For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

ENRIQUE SALDANA, Appellant/Plaintiff,	)	**S. Ct. Crim. No. 2017-0055** Re: Super. Ct. Crim. No. F187/2014 (STT)
v.	)	
PEOPLE OF THE VIRGIN ISLANDS, Appellee/Defendant.	)	

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Michael C. Dunston

Considered: March 12, 2019
Filed: November 20, 2020

Cite as: 2020 VI 21

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

APPEARANCES:

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OPINION OF THE COURT

SWAN, Associate Justice.

¶1 Appellant, Enrique Saldana, appeals the Superior Court's June 14, 2017 judgment and commitment which adjudicated him guilty of several crimes, including murder in the second

degree, in the death of his wife, Jeanette Magras Saldana.[1] For the reasons explicated below, we affirm the convictions.

I. BACKGROUND AND PROCEDURAL POSTURE

¶2 On May 2, 2014 at approximately 7:43 a.m., the Virgin Islands 911 Emergency Call Center received an emergency call from a male at Food Center grocery store in Estate Frydenhoj on St. Thomas. In the 911 emergency call, a man informed the dispatcher that his girlfriend was unconscious, and that he was transporting her to the Roy Lester Schneider Hospital ("RLSH") on St. Thomas. In response, the emergency call dispatcher broadcast the emergency to the Virgin Islands Police Department ("VIPD") and sought police assistance accompanying them safely to the RLSH.

¶3 Corporal Bernard Burke ("Corporal Burke") of the VIPD, who was off duty, heard the 911 emergency dispatch and requested a description of the vehicle. Corporal Burke learned from the 911 Emergency Call Center that the vehicle was a brown Ford Explorer SUV. Corporal Burke observed the vehicle at the Fort Mylner intersection and proceeded to escort it to the RLSH.

¶4 When the brown Ford Explorer arrived at RLSH, the driver was identified as former VIPD Captain Enrique Saldana ("Saldana"). Saldana, who was dressed in only a pair of shorts, exited the driver's door and opened the driver's side rear door. Inside the vehicle, Jeanette Saldana ("Jeanette") was observed lying wet, sandy and unresponsive on the floor between the front and back seats of the vehicle.

¶5 Several RLSH nurses and medical personnel hurried to Jeanette's assistance with a wheelchair. Corporal Burke and Saldana lifted Jeanette from the floor of the vehicle and placed

[1] The jury also convicted Saldana of first degree assault in violation of 14 V.I.C. § 295.

her in the wheelchair. Jeanette was wearing a black robe, which revealed extensive bruises over her entire body including her forehead, chin, throat, arms, breast, back and leg. Additionally, RLSH medical personnel also observed fluids emanating from her mouth. The team of RLSH medical personnel at the emergency room desperately attempted to resuscitate Jeanette. When several attempts to intubate her failed, Jeanette was pronounced dead in the RLSH emergency room.

¶6 The People charged Saldana in a third amended information with seven counts, including second degree murder—domestic violence in violation of 14 V.I.C. § 921, 922(b), 16 V.I.C. § 91(b)(1)(2) (count two); second degree assault—domestic violence in violation of 14 V.I.C. § 296(1), 16 V.I.C. § 91(b)(1)(2) (count four); third degree assault—domestic violence in violation of 14 V.I.C. § 297(a)(3), 16 V.I.C. § 91(b)(1)(2) (count six); and third degree assault—domestic violence in violation of 14 V.I.C. § 297; 16 V.I.C. § 91(b)(1)(2) (count seven).[2]

¶7 The Superior Court empaneled the jury, and trial commenced on March 20, 2017. The People's witnesses included Alana and Antonio Urena, Jeanette's friends and family members, forensic personnel and personnel employed by or otherwise associated with VIPD, including Carolyn Wattley, Gideon Garfield, Corporal Burke, Robin McGonigle, Makeda Simmonds and Maha Hamden.

¶8 Dr. Francisco Landron, the Virgin Islands medical examiner, conducted Jeanette's autopsy and at the trial he testified that the cause of death was acute diphenhydramine intoxication and

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[2] Saldana was also charged with first degree murder—domestic violence in violation of 14 V.I.C. § 921, 922 (a)(1), 16 V.I.C. § 91(b)(1)(2)(count one); first degree assault—domestic violence in violation of 14 V.I.C. § 295(1) (4), 16 V.I.C. § 91(b)(1)(2) (count three); and third degree assault—domestic violence in violation of 14 V.I.C. § 297 (a)(3), 16 V.I.C. § 91(b)(1)(2) (count five) but the jury ultimately returned a not guilty verdict on these charges.

concluded that the manner of death was homicide.

¶9 At the end of the People's case, Saldana submitted a Rule 29 motion, pursuant to the Federal Rules of Criminal Procedure, to dismiss all the counts charged in the third amended information.[3] The People opposed Saldana's Rule 29 motion, which the court subsequently denied. Saldana then presented his defense, which included testimony from Dr. Andrew Baker and Josephina Perez. At the conclusion of all the evidence, Saldana renewed his Rule 29 motion to have the charges dismissed; however, the Superior Court denied his motion.

