NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
APPELLATE DIVISION

MICHAEL LEDESMA,	)	
	)	
Appellant,	)	**D.C. Crim. App. No. 2003/012**
	)	
v.	)	Re: T.C. Crim. No. 378/2002
	)	
GOVERNMENT OF THE VIRGIN ISLANDS,	)	
	)	
Appellee.	)	
	)	

On Appeal from the Territorial Court of the Virgin Islands

Considered: April 16, 2004
Filed: October 6, 2004

BEFORE : **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **THOMAS K. MOORE**, Judge of the District Court of the Virgin Islands; and **LEON A. KENDALL**, Judge of the Territorial Court, Sitting by Designation.

ATTORNEYS:
G. Luz A. James, Esq.
St. Croix, U.S.V.I.
Attorney for Appellant.

Maureen Phelan, AAG
St. Croix, U.S.V.I.
Attorney for Appellee.

MEMORANDUM OPINION

PER CURIAM.

Michael Ledesma ["Ledesma", "appellant"] challenges his conviction in Territorial Court on several grounds. He claims: 1) a Government witness' testimony was incredible because of the 19-

month lapse of time between the incident and her report to police; 2) that his motion for new trial should have been granted based on newly discovered evidence impacting on a witness' credibility, and; 3)the jury was improperly instructed on the elements of first degree murder, resulting in an unfair trial. There is no support for the appellant's arguments in the sparse record submitted to this Court. Moreover, the appellant's motion for new trial did not meet the standard for newly discovered evidence and was appropriately denied. Accordingly, Ledesma's conviction will be affirmed.

I. FACTS AND PROCEDURAL POSTURE

As earlier noted, neither party summarized the facts of this case as required by our rules of appellate procedure nor submitted an appropriate record from which those facts may be readily determined. Accordingly, we rely on the record developed below, as submitted by the trial court,[1] and briefly state the facts of the case as follows.

Ledesma was charged with the shooting death of Kenville Mills, Jr., which occurred on January 19, 2001. The shooting apparently occurred in the vicinity of Hill and Market Streets,

[1] In accordance with V.I. R. App. P. 10(a) and 11(c), we obtained the complete record from the Territorial Court and will, accordingly, consider all of the papers and exhibits filed in that court and the transcripts of proceedings therein.

Christiansted. However, the victim was shot several times as he ran, and his body was found on the gallery of the Pink Punky Bar on Market Street, a short distance away. Normalis Ascensio ["Ascensio"] lived on Hill Street, just a short distance from where the shooting occurred, and witnessed the incident from her open doorway. She did not come forward to give a statement to police until August, 2002 – over one and one-half years later – when she identified the appellant as the assailant from a photo array.

Following trial by jury, Ledesma was found guilty of murder in the first degree, in violation of title 14, section 922(a)(1), and unauthorized possession of a firearm during the commission of a crime of violence, in violation of title 14, section 2253(a) and (c). [*See* Judgment and Commitment, March 27, 2003]. He was sentenced to life imprisonment without parole on the murder conviction and five years for the firearm possession conviction, each to be served consecutively. [*Id*.]. Following the jury's verdict, Ledesma filed a motion for new trial on March 24, 2003, alleging his counsel had become aware of "some startling information" regarding one Kenneth Brown ["Brown"] following a conference in chambers in which that name surfaced. [*See* Mot. for

New Trial, Appendix ("App.") Exh. A].[2] The motion did not specify the nature of that information, nor does a transcript of a hearing on the motion appear on the record; from the trial court's docket sheet, it appears no hearing was held. On the same day the motion was filed, the trial court tersely denied the motion for new trial, stating only that "no valid basis for the same has been brought to the court's attention." [App. at Exh. B]. This timely appeal followed.

II. DISCUSSION

A. Jurisdiction & Standard of Review

This Court has appellate jurisdiction to review the judgments and orders of the Territorial Court in all criminal cases in which the defendant has been convicted, other than on a plea of guilty. See, VIRGIN ISLANDS CODE ANN. tit. 4, § 33(1997 & Supp. 2001).[3] We review *de novo* the trial court's application of legal precepts. *See HOVIC v. Richardson,* 894 F.Supp. 211, 32 V.I. 336 (D.V.I.App.1995). Its factual determinations, however, are reviewed for clear error. *See In re Cendant Corp. Prides Litig.,*

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[2] Appellant does not separately number his joint appendix, as required by V.I.R.A.P. 24(c).

