For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

AKEAM K. DAVIS, Appellant/Defendant, v. **PEOPLE OF THE VIRGIN ISLANDS** Appellee/Plaintiff.	)	**S. Ct. Crim. No. 2015-0124** Re: Super. Ct. Crim. No. F314/2014 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Adam G. Christian

Argued: July 12, 2016
Filed: July 27, 2018

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

APPEARANCES:

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OPINION OF THE COURT

CABRET, Associate Justice.

Akeam Davis ("Akeam")[1] appeals his convictions for aiding and abetting the unauthorized use of a firearm during the commission of a crime of violence, V.I. CODE ANN. tit. 14, §§ 11(a), 2254(a), aiding and abetting third-degree assault, 14 V.I.C. § 11(a), 297(4), and aiding and abetting reckless endangerment in the first degree, 14 V.I.C. §§ 11(a), 625(a), which are memorialized in a judgment entered by the Superior Court on December 8, 2015. For the reasons that follow, we affirm in part, and reverse in part, the Superior Court's December 8, 2015 judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 27, 2014, Akeam drove his brother, Michael Davis, to the Frydenhoj ballpark on St. Thomas, where Khiry Crooke was located. Upon reaching the ballpark, the pair exited Akeam's vehicle. Akeam stayed by the passenger door, holding a gun in his left hand. Michael, also with a firearm, walked away from the vehicle and past Crooke. Eventually, Michael turned around, approached Crooke, and asked him why he did not run. Crooke began walking in the opposite direction of Akeam's vehicle, toward a tree. He bent down to pick up a rock, and Michael shot him once in the chest. Akeam and Michael then left the scene.

On the following day, June 28, 2014, the Virgin Islands Police Department arrested Akeam. By information filed August 19, 2014, the People charged Akeam with, among other things, third-degree assault, unauthorized use of a firearm during the commission of a third-degree assault, and reckless endangerment in the first degree. By discovery request dated January 14, 2015, Akeam

[1] Akeam Davis and his brother, Michael Davis, were both charged in a second amended information dated August 10, 2015 concerning several offenses they allegedly committed together and arising out of the shooting of the victim, Khiry Crooke, on June 27, 2014. They were tried together before a jury over three days in August of 2015, and were each found guilty of several of these charges. In the December 8, 2015 judgment, the Superior Court ruled on various post-trial motions filed by each of the brothers, and imposed sentences upon them for the crimes for which they had each respectively been found guilty. Both brothers filed timely individual appeals from the December 8, 2015 judgment, and both appeals are currently before this Court for consideration. For clarity, in this opinion we refer to each of the Davis brothers by their first names.

requested "all police reports . . . relating to or connected with the investigation of the present matter and/or the arrest and prosecution" of Akeam.

Before the trial of this matter, Michael approached Crooke on June 11, 2015 and asked Crooke to speak. Crooke stated that he would talk in court, and Michael responded by stating "see if you make it to court." Crooke reported this exchange to the police, which the police memorialized in a June 12, 2015 report. As a result of his interaction with Michael on June 11, 2015, Crooke stayed inside for several days, but ultimately left St. Thomas until it was time for the trial of this matter. Despite Akeam's earlier discovery request, the People did not provide him with a copy of the June 12, 2015 police report during discovery.

On June 9, 2015, the Superior Court consolidated this case with the People's case against Michael and the joint trial for this matter began on August 10, 2015. On the first day of the trial, the People filed a second amended information, which charged Akeam with, among other offenses, aiding and abetting third-degree assault, aiding and abetting the unauthorized use of a firearm during the commission of a crime of violence, and aiding and abetting reckless endangerment.

During the trial, Crooke testified to the events that occurred on June 27, 2014, specifically noting that Akeam drove his vehicle to the ballpark and stood by the driver's-side door with a firearm while Michael approached and shot him. The jury also heard testimony that Akeam and Michael left the scene in Akeam's vehicle "with such speed," but no witness identified the driver of Akeam's vehicle as it left the scene. After taking testimony from several other witnesses, the People recalled Crooke to the stand. This time Crooke testified to the exchange he had with Michael on June 11, 2015. In order to refresh Crooke's memory about the date on which he filed the police report, the People showed the June 12, 2015 police report to Crooke, who then recalled the date on which he filed the report. The People did not offer the report into evidence. Following

the conclusion of Crooke's testimony, Akeam requested a limiting instruction that all testimony concerning Michael's June 11, 2015 threat against Crooke be excluded as to himself. The Superior Court granted his request and immediately instructed the jury to disregard Crooke's testimony with regard to Akeam. Following the conclusion of Crooke's testimony, the People rested.

