FOR PUBLICATION

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

AKIL H. NIBBS, Appellant/Defendant,	)	**S. Ct. Crim. No. 2017-0073** Re: Super. Ct. No. 168/2016 (STT)
v.	)	
PEOPLE OF THE VIRGIN ISLANDS Appellee/Plaintiff.	)	

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Denise M. Francois

Considered: November 12, 2019
Filed: September 10, 2020

Cite as: 2020 VI 18

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

APPEARANCES:

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Appellate Public Defender
St. Thomas, U.S.V.I.
Attorney for Appellant,

Dionne G. Sinclair, Esq.
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OPINION OF THE COURT

SWAN, Associate Justice.

¶1 Appellant, Akil H. Nibbs ("Nibbs"), appeals the Superior Court's August 17, 2017 judgment and commitment, which adjudicated him guilty of assault in the third degree,

unauthorized use of firearm during the commission of a crime of violence, and unauthorized possession of a firearm. For the reasons elucidated below, we affirm his convictions.

I. BACKGROUND AND PROCEDURAL POSTURE

¶2 On or about April 20, 2016, Le'Sean Henry ("Henry") was at Gasworks Gas Station ("Gasworks") in Estate Bovoni, ("Bovoni") St. Thomas, which was located near the Sleepy's Trucking establishment where he worked. Nibbs, who was wearing a black pants and a black and white shirt approached Henry. The two men became bellicose in their escalating argument. Nibbs unholstered his gun, held it to Henry's head and stated, "I will blaze you with some bullets." (J.A. 495-96.) Henry hurriedly departed Gasworks in his car and subsequently called his father to inform him of the situation that had occurred. The father told Henry that the owner of Gasworks had already reported the incident to the Virgin Islands Police Department ("VIPD").

¶3 Kendelth Wharton ("Officer Wharton"), a Virgin Islands Police Officer, was dispatched to Gasworks to investigate the report of an assault involving the use of a firearm. Central Dispatch informed the VIPD that the suspect was wearing a black pants and a black and white shirt and that he was seen at T&M Grocery, formerly known as Lima's Grocery.

¶4 Officer Wharton travelled to the T&M Grocery store in Bovoni. Upon arrival, Officer Wharton observed a man matching the description given by Central Dispatch to VIPD. Officer Wharton made contact with the male suspect, who was later identified as Nibbs, and soon thereafter Officer Wharton performed a pat-down search of the suspect but did not find a firearm on him. Officer Wharton continued the investigation, during which he learned that there were surveillance video cameras in the area. Upon acquiring this information, Officer Wharton sought and received permission from the T&M Grocery store manager, Mr. Ala Sableh, to review the grocery store's surveillance video.

¶5 Officer Wharton's review of the surveillance video footage revealed Nibbs running quickly into the area in the rear of the T&M Grocery store and immediately returning from the same area. After reviewing the surveillance footage, Officer Wharton went to the exact area in the store where he observed Nibbs running to and returning from. While in the area, Officer Wharton saw a red plastic bucket with two handguns: a .25 caliber Raven Arms Model MP-25 firearm with an obliterated serial number and a .40 caliber Glock Austria Model 27.

¶6 Subsequently, Nibbs was arrested and charged in an amended information with four counts: Count 1: third degree assault in violation of 14 V.I.C. § 292(a)(2); Count 2: unauthorized use of a firearm during the commission of a crime of violence in violation of 14 V.I.C. § 2253(a); Count 3: unauthorized possession of a firearm with altered identification marks in violation of 23 V.I.C. § 481(b); and Count 4: unauthorized possession of a firearm in violation of 14 V.I.C. § 2253(a).

¶7 A jury trial for Nibbs commenced on May 31, 2017 and ended on June 2, 2017. The jury heard the testimony of the government's witnesses; namely: C. Watley, C. Esprit, I. Christopher, L. Henry, K. Wharton, K. Monsanto, and Bernice Farrell Barton. At the conclusion of the case, the defense made a motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure, which the Superior Court denied. The Superior Court gave the jury its final instructions, including an instruction on the elements of assault in the third degree. The court also defined the terms "firearm" and "crime of violence" in the instructions. The jury found Nibbs guilty of Count 1: third degree assault; Count 2: unauthorized use of a firearm during the commission of a crime of violence; and Count 4: unauthorized possession of a firearm. Nibbs was acquitted of Count 3: unauthorized possession of a firearm with altered identification marks.