[3] *See also* Revised Organic Act § 23A, 48 U.S.C. § 1613a. The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541- 1645 (1994), *reprinted in* V.I.CODE ANN., Historical Documents, Organic Acts, and U.S. Constitution at 159-60 (1995 & Supp. 2003) (preceding V.I.CODE ANN. tit. 1) ["Revised Organic Act"].

233 F.3d 188, 193 (3d Cir. 2000).

B. Credibility of Government Witness

Issues surrounding the credibility of witnesses or the weight to be afforded evidence at trial are matters left to the factfinder. *See e.g., Petillo v. New Jersey,* 562 F.2d 903, 907 (3d Cir. 1977). As an appellate court, we afford great deference to such determinations by the factfinder, who is uniquely positioned to view a witness' demeanor and to assess credibility. *See id.; see also Georges v. Government of the V.I.,* 119 F.Supp.2d 514, 523 (D.V.I. App.Div. 2000); *United States v. Delerme,* 457 F.2d 156, 160 (3d Cir. 1972). Such credibility determinations "should not be disturbed unless they are inherently incredible." *Petillo*, 562 F.2d at 907 (citations omitted); *see also* 29A AM. JUR. *Evidence* § 1447 (2003). Testimony is deemed inherently incredible or improbable where it is "either so manifestly false that reasonable men ought not to believe it, or it must be shown to be false by objects or things as to the existence and meaning of which reasonable men should not differ." 29A AM. JUR. § 1447; *see also Hollis v. Scott*,516 So.2d 576,578-79 (D.Ala. 1987)("The mere fact that testimony given by a witness in support of an issue is not plausible does not destroy its probative force. Where, however, the testimony of a witness is incredible, inherently or physically impossible and

unbelievable, inherently improbable and irreconcilable with, or contrary to physical facts and common observation and experience, where it is so opposed to all reasonable probabilities as to be manifestly false, or is contrary to the laws of nature or to well-known scientific principles . . . , it is to be disregarded as being without evidentiary value even though uncontradicted.")(citation omitted).

Here, appellant argues the testimony of a government witness was incredible because 19 months had elapsed between the incident and when she finally gave a report to police.[4] Appellant additionally asserts that witness' testimony was motivated by her desire to protect the father of her children, who was facing drug-related charges in a separate proceeding and who had entered a guilty plea in that case. The effect of the reporting delay on the witness' credibility or her motive to fabricate testimony merely raises an issue of bias, which is left to the jury's determination after an opportunity for impeachment. *See e.g., Government of V.I. v. Peters*, 121 F.Supp.2d 825, 830 (D.V.I. App. Div. 1998). It does not, however, render her testimony

[4] Although Ledesma does not identify the witness by name, it appears from the record that he is referring to Normalis Ascensio ("Ascensio"). The murder for which Ledesma was charged occurred on January 19, 2001. However, Ascensio did not reveal what she had witnessed to police until August 13, 2002, after a meeting was arranged through a drug enforcement officer [Tr. at 112, 122].

inherently incredible or improbable. Indeed, Ledesma was permitted to put to the jury the issue of Ascensio's lengthy delay in coming forward to police. On direct questioning, Ascensio acknowledged she had waited over one year before giving a statement to police. However, she attributed her delay to fear of reprisal. [*See* Tr. Vol. 1 at 94-96; 106-07]. Ultimately, she said she was forced to abandon her home out of fear for her safety. [*Id*.]. The following discourse ensued on cross examination.

> Q As a good citizen when this incident happened, did you call the police?
> A No. they were there.
> Q Did you have a telephone in your house?
> A No. I think it had gotten cut by then.
> Q It was cut by that time?
> A Yes.
> Q So you couldn't call the police?
> A No.
> Q Did you go down get in your car and drive down Market Street to the end of Market Street to the police station?
> A Attorney James, the pressure in my chest was so much and the pressure in my head, all I could do is shake and cry, shake and cry, because I didn't know what the hell to do because damn if you do, and damn if you don't.
> Q Day number two what did you do. Did you go and report to the police that you observe an incident that took place?
> A No, I did not.
> Q Day number three, did you tell the police?
> A No.
> Q Day number 30, did you tell the police?
> A No.
> Q Day number 60, did you tell the police?