Akeam then moved for a judgment of acquittal, attacking the sufficiency of the People's evidence. The Superior Court denied Akeam's motion, reasoning that the People presented testimony indicated that Akeam drove Michael to the scene and stood by his vehicle while Michael approached and shot Crooke, and concluding that this evidence was sufficient to conclude that Akeam knew that Michael intended to shoot Crooke and facilitated his action. Michael then proceeded to put on his defense, and Akeam presented his defense after Michael rested.

After the close of the evidence, Akeam moved for a mistrial. He argued that the People's failure to disclose the June 12, 2015 police report, coupled with Crooke's testimony concerning Michael's threat, was so prejudicial that a mistrial was warranted. The Superior Court reserved ruling on this motion. It then discussed a proposed jury instruction concerning Crooke's testimony regarding Michael's threats. Neither Akeam nor Michael objected to the proposed instruction, which prohibited the jury from considering Crooke's testimony concerning Michael's threats with respect to both defendants.

Following closing arguments, the Superior Court instructed the jury on the elements of each offense charged against each defendant. Specifically, the Superior Court provided the following instruction with respect to Akeam:

> In count 9 of the Second Amended Information, the People of the Virgin Islands allege that on or about June 27, 2014, in St. Thomas, Virgin Islands, Akeam K. Davis, unauthorized by law, had, bore, possessed, transported, or carried by or under the proximate control of such person, either actually or constructively, openly or concealed a firearm as defined in 23 V.I.C. § 451(d), or an imitation thereof,

> loaded or unloaded, during the commission or attempted commission of a crime of violence as defined by 23 V.I.C. § 451(e), including, but not limited to, attempted first-degree murder, first-degree assault, and third-degree assault, as set forth above, to wit, he participated in the use of a firearm that was not licensed to him in an assault to Khiry Crooke, in violation of V.I. Code Annotated Title 14 Section 2253(a); V.I. Code Annotated Title 14 Section 11 subsection (a). Unauthorized use of a firearm during the commission of a crime of violence.
>
> In order to sustain its burden of proof for the crime of aiding and abetting using a dangerous weapon during the commission of a crime of violence as set forth in [c]ount 9 of the Second Amended Information against Defendant Akeam K. Davis, the People of the Virgin Islands must prove beyond a reasonable doubt: (1), on or about June 27, 2014; (2) in St. Thomas, Virgin Islands; (3), the crime of unauthorized use of a firearm during the commission of a crime of violence, in the course of the attempted murder or first-degree assault on, or third-degree assault on Khiry Crooke, in fact occurred; (4), Defendant Akeam Davis knew that the crime had been committed; (5), he took an act in furtherance of that crime; and, (6), he intended to facilitate that crime.

The Superior Court finished reading the instructions and directed that the jury begin deliberations. The jury returned a verdict of guilty against Akeam on count 8, aiding and abetting third-degree assault; count 9, aiding and abetting the unauthorized use of a firearm during the commission of a crime of violence; and count 10, aiding and abetting reckless endangerment in the first degree.

Following his convictions, Akeam filed a motion for judgment of acquittal, arguing that the evidence was insufficient to sustain his convictions. Akeam appeared before the Superior Court for sentencing on November 18, 2015. During the sentencing hearing, the Superior Court orally denied Akeam's motion for a mistrial, and his motion for a judgment of acquittal. The Superior Court reduced the decisions on those motions to writing in its judgment, which was entered on December 8, 2015. Akeam filed a timely notice of appeal on December 22, 2015.

II. JURISDICTION

We have jurisdiction "over all appeals rising from final judgments, final decrees or final orders of the Superior Court." V.I. CODE ANN. tit 4, § 32(a). In a criminal case, the written judgment embodying the adjudication of guilt and the sentence imposed based on that adjudication

constitutes a final judgment for purposes of this statute. *Williams v. People*, 58 V.I. 341, 345 (V.I. 2013) (citing cases). The Superior Court's judgment and commitment in this case, entered on December 8, 2015, was therefore a final judgment from which an appeal lies. *See Francis v. People*, 59 V.I. 1075, 1078 (V.I. 2013). Accordingly, we have jurisdiction over this appeal.

