 P.2d 641, 645 (Wyo. 1978), in which the Supreme Court of Wyoming held that the prosecution "[is] charged with establishing the factual predicates for his questions" before attempting to elicit testimony from the stand that the defendant was connected to a third-party's attempt to fabricate evidence).

However, in *Roby*, the prosecution was lambasted for eliciting testimony that the defendant's father had asked a restaurant to date a receipt on the same date his son stated that he was at lunch with his father instead of transacting a drug sale, concluding that "[i]t is improper… for the prosecution to leave the jury with the inference of [the defendant's involvement in a third-party's attempt to fabricate evidence] under the guise of impeachment" because "[w]hen cross-examination is not confined to matters testified to in the examination in chief, it must be limited to those things which affect the credibility of the witness." *Roby*, 587 P.2d at 644.

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, *see* Admissibility 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, 79 A.L.R.3d 1156, 4; or if the threats explain why a witness provided false or inconsistent statements. *Commonwealth v. Tinsel*, 249 A.3d 1189 (Pa. Super. Ct. 2021) (citations omitted).

a. The issue is waived and thus not properly before this Court.

There was only one objection made to the testimony, that the questioning was beyond the scope of cross. (JA 267.) A request for a mistrial was never made, either orally or by motion. And it appears that thirty-six (36) days after the trial concluded, the Appellant was still not particularly concerned with the testimony. *See* July 1, 2022, Notice of Appeal ("Please take notice that... Appellant hereby appeals to the Supreme Court of the Virgin Islands, from the trial Order/Verdict/Judgment announced by the Superior Court of the Virgin Islands... on June 30, 2022.... Defendant appeals this decision on the following grounds: Constitutional, Procedural, and Evidentiary Issues"; *see also* Virgin Islands Rules of Appellate Procedure Rule 4(c) ("The notice of appeal … designate the judgment, order, or part thereof appealed from and the reason(s) or issue(s) to be presented on appeal.... [A]ny omission of matters of substance may be grounds for sanctions.")). The Notice of Appeal makes no reference to the Appellant's aggrievance with any testimony, let alone the brief testimony referencing a few fleeting contacts made by his mother.

Because the issue of Jaglal's mother's actions was never brought up to the trial court at or even after trial, this Court should find that the issue is waived.

b. There is abundant evidence to support Jaglal's guilt and thus any error did not deprive Jaglal's of his right to a fair trial.

If this Court determines that the issue is properly before it, this Court should conclude that there was ample evidence to support the jury's finding of guilt and thus the testimony did not impact Jaglal's substantial rights. *Davis*, 74 V.I. at 485 ("[E]vidence must be relevant, and must not be *substantially* more prejudicial than probative".) (emphasis added).

In *Davis*, 74 V.I. at 485, this Court held that when considering potentially prejudicial testimony, the Appellant must establish whether "taken in the context of the trial as a whole, [the comments] were sufficiently prejudicial to have deprived [the Appellant] of his right to a fair trial." (quoting *Augustine v. People*, 55 V.I. 678, 686 (V.I. 2011) (in turn quoting *Gov't of V.I. v. Charleswell*, 24 F.3d 571, 576, 30 V.I. 394 (3d Cir. 1994) (further citation omitted). "To determine the extent of the prejudice, this Court must consider '(1) whether [the witness's] remarks were pronounced and persistent, creating a likelihood they would mislead the jury; (2) the strength of the other evidence; and (3) curative action taken by the [trial] court." *Davis*, 74 V.I. at 485 (quoting *Augustine*, 55 V.I. at 686 (in turn quoting *United States v. Lore*, 430 F.3d 190, 207 (3d Cir. 2005)).

As to consideration one (1), whether the remarks were pronounced and persistent, the trial lasted for three days. Only once did Ms. Ramirez testify that Jaglal's

mother had asked Ms. Ramirez to dismiss the claim. (JA 270.) Only once did the People ask Jaglal if his mother "was trying to get [Ramirez] to drop this case," (JA 585), and only once in closing was it brought up that Jaglal's mother tried to discourage Ramirez from going forward with this matter. (JA 639

Although the testimony regarding Jaglal's mother's contacts with the victim was brief and sporadic, the evidence offered by the People in support of Jaglal's guilt was overwhelming. This supports consideration two (2), the strength of the other evidence. The People submitted:

- Transcripts and recordings of a 911 call in which someone at the 911 call center indicated that they could hear a female screaming for help in the background, (JA 98, 123, and 124), as well as evidence of calls to the center regarding a female screaming for help, (JA 102-103, 106, 107, and 122.) *See also*, 911 call history transcript (JA 100), calls to 911 as well as recordings of the officers doing dispatch);
- Photos of injuries to the victim's neck, (JA 137, 155, 156, 161, and 588), arm, (JA 156, and 161), hip, (JA 157, and 162), pelvis area, (JA 163);
- The testimony of the victim, Rocio Ramirez, (JA 125), who testified that while she was in the early stages of pregnancy, (JA 233, 301, 307, 309, 310, and 311), kicked, (JA 137, 157, 162, 227, 229, and 263), punched, (JA 210 and 263), slapped, (JA 133, 154, 227, 229, 230, and 263), and choked her, (JA 133, 208, 213, 227, 230, 231, 232, and 263), until she lost

consciousness, (JA 138, 142, and 232), and would not allow her to leave the apartment, (JA 136, 137, 264, and 265), while he threatened to kill her, (JA 134, 136, 138, 227-228, 232, and 262), and she screamed for help, (JA 138, 140, 227, 228, 243, 260, 261, 262, and 264), for approximately an hour, (JA 142);

- The testimony of Keisha Baynes, (JA 273), who testified to the validity of Ramirez's emergency room record, (JA 277-273);
- The testimony of Davion Samples, who was staying in the condo next to Jaglal and Ramirez, (JA 415), who testified that he called the police, (JA 396), because Ramirez "was screaming for her life. She said, please don't kill me.... it was like a scary movie." (JA 419), and that he could hear banging of furniture, (JA 422). *See also*, Exhibit 3, 911 calls from Samples' room next to Jaglal's at Sapphire Beach Resort;
- The testimony of Bradley Thomas, (JA 367), who testified that while staying with Davion Samples next door to Jaglal and Ramirez, he and his friends "heard a scream. Somebody screaming for help," (JA 369), that he heard furniture knocking around, (JA 371), and that after 911 was called but before police arrived, Jaglal banged on the door and told the group of friends to "[Open up this door and come out here. You're going to find out how it works down… on the island real quick." (JA 377);

- The testimony of Officer Khalil Tatum, (JA 461), who testified that Ramirez's demeanor "was very meek, very scared. She was huddling in a standing fetal position. She basically looked like a beaten, wet dog," (JA 469);
- The testimony of Dr. Robert Smith, (JA 278), who testified that the victim relayed to him that she had lost consciousness, (JA 320), while Jaglal was assaulting, (JA 282), and choking her, (JA 283 and 317), and that her injuries were consistent with an assault, (JA 308);
- And screenshots from Jaglal's diary from November of 2020 in which he indicated that: "[A]s I sit here in this airport waiting for my flight to get off of [St. Thomas], the gravity of my mistake can [] overwhelm me. I came here with a girl I love… to celebrate her birthday, to make it special, but instead only to make a disaster and leave without the girl I love ... Spending [time] in jail was one of the worse things to happen to me in my life. Equally as worse was knowing how much I broke the trust and ruin[ed] a relationship of the women that… I love. God knows I had time to think in jail. That's all I did was think. Self-reflect about… how bad I was treating her, about the disrespect. About the fights. About the hurt I caused. I made the girl fall in love with a monster… It was the day she found niceness to bring me my luggage in jail is whenever I vowed myself to get help and fix these issues… If [Ramirez] was here now, I would tell

her all that and I'm sorry for all the hurt I caused… and I regret all the things I've done." (JA 274-277).

The jury found the witnesses and evidence to be credible and concluded that Jaglal was guilty on Counts II and III. Although Jaglal argues that the jury was inflamed by the testimony regarding his mother's behavior, that it unfairly concluded that Jaglal was guilty by association, and that the jury was then unable to make an unbiased determination of his guilt, note that the jury did not find him guilty of Count I, False Imprisonment, Domestic Violence, in which he could have been imprisoned for up to twenty (20) years. The jury was capable of weighing the evidence before it.

Regarding consideration three (3) - what curative action was taken by the trial court – this Court should note that Jaglal never objected to this line of questioning. The only objection made was that the subject was "beyond the scope of cross." (JA 267). This Court should find that Jaglal does not meet his burden that the testimony was sufficiently prejudicial to have deprived him of his right to a fair trial because any errors, if made, did not impact Jaglal's substantial rights in the light of the overwhelming evidence in support of his guilt. *Davis*, 74 V.I. at 485.

