

**SUPERIOR COURT OF THE VIRGIN ISLANDS  
APPELLATE DIVISION OF ST. CROIX**

**ERMA DAVID,**

**Petitioner,**

**v.**

**PEOPLE OF THE VIRGIN ISLANDS,**

**Respondent.**

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CASE NO. SX-15-RV-007

(Re: SX-13-CR-326)

On Review from the Magistrate Division  
District of St. Croix  
Superior Court Magistrate: Hon. Miguel A. Camacho

**APPEARANCES:**

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**MEMORANDUM OPINION**

**MOLLOY, Judge.**

**THIS MATTER** is in the Appellate Division on review from the Magistrate Division. Erma David, the defendant below and the petitioner on internal appeal, challenges the sufficiency of the evidence the People of the Virgin Islands presented on charges of simple assault and battery and disturbance of the peace. David further argues that the People failed to disprove that she was acting in self-defense when she got into a fight in Home Depot on St. Croix. For the reasons stated below, this Court, in its appellate capacity, rejects David's claims and affirms her convictions. However, the Court will vacate her sentence and remand for re-sentencing in accordance with section 104 of title

14 of the Virgin Islands Code and section 3711(a) of title 5 of the Virgin Islands Code.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

Through a criminal complaint filed on July 24, 2013, the People of the Virgin Islands charged Erma David with committing three offenses under the Virgin Islands Code, all stemming from a fight between David and Florel McFarlande inside the Home Depot store on St. Croix. The complaint, which was docketed by the Criminal Division as case number SX-13-CR-326, charged one count of simple assault and battery in violation of section 299(2) of title 14, one count of disturbance of the peace by fighting in violation of section 622(1) of title 14, and one count of destruction of property in violation of section 1266 of title 14. David appeared before a Superior Court magistrate for a preliminary hearing and arraignment on August 14, 2013. The magistrate found probable cause, advised David of her rights, and appointed her defense counsel. David plead not guilty to each of the charges, demanded a jury trial, and was released on her own recognizance. The Criminal Division then assigned a Superior Court judge and transferred the case to the Jury Division for further proceedings.

More than a year after filing charges, the People, on September 26, 2014, moved to amend the complaint to dismiss the destruction of property charge and have the case transferred to the Magistrate Division. David did not file a response in opposition. The Superior Court judge assigned to the case issued an order, entered October 31, 2014, granting the People's motion to amend and directing the Clerk's Office to transfer the case to the Magistrate Division for reassignment to a Superior Court magistrate. The Magistrate Court held a bench trial on April 16, 2015. The prosecution called Florel McFarlande and Police Office Keisha Benjamin to testify. David called Tamisha Williams in her defense and also testified herself.

McFarlande testified that she was at Home Depot on St. Croix around four o'clock in the afternoon on March 1, 2013 when she got into an "altercation with one, Erma David." (Trial Tr. 9:11-12, Apr. 16, 2015.) McFarlande went to the store to see Sylvester Brown. Before entering the store McFarlande noticed a vehicle on the highway that looked like David's vehicle, so she called Brown to let him know that she was there and that David was also there. McFarlande wanted to alert Brown because he and David have two children together and she and David "had many verbal . . . tit-tats . . . back and forth." (Trial Tr. 10:2-3.) McFarlande waited for David to park and go into the store before leaving her own vehicle and going in. Once inside, David went to the right-side of the store and McFarlande went to the left-side. McFarlande found Brown in one of the aisles, went up to him and handed him a receipt, and then turned to leave. As she was walking back down the aisle, she saw David walking toward her. McFarlande testified that as they were about to pass each other David "veered into" her with "her shoulder and . . . bump[ed her]." (Trial Tr. 13:9-10.) McFarlande turned around and asked David why she hit her. David laughed in response, saying "I told you already that any time I see you, I was going to bust your ass." (Trial Tr. 13:22-23.) David then grabbed hold of McFarlande's face. A ring David was wearing left "some nasty scratches" on McFarlande's face. (Trial Tr. 14:9.) So, McFarlande "retaliated" and she and David "started to fight" in earnest. (Trial Tr. 15:22.) Brown stepped in between and separated them, but David reached over Brown's shoulder and grabbed a chain from McFarlande's neck. This caused the women to resume fighting. Eventually a security guard arrived and he and Brown broke up the fight. The police were later called to the store.