III. DISCUSSION

Akeam argues that the Superior Court erred in denying his motion for judgment of acquittal. He also argues that the Superior Court abused its discretion in denying his motion for mistrial. Finally, Akeam challenges the propriety of the jury instruction given on count 9, aiding and abetting the unauthorized use of a firearm during the commission of a crime of violence. We consider each challenge in turn.

A. Motion for Judgment of Acquittal

Akeam argues that the Superior Court committed reversible error in denying his motion for judgment of acquittal on counts 8, 9, and 10 due to an insufficiency of evidence to support convictions on those counts. The People contend that they introduced sufficient evidence to convict Akeam on all three counts. In reviewing the Superior Court's denial of a motion for judgment of acquittal based on the sufficiency of the evidence, we exercise plenary review and apply the same standard as the Superior Court. *Thomas v. People*, 60 V.I. 183, 191 (V.I. 2013); *Fontaine v. People*, 59 V.I. 640, 648 (V.I. 2013). Our review is highly deferential to the jury's verdict, and we view the evidence in the light most favorable to the People. *Thomas*, 60 V.I. at 191 (citing *Augustine v. People*, 55 V.I. 678, 684 (V.I. 2011)); *Stevens v. Virgin Islands*, 52 V.I. 294, 304 (V.I. 2009) (quoting *Smith v. People*, 51 V.I. 396, 397–98 (V.I. 2009)). We will affirm a conviction if any rational trier of fact could have found the essential elements of the crime were

proven beyond a reasonable doubt. *Stevens*, 52 V.I. at 304. We review each of the three challenged counts in turn.

1. Count 8: aiding and abetting third-degree assault

In order to establish the offense of aiding and abetting, the People must prove beyond a reasonable doubt "that the substantive crime has been committed and that the defendant knew of the crime and attempted to facilitate it, and that the defendant had the specific intent to facilitate it." *See Brown v. People*, 54 V.I. 496, 505 (V.I. 2010) (collecting cases). Akeam only argues that the People failed to introduce any evidence regarding his intent to facilitate the crime of third-degree assault. He does not challenge the sufficiency of the evidence to sustain any other element of the offense charged in count 8.[2] The Superior Court concluded that a jury could reasonably infer that Akeam aided and abetted Michael by "acting as a guard and in transporting [him] to, and by inference, the [j]ury could find, away from the scene." The People urges us to affirm the judgment of the Superior Court on this count because Akeam transported Michael to Crooke's location.

It is true that the People presented no direct evidence of Akeam's intent to aid and abet Michael's assault of Crooke. This is not fatal to their case, however, because there is often no direct evidence of a person's intent. *See Rose v. Clark*, 478 U.S. 570, 581 (1986) (observing that in "many cases ... there is no direct evidence of intent"). Instead, the conclusion that someone acted with a particular intent is typically established through circumstantial evidence, *see Phillip v. People*, 58 V.I. 569, 585–86 (V.I. 2013) (citing *Ibrahim v. Gov't of the V.I.*, 47 V.I. 589, 598 (D.V.I. App. Div. 2005)), and the jury may infer intent from that evidence. *See, e.g.*, *Ostalaza v. People*, 58 V.I. 531, 549 (V.I. 2013).

[2] Accordingly, all such arguments are waived for purposes of appeal. V.I. R. APP. P. 4(h).