¶8 On August 17, 2017, the Superior Court imposed concurrent sentences of 3 years imprisonment and five hundred dollars ($500) on his conviction for third degree assault, 15 years

imprisonment and a fine of twenty-five thousand dollars ($25,000) on his conviction for unauthorized use of a firearm during the commission of a crime of violence and 10 years imprisonment and a fine of twenty-five thousand dollars ($25,000) on his conviction for unauthorized possession of a firearm. The Superior Court then suspended all of these sentences, except three thousand dollars ($3,000) on his conviction for unauthorized possession of a firearm during the commission of a crime of violence and three thousand dollars ($3,000) on his conviction for unauthorized possession of a firearm. A timely amended notice of appeal was filed on August 24, 2017 and this appeal ensued.

II. JURISDICTION AND STANDARD OF REVIEW

¶9 Title 4, section 32(a) of the Virgin Islands Code provides, in pertinent part, that "[t]he Supreme Court shall have jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law." "It is well established that in a criminal case, the written judgment embodying the adjudication of guilt and the sentence imposed based on that adjudication constitute a final judgment for purposes of appeal." *Davis v. People*, 69 V.I. 619, 620 (V.I. 2018) (quoting *Miller v. People*, 67 V.I. 827, 835 (V.I. 2017)). Since the Superior Court's August 17, 2017 judgment and commitment is final, this Court possesses jurisdiction over this appeal. *Id.* (citing *Fahie v. People*, 62 V.I. 625, 629 (V.I. 2015)).

¶10 The standard of review in examining the Superior Court's application of law is plenary, while findings of fact are only reviewed for clear error. *St. Thomas-St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007). "When reviewing a claim of insufficient evidence, we view all issues of credibility in the light most favorable to the People and will affirm where any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Tyson v. People*, 59 V.I. 391, 400 (V.I. 2013) (quoting *Mendoza v. People*, 55 V.I. 660, 666-67

(V.I. 2011)) (internal quotation marks omitted); *see also Latalladi v. People*, 51 V.I. 137, 145 (V.I. 2009); *Mulley v. People*, 51 V.I. 404, 409 (V.I. 2009) (quoting *United States v. Carr*, 25 F.3d 1194, 1201 (3d Cir. 1996)) ("[E]vidence need not be 'inconsistent with every conclusion save that of guilt so long as it establishes a case from which a jury could find the defendant guilty beyond a reasonable doubt.'").

III. DISCUSSION

A. Assault in the Third Degree

¶11 Nibbs argues that the third degree assault statute, 14 V.I.C. § 297(a),[1] requires that the prosecution prove "circumstances not amounting to an assault in the first or second degree" as a separate element, and the conviction cannot stand because the prosecution did not prove this at trial.

¶12 We have already addressed this argument. *Davis v. People*, 69 V.I. 619, 632-33 (V.I. 2018). As we noted in *Davis*, "the language 'under circumstances not amounting to an assault in the first or second degree' does not establish an additional element of the offense, but rather constitutes a condition precedent to the Superior Court's application of the sentencing range prescribed in § 297." *Id.* at 632. Therefore, the third-degree assault conviction is valid, and Nibbs' argument to the contrary is wholly without merit.

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[1] "Whoever, under circumstances not amounting to an assault in the first or second degree—
(1) assaults another person with intent to commit a felony;
(2) assaults another with a deadly weapon;
(3) assaults another with premeditated design and by use of means calculated to inflict great bodily harm;
(4) assaults another and inflicts serious bodily injury upon the person assaulted shall be fined not less than $500 and not more than $3,000 or imprisoned not more than 5 years or both."

B. Sufficiency of the Evidence

¶13 Nibbs was convicted of three firearm-related offenses: unauthorized possession of a firearm, unauthorized possession of a firearm during a crime of violence, and assault with a deadly weapon. However, he argues that the evidence was insufficient on all four charges because (1) the jury could not have determined which of the two guns in the store belonged to Nibbs; (2) the facts elicited in the case could not establish constructive possession; (3) there was no assault with a firearm because the victim knew that the gun was inoperable; and (4) the prosecution failed to produce any evidence that Nibbs possessed a firearm as defined in 23 V.I.C. § 451(f).[2]

¶14 Here, the evidence provided by the prosecution consisted of Henry's testimony that Nibbs pointed a gun at his head while stating, "I will blaze you with some bullets"; the video surveillance showing a black object on the ground that Henry testified was a holster and showing an object in Nibbs' hand; and the two guns recovered from the back area of T&M Grocery store, along with the police testimony and surveillance video of where Nibbs went in the store and where the police found the guns. (J.A. 495-96.) This evidence is sufficient for all charges. First, Officer Bernard Burke, supervisor for the Virgin Islands Police Department, provided evidence in the form of testimony that he performed a search of the firearm registry which revealed that Nibbs did not have a license to possess a firearm in the Virgin Islands on April 2016, the date of the incident between Nibbs and Henry. Second, the jury did not specifically convict Nibbs of possession or use of either of the two firearms discovered in the T&M Grocery store, but merely convicted him of possession and use of a gun in an assault. For none of the three counts in the information for