IV. THE TRIAL COURT DID NOT ERR IN IMPOSING JAGLAL'S SENTENCE BECAUSE IT MADE A PASSING COMMENT ABOUT JAGLAL'S MOTHER'S CONTACTS WITH THE VICTIM.

Jaglal alleges that the Superior Court abused its discretion by giving significant weight to the testimony regarding the mother's attempts to contact the victim

in the sentencing considerations. Jaglal asks that this Court vacate his sentence as a result. Because Jaglal raises these issues for the first time on appeal, the issues to waiver or, at most, plain error review.

This Court ordinarily reviews a sentence only for abuse of discretion, but when an appellant fails to object below and forfeits the argument, this Court reviews for plain error. *Caraballo v. People of the V.I.*, 75 V.I. 297, 302 (2021). However, if the failure to object was the product of waiver, then the argument is not properly before this Court.

The trial court only referenced the mother's actions once at the sentencing hearing: an innocuous statement that Jaglal's family – "especially… [t]he same mother who [the victim] testified called her on the phone" – had "not even a shred of sympathy for [the victim]." (JA 775.)

The trial court's comments during sentencing make it clear that it gave no weight to these statements when determining Jaglal's sentence – instead, the trial court stressed that the mother's behavior was just one of the reasons it was not persuaded by Jaglal's apology or the many letters submitted on Jaglal's behalf asking for leniency. In nine (9) pages of discussion regarding the trial court's sentencing, approximately four (4) lines mentioned the mother's contact with the victim:

> ….
>
> 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.**

….

(JA 772-781.)

It is clear that the reference to Jaglal's mother's actions was – as is much of the trial court's discussion at sentencing – meant as an admonishment of Jaglal and the family and friends who enabled and excused his behavior. There is no indication that Jaglal's mother's attempts to contact the victim were even a consideration in Jaglal's sentencing and instead was an example of the family's enabling of Jaglal's behavior. (JA 772-781.)

Additionally, while Jaglal argues that the trial court erred in considering the "irrelevant and improper" issue of his mother's conduct when it imposed an "undeniably harsh sentence," Appellant's Brief, p. 30 and 31, the Court did not even sentence him to the full extent allowed by law. The jury found Jaglal guilty on Counts II and III, simple assault, domestic violence, and second-degree assault, domestic violence. A defendant who is found guilty of simple assault "shall be fined not more than $250 *or* imprisoned not more than six months, *or* both imprisoned and fined," 14 V.I.C. § 299 (emphasis added), and a defendant found guilty of second-degree assault "shall be imprisoned not more than 10 years *and* if the conviction results from an act of domestic violence, the person shall be fined no less than $1,000 and

shall successfully complete certified mandatory Batters Intervention Program.". 14 V.I.C. § 296 (emphasis added). Jaglal could have been sentenced to ten and a half (10.5) years imprisonment instead of seven (7). "[T]he Superior Court has significant discretion to sentence a defendant in accordance with the sentencing range outlined for each offense in the Virgin Islands Code." *Fenton v. People of the V.I.*, 69 V.I. 889, 901 (2018).

But the trial judge stated that she was not going to sentence Jaglal to ten years and instead, with respect to Count II, Assault in the Second-Degree, sentenced him to seven (7) years incarceration with a fine of five thousand dollars ($5,000). In regard to Count III, Simple Assault, she fined him $250 and sentenced him to six (6) months imprisonment to run concurrently with Count II. Therefore, Jaglal's sentence should be upheld because it was within the statutory limits, and the sentence was reasonable in light of the evidence.

CONCLUSION

This Court should find that because the Appellant failed to raise any of the above issues at trial, his arguments are waived. If this Court does elect to address any of the Appellant's issues, it should find that the trial court properly instructed the jury as to the elements of Counts II and III—simple assault and assault in the second degree; that any error in presenting evidence of his mother's contacts with the victim did not impact Jaglal's substantial rights in light of the overwhelming amount of evidence presented at trial; and that the trial court did not abuse its

discretion when imposing his sentence as the sentence was within the permissible statutory range. Thus, the Superior Court's decision should be affirmed.

Respectfully submitted,

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Dated: March 1, 2023

By: *<u>/s/ Tracy Myers</u>*

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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 under Virgin Islands Bar Number 1149.

/s/ *Tracy Myers*

CERTIFICATION OF COMPLIANCE WITH LENGTH 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 7737 words.

/s/ *Tracy Myers*

CERTIFICATE OF SERVICE

The Appellant Devindra Jaglal is represented by a Filing User. I hereby certify that on March 1, 2023, a true and exact copy of the foregoing was sent via VISCEFS to:

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