¶10 The trial ended on March 24, 2017. The jury unanimously convicted Saldana of counts two, four, six and seven. During sentencing on May 30, 2017, the Superior Court declined to impose a sentence on count 4 but concluded that it would impose a 10 year concurrent sentence with the sentence it would impose on count two. Lastly, the court sentenced Saldana to 40 years of incarceration on his conviction for count two, with credit for 326 days served. Saldana timely filed his notice of appeal on June 6, 2017.

II. JURISDICTION AND STANDARD OF REVIEW

¶11 Pursuant to the Revised Organic Act of 1954, this Court has appellate jurisdiction over "all appeals from the decisions of the courts of the Virgin Islands established by local law[.]" 48 U.S.C. § 1613a(d). Title 4, section 32(a) of the Virgin Islands Code vests this Court with jurisdiction over

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[3] The Federal Rules of Criminal Procedure applied to proceedings in the Superior Court of the Virgin Islands to the extent that they were not inconsistent with either the procedural rules promulgated under the Virgin Islands Code or the Rules of the Superior Court. *See Phillips v. People*, S. Ct. Crim. No.2007-037, 2009 WL 707182, at *8 (V.I. Mar.12, 2009); Former Super. Ct. R. 7. Effective December 1, 2017, the Virgin Islands Rules of Criminal Procedure became operative and were subsequently amended on December 19, 2017. S. Ct. Prom. Orders 2017-0010 (Dec. 1 & 19, 2017). Further, Promulgation Order 2017-0006 amended Superior Court Rules 1 and 7.

"all appeals arising from final judgments, final decrees, [and] final orders of the Superior Court." Because the Superior Court's June 14, 2017 judgment and commitment resolved all of the claims in the People's third amended information, it is a final judgment under section 32(a). *Joseph v. Daily News Publishing Co., Inc.*, 57 V.I. 566, 578 (V.I. 2012); *see also* 48 U.S.C. § 1613a(d).

¶12 In reviewing Saldana's challenge to the sufficiency of the evidence, we apply a "particularly deferential standard of review." *Ponce v. People*, 2020 VI 2, ¶12; *James v. People*, 60 V.I. 311, 317 (V.I. 2013). Also, we determine whether any rational trier of fact could fairly find the defendant not guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the people. *Ponce*, ¶12; *Fahie v. People*, 62 V.I. 625, 630 (V.I. 2015); *Coleman v. Johnson*, 566 U.S. 650, 651 (2012). *See also Viera v. People*, 2019 VI 22, ¶ 26; *McIntosh v. People*, 57 V.I. 669, 678 (V.I. 2012).

¶13 Secondly, we review the Superior Court's evidentiary rulings for abuse of discretion, unless its decision involves application of a legal precept, in which case this Court would exercise plenary review. *Corriette v. Morales*, 50 V.I. 202, 205 (V.I. 2008).

¶14 Lastly, we review a trial court's refusal to give specific jury instructions for an abuse of discretion. *Gilbert v. People*, 52 V.I. 350, 354 (V.I. 2009). Where no objection to the jury instructions is made at trial, the Court will review the trial record for plain error. *Monelle v. People*, 63 V.I. 757, 771 (V.I. 2015).

III. DISCUSSION

A. The plain reading of the Virgin Islands murder statutes makes clear that second degree murder is a lesser included offense of first degree murder and, accordingly, Saldana could be properly charged and convicted under 14 V.I.C. §§ 921 and 922(b), even though he was found not guilty of first degree murder under 14 V.I.C. §§ 921, 922(a)(1).

¶15 On appeal Saldana argues, *inter alia*, that the plain and unambiguous meaning of 14 V.I.C.

§ 922 is that "a killing by poison is always first-degree murder." (Appellant's Br. 18-22.) Saldana contends that because first degree murder, as codified in 14 V.I.C. § 922, was enacted to punish killing by poison, there is absolutely no legal or factual support for his conviction of second degree murder and therefore his conviction of second degree murder must be overturned. Because Saldana failed to raise this issue before the Superior Court, we review only for plain error. *See Billu v. People*, 57 V.I. 455, 464 (V.I. 2012) (citing *Hightree v. People*, 55 V.I. 947, 954 (V.I. 2011)).

¶16 Saldana's argument is simply spurious and meritless. The People charged Saldana in a third amended information with first degree murder pursuant to 14 V.I.C. §§ 921, 922(a)(1) and second degree murder pursuant to 14 V.I.C. §§ 921, 922(b). The Superior Court properly instructed the jury on first degree murder and second murder and correctly defined applicable legal terms within the statutes such as "knowingly or willfully," "intentionally or deliberately," "voluntary," "unlawfully," "premeditation," and "malice aforethought."