Here, the People introduced evidence that Akeam drove Michael to Crooke's location and stood by his vehicle holding a weapon that was visible to Crooke while Michael approached and eventually shot Crooke. From this evidence, a reasonable juror could infer that Akeam intended to facilitate Michael's assault by standing guard and preventing Crooke from escaping. *See, e.g.*, *People v. Ross*, No. D058377, 2012 WL 1132121, at *19 (Cal. Ct. App. Apr. 5, 2012) (unpublished) (the jury could infer that the defendant intended to assist a gunman by standing guard, ensuring that the victims would be unable to leave the apartment in which they were confined); *People v. Butts*, 46 Cal. Rptr. 362, 374 (Cal. Ct. App. 1965) (a defendant who serves as an ally and "stands by to assist" an aggressor may demonstrate intent to aid and abet the aggressor (citations omitted)); *State v. Chambers*, 998 S.W.2d 85, 91 (Mo. Ct. App. 1999) (conduct of a defendant was "consistent with the status of an aider and abettor" when the defendant, among other things, prevented the victim from leaving during an assault); *State ex rel. Juvenile Dep't of Washington Cty. v. Saechao*, 2 P.3d 935, 941 (Or. Ct. App. 2000) (a reasonable jury could infer that a defendant aided and abetted an assault by sealing off the victim's escape route); *State v. Koester*, 519 N.W.2d 322, 324–25 (S.D. 1994) (evidence that defendant drove one of the vehicles that boxed the victims in, subjecting the victims to swinging baseball bats and sticks, constituted evidence of intent to aid and abet the assault of the victims). Consequently, the jury was presented with sufficient evidence to infer that Akeam intended to aid and abet Michael's third-degree assault of Crooke, and his conviction under count 8 is affirmed.

2. Count 9: aiding and abetting the unauthorized use of a firearm during the commission of a crime of violence

Akeam claims that the People presented no evidence that he either knew that Michael possessed a firearm, or that he transported Michael on the day in question with the specific intent

to facilitate Michael's use of a firearm. Akeam argues that our decision in *People v. Clarke*, 55 V.I. 473 (V.I. 2011) requires the People to prove beyond a reasonable doubt that his actions linked him to Michael's use of a firearm. Akeam claims that the People can only establish such a link by "an overly attenuated piling of inference upon inference" that is impermissible under our case law.

Where the People charge a defendant with aiding and abetting the unauthorized use of a firearm during the commission of a crime of violence, the People must link the alleged aider and abettor to the firearm. *See Clarke*, 55 V.I. at 483 ("linking [the defendant] to the firearm was necessary," and the People's failure to present evidence that the defendant knew or facilitated his codefendant's possession of a firearm necessitated a judgment of acquittal in the defendant's favor); *accord United States v. Sorrells*, 145 F.3d 744, 753–54 (5th Cir. 1998) ("The link to the firearm is necessary because the defendant is punished as a principal for 'using' a firearm in relation to [another] offense, and therefore must facilitate in the 'use' of the firearm rather than simply assist in the crime underlying the [use or carrying of a firearm] violation."); *see generally United States v. Bowen*, 527 F.3d 1065, 1079 (10th Cir. 2008) (collecting cases). The People cannot create this link by drawing inferences from other inferences. *See Clarke*, 55 V.I. at 481–82 (explaining that the jury would have to infer their conclusion from a second inference that was, in turn, based on a third inference); *id.* at 483 (concluding that this type of reasoning could not support a guilty verdict). However, "the jury is entitled to draw reasonable inferences of knowledge or intent from the actions of the defendant" in order to create this link. *See United States v. Lopez-Urbina*, 434 F.3d 750, 758 (5th Cir. 2005) (citing *Sorrells*, 145 F.3d at 754).

Here, the People introduced evidence that Akeam drove Michael to Crooke's location, that the vehicle driven by Akeam belonged to him, and that Michael exited the passenger's side of the vehicle and was carrying a pistol in his left hand. The People also introduced evidence that Akeam

stood by the driver's side door and that Michael and Akeam drove away from the scene. From Michael's status as a passenger in Akeam's vehicle and his possession of a gun before shooting Crooke, a reasonable jury could find beyond a reasonable doubt that Akeam knew that Michael possessed a weapon when Akeam drove him to Crooke's location. *See United States v. Wix*, 416 Fed. App'x 338, 344 (5th Cir. 2011) (concluding that a reasonable jury could infer that defendant acted with the knowledge and specific intent of advancing the use of the firearm by driving himself and his codefendant to the scene of the crime and exiting the vehicle with his codefendant, who was holding a firearm at the time he exited the vehicle). Coupled with this inference, the fact that Akeam drove Michael to Crooke's location indicates that Akeam took some action to facilitate Michael's transport and use of the firearm against Crooke. *See United States v. Woods*, 148 F.3d 843, 848 (7th Cir. 1998) ("[O]nce knowledge is established, merely transporting [the principal] and the firearm to the scene of the crime amounts to facilitation."); *Bazemore v. United States*, 138 F.3d 947, 950 (11th Cir. 1998) ("As the owner and driver of the automobile which carried both [the principal] and the gun . . . [the defendant] was vital to the transportation of the weapon.").