On cross-examination McFarlande denied that she and David had just "brushed up against each other." (Trial Tr. 30:25-31:1.) But she admitted that she threw her bags down after David

“veered into” her and told her, “I tired of you.” (Trial Tr. 31:11-14.) She also admitted that “after the second spur of the fight” she picked up some of the store’s tiles, broke them, “and attacked Ms. David with the tile to defend” herself. (Trial Tr. 32:1-3.) She also conceded that some of her injuries were self-inflicted from throwing the tile pieces at David. But she maintained that David started the fight.

Police Officer Keisha Benjamin was dispatched to Home Depot to investigate. She met McFarlande and David in the parking lot and took statements from them and also from Brown. According to Benjamin, David said she was driving home but stopped at Home Depot when she saw Brown standing outside and McFarlande’s car in the parking lot. Brown went back into the store, so David went in to look for him, but saw McFarlande and followed her and then “encountered the two of them” in aisle 45. (Trial Tr. 37:18.) David told Officer Benjamin that “McFarlande bumped into her when she was exiting the aisle and they began to fight.” (Trial Tr. 37:19-20.)

After Officer Benjamin’s testimony, the People rested. David moved for judgment of acquittal, which the court denied. David called Tamisha Williams. Williams was with David at Home Depot though they went in different directions when they first walked into the store. Sometime later, Williams found David and saw that she was in a confrontation with another woman. She tried to help Brown separate David and McFarlande. McFarlande hit Williams on her arm with a broken tile, but Williams was not injured because she had on a sweater. On cross-examination, Williams confirmed that she did not see how the fight started.

David testified last. Her testimony corroborated McFarlande’s testimony concerning who arrived first, where they parked their cars, and who went into the store first. David explained that she had stopped at the store because Brown asked her to pick something up for him and take it home. Inside the store, she found Brown in one of the aisles talking with McFarlande. When

McFarlande saw her approaching, she left Brown and walked toward David. According to David, the two bumped shoulders because neither of them would move over to allow the other space to pass. David testified that after they collided McFarlande threw down her bag, asked her why she hit her, and then put her hand in David's face. That triggered the fight. But David also admitted that she did not recall "who hit who first." (Trial Tr. 65:9.) On cross-examination, she further admitted that she was upset at seeing her boyfriend for seventeen years with another woman, but denied that she grabbed McFarlande's face.

Following David's testimony, the defense rested and moved again for acquittal. The court heard arguments from both sides and denied the motion. The parties made their closing arguments. From the bench, the court delivered its verdict, finding David guilty of simple assault and battery and disturbance of the peace by fighting. David waived a presentence report and the court proceeded to sentence her to six months of probation, to pay a \$500 probation fee and \$75 in court costs, to complete an anger management course, and further to stay at least one thousand feet away from McFarlande. The court reduced its decision to writing in a Judgment and Sentence entered May 14, 2015.

On May 28, 2015, David filed a petition for review with the Appellate Division. The Clerk's Office docketed her internal appeal as case number SX-15-RV-007<sup>1</sup> and assigned it to the undersigned judge. By order entered June 8, 2015, the Court granted David's request to have the Superior Court absorb the costs of preparing a transcript of the April 15, 2015. *See In re Payment for Prep. of Tr. Reqs. by the Office of the Terr. Pub. Defender*, ST-14-MC-036, 2014 V.I. LEXIS 90, \*1

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<sup>1</sup> "Beginning in January 2015, the Clerk of the Superior Court adopted a new internal procedure whereby petitions for review filed with the Appellate Division on appeal from the Magistrate Division are assigned a new case number designated with the code 'RV' referring to 'petitions for review.'" *People v. Joseph*, SX-15-RV-006, 2016 V.I. LEXIS 5, \*3 n.1 (Super. Ct. App. Div. Jan. 19, 2016) (unpublished).

(V.I. Super. Ct. Aug. 1, 2014) (unpublished). The Order also set a briefing schedule for the parties to follow once the transcript was submitted. The court reporter submitted the transcript on July 9, 2015. David filed her brief on July 22, 2015. The People filed their response on July 30, 2015.