¶17 Title 14, section 921 of the Virgin Islands Code provides that "murder is the unlawful killing of a human being with malice aforethought." In the Virgin Islands, malice aforethought

> does not simply mean hatred or particular ill will, but extends to and embraces generally the state of mind with which one commits a wrongful act. It may be inferred from circumstances which show a wanton and depraved spirit, a mind bent on evil mischief without regard to its consequences. And where the killing is proved to have been accomplished with a deadly weapon, malice can be inferred from that fact alone.

Nicholas v. People, 56 V.I. 718, 731-32 (V.I. 2012) (quoting *Gov't of the V.I. v. Sampson*, 42 V.I. 247, 253 94 F. Supp.2d 639 (D.V.I. App. Div. 2000)).[4] Importantly, such malice may be expressed

[4] The Superior Court gave the following jury instruction on malice aforethought in the case, "[t]o say that the defendant acted with malice aforethought means that the defendant either intended to

or implied. *People v. Chavez*, 231 Cal. Rptr. 3d 20, 39 (Cal. Ct. App. 2018), *review denied* (June 27, 2018). "Malice is express[ed] when a defendant manifests a deliberate intention to kill another person." *Id.* Malice is implied "when the killing of another person is proximately caused by an act, the natural and probable consequences of which are dangerous to life, which act was deliberately performed by a person who knows his or her own conduct endangers the life of another and act with conscious disregard for life." *Id.* The Superior Court further instructed the jury that they "may infer malice aforethought from circumstances that show a wanton intent to act, without regardless [sic] of consequences. If a killing is proved to have been accomplished with a deadly weapon, malice may be inferred, but may not be inferred from that fact alone." (J.A. 1433-34.) Title 14 section 922(a)(1) of the Virgin Islands Code, also applicable in this case, provides that "all murder which is perpetrated by means of poison, lying in wait, torture, detonation of a bomb or by any other kind of willful deliberate and premeditated killing is murder in the first degree."

¶18 Lastly, Title 14 section 922(b) of the Virgin Islands Code states that "all other kinds of murder are murder in the second degree." In reviewing the plain meaning of 14 V.I.C. § 922(a)(1), we have stated that

> because the statute lists four examples as specific ways to commit first degree murder and then states that any other kind of willful, deliberate and premeditated murder is also first degree murder, a murder accomplished through one of the four enumerated methods does not require a willful, deliberate and premeditated showing.

Codrington v. People, 57 V.I. 176, 185-86 (V.I. 2012) (internal quotation marks omitted). To put

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kill Jeanette Magras Saldana, or intentionally committed an act the natural consequences of which were dangerous to human life, and at the time he acted, the defendant knew his act was dangerous to human life, and the defendant deliberately acted with conscious disregard for human life." (J.A. 1433.)

it more simply, when a murder is committed by "poison, lying in wait, torture and detonation of a bomb," premeditation and deliberation are not elements of the crime of first degree murder and are not necessary for a conviction thereof. *See id. see also People v. D'Arcy*, 226 P.3d 949, 975 (Cal. 2010); *State v. Moore*, 440 S.E.2d 797, 818 (N.C. 1994); *State v. Davis*, 519 S.E.2d 852, 867 (W.Va. 1999). However, this does not mean that there cannot be a finding of first degree murder predicated on acts other than the four that are enumerated in 14 V.I.C. § 922(a)(1). In its plain terms, the statute allows for a conviction for first degree murder outside of the enumerated acts whenever a killing is accomplished willfully, deliberately, and with premeditation. *See Codrington*, 57 V.I. at 186; *see also Brown v. People*, 54 V.I. 496, 506-08 (V.I. 2010); *Richardson v. Gov't of the V.I.*, 55 V.I. 1193, 1216 (D.V.I. App. Div. 2011). "It is clear from a simple reading of the plain language of section 922(a)(1) that the Legislature intended to define all murder accomplished by the four enumerated examples—poison, detonation of a bomb, lying in wait, and torture—and any other murder, regardless of how the murder was accomplished, so long as the murder was willful, deliberate and premeditated as first degree murder." *Codrington*, 57 V.I. at 186. Second degree murder, on the other hand, requires an unlawful killing of a human being with malice aforethought. 14 V.I.C. § 922(b).

¶19 Comparing the plain reading of 14 V.I.C. §§ 921, 922(a)(1) and 922(b) we conclude that a person could be convicted of first degree murder perpetrated purely by poison with malice aforethought, which was "willful, deliberate and premeditated." 14 V.I.C. §§ 921; 922(a)(2), *see also Nicholas v. People*, 57 V.I. 718, 732 (V.I. 2012). Importantly, a person could be convicted of second degree murder by proving malice aforethought because deliberation and premeditation are not necessary to prove second degree murder. *See id.* at 731 (noting that "[b]oth first- and second-degree murder in the Virgin Islands require an unlawful killing [of a human being] which

must be committed with 'malice aforethought.'") Because "the statutory language [in 14 V.I.C. §§ 921, 922(a)(1), and 922(b)] is unambiguous and the statutory scheme is coherent and consistent, no further inquiry is needed." *Heyliger v. People*, 66 V.I. 340, 350 (V.I. 2017).