Based on the facts presented, the jury was only required to infer that Akeam knew that Michael possessed a weapon before arriving at Crooke's location. The jury was not required to draw any inferences from that inference, so this case does not resemble the stacking of inferences upon inferences that we found impermissible in *Clarke*. Because a reasonable jury could have inferred from the evidence that Akeam knew that Michael possessed a firearm before driving him to Crooke's location, the People presented sufficient evidence to link Akeam to the firearm that shot Crooke, and we therefore affirm his conviction under count 9.

3. Count 10— aiding and abetting reckless endangerment in the first degree

Akeam argues that the People failed to introduce any evidence regarding his intent to facilitate the crime of reckless endangerment in the first degree. He claims that his presence, with an alleged firearm, does not establish intent to facilitate Michael's reckless endangerment in the first degree. Akeam does not challenge the sufficiency of the evidence to sustain any element of count 10 aside from the intent requirement. The People do not specifically address the element of intent, but argue that Akeam's presence at Crooke's location with Michael while in possession of a firearm is sufficient to sustain his conviction under count 10.

A conviction for aiding and abetting cannot stand unless the People prove beyond a reasonable doubt that the defendant "had the specific intent to facilitate" the underlying crime. *See Brown*, 54 V.I. at 505. The People need not prove intent with direct evidence. Rather, as noted above, the prosecution typically establishes the element of criminal intent through circumstantial evidence, *see Phillip*, 58 V.I. at 585–86 (citing *Ibrahim*, 47 V.I. at 598), and the jury may infer intent from that evidence. *See, e.g.*, *Ostalaza*, 58 V.I. at 549. We have previously found that discharging a firearm in a public place demonstrates sufficient intent to aid and abet reckless endangerment. *See Freeman v. People*, 61 V.I. 537, 542–43 (V.I. 2014) (finding sufficient evidence to convict defendant as both a principal and an aider-and-abettor of reckless endangerment).

A jury can infer intent to aid and abet a crime when a defendant transports a principal to the crime scene with knowledge that the principal has a weapon and plans to use it. *See State v. Llamas*, 311 P.3d 399, 401–02 (Kan. 2013); *People v. Moore*, 679 N.W.2d 41, 52 (Mich. 2004); *People v. McGee*, 930 N.Y.S.2d 117, 118-19 (N.Y. App. Div. 2011); *State v. Lark*, No. W2007-00684-CCA-R3-CD, 2009 WL 586073, at *5 (Tenn. Crim. App. Mar. 5, 2009) (unpublished);

State v. Trujillo, 49 P.3d 935, 945 (Wash. Ct. App. 2002). Here, the People introduced evidence that Akeam drove Michael to Crooke's location and stood by his jeep holding a weapon that was visible to Crooke while Michael approached and eventually shot Crooke. The People also introduced evidence that Michael exited Akeam's vehicle on the passenger side with a weapon in his left hand that was visible. From this evidence, a reasonable juror could infer that Akeam knew that Michael possessed a firearm before they reached Crooke's location, and consequently, that Akeam intended to facilitate the discharge of Michael's firearm by driving him to Crooke's location. Therefore, we reject Akeam's argument that the People failed to introduce sufficient evidence to establish his specific intent to facilitate the crime of reckless endangerment beyond a reasonable doubt.

However, as discussed above, the first element of the crime of aiding and abetting requires the People to prove that the underlying, substantive crime has been committed. *See Brown*, 54 V.I. at 505. Consequently, Akeam's conviction for aiding and abetting the crime of reckless endangerment can only stand if we conclude that the People introduced sufficient evidence to prove that Michael actually committed the underlying crime of reckless endangerment. Akeam has not challenged the finding that Michael was guilty of reckless endangerment in the first degree, so that argument is waived for purposes of appeal. V.I. R. APP. P. 4(h); 22(m). Nevertheless, we may consider any issue not raised if required by the interests of justice. V.I. R. APP. P. 4(h). And because we conclude, for the reasons expressed in our opinion in Michael Davis's appeal, S. Ct. Crim. No. 2015-0121, filed contemporaneously herewith, that the People failed to introduce sufficient evidence to establish that Michael discharged his weapon in a public place, the interests of justice compel us to reverse Akeam's conviction under count 10 because proof of an essential element—the commission of the underlying offense—is absent.