A No
Q One year later did you tell the police?
A Yes
Q On January 19, 2002?
A No.
Q That's a year later?
A No.
Q Why as a good citizen, why didn't you report it to the police?
A Attorney James, up to now I am nervous. I am scared. There is nothing that – this was to me – it was property, what I bought with what little savings I have. I have nothing. Now, I don't have a home. And with all of the things that were happening, they ask – I was speaking to someone and the next thing I know I just said let me just do this because sooner or later they were coming to ask me any way because all of these cases are being dug up.
Q All of this. What other case you know about?
A All the murders that happen up there.

[*Id*. at 100-101].

Q And you went back into your house?
A Yes
Q You didn't get in your car to go and tell the police anything?
A No.
Q And that lasted for 19 months; isn't that correct?
A Yes. That 's correct.

[*Id*. at 105]. On cross examining Police Detective Kenneth Edwards, Ledesma's counsel again drove home to the jury the fact of a 19-month reporting delay. [Id. at 121-22]. During closing arguments, Ledesma's counsel yet again called into question Ascenscio's credibility on this basis. [Tr. Vol. II at 83-84]. This issue was properly developed before the jury to be considered in its credibility determination. Having considered

the fact of the delay, the jury could have accepted Ascensio's explanation that she was in fear for her safety and that of her two children and the fact that living in the midst of a high crime area increased her perceived vulnerability to such reprisal.

C. Denial of Motion for New Trial.

Appellant similarly contends he was improperly denied a new trial based on evidence he discovered following trial which called into question Ascensio's motive for testifying.

The trial court may exercise its discretion to grant a new trial if required in the interest of justice. *See* TERR. CT. R. 135. The court's denial of a motion for a new trial is reviewed for abuse of discretion. *See Government of the V.I. v. Sampson*, 94 F. Supp. 2d 639, 649-51 (D.V.I. App. Div. 2000). To warrant a new trial based on newly discovered evidence, the movant must satisfy the following:

> (1) the motion must allege facts from which the court may infer diligence on the part of the movant;
> (2) the evidence must indeed be newly discovered, meaning discovered since the trial;
> (3) the evidence must not be merely cumulative or impeaching;
> (4) the evidence must be material to the issues involved; and
> (5) the evidence must be of such probative value, and of such nature, that it would probably produce an acquittal if presented at a new trial.

Sampson, 94 F. Supp. 2d at 649-51. All five prongs must be satisfied to obtain such post-trial relief. *Id.*

Ledesma's basis for seeking a new trial below was that he learned information regarding another individual, Kenneth Brown, after that name was mentioned during Ledesma's trial and during an *in camera* conference. [J.A. at Exh. A]. Ledesma's counsel claims he did not know the significance of that name at the time but "got an inclining" [sic] after questioning why that name had been mentioned. [*Id*.]. Counsel said that after some follow up investigation following trial, he came upon "some startling information" which now warrants a new trial to permit him the opportunity to cross-examine Ascensio and Brown. Significantly, the motion for new trial did not reveal the nature of the information to which counsel referred, nor did it point to facts establishing the five-prong test as outlined in *Sampson*. Provided with only the above sketchy facts and reasons in support of the motion, the trial court did not abuse its discretion in denying a new trial based on the lack of a valid basis therefor.

On appeal, Ledesma expands on his reasons supporting the motion for new trial. He now argues on appeal that Ascensio's testimony was motivated by her desire to protect Brown, Ascensio's companion and the father of her children who was facing drug charges in a separate case and who had entered a plea

agreement in that case. Ledesma now claims he had no knowledge of those facts until after the trial had concluded. As an appellate court, we are not inclined to consider facts not presented below. However, even assuming the trial court had before it the specific reasoning Ledesma now presents on appeal in support of a new trial, a new trial would nonetheless be unwarranted.

First, Ledesma's assertion that he did not know about Brown's connection to Ascensio or the fact of Brown's plea agreement is disingenuous, at best. Ledesma acknowledged his counsel inquired at trial about the relevance of Kenneth Brown to the case after that name arose several times during the course of trial. A review of the trial transcript reveals the trial court, apparently *sua sponte*, questioned the government regarding any potential relationship between Ascensio's testimony and the separate prosecution of Brown.