¶20 Equally important, it is well-established in the Virgin Islands that second degree murder is a lesser included offense of first degree murder. *See Fontaine v. People*, 62 V.I. 643, 650 (V.I. 2015); *Gov't of the V.I. v. Joseph*, 765 F.2d 394, 396 (3d Cir. 1985) ("A defendant may be found guilty of an offense necessarily included in the offense charged."); *Williams v. People*, 56 V.I. 821, 826 (V.I. 2015). In this case, the People charged Saldana with first degree murder in count one of the third amended information which makes his argument even more baseless.[5]

B. The People presented sufficient evidence for a rational jury to find beyond a reasonable doubt that Saldana committed second degree murder in the death of Jeanette.

¶21 On appeal, Saldana also challenges the legal and factual sufficiency of the evidence presented in support of his conviction for second degree murder, thus contending that his conviction should be overturned. On the other hand, the People argue that based on the evidence presented the jury properly convicted Saldana of second degree murder, which is a less included offense of first degree murder charged in count 1 of the third amended information.

¶22 Second degree murder is the unlawful killing of a human being with malice aforethought. 14 V.I.C. § 922(b). The Superior Court's instruction to the jury, based on the charging language of the third amended information pertinent to count two, second degree murder, was as follows:

> In order to prove the offense of murder in the second degree,

[5] Moreover, Saldana does not adequately explain what prejudice he may have incurred as a result of the word poison being included in the final instructions or any mention that Jeanette was killed with poison. Notably, the word "poison" is excluded from count two of the second degree murder charge in the third amended information.

> a crime of domestic violence as charged in count two, the People must prove each of the following element beyond a reasonable doubt:
>
> On or about May 2, 2014, on St. Thomas U.S. Virgin Islands the defendant [Enrique Saldana] unlawfully killed a human being, Jeanette Magras Saldana, a person with whom he had an intimate relationship, with malice aforethought [in violation of V.I. Code Ann tit. 14 §§ 921, 922(b); 16 V.I.C. § 91(b)(1)(2) second degree murder—domestic violence]. [6]

(J.A. 1434.) Here, the jury instructions accurately enumerated the elements of second degree murder pursuant to the statute, without any direct or implied reference to the word "poison" or any reference to Jeanette being killed by poison in count two of the third amended information. The Superior Court also instructed the jury on the definition of malice aforethought by informing them that:

> [M]alice aforethought means that the defendant either intended to kill Jeanette Magras Saldana, or intentionally committed an act the natural consequences of which were dangerous to human life, and at the time he acted, the defendant knew his act was dangerous to human life, and the defendant deliberately acted with conscious disregard for human life.

(J.A. 1433.) Additionally, the Superior Court instructed the jury that they "may infer malice aforethought from circumstances that show a wanton intent to act, without regardless [sic] of consequences." (J.A. 1433-34.) We also take into consideration the well-established significance of a sworn empaneled jury. A sworn and empaneled jury "is entrusted with the obligation to apply the law, and we in turn presume that juries follow instructions given to them throughout the course of the trial." *United States v. Padilla*, 639 F.3d 892, 897 (9th Cir. 2011), *see also Galloway v.*

[6] We note that the initial information was amended to the third amended information version, but the language in count two remained the same in all versions of the information the People presented to the court.

People, 57 V.I. 693, 711 (V.I. 2012) (noting "we must assume that juries for the most part understand and faithfully follow instructions") (citation and internal quotation marks omitted).

¶23 Cory and Odette offered uncontested evidence in the form of their testimony at trial that they visited Jeanette at her house at approximately 9:30 p.m. on May 1, 2014. The evidence shows that Cory, Odette, Jeanette, and Saldana listened to music and talked about a family gathering that was planned for the next day at Lindquist Beach. Cory and Odette testified that at approximately 12:30 a.m. when they left to go home, Jeanette, who had some wine to drink, was at the house with Saldana and Serene Saldana, who was the daughter of Jeanette and Saldana. Their uncontested testimony was that Jeanette was fine and happy and looking forward going to the beach with them next day.

¶24 Officer Allen, a VIPD police officer, testified that he interviewed Saldana after he left the RLSH. Officer Allen testified that after Saldana was given *Miranda* warnings, he gave several statements. Officer Allen testified that Saldana stated that he was alone with Jeanette up until the time he took her to RLSH.

¶25 Dr. Francisco Landron, the Virgin Islands medical examiner, testified that he conducted an autopsy on Jeanette. Dr. Landron testified that Jeanette died of acute diphenhydramine intoxication and that the manner of death was homicide. Dr. Landron further testified that the level of diphenhydramine was very high. Dr. Landron testified that there was also alcohol and Xanax (a prescription form of benzodiazepine sometimes prescribed to treat anxiety disorders or depression) present in Jeanette's system and -- when asked whether those substances may have contributed to Jeanette's death -- he specified that he considered the diphenhydramine the acute cause because the Xanax and alcohol were at low levels. Dr. Landron further specified that he considered the Xanax and the alcohol to be willingly ingested but thought that the

diphenhydramine was not willingly ingested due to the high level that was present. Dr. Arden, who also testified as an expert witness, concluded that the cause of death was the combination of alcohol, Xanax, and the high level of diphenhydramine. He explained that his attempts to intubate Jeanette when she was brought to the hospital were futile because rigor mortis had begun to set in. Dr. Landron also testified that based on his observations, Jeanette died 2 to 4 hours before she was brought to the hospital. Dr. Landron also testified that Jeanette had several bruises on her body, including, but not limited to, her left and right temple, face, underneath the scalp on top of her head, back, leg, breast, chin, and upper neck. Dr. Landron testified that the bruises were not consistent with a person receiving CPR but that the bruises were a "result of impact with blunt force." (J.A. 776.)