## **II. JURISDICTION AND STANDARD OF REVIEW**

The Magistrate Division of the Superior Court of the Virgin Islands has original jurisdiction over all non-felony traffic offenses, petty criminal offenses, small claims actions, landlord and tenant actions, probate matters, and civil domestic violence and civil stalking actions. *See In re Estate of Small*, 57 V.I. 416, 428 (V.I. 2012) (“the Legislature provided the Magistrate Division the original jurisdiction to hear certain kinds of cases without the oversight of a Superior Court judge” (citing 4 V.I.C. § 123(a)); *see also* Act 7744, § 1, 31st Leg., Reg. Sess. (V.I. 2015) (to be codified at 5 V.I.C., ch. 101, §§ 1471-76). Superior Court magistrates—and Superior Court judges sitting in the Magistrate Division, *see Brown v. Brown*, 59 V.I. 583, 587 (V.I. 2013) (per curiam)—serve as the trial court in an original jurisdiction case, presiding over the case from commencement through dismissal or issuance of a judgment.

But cases heard in the Magistrate Division are not final, meaning not appealable to the Supreme Court of the Virgin Islands, until reviewed by a Superior Court judge sitting in the Appellate Division. “Judges sitting in the Appellate Division of the Superior Court function like an appellate court with the Magistrate Division functioning as the trial court.” *People v. Mayers* SX-14-MV-190, 2016 V.I. LEXIS 6, \*5 (V.I. Super. Ct. App. Div. Jan. 19, 2016) (unpublished). *Accord Bekker v. People*, ST-14-MV-504, 2015 V.I. LEXIS 82, \*2-3 (V.I. Super. Ct. App. Div. July 7, 2015) (unpublished) (“this Court sits as an appellate court when it reviews decisions from the Magistrate [Division]”).

On review the Appellate Division judge must “address the arguments raised . . . in the parties’

briefs” unless the court finds “any of the arguments” have been waived. *Gardiner v. Diaz*, 58 V.I. 199, 205 n.5 (V.I. 2013). When considering the arguments raised on review, the appellate court defers to the facts found by the magistrate court, including which witnesses’ testimony to credit and how much weight to give such testimony. *Id.* at 205. However, the appellate court does not defer to the law the magistrate court applied. Instead, questions of law are reviewed under a plenary standard. *See id*; *see also Browne v. Gore*, 54 V.I. 195, 202-03 (Super. Ct. App. Div. 2011) (“Plenary means full; complete; entire . . . . The court must provide sufficient analysis to demonstrate that it has truly performed a full review of the record, including the evidence” (quotation marks, citation, and brackets omitted)), *rev’d on other grounds*, 57 V.I. 445 (V.I. 2012).

### III. DISCUSSION

David raises three arguments on internal appeal: (1) that the evidence was insufficient to find her guilty of simple assault and battery; (2) that the evidence was insufficient to find her guilty of disturbance of the peace by fighting; and (3) that the magistrate court erred by not finding that she was acting in self-defense. In response, the People asserted that there is “no basis in law or fact for the Defendant’s Petition for Review.” (Resp.’s Gen. Obj. to Def’s Pet. for Review 1, filed July 30, 2015.). While the People did, technically, file a response to David’s brief, the filing was perfunctory and cannot qualify as a “brief.” *See* Super. Ct. R. 322.1(i)(E). Therefore, because the People failed to address any argument David raised, the Court finds their response insufficient and concludes that the People have waived the right to “be heard in the review proceedings” in opposition to David’s claims. *See* Super. Ct. R. 322.1(G)(ii) (“If a respondent fails to file a responsive brief . . . the respondent shall lose any further opportunity to be heard in the review proceeding”). *Cf. Gardiner*, 58 V.I. at 205 n.5 (the appellate court should determine whether the “appellant has waived any of

the arguments raised” on review). Each argument will be considered below.

