

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS/ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,

Plaintiff)

Vs.)

CHARMAINE CLARKE,

Defendant)

CASE NO. ST-08-CR-371

ACTION FOR: 14 VIC 921, 922(a)(1)
14 VIC 2253(a)

**NOTICE
OF
ENTRY OF JUDGMENT/ORDER**

TO: COURTNEY REESE, Esquire JUDGES & MAGISTRATES, SUPERIOR COURT
JESSE BETHEL, Esquire LIBRARIAN
DAVID J. CATTIE, Esquire IT DIVISION & ORDER BOOK

Please take notice that on SEPTEMBER 21, 2009 a Memorandum Opinion & Order was entered by this Court in the above-entitled matter.

Dated: SEPTEMBER 21, 2009

VENETIA H. VELAZQUEZ, ESQ.

Clerk of the Superior Court

Diane Matthew-Turnbull
DIANE MATTHEW-TURNBULL

By:

COURT CLERK II

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,)	
)	CRIMINAL NO. ST-08-CR-371
Plaintiff,)	
)	V.I. Code Ann. tit. 14, §§ 921, 922(a)(1),
v.)	11(a); 2253(a), 11(a)
)	
CHARMAINE CLARKE,)	
(D.O.B.: 12-26-69))	
)	
Defendant.)	
_____)	

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant Charmaine Clarke's Motion for Judgment of Acquittal and Defendant Charmaine Clarke's Renewed Rule 29 Motion. The Defendant is represented by David Cattie, Esq. The People of the Virgin Islands are represented by Assistant Attorneys General Courtney Reese, Esq., and Jesse Bethel, Esq. The Court will grant the Defendant's Motion For Judgment of Acquittal and Renewed Rule 29 Motion and will dismiss the Information.

FACTS

On or about the late evening hours of May 18, 2008, in the area of Smith Bay, St. Thomas, Virgin Islands, Malaika Pemberton ("Pemberton"), who was a passenger in an automobile driven by her friend, heard shots fired. At the time, Pemberton was on Coki Beach Road at the point where it intersects with Smith Bay Road. The automobile turned left, traveling in the direction of Red Hook, and while on Smith Bay Road in the area of the Ballpark, Pemberton saw a man known to her as "Sogee" a.k.a. "Bret" or "Brent" a.k.a. Issac Austrie ("Austrie") running across the street trying to tuck a gun that he held in his right hand into his

pants. The witness saw Austrie running from the direction where a body lay face down on the ground.

Austrie ran to the other side of the road and got into the passenger side of a white Ford Focus. Pemberton had known Austrie for approximately eight months as the boyfriend of Charmaine Clarke ("Clarke"). She testified that she always saw Austrie with Clarke and vice versa. Pemberton looked into the car as she drove by and recognized the driver of the car as Clarke, whom she had known for approximately ten years. After passing the car, she looked back and noticed that the license plate of the car started with the letter "T" and ended with the numbers "566." After Austrie got into the passenger seat of the automobile, it sped away, going in the direction of Cassi Hill.

On Monday, June 30, 2008, Pemberton viewed photo arrays consisting of six photos each and picked out both Austrie and Clarke as the individuals she saw in the early morning hours of May 18 in Smith Bay. The police had forensic evidence that confirmed that a projectile or bullet was found under the body of the deceased who was identified as Geffrad Fritz. The police also verified that Clarke owns a white Ford Focus with the license plate number "TCH 566." Finally, police confirmed that neither Austrie nor Clarke is authorized to possess or carry a firearm in the Virgin Islands.

Based upon the evidence that they had gathered, the police arrested Austrie and Clarke on September 8, 2008, and they were charged with premeditated first degree murder, unauthorized use of a firearm during the commission of a crime of violence and first degree assault. An information was later filed against Austrie and Clarke charging them with first degree premeditated murder, unauthorized use of a firearm during the commission of a crime of violence and other crimes.

After the first trial ended in a mistrial, Austrie and Clarke were tried again. At the close of the evidence, Clarke argued that the evidence was insufficient to convict her of the crimes charged and that the Court should issue a judgment of acquittal. The Court reserved decision and allowed the case to be decided by the jury. The Court submitted the charges of murder first degree and unauthorized use of a firearm during the commission of a crime of violence to the jury for their consideration. The jury was also advised that if they found Clarke not guilty of murder first degree or were unable to reach a verdict on that charge, that they were to determine the guilt or innocence of Clarke on the charge of murder second degree, the lesser included offense of murder first degree. The jury found both Clarke and Austrie guilty of unauthorized use of a firearm during the commission of a crime of violence. The jury was unable to reach a verdict as to murder first degree as to either defendant, and the Court declared a mistrial as to that charge as to both defendants. Clarke renewed the motion for judgment of acquittal after trial.