¶26 In determining whether there was sufficient evidence presented to convict Saldana of second degree murder, "we [do] not weigh the evidence or determine the credibility of witnesses." *Smith v. People*, 51 V.I. 396, 401 (V.I. 2009) (quoting *United States v. Casper*, 956 F.2d 416, 421 (3d Cir. 1992)). *See Ledesma v. Gov't of the V.I.*, 2019 VI 31, ¶ 16; *John v. People*, 63 V.I. 629, 646 (V.I. 2015). The testimony of the witnesses and all the evidence presented at trial could lead a rational jury to find beyond a reasonable doubt that Saldana committed second degree murder. "The reasonable doubt which will prevent conviction must be the jury's doubt and not that of this Court." *Smith*, 51 V.I. at 401 (quoting *United States v. Stirone*, 311 F. 2d 277, 284 (3d Cir. 1962)) (internal quotation marks omitted). "To the extent that there were conflicts in the testimony, these conflicts presented credibility issues for the jurors to resolve." *Smith*, 51 V.I. at 401 (citing *United States v. Boone*, 279 F. 3d 163, 189 (3d Cir. 2002)). "We are not at liberty to substitute our own credibility determinations for those of the jury." *Id.* (quoting *United States v. Dillon*, 532 F.3d 379, 391 n. 9 (5th Cir. 2008)) (internal quotation marks omitted). Having carefully reviewed the

evidence in the light most favorable to the People, we find that there was sufficient evidence to convict Saldana of second degree murder.

C. The Superior Court did not err in its failure to provide a jury instruction on the defense of voluntary intoxication.

¶27 Saldana argues on appeal that the People offered overwhelming proof that he was more than intoxicated or extremely intoxicated and that fact should negate his guilty verdicts stemming from his convictions on specific intent crimes. In opposition, the People contends that the Superior Court was correct in not giving a jury instruction on voluntary intoxication because second degree murder is not a specific intent crime. The People further argues that Saldana failed to request an instruction on intoxication, despite the provision of 14 V.I.C. § 16, which addresses intoxication. Therefore, the People posit that there was no plain error requiring reversal of the convictions. We agree.

¶28 A complete review of the trial record discloses that Saldana failed to object to the final jury instructions during trial. Neither Saldana nor the People ever requested, inferentially or otherwise, a jury instruction on intoxication at the jury instruction conference or after the Superior Court instructed the jury. Both parties registered agreement with the jury instructions as rendered by the court, even after the court's explicit inquiry to the parties after the jury was instructed. Importantly, the record discloses that the Superior Court provided the parties' counsel with a proposed draft of the jury instructions the day prior to the court instructing the jury. Additionally, the trial record confirms that the Superior Court judge inquired of the parties if the court needed to make modifications to the proposed jury instructions, but the parties' counsel responded that they were satisfied with the instructions after they had reviewed them. Accordingly, we will only review his claim on this issue for plain error.

¶29 Pursuant to Rule 4(h) of the Virgin Islands Rules of Appellate Procedure, "[o]nly issues and arguments fairly presented to the Superior Court may be presented for review on appeal; provided, however, that when the interests of justice so require, the Supreme Court may consider and determine any question not so presented." Because Saldana failed to object to a jury instruction in the trial court, we review only for plain error. "[B]efore an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson v. United States*, 520 U.S. 461, 466-67 (1997) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 467 (citations and punctuation omitted).[7]

¶30 A defendant is entitled to a voluntary intoxication instruction when he presents evidence: "(1) that he was intoxicated, and (2) that his intoxication precluded him from forming the specific intent necessary to commit the crime." *United States v. Garcia*, 1994 WL 112884, at *4 (9th Cir. March 17, 1994) (unpublished) (citing *United States v. Washington*, 819 F.2d 221, 225 (9th Cir.1987)).

¶31 Here, Saldana never raised the issue of intoxication during the entire trial despite the provisions of 14 V.I.C. § 16. This provision explicitly states that the court or jury may take into consideration the fact that the accused was intoxicated at the time the crime was committed.

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[7] For purposes of this analysis we assume, without deciding, that Appellant did not intentionally waive his objection to the trial court's jury instructions. *See Gov't of the V.I. v. Rosa*, 399 F.3d 283, 290–91 (3d Cir. 2005) (distinguishing between waived and forfeited errors); *see also Latalladi v. People*, 51 V.I. 137, 143-44 (V.I. 2009) (holding that errors invited by the appellant cannot form the basis for reversal).