#### **A. Sufficiency of the Evidence for Simple Assault and Battery**

In her first argument, David contends that the Magistrate Court erred in finding her guilty of simple assault and battery. Specifically, she argues that the People failed to prove beyond a reasonable doubt that she had the intent to injure McFarlande. In determining whether there was sufficient evidence to sustain a conviction for simple assault and battery, appellate courts view the evidence in the light most favorable to the prosecution. *Boston v. People*, 56 V.I. 634, 641-42 (V.I. 2012). Section 299(2) of title 14 of the Virgin Islands Code declares that “[w]hoever commits . . . an assault or battery unattended with circumstances of aggression” is guilty of simple assault and battery. Section 291 in turn defines assault as an “attempt[] to commit a battery” or “a threatening gesture” that shows the “immediate intention . . . to commit a battery.” 14 V.I.C. § 291. “[A]ssault and battery” is further defined in section 292 as the use of “unlawful violence upon the person of another with intent to injure.” 14 V.I.C. § 292. Specific intent to injure must also be shown. *Boston*, 56 V.I. at 641.

In the amended complaint, the People alleged that David had assaulted and battered McFarlande “by striking . . . [her] with her shoulder and/or grabbing her hair.” (First Am. Compl. 1, filed Sept. 26, 2014, *People v. David*, SX-13-CR-326.<sup>2</sup>) At trial, McFarlande testified that David

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<sup>2</sup> As noted earlier, *see supra* n.1, the new procedure the Clerk’s Office implemented for petitions for review from the Magistrate Division includes assigning a new case type and case number for every internal appeal. In the past, the Clerk’s Office docketed petitions for review within the same case file. A petition for review from an order issued in a small claims action, for example, would be docketed within the same small claims case file that was before the magistrate court. That same case file, with all of the pleadings, orders, and filings generated at the trial level, would then be forwarded to the appellate court along with all of the filings, orders, and briefs generated in the review proceeding. Confusion and delay often resulted because the same case file had to move between the appellate court and the trial court with each occasionally issuing orders in the same case at the same time. *Cf.* Super. Ct. R. 322.1(b)(2)(C) (allowing internal appeals from oral decision before decision is reduced to writing); Super. Ct. R. 322.1(e) (authorizing subsequent orders by magistrate court in limited instances after internal appeal filed); Super. Ct. R. 322.1(f) (requiring magistrate court inform appellate court in writing of orders entered or motions filed after review proceeding initiated). By adopting



“veered” into her and “bumped” her with her shoulder. (Trial Tr. 13:9-10.) David admitted that their shoulders bumped. But she said it happened because neither woman wanted to make room for the other to pass. Citing *Government of the Virgin Islands v. Frett*, 14 V.I. 315 (Terr. Ct. 1979), David argues that the People failed to prove “that she had the mens rea to commit simple assault and battery.” (Pet’r’s Br. 4.) Her own testimony shows, she contends, that “she had no intention to injure Ms. McFarlande” because, when McFarlande asked why she hit her, David responded by asking, “‘I hit you?’” *Id.* (quoting Trial Tr. 58:13-14.) But David’s point is misplaced.

Both women testified that they bumped shoulders and that McFarlande then dropped her bag and asked David why she hit her. However, according to McFarlande, David then grabbed her face—not her hair as the complaint charged—and left scratches. According to David, McFarlande had her own hand in David’s face when she asked David why she hit her. David responded by “push[ing] her hand out of [her] face.” (Trial Tr. 58:20.) “[A]nd that’s when [they] started to fight,” she testified. (Trial Tr. 58:21.) But David also admitted that she could not remember “who hit who first.” (Trial Tr. 65:9.) And the People moved into evidence a photograph showing scratch marks on McFarlande’s face from the day of the fight. David’s testimony did not directly contradict McFarlande’s testimony on this point. So, while David is correct that the People had to show specific intent, *see Boston*, 56 V.I. at 461, David overlooks that the People were not limited to showing intent only from the shoulder bump. *See Brito v. People*, 54 V.I. 433, 440-41 (V.I. 2010) (facts alleged in “to

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a new case numbering system for internal appeals, which includes creating a separate case file for each review proceeding, the Clerk’s Office significantly improved the internal operating procedures of the Appellate Division. But, whereas before the appellate court had more than what was needed to decide the appeal, now the appellate court often does not have enough to make a decision because there is no Appellate Division rule at present that requires the parties to prepare and submit the trial court record in the internal appeal case. Nevertheless, because the “record on review” includes “[t]he original case file” as well as “all exhibits and evidence taken . . . in consideration of the case,” Super. Ct. R. 322.1(h)(1), the Court has, on its own, reviewed the documents filed in David’s trial case to decide this internal appeal.