DISCUSSION

The Court “must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.” Fed. R. Crim. P. 29(a).¹ The rule allows the Court to “reserve decision on the motion, . . . submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.” Fed. R. Crim. P. 29(b).

The Court must determine based upon the evidence presented by the People at trial whether there is sufficient evidence to sustain the conviction when considering that evidence in

¹ Pursuant to Super. Ct. R. 7, “[t]he practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and to the extent not inconsistent therewith, by . . . the Federal Rules of Criminal Procedure.”

the light most favorable to the People. *Maynard v. Government of the Virgin Islands*, 49 V.I. 718, 721 (D.V.I. App. Div. 2008). The verdict of the jury will be sustained “if any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence.” *Id.* (quoting *United States v. Wolfe*, 245 F.3d 257, 261 (3rd Cir.2001)). The Information charged Clarke with the crimes of murder first degree (premeditated) and unauthorized use of a firearm during the commission of a crime of violence. The jury found the Defendant guilty of unauthorized use of a firearm during the commission of a crime of violence, but was unable to reach a verdict on the charge of murder first degree.

In the Information, the People charge “aiding and abetting,” pursuant to V.I. Code Ann. tit. 14, § 11 (1996), in conjunction with the substantive offenses. That section provides that:

- (a) Whoever commits a crime or offense or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
- (b) Whoever willfully causes an act to be done which if directly performed by him or another person would be a crime or offense, is punishable as a principal.
- (c) Persons within this section shall be prosecuted and tried as principals, and no fact need be alleged in the information against them other than is required in the information against the principal.

Id. In *United States v. Xavier*, 2 F.3d 1281 (3d Cir. 1993), the court stated that:

Liability as an aider and abettor requires proof that defendant associated himself with the venture, that he participated in it as something he wished to bring about, and that he sought by his words or action to make it succeed The government can show the requisite intent with evidence defendant encouraged or helped the perpetrator.

Id. at 1288.

The facts in *Xavier* are similar to the facts in the instant case. In that case, the Court found that there was sufficient evidence underlying the conviction of third degree assault where the Defendant not only yelled, "Let's go, Franky," and drove the car they sped off in after the attack, but also helped provide his brother the gun that was used during the crime. *Id.* However, case law from this Court also supports the well-settled rule that mere presence at the scene is not enough to establish guilt as an aider and abettor, and that the government must also prove that the defendant was a participant and not merely a knowing spectator. *Government of the Virgin Islands v. Davis*, 35 V.I. 72 (Terr. Ct. 1997).

In her brief, Clarke cites *State v. Gazarro*, 420 A.2d 816 (R.I. 1980), a case decided by the Rhode Island Supreme Court, which this Court finds to be helpful in its analysis. In that case, the victim was shot to death by the passenger in an automobile and his body was then thrown out of the automobile. The defendant in that case, Badessa, was the owner and driver of the automobile. The evidence showed that Badessa was driving at the time of the shooting, and that the victim, the killer and he had been seen together several hours before the shooting. The State argued that the evidence was sufficient to support the inference that Badessa and the shooter were part of a conspiracy to kill the victim – Badessa's role was to drive the automobile while the shooter's role was to shoot the victim. The Supreme Court of Rhode Island stated:

This hypothesis of prearrangement, however, rests to such an extent on inferences that it verges on speculation. We believe that our responsibility on review is to make sure that suspicion, speculation, or conjecture are not substituted for probative evidence of guilt beyond a reasonable doubt. See *United States v. Barber*, 429 F.2d 1394, 1397 (3d Cir. 1970). Taking account of the evidence and only what we believe are the reasonable inferences to be drawn therefrom in the present case, we find that the state failed to carry its burden to establish beyond a reasonable doubt that Badessa aided in and abetted the commission of the crime.

Gazero, 420 A.2d at, 829. The State also argued that the evidence supported the inference that Badessa slowed or stopped the vehicle so that the victim could be pushed out of the car to the side of the road. The Court found that such facts would support the conclusion that Badessa may have been complicit as an accessory after the fact, but would not support a conviction beyond a reasonable doubt of Badessa's aiding and abetting in the murder. *Id.*

The facts and analysis in *Gazero* are helpful in the instant case. Evidence in the present case indicates that Clarke was the driver of the car that waited at the side of the road during the shooting, and it is a reasonable inference that Clarke drove Austrie to the scene of the crime. After shots were fired and Fritz's body lay on the ground, Clarke continued to wait in the car while Austrie ran across the street and got into the passenger side. Clarke then drove off from the crime scene with Austrie at a high rate of speed.