Undeniably, the language is discretionary and not mandatory. Moreover, Saldana failed to provide any evidence that he was intoxicated or that his intoxication prevented him from forming the requisite intent necessary to commit second degree murder or any of the assault charges.[8] Unmistakably, the evidence the People presented raised the issue of Saldana's sobriety. The People presented evidence from the witnesses that Saldana was drinking and appeared inebriated on the night of his wife's death. However, that evidence was embedded in the People's case—not a contention that Saldana argued to the jury. Saldana's theory of defense was that he was innocent of the murder of Jeanette. The People, not Saldana, raised the issue that Saldana may have been intoxicated when the crimes occurred. Importantly, on the morning of Jeanette's death, Saldana drove her to the beach in Vessup Bay. He then drove her to the RLSH, which is a significant distance over a meandering road, traveling from the eastern part of the island to the middle of the island. Importantly, no one, including police officers and medical personnel who observed and interacted with Saldana at the hospital, ever testified that Saldana exhibited any indicia of intoxication, such as slurred speech, an unsteady gait, the smell of alcohol on his breath or clothing or bloodshot eyes during his encounter and interaction with them. Accordingly, this Court finds no clear error and concludes that the failure to provide a jury instruction on the defense of voluntary intoxication was harmless and did not prejudice Saldana. Moreover, by not raising the issue of intoxication as a defense in the trial court, Saldana waived the issue.

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[8] This argument is not applicable to Saldana's conviction of second degree murder because second degree murder is a general intent crime, not a specific intent crime. *See e.g. Carty v. David*, No. CV 2015-61, 2017 WL 3730360, at *5 (D.V.I. August 29, 2017) (noting that the language of 14 V.I.C. § 16 indicates that "voluntary intoxication may be a defense with respect to an offense requiring specific intent" but "is not a defense to a general intent offense").

D. The Superior Court did not err in its decision to allow the People to present evidence of Saldana's motive to murder Jeanette.

¶32 Saldana argues on appeal that the Superior Court admitted improper character evidence that was irrelevant and was unfairly prejudicial requiring reversal by this Court. In response, the People argue that the Superior Court did not err by allowing the People to present character witness evidence because character evidence of this nature is appropriate in this case. We agree that no error occurred and explain here why the character evidence doctrines were not implicated in the proof actually offered in the case.

¶33 Federal Rule of Evidence 404(b)(2) allows the admission of evidence of crimes, wrongs, or other acts for non-propensity purposes, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." FED. R. EVID. 404(b)(2).[9] In *Huddleston v. United States*, 485 U.S. 681, 691–92 (1988), the United States Supreme Court enunciated four requirements to consider in evaluating whether evidence is properly admitted under Rule 404(b)(2). Namely, (1) the evidence must be offered for a proper purpose, (2) the evidence must be relevant under the standards of Rule 402, (3) its probative value must not be substantially outweighed by its potential for unfair prejudice pursuant to Rule 403, and (4) where requested the court must instruct the jury to consider the evidence only for its limited

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[9] The Virgin Islands Rules of Evidence became effective one week after the present trial ended on March 31, 2017, pursuant to Promulgation Order 2017-002. Previously, the Virgin Islands Legislature repealed the Uniform Rules of Evidence in 2010 and replaced them with the Federal Rule of Evidence. *See e.g. Simmonds v. People*, 59 V.I. 480, 500 (V.I. 2013) ("Act No. 7161 provides that Chapter 67 of title 5, dealing with the admissibility of evidence, is 'hereby repealed and replaced with the Federal Rules of Evidence.' ") (citing Act No. 7161, § 15(b)). Thus, the Federal version of Rule of Evidence 404, quoted in the text above, was applicable at the time of this trial.

admissible purpose. *See id.*; *Chinnery v. People*, 55 V.I. 508, 526 (V.I. 2011); *United States v. Kellogg*, 510 F.3d 188, 199 n.10 (3d Cir. 2007). The trial court's ruling under Rule 404(b) "may be reversed only when [it] is clearly contrary to reason and not justified by the evidence." *United States v. Balter*, 91 F.3d 427, 437 (3d Cir. 1996) (some internal quotation marks omitted).

¶34 On March 13, 2017, the People filed a motion for admission of character evidence under Federal Rules of Evidence 404(b). Saldana filed his opposition on March 24, 2019, arguing that such evidence was irrelevant and highly prejudicial to him. The Superior Court permitted evidence from witnesses who testified that Jeanette was thinking of divorcing Saldana. During trial several key witnesses, including Detective Allen, Alex Dorsett, Antonio and Alana Urena, Alberto Robles, and Nicole Turnbull testified that Jeanette contemplated divorcing Saldana.