> THE COURT: Before we call the jury into the courtroom, and before any witness testify based on the testimony in this case and the recollection of the Government, recollection of the Court, the Court asked the Government to inquire of the persons involved in the case; Government of the Virgin Islands versus Kenneth Brown, who is allegedly the live-in companion. I don't know of the witness, Ms. Asensio, whether or not any benefits flow to Kenneth Brown as a result of Ms. Asencio's testimony in the case against Mr. Ledesma.
>
> Mr. Evans, you care to report to the Court?

> MR. EVANS: Inquiry was made with Attorney Tracey Christopher of H.I.D.A. [sic][5] today and she represented to me no promise was made to Kenneth Brown by having Ms. Ascendo [sic] to testify in this particular case; two separate and distinct matters; two separate case agent. [sic] One did not have to do with the other.
>
> THE COURT: Ms. Christopher was the prosecuting attorney in the case of Kenneth Brown?
>
> MR. EVANS: I believe she was, Your Honor.
>
> THE COURT: Absolutely no agreement and exchange for the testimony of Ms. Ascensio that any special treatment would be given to Kenneth Brown.
>
> MR. EVANS: That is what was represented to me.
>
> THE COURT: Very well.

[Tr. Vol. II at 40-41]. Thereafter, counsel for Ledesma asked the court who Kenneth Brown was and was told he was the live-in companion of Ascensio who had appeared before the court just a few months earlier to enter a guilty plea in a separate matter. [*Id*. at 41]. Although counsel asserted the information was "shocking news", he represented to the court that he was ready to proceed nonetheless, and the trial continued. [id]. Just prior to the jury charge, the issue of Kenneth Brown again arose.

> THE COURT: You understood the conversation the Court had with the Government's attorney in reference to Ms. Asencio's testimony. Did you understand it?

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[5] This was an apparent reference to the High Intensity Drug Trafficking Area task force (H.I.D.T.A.).

> MR. JAMES: I was not present at that conversation.
>
> THE COURT: Mr. James, before we brought the jury in, I informed you – inquired of the Government whether or not there was any special favors granted to a defendant Kenneth Brown in reference to obtaining the testimony.
>
> MR. JAMES: Yes, that I understood. I heard that.
>
> THE COURT: I just want you to understand clearly what it is about.
>
> MR. JAMES: Very well, sir.

[*Id*. at 58-59]. Given this exchange, Ledesma could not cross even the first hurdle in obtaining a new trial by establishing that the fact of the witness' relationship with the separate defendant or the contents of Brown's plea agreement was newly discovered and could not, with some amount of diligence, be obtained prior to the close of trial. Moreover, Ledesma presented no facts on the record that would tend to establish that the witness' relationship to Brown was probative of the material issues at trial or was likely to lead to acquittal if given another trial. Thus, from the facts asserted, Brown's relationship to the witness would be merely impeaching evidence which, standing alone, cannot serve as a basis for a new trial where the appellant could have discovered the information during trial and exposed those facts on cross examination.

D. Jury Instructions

Ledesma next contends the jury was improperly instructed on

the elements of first degree murder, resulting in an unfair trial. He asserts the court improperly instructed the jury that an intent to harm the victim was a sufficient basis for their finding of guilt on the charge of murder first degree. Ledesma does not assert, nor does the record reflect, that he objected to the instruction at trial.[6] Therefore, our review is limited to plain error. *See* FED. R. CRIM. P. 30[7]; FED. R. CRIM. P. 52(b).[8] "Plain error[s]" are those errors that undermine substantial rights and contribute to a "miscarriage of justice" or an unfair trial. *Government of V.I. v. Albert*, 89 F.Supp.2d 658, 666 (D.V.I. App. Div. 1999)(citation omitted)*; see also Sanchez v. Government of V.I.,* 921 F.Supp. 297, 300 (D.V.I.App. Div. 1996)(defining plain error as those errors that "seriously affect the fairness, integrity, or public reputation of judicial

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[6] Ledesma raised no objection at a charge conference, [*See* Tr. Vol. II at 64], and also indicated following the charge to the jury that he had no objection to the instructions as delivered.

[7] That rule provides:

> A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

FED.R.CRIM. P. 30(d).