wit" clause were surplusage because charging document properly alleged elements of charge). Rather, the People could have shown, and did show, intent to injure from David grabbing McFarlande's face and leaving scratches. Because "intent is a question of fact," it "may be inferred from the facts and circumstances surrounding the act, the situation of the parties, [and] the nature and extent of the violence." *Frett*, 14 V.I. at 324. The Magistrate Court could reasonably find that David unlawfully used violence on McFarlande with the specific intent to injure her either by veering into McFarlande's shoulder and scratching her face. *Accord Duggins v. People*, 56 V.I. 295, 302 n.3 (V.I. 2012) (defining specific intent as "the intent to accomplish the precise criminal act that one is later charged with" (quotation marks, brackets, and citation omitted)). Viewed in the light most favorable to the prosecution, this evidence supports finding beyond a reasonable doubt that David committed simple assault and battery. Therefore, the Court rejects David's first argument.

#### **B. Sufficiency of the Evidence of Disturbance of the Peace**

David's second argument challenges the sufficiency of the evidence for her conviction of disturbance of the peace. Specifically, David argues that the People failed to prove beyond a reasonable doubt that she "acted maliciously or willfully." (Pet'r's Br. 6.) Section 622(1) of title 14 of the Virgin Islands Code declares that "[w]hoever maliciously and willfully . . . disturbs the peace or quiet of any . . . person by . . . fighting" is guilty of disturbing the peace. In the amended complaint, the People alleged that David had "maliciously and willfully disturbed the peace and quiet of a person, namely, Florel McFarlande, to wit: by fighting and/or cursing with said Florel McFarlande." (First Am. Compl. 1, *People v. David*, SX-13-CR-326.) To prove this offense, the prosecution had to show that David (1) maliciously and willfully, (2) disturbed another person's peace or quiet (3) by fighting. *Accord Webster v. People*, 60 V.I. 666, 679-80 (V.I. 2014) ("to obtain a conviction in this case,

the People were required to prove that [the defendant] (1) maliciously and willfully disturbed [another]'s peace or quiet (2) by loud or unusual noise, or by tumultuous offensive conduct, or threatening, traducing, quarreling, challenging to fight or fighting." (quotation marks omitted)).

In support of her argument, David offers two points. First, David points to the meaning of "willful" and "malicious." Willful means "[v]oluntary and intentional, but not necessarily malicious," David says, whereas malicious means "an intentional, wrongful act done willfully or intentionally against another without legal justification or excuse." (Pet'r's Br. 5 (citing Black's Law Dictionary but without edition or page numbers)). "[I]nnocently bump[ing] Ms. McFarlande's shoulder" was not acting maliciously and willfully, David argues. *Id.* David's second point is that her own testimony showed that McFarlande started the fight because she "put her hand in [David's] face first." *Id.* Therefore, the People failed to carry their burden of proof.

To the extent David attempts to raise a question about how the phrase "maliciously and willfully" in section 622 of title 14 should be construed, that question lacks merit. Section 41 of title 1 of the Virgin Islands Code defines maliciously to mean "the doing of a wrongful act, intentionally, without just cause or excuse; a conscious violation of the law to the prejudice of another." The same statute also defines willfully, "when applied to the intent with which an act is done . . . [as] a purpose or willingness to commit the act." 1 V.I.C. § 41. While David disputed at trial that she started the fight and reiterates this point on appeal, David overlooks that who started the fight is irrelevant. Section 622(1) criminalizes acts done purposefully, intentionally, and without lawful justification, or in other words willfully and maliciously, that disturbs another person's peace and quiet. Here, the specific act charged was fighting. The statute does not make it an offense to start a fight that causes another's peace and quiet to be disturbed.