B. Motion for Mistrial

We review the Superior Court's denial of a motion for a mistrial for an abuse of discretion. *George v. People*, 59 V.I. 368, 377 (V.I. 2013). "A mistrial is an extreme sanction for a discovery violation and is to be avoided unless the fundamental fairness of the trial itself is at stake." *Cornett v. State*, 389 S.W.3d 47, 51 (Ark. 2012).

Akeam argues that the Superior Court abused its discretion in denying his motion for a mistrial in three respects. First, he claims that the Superior Court should have found that he was entitled to the production of the June 12, 2015 police report. Second, he argues that the Superior Court failed to consider the factors set forth in *People v. Rodriguez*, S. Ct. Crim. No. 2009–028, 2010 WL 1576441, at *4 (V.I. Apr. 14, 2010) (unpublished), when determining how to address the People's alleged failure to disclose the police report. Third, he challenges the Superior Court's conclusion that its curative instructions were sufficient to cure any prejudice that he may have suffered. The People contend that Akeam was not entitled to production of the police report because it was a statement made by one of the People's witnesses. The People contend that the Superior Court weighed the *Rodriguez* factors when determining how to address the discovery violation. Finally, the People contend that the Superior Court correctly concluded that the curative instruction was sufficient. We address each of Akeam's three arguments in turn.

First, we consider Akeam's allegation that the Superior Court erred by concluding that it was unclear whether he was entitled to the police report. Upon request, a defendant is entitled to the production of documents in the People's possession that are material to the preparation of his defense. *See Rodriguez*, 2010 WL 1576441, at *3–4. Information is material so long as it helps the defendant prepare a defense or causes a defendant to abandon a planned defense. *See United States v. Hernandez-Meza*, 720 F.3d 760, 768 (9th Cir. 2013). Police reports may be material to the

preparation of a defense, *United States v. Fort*, 472 F.3d 1106, 1110 (9th Cir. 2007), especially when the report may aid in cross-examination of a witness. *See, e.g.*, *Flores v. Demskie*, 215 F.3d 293, 302–03 (2d Cir. 2000); *Mercado v. Gonzalez*, No. CV 08-04285 MMM (SS), 2009 WL 6418268, at *6 (C.D. Cal. Sept. 14, 2009) (unpublished); *United States ex rel. Merritt v. Hicks*, 492 F. Supp. 99, 109 (D.N.J. 1980); *United States ex rel. Moore v. Powell*, 336 F. Supp. 278, 280 (E.D. Pa. 1972). Here, Akeam requested "all police reports . . . relating to or connected with the investigation of the present matter." He argues that pretrial possession of the report would have given him an opportunity to seek its exclusion, provided additional grounds for severing his trial from Michael's, and helped him prepare to cross-examine Crooke. Accordingly, the July 12, 2015 police report was material to Akeam's defense and the People should have produced it.[3]

Second, we consider whether the Superior Court failed to follow our opinion in *Rodriguez*. Akeam assigns error to the fact that the Superior Court "made no findings as to whether the People's failure to produce the June 12, 2015 police report before trial was willful or in bad faith." *Rodriguez* states that "a trial court should balance three factors" in determining the appropriate sanction for a discovery violation. 2010 WL 1576441, at *4. The first factor the court should consider is "[t]he reason the government delayed in producing the requested materials, including whether or not the government acted in bad faith when it failed to comply with the discovery order." *Id.* Akeam has not identified a discovery order with which the People was obligated to comply, and *Rodriguez* does not obligate the Superior Court to make factual findings concerning

[3] The Superior Court's position on Akeam's entitlement to the report is unclear. Although the Superior Court equivocated when ruling on Akeam's motion for a mistrial—"it's very questionable whether or not [the police report] would even be required to be produced to Akeam Davis under Rule 16"—the Superior Court had previously stated that the police report "should have been turned over in the course of discovery."

compliance with an unidentified discovery order. Consequently, we find no merit to Akeam's second argument.

