

Not For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

LEMUEL PHILLIPS, ) S. Ct. Crim. No. 2008-017  
) Re: Super. Ct. Crim. No. 90/2007  
Appellant/Defendant, )  
)  
)  
v. )  
)  
PEOPLE OF THE VIRGIN ISLANDS, )  
)  
)  
Appellee/Plaintiff. )  
\_\_\_\_\_ )

On Appeal from the Superior Court of the Virgin Islands  
Argued: July 8, 2009  
Filed: February 11, 2010

**BEFORE:** MARIA M. CABRET, Associate Justice; IVE ARLINGTON SWAN, Associate Justice, and AUDREY L. THOMAS, Designated Justice.<sup>1</sup>

**ATTORNEYS:**

**Clive Rivers, Esq.**  
The Law Offices of Clive Rivers  
St. Thomas, U.S.V.I.  
*Attorney for Appellant*

**Pamela R. Tepper, Esq.,**  
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St. Thomas, U.S.V.I.  
*Attorney for Appellee*

**OPINION OF THE COURT**

**PER CURIAM.**

Appellant, Lemuel Phillips, was involved in a long-standing dispute with his neighbor, Julian Industrious. The dispute escalated into a confrontation in which Phillips pointed a gun at

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<sup>1</sup> Chief Justice Rhys S. Hodge is recused from this matter. The Honorable Audrey L. Thomas of the Superior Court has been designated in his place pursuant to title 4, section 24(a) of the Virgin Islands Code.

Industrious and Industrious's landscaper and threatened to shoot the two men. After the confrontation, the People of the Virgin Islands charged Phillips with, among other crimes, two counts of third degree assault. Following a bench trial on the charges, the Superior Court found Phillips guilty. Phillips filed the instant appeal challenging the sufficiency of the evidence supporting his convictions. For the reasons which follow, the Superior Court's judgment of conviction is affirmed.

### **I. FACTS AND PROCEDURAL BACKGROUND**

The record reveals that on the morning of March 24, 2007, Industrious had a landscaper, Dave Bryan, trimming a hedge atop an eight foot wall along the boundary line separating Industrious's property from Phillips's property. As Bryan trimmed the hedge, cuttings fell onto Phillips's side of the property line. At some point, Bryan looked up and saw Phillips pointing a gun at him. After Phillips threatened to shoot Bryan, Bryan retreated from the wall and reported to Industrious what had occurred. When Industrious went to investigate the matter, Phillips pointed the gun at him and threatened: "if you cut another piece of the bush today will be your last day around." (J.A. at 48.) Industrious then called the police, who arrested Phillips after investigating the complaint. Based on the incident, the People of the Virgin Islands charged Phillips with two counts of assault in the third degree under title 14, section 297(2) of the Virgin Islands Code.<sup>2</sup>

On January 29, 2008, the Superior Court conducted a bench trial on the charges. At the trial, the People presented testimony from Bryan, Industrious, and the police officer who

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<sup>2</sup> The People also charged Phillips with two counts of carrying or using dangerous weapons with intent to use the same unlawfully against another during the commission of a crime of violence, pursuant to title 14, section 2251(a)(2)(B). At the close of the evidence, however, the court granted the People's motion to dismiss the two weapons charges.

responded to the reported assault. Bryan testified that he was trimming a hedge along the property line when he heard the sound of a gun being cocked. Bryan looked up and saw Phillips pointing a gun directly at him. Bryan described the gun as “like a black rifle.” (J.A. at 22.) According to Bryan, Phillips threatened to shoot him if he continued cutting the hedge. Bryan immediately retreated down the wall and told Industrious what had happened.

Industrious testified that he was outside in his yard when Bryan told him there was a man with a gun up on the wall. Industrious took the shears that Bryan had been using to trim the hedge and climbed up a ladder to the top of the wall to see what was going on. Industrious stated that he encountered Phillips, who raised a gun, pointed it at him, and threatened: “if you cut another piece of that bush today will be your last day around.” (J.A. at 48.) Industrious then got off the wall and called the police. Industrious described the gun as a brown “shotgun,” but stated that he is not very familiar with guns. (J.A. at 47.)

The final witness for the People was the police officer who responded to the call, Officer Sharmen Williams. Officer Williams stated that during her investigation, she asked Phillips whether he owned any guns, and Phillips produced two rifles. Officer Williams testified that she showed the two rifles to Bryan and Industrious and asked whether they could identify the gun that Phillips reportedly pointed at them. According to Officer Williams, Bryan and Industrious both answered that they were not “too sure exactly which rifle it was.” (J.A. at 72.)

Phillips presented the testimony of several witnesses in his defense, including his wife, Rochelle Phillips (“Rochelle”), who was at home with Phillips when the confrontation occurred.<sup>3</sup>

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<sup>3</sup>In addition to Rochelle, Phillips called three witnesses to testify about title issues related to his property and Industrious’s property. The ongoing dispute between the two neighbors is apparently attributable, at least in part, to Phillips’s claim that he owns part or all of the land on which Industrious’s home is located. Phillips also called a

Rochelle testified that she observed her husband walk over to the hedge along the property line, “holding a rifle in his hand” and speak to someone there. (J.A. at 99.) Rochelle could not hear what Phillips was saying, but stated that at no point did she observe him pointing the gun at anyone.