Here, all of the eyewitnesses, including David, herself, testified that she and McFarlande got into a fight. Although David argues that she was only defending herself, deciding whether to accept her testimony was for the finder of fact. Since the fact-finder in a bench trial is the trial court, *see Farrell v. People*, 54 V.I. 600, 620 (V.I. 2011), and the trial court in a section 123(a) case is the magistrate, *see Estate of Small*, 57 V.I. at 429, the Magistrate Court had to determine whose testimony to believe. Based on the evidence, the Magistrate Court could reasonably conclude that the People proved beyond a reasonable doubt that David acted without just cause or excuse in fighting with McFarlande and that she did so willingly and with purpose and disturbed McFarlande's peace and quiet. *Cf. Webster*, 60 V.I. at 680 (citing cases holding that commission of a criminal assault was sufficient to show disturbance of the peace).

### **C. Failure to Disprove Self Defense**

In her last argument, David claims that the People failed to carry their burden of proving that she was not acting in self-defense. Citing *Government of the Virgin Islands v. Smith*, 27 V.I. 332 (3d Cir. 1991), David argues that once she "raised an issue of self-defense, the People had the burden of proving its absence beyond a reasonable doubt." (Pet'r's Br. 6.) According to David, she testified at trial that she was just defending "herself during Florel McFarlande's attack with the tiles and her threatening gestures made by Florel McFarlande putting her hand in [David's] face." *Id.* at 6-7. "This self-defense gesture," she argues now on appeal, "should not have resulted in her [being] convicted of simple assault and battery and disturbance of the peace." *Id.* at 7. So, since she raised self-defense, and the People failed to disprove it, her convictions should be set aside, David claims.

David is correct that "when a defendant raises a claim of self-defense—even through his own testimony without any corroboration—the . . . People must disprove the self-defense claim beyond

a reasonable doubt.” *Joseph v. People*, 60 V.I. 338, 348-49 (V.I. 2013) (citing *Phipps v. People*, 54 V.I. 543, 547-49 (V.I. 2011)). However, what David ignores is that the People only have the burden of disproving self-defense when “some evidence” shows “that the defendant acted in self defense against *unlawful violence* offered to his person.” *Fahie v. People*, 59 V.I. 505, 512 (V.I. 2013) (quotation marks, ellipses, and citation omitted). In this case there was no evidence that McFarlande used violence unlawfully against David. McFarlande did admit that, after their shoulders collided, she threw down her bag and said to David, “I tired of you.” (Trial Tr. 31:12-14.) According to David, McFarlande put her hand in David’s face when she spoke; McFarlande denied this. In contrast, McFarlande testified that David responded to her remark by grabbing her face, which David denied. Conflicts in witness testimony are resolved by the fact-finder at trial and not by courts on appeal. *See Moore v. Walters*, 61 V.I. 502, 508 (V.I. 2014) (“on appeal, the court must defer to the credibility decision made by the factfinder, whether it be the judge or the jury”). Finally, while David is correct that the evidence showed that McFarlande grabbed loose tiles from a shelf, broke them to create a sharp edge, and threw them at her, David fails to recognize that the evidence also showed that the tile-throwing happened after the fight had already begun. None of the evidence at trial showed that McFarlande used unlawful violence against David first. Therefore, David is incorrect in claiming that the People had to disprove self-defense.

#### **D. Sentencing Errors**

Lastly, the Court addresses, on its own, certain concerns regarding David’s sentence though she did not raise any error on review. *Accord Brown v. People*, 55 V.I. 496, 506-07 (V.I. 2011) (explaining that an illegal sentence satisfies the plain error test for appellate review). In its May 14, 2015 Judgment and Sentence, the Magistrate Court entered a conviction for each count, placed

David on supervised probation for six months, and, in addition to imposing administrative fees and court costs, ordered further that David stay at least a thousand feet away from McFarlande. Two concerns are raised by this sentence.

The first concern is that the court did not announce or impose a separate sentence for each of David's convictions. A conviction for simple assault and battery carries either a \$250 fine, imprisonment for no more than six months, or both. *See* 14 V.I.C. § 299. A conviction for disturbing the peace requires either a \$100 fine, imprisonment for no more than 90 days, or both. *See* 14 V.I.C. § 622. Here, the court did not announce or impose a sentence on any count. Instead, the court placed David on probation for six months. Section 3711(a) of title 5 of the Virgin Islands Code gives trial courts the option of "suspend[ing] the imposition or execution of sentence" when "a judgment of conviction" has been entered and instead placing a defendant on probation. So, at first glance, there is no concern.<sup>3</sup> But because the Magistrate Court failed to specify whether probation applied to one or both convictions, the Court must presume, "in the absence of express limitation," that probation "extend[s] to the entire sentence and judgment." 5 V.I.C. § 3711(a).