¶35 The evidence provided by the witnesses that Jeanette was considering a divorce from Saldana was properly admitted as relevant on the issue of the defendant's intent or motive for the crime; therefore, it was offered for a proper purpose. It was not however character evidence. Statements or conduct of Jeanette, and evidence that the defendant may have been aware of her intentions, is not proof of the defendant's other bad acts and Rule 404(b) was therefore inapplicable to such proof. Nor was proof of Jeanette's intention excludable under Rule 403. This evidence was obviously probative of possible motive for Saldana and the introduction of Jeanette's possible intention to seek a divorce was not itself inflammatory or prejudicial to Saldana; rather it had legitimate probative value which was not substantially outweighed by its potential for unfair prejudice, pursuant to Rule 403(b) and the Federal Rules of Evidence. In addition, in this case, the Superior Court instructed the jury on the limited possible purpose of the evidence concerning Jeanette's intentions. A review of the all the evidence Saldana cites reveals that this proof was probative of a material issue, the evidence was relevant under the standard of Rule 402, and its

probative value was not substantially outweighed by its potential for unfair prejudice pursuant to Rule 403. Further, the Superior Court judge instructed the jury on the limited possible purpose of the proof received in this case. Accordingly, we find that the Superior Court did not err in its determination to allow the People to present evidence of Jeanette's possible intentions as they may have related to Saldana's motive or intent to murder Jeanette.

E. The People's expert witnesses were qualified to give the expert testimony presented, which did not violate Saldana's confrontation rights.

¶36 Saldana argues that the People's testifying expert witness relied on a non-testifying expert's report which violated his right to confront witnesses as established by *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). (Appellant's Br. 49-51.) Specifically, Saldana highlights Dr. Landron's autopsy report and Dr. Arden's testimony, claiming that both relied on a toxicology report prepared by Dr. Daniel S. Isenschmid. Additionally, Saldana takes issue with the evidence provided by Dr. Sherry Kacinko, an expert forensic toxicologist. (Appellant's Br. 49-51.) In response, the People contend that the expert witnesses were qualified to give the testimony presented.

i. Qualifications of Three Expert Witnesses.

¶37 At trial, defendant Saldana made no objection to the professional qualifications of these three prosecution expert witnesses, stipulating to the qualifications of Dr. Landron, an M.D. who is the Chief Medical Examiner for the Virgin Islands (see concessions at J.A. 765; 795), Dr. Jonathan Arden, Chief Medical Examiner for the State of West Virginia and a consulting forensic pathologist (J.A. 1308: "no objections, Your Honor"), and raising no objections to the professional qualifications of Dr. Sherri Kacinko, a Ph.D. with vast laboratory and supervisory experience who teaches both chemistry and forensic toxicology at the college level. (J.A. 1070: "no objections as

to qualification"). This leaves only the Confrontation Clause objections.

¶38 The Confrontation Clause of the Sixth Amendment of the United States Constitution provides in pertinent part that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. CONST. amend. VI. The Supreme Court of the United States held in *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004), that the Confrontation Clause specifically applies to the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."

ii. Confrontation Issues in the Present Case.

¶39 Dr. Landron testified at trial that he came to his conclusion that Janette died due to a high level in her system of the chemical diphenhydramine (commonly known as Benadryl). Saldana waived any confrontation objection based upon the generalized laboratory findings that Jeanette's body had a high concentration of diphenhydramine. His counsel stated "no objection" (J.A. 781) when Exhibit 196 was offered into evidence, the Certificate of Death reciting that the cause of Jeanette's death was "Acute Diphenhydramine Intoxication." Thus – while Saldana contends on this appeal that admission of a laboratory report underlying this Death Certificate somehow violated the Confrontation Clause – the primary evidentiary impact of the fact that the victim had been overdosed with diphenhydramine was received into evidence without objection, and thus any use of a laboratory report stating a specific number of nanograms per milliliter of that chemical in Jeanette's blood would be at most harmless error, beyond a reasonable doubt.

¶40 The sequence of proof in this case was that the Autopsy Report by Dr. Landron admitted in evidence in this case as Exhibit 125 states "TOXICOLOGY, See attached report" and lists a "Finding[]" of "Acute diphenhydramine intoxication by toxicology report," but – in fact – no

toxicological lab report was actually attached as Exhibit 125 was offered or received into evidence in this case. Instead, the prosecution later called Dr. Kacinko, who personally reviewed the underlying testing results and generated her own report shortly before trial in 2017, repeating the original findings from 2014 in every detail. Dr. Kacinko testified live, subject to cross-examination, and only this 2017 version of the laboratory report – received as Exhibit 128 – was offered by the prosecution.

¶41 The confrontation argument concerning Dr. Kacinko's testimony and her version of the report is utterly without merit. We will assume, without deciding, that a laboratory report is a "testimonial" item if it is prepared on the eve of trial by a laboratory supervisor who knows that she will be asked to testify for the prosecution in a murder trial based on that report. In this case, however, the preparer appeared live at trial to present her report, and was subject to detailed questioning by defense counsel concerning all aspects of the report, eliciting several items of information helpful to the defense from this witness in the process. Hence the witness was produced for effective cross-examination, and the Confrontation Clause was satisfied.