At the end of the trial, Phillips moved for judgment of acquittal, asserting, among other arguments, that the evidence was insufficient to sustain a conviction because significant conflicts in the testimony of Industrious and Bryan rendered all of their testimony totally unbelievable.<sup>4</sup> Specifically, Phillips pointed to testimony from Bryan in which he stated that he had known Industrious for “about three years” and worked for him once every two weeks to a month during that period. (J.A. at 17.) Conflicting with this testimony, Industrious stated that he first met Bryan “a week or two” before the confrontation, and that the day of the confrontation was the first time Bryan had worked for him. (J.A. at 52.) Based on this conflict, Phillips argued, Industrious and Bryan were “impossible to believe.” (J.A. at 189.)

In ruling on the motion, the trial judge stated: “I have considered the fact that there are significant inconsistencies between the testimony of Mr. Bryan and Mr. Industrious, however, I find that the substantial portions of those inconsistencies are not material to the issues before the Court.” (J.A. at 202.) The court further found that Bryan “appeared . . . unwavering in his commitment that the events had occurred as he describe[d] them,” (J.A. at 204) and made a similar finding concerning the testimony of Industrious. Believing that the long-standing property dispute between Phillips and Industrious provided a credible motive for the assaults, the

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former tenant of his as a witness. The former tenant testified that he believed Industrious killed a flamboyant tree which was growing on Phillips’s property near the property line.

<sup>4</sup> Phillips raised the same argument in moving for a judgment of acquittal at the close of the People’s case. The Superior Court denied that motion.

Superior Court denied Phillips's motion for judgment of acquittal and subsequently found him guilty on both charges of assault in the third degree with a deadly weapon.<sup>5</sup> Phillips filed this appeal, again arguing that the evidence was insufficient because the testimony of the two victims who testified against him was conflicting to the point that neither witness should have been believed.<sup>6</sup> We disagree.

## II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction to review the Superior Court's judgment and commitment pursuant to title 4, section 32(a) of the Virgin Islands Code which provides 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."

In reviewing Phillips's challenge to the sufficiency of the evidence,

we apply a particularly deferential standard of review. Following a criminal conviction, we view the evidence presented at trial in a light most favorable to the People. We will affirm a conviction if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

*Smith v. People*, S.Ct. Crim. No. 2007-078, 2009 WL 1530694, at \*1 (V.I. May 19, 2009) (citations and quotation marks omitted); *accord Latalladi v. People*, S.Ct. Crim. No. 2007-090, 2009 WL 357943, at \*5 (V.I. Feb. 11, 2009).

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<sup>5</sup> The Superior Court convicted Phillips of two counts of assault in the third degree under title 14, section 297(2) of the Virgin Islands Code. This section provides: "Whoever, under circumstances not amounting to an assault in the first or second degree . . . assaults another with a deadly weapon" is guilty of assault in the third degree. V.I. CODE ANN. tit. 14, §297(2) (1996). Assault is defined under title 14, section 291(2) as making a "threatening gesture showing in itself an immediate intention coupled with an ability to commit a battery." The court, sitting as fact-finder, found that "Phillips made a threatening gesture that showed in itself an immediate intention coupled with an ability to commit a battery upon [Bryan and Industrious] by pointing a gun in [their] general direction and indicating to [them] that if [they] continued to cut that bush it would be the last time . . ." (J.A. at 205-06.)

<sup>6</sup> In his appellate brief, Phillips also asserted that the evidence was insufficient because the People failed to establish that the rifle he pointed at the victims was a deadly weapon. However, at oral argument Phillips expressly abandoned this assertion.

### III. DISCUSSION

Under this deferential standard, we find that the evidence presented at trial was sufficient to sustain Phillips's convictions. Bryan and Industrious both testified that Phillips pointed a gun at them and threatened to shoot them. Their testimony was partially corroborated by Phillips's wife, Rochelle, who stated that she saw Phillips approach the hedge with a rifle and talk to someone. As we pointed out in *Smith*, by pointing to conflicts in the evidence Phillips

is clearly asking this Court to weigh the evidence and judge the credibility of certain witnesses. On appeal, we do neither. To the extent that there were conflicts in the testimony, these conflicts presented credibility issues for the trier of fact to resolve. We are not at liberty to substitute our own credibility determinations for those of . . . the trier of fact. Thus, on appeal, this Court resolves such conflicts in favor of the conviction. The reasonable doubt which will prevent conviction must be the trier of fact's doubt and not that of this Court.

*Smith*, 2009 WL 1530694, at \*3.

The Superior Court was clearly entitled to believe the testimony of the two victims in this case, and apparently did, despite the conflicts in their testimony. Under these circumstances, we find no merit in Phillips's assertion that the conflicts in the testimony of Bryan and Industrious rendered the evidence insufficient to sustain his convictions.

### IV. CONCLUSION

We conclude that the evidence was sufficient for the Superior Court, as the trier of fact, to find Phillips guilty of both charges of assault in the third degree beyond a reasonable doubt. Although there were conflicts in the evidence, on appeal we do not resolve conflicts, weigh the evidence, or assess witness credibility. The Superior Court, as fact finder, properly made these determinations. Accordingly, we affirm Phillips's convictions on both charges of assault in the third degree.

**DATED this 11th day of February, 2010.**

**ATTEST:**  
**VERONICA J. HANDY, ESQ.**  
**Clerk of the Court**