The concern becomes then whether David has been punished by being granted probation.

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<sup>3</sup> Although no Virgin Islands court has addressed this question yet, namely whether section 3711(a) allows the trial court to suspend imposing a sentence entirely when placing a defendant on probation—rather than announce a sentence and then suspend its execution—the Supreme Court of the United States, in construing former 18 U.S.C. § 3651, the federal analogue to section 3711 of title 5, has held that the federal statute did give the trial judge the discretion to choose "between imposing sentence before probation is awarded or after probation is revoked." *Roberts v. United States*, 320 U.S. 264, 268 (1943); *see also United States v. Colvin*, 644 F.2d 703, 705 (8th Cir. 1981) ("If the district court finds that the defendant's probation should be revoked, it then must choose from among the alternatives found in the statute. If a sentence had been previously imposed, but suspended, the court may impose that same sentence or any lesser one. If no sentence had been imposed at the original hearing (defendant placed on probation with imposition of sentence suspended), then upon revocation of probation the court may impose any sentence which might originally have been imposed" (internal citation and quotation marks omitted)). While not binding, this precedent is still very persuasive. *See Jackson-Flavius v. People*, 57 V.I. 716, 728 (V.I. 2012) ("federal cases interpreting the federal statute . . . are . . . instructive"). Therefore, the Court assumes, without deciding, that trial courts in the Virgin Islands have discretion when placing defendants on probation pursuant to section 3711(a) to either suspend imposition of a sentence or to announce and impose a sentence but suspend its execution.

Courts take different views on whether probation is a form of punishment. *Compare People v. Howard*, 946 P.2d 828, 835 (Cal. 1997) (“Grant of probation is, of course, qualitatively different from such traditional forms of punishment as fines or imprisonment. Probation is neither punishment nor a criminal judgment. Instead, courts deem probation an act of clemency in lieu of punishment, and its primary purpose is rehabilitative in nature” (internal citations and quotation marks omitted)), *with, Rohn v. People*, 57 V.I. 637, 642 n.4 (V.I. 2012) (citing *Korematsu v. United States*, 319 U.S. 432, 434-35 (1943) and explaining parenthetically that “the ‘incidents of probation’ compel a conclusion that it is a punishment like any other, though mild in degree”). If being placed on probation pursuant to section 3711(a) is a form of punishment, then section 104 of title 14 of the Virgin Islands Code is also implicated here.

Section 104 prohibits imposing multiple punishments for the same act. *See* 14 V.I.C. § 104 (“An act or omission which is made punishable in different ways by different provisions of this Code may be punished under any of such provisions, but in no case may it be punished under more than one.”). David was charged and convicted of simple assault and battery and disturbance of the peace. Both charges were unquestionably based on the same act: getting into a fight with McFarlande in Home Depot.<sup>4</sup> If probation is punishment and if a defendant cannot be punished for more than one act, then the Magistrate Court erred in not specifying which count David was being “punished” for by being placed on probation and which count sentence was suspended per section 104. As the Supreme Court of the Virgin Islands recently explained:

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<sup>4</sup> The only reported case where both an assault conviction and a disturbance of the peace conviction were addressed in the context of a possible section 104 violation was *Webster v. People*. However, in that case, because the Supreme Court reversed Webster’s assault conviction, the Court rejected his section 104 claim in a footnote, explaining that “[b]ecause we reverse his assault conviction on other grounds, the only sentences that could implicate section 104 are the concurrent sentences imposed for disturbing the peace and unauthorized use of a vehicle,” neither of which “constitute[d] ‘a single act or omission’ for the purposes of 14 V.I.C. § 104.” *Webster*, 60 V.I. at 682 n.7.

Merely suspending the sentences, and not staying the execution of the sentences, violates section 104. Section 104 acts to ensure that a defendant's stayed convictions are not used against him for any purpose unless the unstayed conviction is reversed or vacated, and the stay on remaining convictions is thereafter lifted to allow imposition and execution of sentence on that charge. Thus, when a defendant serves the sentence on the remaining offense, the other stayed offenses must be dismissed.