[2] "'Firearm' means any device by whatever name known, capable of discharging ammunition by means of gas generated from an explosive composition, including any air gas or spring gun or any "BB" pistols or "BB" guns that have been adapted or modified to discharge projectiles as a firearm."

which Nibbs was convicted was it necessary for the jury to determine specifically which – if either – of the two discovered weapons Nibbs possessed. Third, even assuming *arguendo* that the evidence cannot show constructive possession,[3] the evidence is sufficient and compelling for the jury to find that Nibbs had actual possession over at least one of the guns. As per *John*, Henry's testimony alone would have been sufficient to support a finding of actual possession of a firearm and its use during the assault, despite Nibbs' testimony that he was carrying only a wrench at the time he confronted Henry. *John v. People*, 63 V.I. 629, 647 (V.I. 2015) ("[T]he testimony of a single witness is sufficient to support a conviction, even if uncorroborated and contradicted by other testimony") (internal citation omitted). It is preposterous and outlandish for anyone to suggest that the words, "I will blaze you with some bullets" would pertain to a wrench and not to a gun. (J.A. 495-96.)

¶15 Nibbs next argues that at the time he uttered those threatening words to Henry with the object in his hand pointed directly at Henry's head, the gun was inoperable and Henry knew this, and therefore there was neither an assault, nor a firearm being used in connection therewith. This is not consistent with Henry's testimony. Henry never gave any indication that the firearm was actually inoperable or that Nibbs even attempted to fire the gun; he stated merely that the "firearm didn't fire," while Nibbs was pointing the gun at his head. Additionally, contrary to Nibbs' argument, Bernice Farrell Barton, an employee in the Forensic Identification Division of the Virgin Islands Police Department, testified during trial that she test fired the two guns retrieved from the

[3] Constructive possession is "having the power and the intention at any given time to exercise dominion or actual control over the firearm, either directly or through another person." 14 V.I.C. § 2253(d)(5). Constructive possession is frequently found when the firearm or other illegal item is in a car driven by the defendant or otherwise within the defendant's reach. *See, e.g., Alfred v. People*, 56 V.I. 286, 294-94 (V.I. 2012); *Sonson v. People*, 59 V.I. 590, 602 (V.I. 2012).

rear of T&M Grocery store, and they were both operable. Furthermore, even an inoperable gun (or one that does not meet the statutory definition of a firearm) can be the basis for a conviction of assault with a deadly weapon or unauthorized possession of a firearm during a crime of violence[4] under 14 V.I.C. § 2253(a). *Fontaine v. People*, 56 V.I. 660, 670 (V.I. 2012) ("By its use of the phrase 'imitation thereof,' the statute clearly criminalizes the possession of an item which appears to be a firearm, even if it is incapable of discharging ammunition, when it is possessed during a crime of violence."). This argument is meritless.

¶16 However, the crime of unauthorized possession of a firearm under 14 V.I.C. § 2253(a) does not include the "imitation thereof" language; thus, Nibbs is correct that to convict a person of this offense, the prosecution is required to prove beyond a reasonable doubt that the weapon is "capable of discharging ammunition by means of gas generated from an explosive composition."[5]

¶17 In this case, while the prosecution did not present explicit technical evidence that the weapon fits the statutory definition, the evidence was sufficient for the jury to conclude that Nibbs possessed a firearm as defined under the statute. Viewed in the light most favorable to the prosecution, the evidence was sufficient for the jury to conclude that the weapon Nibbs used in the assault was either the Glock or the Raven Arms, both of which fire by means of a gas explosion. *See Davis v. People*, 69 V.I. 600, 611 (V.I. 2018). And, it is within the competence of a juror –

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[4] "'Crime of violence' means the crime of, or the attempt to commit, murder in any degree, voluntary manslaughter, rape, arson, discharging or aiming firearms, mayhem, kidnapping, assault in the first degree, assault in the second degree, assault in the third degree, robbery, burglary, unlawful entry or larceny." 14 V.I.C. § 451(g).