[8] Rule 52(b) provides that, "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

proceedings"); *United States v. Olano,* 507 U.S. 725, 732 (1993)(plain error exists where a legal rule has been violated without a valid waiver by the defendant, the error was clear or obvious, and must have affected substantial rights of the defendant).

With regard to murder in the first degree, the trial court instructed the jury as follows:

> In Count I, the defendant is charged with murder in the first degree, in that the Government alleges that on or about January 19, 2001, in the vicinity of the Pink Punky Bar in Christiansted, St. Croix, Virgin Islands, the defendant, Michael Ledesma, with malice aforethought, did unlawfully and with willfully deliberate [sic] and premeditated design kill Kenville Mills, Jr., a human being, by shooting him with a firearm, in violation of the laws of the Virgin Islands.

[Tr. Vol. III at 14).

> Murder in the first degree occurs when there is an unlawful, willful, deliberate, premeditated killing of a human being with malice aforethought. Malice aforethought means an intent, at the time of the killing, willfully to take the life of a human being, or an intent willfully to act in a callous and wanton disregard of the consequences of human life. But malice aforethought does not necessarily imply any ill will, spite, or hatred toward the individual killed. Malice is a term, as used here, is but another name [sic] for a certain state or condition of a person's mind or heart . . . .

[*Id*. at 15-16]. The court then went on to define "premeditation" and instructed the jury that "any interval of time between the forming *of the specific intent to kill* and the execution of that

intent which is of sufficient duration for the accused to be fully conscious and mindful of what he intended willfully to set about is sufficient to justify a finding of premeditation." [*Id*. at 16-17](emphasis added). Finally, the court instructed the jury of the following essential elements which the Government was required to prove to establish the defendant's guilt for the crime of murder first degree:

> That the defendant, and no other person, unlawfully killed Kenville Mills, Jr.;
> That the defendant and no other person, acted willfully and with malice aforethought;
> And that the defendant acted with premeditation and deliberation, and that the defendant knowingly used a firearm to kill Kenville Mills, Jr.;
> And the acts took place on or about January 19, 2001, on St. Croix, Virgin Islands.
> If it is shown that the defendant used a deadly weapon in the commission of the homicide – and a firearm is by law a deadly weapon – then you may find from the use of such weapon, in the absence of mitigating circumstances, the existence of malice, which is an essential element of the offense.

[Tr. Vol. III at 19-20]. Following the reading of the instructions, Ledesma indicated to the court he had no objection to the instructions as read. [*Id*. at 32].

The above instruction to the jury, and its definition of the state of mind necessary for a finding of guilt, did not deviate from what is required by the Virgin Islands murder statute and the relevant caselaw. *See e.g., Government of V.I.*

v. Lake, 362 F.2d 770,774-76 (3d Cir. 1966); *Rosa v. Government of V.I.*, 307 F.Supp.2d 695(D.V.I. App. Div. 2004). Nowhere in the instruction, as reflected in the record, does the trial court refer to an intent to do bodily harm or to injure as a permissible basis for establishing Ledesma's guilt for murder in the first degree, as Ledesma argues. Ledesma's challenge to the jury instruction is, therefore, based on a misapprehension of the record and no error – much less plain error – may be found.

III. CONCLUSION

Ledesma failed to establish a new trial was warranted under the applicable standards or that the jury was improperly instructed that murder in the first degree could be found based on an intent to merely harm the victim. Moreover, Ledesma's challenge to the testimony of a government witness goes to credibility and weight, rather than to admissibility of the testimony. Therefore, for the foregoing reasons, Ledesma's conviction and the trial court's denial of his motion for new trial will be affirmed.

A T T E S T:

WILFREDO F. MORALES
Clerk of the Court

By:_____
Deputy Clerk

NOT FOR PUBLICATION

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ATTORNEYS:
G. Luz A. James, Esq.
St. Croix, U.S.V.I.
Attorney for Appellant.

Maureen Phelan, AAG
St. Croix, U.S.V.I.
Attorney for Appellee.

ORDER OF THE COURT

PER CURIAM.

AND NOW, for the reasons more fully stated in a Memorandum Opinion of even date, it is hereby

ORDERED that the appellant's conviction is **AFFIRMED**.

SO ORDERED this 6th day of October, 2004.

A T T E S T:

WILFREDO F. MORALES
Clerk of the Court

By:_____
Deputy Clerk

Copies (with accompanying Memorandum Opinion) to:
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