*Estick v. People*, 62 V.I. 604, 623 (V.I. 2015) (internal citation omitted)).

While there is no direct precedent addressing this precise issue yet—which could also mean that the plain error test is not met here, *see People of the V.I. ex rel J.G.*, 59 V.I. 347, 361 n.14 (V.I. 2013) (“an error is plain only if the error is clear under current law, and thus there can be no plain error where there is no precedent directly resolving it” (quotation marks, ellipsis, and citation omitted))—there is still sufficient precedent, broadly speaking, regarding sentencing in general that should have prompted the Magistrate Court to question whether section 104 was implicated. Moreover, as noted earlier, federal cases like *Korematsu* hold that probation, under the former federal probation statute before Congress repealed it, was a form of punishment. This precedent is still persuasive when construing the local probation statute. *See Jackson-Flavius*, 57 V.I. at 728. And while federal law does not prohibit multiple punishments for the same act, Virgin Islands law does. *See* 14 V.I.C. § 104. Based on this authority, the Court concludes that probation is a form of punishment. Accordingly, probation as punishment for multiple conviction for the same act violates section 104 of title 4.

Since the Magistrate Court did not expressly limit probation to a specific offense, David's probation “extend[s] to the entire sentence and judgment.” 5 V.I.C. § 3711(a). But, because both of David's convictions arose from one “indivisible course of conduct,” the Magistrate Court erred by punishing David for both offenses. *Williams v. People*, 56 V.I. 821, 832 n.7 (V.I. 2012). Therefore, David's sentence must be reversed and, on remand, the Magistrate Court must state the offense for



which probation was granted and, for the remaining offense, either announce a sentence and stay its execution or state that imposition of a sentence is suspended.

The final concern with David's sentence is that the May 14, 2015 Judgment and Sentence ordered David to stay a thousand feet away from McFarlande. While trial courts have discretion to "place the defendant on probation for such period and upon such terms and conditions as the court deems best," 5 V.I.C. § 3711(a), the period of probation, with its accompanying terms and conditions, cannot "exceed[] the statutory maximum penalty for the crime." *Jackson-Flavius*, 57 V.I. at 730. Because the statutory maximum penalty for simple assault and battery is six months, and ninety days for disturbance of the peace, on remand the Magistrate Court must modify the judgment to state that the requirement that David stay at least a thousand feet away from McFarlande is imposed only for the duration of the period of probation. Otherwise, at any point in the future, David could be charged with contempt for violating this portion of the judgment, particularly if the court failed to timely discharge David from probation, or take other action if she fails to successfully complete probation, and then dismiss the stayed offense.

#### IV. CONCLUSION

After careful consideration, the Court must reject each claim David raised on review. Determining credibility is for the fact-finder and the fact-finder in Magistrate Division cases is the trial court. Here the evidence was sufficient when viewed in the light most favorable to the prosecution to find beyond a reasonable doubt that David committed simple assault and battery and disturbance of the peace. Additionally, because the evidence showed that David was the initial aggressor, the prosecution did not fail to disprove that she acted in self-defense. Therefore, David's convictions must be affirmed.

However, David's sentence cannot be affirmed. While David could be charged and convicted for multiple offenses stemming from the same act, she could not be punished for more than one conviction. Probation is a form of punishment. Therefore, the Magistrate Court should have specified the conviction for which David was being placed on probation and for the other conviction announced a sentence and stayed its execution or suspended imposition of a sentence entirely. Accordingly, David's sentence will be vacated and this matter remanded for re-sentencing in compliance with section 104 of title 14, and section 3711(a) of title 5, of the Virgin Islands Code.

Date: February 22, 2016

ATTEST:

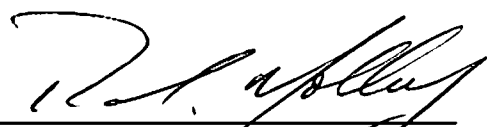
ESTRELLA H. GEORGE

Acting Clerk of the Court

By:

  
Court Clerk Supervisor

Dated: 2/22/16

  
**ROBERT A. MOLLOY**  
Judge of the Superior Court