[5] While in this case the evidence offered by the prosecution was sufficient for the jury to find that Nibbs possessed a firearm under the statute, the Legislature would be well-advised to amend the language of 14 V.I.C. § 2253(a) to include the "imitation thereof" language or otherwise clarify its intent.

especially when bolstered by Officer Bernice Farrell Barton's testimony as to the firing mechanism of the Raven Arms and the testimony that both the Raven Arms and the Glock use "cartridges" – to make the connection to the statutory definition.[6] Alternatively, Henry specifically stated that Nibbs was holding a "firearm," and numerous courts in jurisdictions with similar statutes have held that a lay witness's testimony is sufficient to support a finding that a weapon is a firearm. *See, e.g.*, *People v. Jackson*, 64 N.E.3d 52, 56-57 at ¶¶ 15-18 (Ill. App. Ct. 2016); *People v. Jeffries*,

[6] Some courts have observed that a firing mechanism is not something that can be discerned by the naked eye of a lay witness but rather requires the technical testimony of an expert, particularly in cases of mere possession; in the absence of such testimony, that element cannot be proven. *People v. McLaurin*, 122 N.E.3d 788, 795 (Ill. App. Ct. 2018) (reversing a possession conviction because a police officer's testimony that she saw defendant with a gun was not "evidence that the item she observed met the statutory definition of a firearm"); *People v. Clifton*, No. 1-15-1967, 2019 Ill. App. LEXIS 254, at ¶ 45 (Ill. App. Ct. Apr. 16, 2019) ("Absent some physical evidence, it seems almost impossible to prove that an item alleged to be a firearm meets the technical statutory definition unless fired. . . . No lay witness would ever be able to testify to [a gun's firing mechanism] unless the gun was fired or the witness somehow had an opportunity to examine the gun."). However, such a requirement would make it impossible to convict a person of unauthorized possession of a firearm unless the specific firearm can be located and tested, which is extremely unlikely to be the intent of the Legislature; this is an absurd result, which we generally seek to avoid. *People ex rel. K.J.F.*, 59 V.I. 333, 344 (V.I. 2013); *see Gilbert v. People*, 52 V.I. 350, 365 (V.I. 2009) (refusing to interpret a statute in a way that "is clearly inconsistent with the Legislature's intent and would lead to unjust and absurd results."). Moreover, it is well established that a defendant in a criminal case is not entitled to an unreasonable restrictive interpretation of a criminal statute, even though such statutes are to be strictly construed. *See e.g.*, *Gov't of the V.I. v. Creque*, 22 V.I. 126, 130 (V.I. 1986) (observing that while "[i]t is well settled that restrictive and penal statute shall be strictly construed, . . . such construction should neither narrow nor broaden the conduct, whether commission or omission, which is proscribed and penalized by the statute"); *Hollman v. Commonwealth*, 221 Va. 196, 198 (1980) (observing that "[e]ven though any ambiguity or reasonable doubt as to the meaning of a penal statute must be resolved in favor of an accused, nevertheless a defendant is not entitled to benefit from an unreasonable restrictive interpretation of the statute,'" and concluding as a result that the evidence "was sufficient to convict [the] defendant of using a firearm in violation of [the Virginia statute prohibiting the use of a 'pistol, shotgun, or rifle or other firearm while committing or attempting to commit rape'] upon proof that defendant employed an instrument which gave the appearance of having a firing capability, whether or not the object actually had the capacity to propel a bullet by the force of gunpowder"). Therefore, in the Virgin Islands, lay witness testimony is sufficient to support a finding that a gun is a firearm.

No. 1-17-0127, 2019 Ill. App. Unpub. LEXIS 242, at ¶¶ 18-19 (Ill. App. Ct. Feb. 15, 2019).[7] The court here properly instructed the jury as to the definition of a firearm under the statute, and the evidence provided was sufficient for them to find Nibbs guilty of the charges.

IV. CONCLUSION

¶18 For the forgoing reasons, the Superior Court's August 17, 2017 judgment and commitment is affirmed.

DATED this 10th day of September 2020.

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

ATTEST

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: **/s/ Natasha Illis**
Deputy Clerk

Dated: September 10, 2020

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[7] The Illinois statute, similar to those of other states, defines a firearm as "any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas." 430 I.L.C.S. 65/1.1. Unlike courts in other states, Illinois courts have directly engaged with this language.

Numerous federal courts have similarly held that a single lay witness is sufficient to testify that a weapon is a firearm. *See, e.g.*, *United States v. Lawson*, 810 F.3d 1032, 1039-40 (7th Cir. 2016). Like the Virgin Islands and Illinois statutes, the federal firearm possession statute defines a firearm in specific terms: "any weapon ... which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." 18 U.S.C. § 921(a)(3)(A). However, this definition is less technical than that in the Virgin Islands, and thus more squarely within the competence of a lay witness.