Finally, we consider whether the Superior Court erred in concluding that its curative instruction was a sufficient remedy. "There are some contexts in which the risk that the jury will not, or cannot, follow curative instructions is so great, and the consequences of failure so vital to the defendant," that an instruction cannot cure an error. *Bruton v. United States*, 391 U.S. 123, 135 (1968). "Whether a curative instruction is a reasonable alternative to a mistrial depends on whether the prejudice was so substantial as to deprive a party of the right to a fair trial and therefore warrant a mistrial." *Simmons v. State*, 81 A.3d 383, 393 (Md. 2013) (citing *Bruton*, 391 U.S. at 135). A promptly-issue curative instruction can mitigate the prejudice of improper testimony. *See, e.g.*, *Michaels v. State*, 970 A.2d 223, 229–30 (Del. 2009) (passage of two days did not render an otherwise-adequate instruction inadequate). Additionally, where threat evidence has little bearing on a defendant's guilt and no evidence links the defendant to the threat, an instruction will generally be sufficient to cure any prejudice suffered by the defendant by the introduction of that evidence. *See Lockhart v. Hedgpeth*, No. C 08–2935 JSW (PR), 2013 WL 1282973, at *12 (N.D. Cal. Mar. 26, 2013) (unpublished). Although a defendant is entitled to a fair trial, he is not entitled to a perfect one, *Bruton*, 391 U.S. at 135, and if a curative instruction is adequate, the denial of a motion for a mistrial will not constitute an abuse of discretion. *See Michaels*, 970 A.2d at 229. Importantly, we presume that a jury follows curative instructions. *Ostalaza*, 58 V.I. at 555 (citations omitted).

Akeam has not overcome the presumption that a jury follows curative instructions. Although he cites two cases discussing the prejudice arising from threats evidence, the trial court gave a limiting instruction in neither case. *See Ebron v. United States*, 838 A.2d 1140, 1149–50

(D.C. Cir. 2003); *United States v. Morgan*, 786 F.3d 227, 230 (2d Cir. 2015). Here, Crooke's testimony concerning Michael's threat does not mention Akeam at all, and no evidence was presented linking Akeam to Michael's threat. Further, Akeam's attorney requested a limiting instruction immediately following Crooke's testimony, and the Superior Court immediately instructed the jury that it could not consider Crooke's testimony against Akeam. Because Crooke's testimony concerning Michael's statement did not mention Akeam and because the Superior Court immediately instructed the jury that it could not use Crooke's testimony against Akeam, the Superior Court's instruction was sufficient. Thus, the Superior Court did not err in concluding that its curative instruction was a sufficient remedy. *Accord Lockhart*, 2013 WL 1282973, at *12.

In sum, although Akeam was entitled to the police report, the Superior Court's instruction cured any prejudice Akeam may have suffered. Accordingly, the Superior Court did not abuse its discretion by issuing a curative instruction—at Akeam's behest—instead of declaring a mistrial.

C. The Jury Instruction

Akeam challenges the fact that the Superior Court included the language of count 9 from the second amended information in its jury instructions. He claims that the instruction's language invited the jury to find him guilty of his own possession of a firearm. He further argues that the Superior Court erred when it used the past-perfect tense to describe the knowledge requirement for aiding and abetting. The People argue that, when read as a whole, the jury instructions clearly indicate that Akeam was charged with aiding and abetting Michael's use of a firearm.

Akeam did not object to the jury instructions as given, so we review his argument only for plain error. *Monelle v. People*, 63 V.I. 757, 763 (V.I. 2015) (citing *Phipps v. People*, 54 V.I. 543, 546 (V.I. 2011)). To establish plain error, Akeam must show an error, which was plain, that affected his substantial rights. *Id.* (citing *Phipps*, 54 V.I. at 546). In order for an error to affect