While there is substantial evidence that Clarke was on the scene and acted after the fact to help Austrie flee from the crime, the People failed to provide sufficient evidence to show that Clarke was more than a "knowing spectator." Indeed, allowing the jury to determine whether Clarke participated in a plan to murder Fritz can only be considered speculation, since the inference of complicity is not supported by any concrete facts. There was not substantial evidence submitted to show that Clarke associated herself with Austrie in a scheme to kill Geffrard Fritz or that she knew before the crime was committed that Austrie intended to kill Fritz. There is no evidence that Clarke helped secure a weapon for Austrie or that she encouraged him in word or deed to commit the murder. Although the People may have presented substantial evidence from which a jury could have concluded guilt beyond a reasonable doubt of Clarke as an accessory after-the-fact, they failed to produce substantial

evidence to show that Clarke is guilty beyond a reasonable doubt of murder first degree or the lesser included offense of that crime, murder second degree.


The same considerations support the conclusion that there is insufficient evidence on the charge of possession of a firearm during the commission of a crime of violence. Other than Clarke's being present at the scene of the crime and driving the automobile that may have transported Austria to and from the scene of the crime, there is insufficient evidence for the jury to have concluded that Clarke aided and abetted in the unauthorized possession of the firearm. Therefore, because the evidence presented was not sufficient to support the charge of unauthorized possession of a firearm against Clarke, the Court must set aside the jury's verdict.

Having found that there was insufficient evidence upon a review in the light most favorable to the People, the Court must grant the Motion for Judgment of Acquittal on behalf of Charmaine Clarke. There may be sufficient evidence that Clarke aided the crime of murder and unauthorized use of a firearm during the commission of a crime of violence as an accessory after the fact, but the People did not present sufficient evidence to support a conviction for aiding and abetting in the commission of these crimes. Therefore, the Court must grant the Motion for Judgment of Acquittal made before the jury retired to deliberate and the renewed Motion for Judgment of Acquittal after the conclusion of the trial. A separate Order will follow.

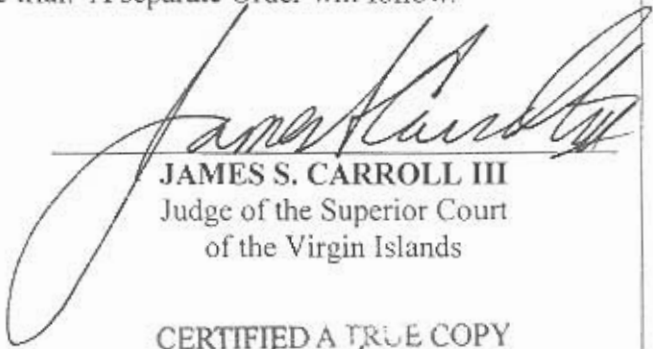
DATED: September 21, 2009

ATTEST:
VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court

BY:


ROSALIE J. GRIFFITH

Court Clerk Supervisor 9/21/09


JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

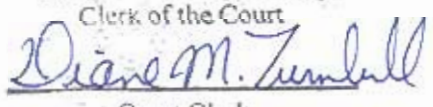
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Date:

9/21/09

Venetia H. Velazquez, Esq.
Clerk of the Court

By:


Diane M. Turnbull

Court Clerk

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,)	
)	CRIMINAL NO. ST-08-CR-371
Plaintiff,)	
)	V.I. Code Ann. tit. 14, §§ 921, 922(a)(1),
v.)	11(a); 2253(a), 11(a)
)	
CHARMAINE CLARKE,)	
(D.O.B.: 12-26-69))	
)	
Defendant.)	
_____)	

ORDER

AND NOW, the Court having provided its analysis and findings regarding this matter in a separate Memorandum Opinion, it is hereby


ORDERED that Defendant's Motion for Judgment of Acquittal is **GRANTED**; and it is further

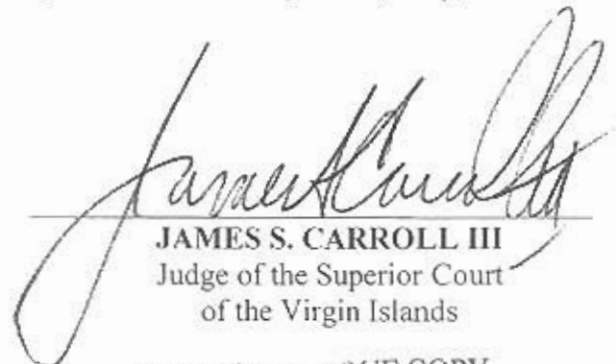
ORDERED that the Information against the Defendant, Charmaine Clarke, in this case is **DISMISSED**; and it is further

ORDERED that a copy of this Order of Dismissal shall be served personally upon the Defendant, Charmaine Clarke, and copies thereof shall be directed to David Cattie, Esq., counsel for the Defendant, and to Assistant Attorneys General Courtney Reese, Esq., and Jesse Bethel, Esq.


DATED: September 21, 2009

ATTEST:
VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court

BY: 
ROSALIE J. GRIFFITH
Court Clerk Supervisor 9/21/09


JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

CERTIFIED TRUE COPY
Date: 9/21/09
Venetia H. Velazquez, Esq.
Clerk of the Court

By: 
Court Clerk