¶42 Dr. Kacinko was not acting in this case as a conduit for the work of the absent Dr. Isenschmid. Dr. Kacinko's testimony was that she regularly reviews testing conducted by others in her lab and that no corrections were needed for the data in this case. In this case, she herself prepared the only laboratory report that was actually offered and received into evidence in this case, Exhibit 128, the toxicology report from NMS Laboratories that also carries Dr. Isenschmid's name. Dr. Kacinko personally prepared this report, based on the analytical work of staff in her laboratory some years before, which she reviewed and determined did not need any correction. It is a regular practice for this witness to prepare such reports based upon data collected and analyzed in her office. As is the practice in the laboratory, Dr. Kacinko reviews the results of analytical

testing performed by others in the lab, by reviewing the actual data produced by the instruments that analyze a given sample. The laboratory operates with a "paperless" procedure, and all the data is preserved electronically. Dr. Kacinko was personally able to review the underlying data before preparing her report (Exhibit 128) approximately one week prior to trial. *Id.* Data is routinely kept in the laboratory for at least five years for such purposes, and is kept in a "PDF" format that prevents alteration of the information over time. The data she used related to a particular "patient" identified as Jeanette A. Saldana and Exhibit 128 reports Dr. Kacinko's personal "findings" on the various chemical test results. In her live testimony Dr. Kacinko was able to explain, in detail, the ranges for the various chemicals detected, and to explain the nature and consequences of such chemical concentrations. The witness herself "listed" certain "fatal range[s]" for the chemicals. (J.A. 1079.) During her testimony she was asked about whether she made various findings, and what her findings reflected on Exhibit 128 meant. She was able to explain to the jury several factors that bear on the meaning of the test results, such as a phenomenon known as "postmortem redistribution" of a chemical in the human body, about which both the prosecutor and defense counsel questioned her. (J.A. 1081-83; 1087-89.) Defense counsel was also able to question Dr. Kacinko about diphenhydramine, alcohol, Xanax, and other substances reported in the data on which she reported. Defense counsel adopted Dr. Kacinko as his own witness to inquire about the cumulative effect of the chemicals on which Exhibit 128 reports. Defendant was able to test the accuracy of the report by eliciting information from Dr. Kacinko about the body location where the blood samples analyzed had been collected, the time delay in obtaining the blood samples for testing, and other factors, such as the temperature. The possibility of unexpected results from the drugs found in this testing (described as potentially "paradoxical" effects) was explored by defense counsel with this witness on re-cross-examination. In sum, the

witness prepared the report herself, from the original – unaltered – data and was fully available for cross-examination about the meaning and limitations of the findings. Hence the constitutional imperatives of the Confrontation Clause were more than satisfied. *See, e.g., United States v. Summers*, 666 F.3d 192 (4th Cir. 2011) (finding the Confrontation Clause satisfied through the testimony of a supervisor who had prepared and signed a DNA test report based on data generated by another analyst but conclusions drawn by the supervisor); *Jenkins v. State*, 102, So 3d. 1063 (Miss. 2012) (finding no confrontation violation when a supervisor did not perform the actual test but review the data generated, reached his own conclusion, and sign the report as a supervisor); *Commonwealth v. Yohe*, 39 A.3d 381 (Pa. Super. Ct. 2012) (allowing a lab supervisor to introduce a blood alcohol test when he did not perform the test but reviewed the results, certified the accuracy, and signed the report); *State v. Lopez*, 45 A.3d 1(R.I. 2012) (allowing a lab supervisor to introduce DNA results when he did not perform the test but evaluated all the results, drew conclusions based on those results, and prepared the report). These cases establish the precedent that when a lab supervisor such as Dr. Kacinko, independently reviews scientific data, draws the conclusion from the data and prepares and issues a report to that effect that is admitted at trial, the Confrontation Clause is not violated if she testifies and is available to the opposing party for cross-examination.[10]

¶43 The third expert mentioned by Saldana on this appeal, Dr. Arden, used Exhibit 196 (the

[10] Including the arguments Saldana raised above that this Court addressed, he summarily stated that the Superior Court "eviscerated his Fifth, Sixth, and Fourteenth Amendment rights to a fair jury trial." (Appellant's Br. 2, 10 and 14.) We have addressed these issues where applicable and those "[i]ssues that were . . . only adverted to in a perfunctory manner or unsupported by argument and citation to legal authority, are deemed waived for purposes of appeal." V.I. R. APP. P. 22(m).

death certificate to which the defendant had no objection) in presenting his opinion that the death was not accidental and the only version of the underlying laboratory report presented to Dr. Arden in soliciting his opinion was Exhibit 128, properly authenticated by Dr. Kacinko, who was subject to cross-examination about it, as discussed above. Accordingly, the presentation of evidence from Dr. Arden also did not violate the Confrontation Clause.

IV. CONCLUSION

¶44 Accordingly, we affirm the Superior Court's June 14, 2017 judgment and commitment.

DATED this 20th day of November 2020.

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

ATTEST

VERONICA J. HANDY, ESQ.
Clerk of the Court