Akeam's substantial rights, there must be a reasonable probability that the error affected the outcome of the trial. *Fahie v. People*, 59 V.I. 505, 511 (V.I. 2013) (citing *Elizee v. People*, 54 V.I. 466, 479 (V.I. 2010)). Any challenge alleging reversible error in jury instructions must be considered in light of the complete jury instructions and the whole trial record. *Monelle*, 63 V.I. at 763 (collecting cases). "The specific elements of a crime are the only elements the jurors must consider in their deliberation, as they compare the evidence in the case with the trial court's instructions on the specific elements of the crime." *Francis v. People*, 52 V.I. 381, 406 (V.I. 2009). And even if it adds definitions that are inconsistent with the elements of an offense, the Superior Court does not commit plain error if it still properly instructs the jury on the elements of the charged offense. *See Cascen v. People*, 60 V.I. 392, 414 (V.I. 2014) (inclusion of felony murder in a first-degree murder instruction did not deprive the defendant of his rights where the court properly instructed the jury on the elements of premeditated first-degree murder); *accord United States v. McRae*, 593 F.2d 700, 705–06 (5th Cir. 1979) (a defendant's rights were not prejudiced when the trial court included the definition of first-degree murder in the jury instructions where the jury was properly instructed that it must find the elements of second-degree murder to convict); *see also Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (a jury instruction violates due process if it fails to require the government to prove every element of an offense beyond a reasonable doubt).

Akeam has not demonstrated that the Superior Court erred in issuing its jury instructions on count 9. Although Akeam alleges that the jury instruction invites the jury to convict Akeam for aiding and abetting his own possession of a firearm, he ignores the fact that the instruction charges him with participating in "the use of a firearm . . . in an assault to Khiry Crooke." This language indicates that the firearm at issue is the one used by Michael to assault Crooke, not the one held

by Akeam during the shooting. Akeam relies on a narrow reading of the jury instructions, but we must read the jury instructions as a whole. *Monelle*, 63 V.I. at 763.

Even if the language of the charge confused the jury, the following paragraph eliminated any potential confusion by explaining that Akeam was being charged with "the crime of aiding and abetting using a dangerous weapon during the commission of a crime of violence." The paragraph properly sets forth the elements for aiding and abetting the use of a dangerous weapon during the crime of violence. *See Brown*, 54 V.I. at 505 ("In order to establish the offense of aiding and abetting, the Government must prove [the following] elements: that the substantive crime has been committed and that the defendant knew of the crime and attempted to facilitate it." (citation and internal quotation marks omitted)). Since the instruction specifically referenced the use of a firearm in the course of the assault on Crooke—and since it is undisputed that the weapon carried by Akeam was not the firearm that was used to assault Crooke—the instruction does not permit the jury to convict Akeam for the possession of his own firearm.

Akeam's argument concerning the Superior Court's use of the past-perfect tense is similarly unpersuasive. In *Brown*, we used the present perfect tense when we specified that a defendant must know "that the substantive crime **has been** committed" in order to be found guilty as an aider and abettor. *See* 54 V.I. at 505 (emphasis added). The Superior Court instructed the jury that it must find that Akeam "knew that [the crime] **had been** committed." (emphasis added). "The present perfect verb tense indicates action occurring in the past and continuing to the present. . . . The past perfect tense is formed by use of the helping verb "had." . . . The past perfect tense indicates action completed at a past time or before the immediate past." *State v. McPherson*, 828 S.W.2d 81, 82 (Tex. App. 1992) (citations omitted), *rev'd on other grounds* 851 S.W.2d 846 (Tex. Crim. App. 1992). Since both tenses refer to actions that took place in the past, we cannot say that

the Superior Court's use of the past perfect tense constitutes plain error. Accordingly, we find no error in the Superior Court's instructions on count 9.

IV. CONCLUSION

Akeam was not entitled to an acquittal as to the charges of aiding and abetting unauthorized use of a firearm during the commission of a crime of violence and aiding and abetting assault in the third degree because the People introduced sufficient evidence to convict him on both counts. However, because the People failed to introduce sufficient evidence to convict Michael of reckless endangerment, we must reverse Akeam's conviction for aiding and abetting that same crime. Moreover, Akeam was not entitled to a mistrial because, although Akeam was entitled to the undisclosed police report, the Superior Court's curative instruction alleviated any prejudice Akeam may have suffered. And since we find no plain error in the Superior Court's jury instruction on count 9, we affirm the Superior Court's December 8, 2015 judgment in all other respects.

Dated this 27th day of July, 2018.

BY THE COURT:

/s/ Maria M. Cabret
MARIA M. CABRET
Associate Justice

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

SWAN, **Associate Justice, dissenting in part and concurring in the judgment only, in part**.

Because the Appellants were tried together and the Appellants were involved in the same incident from which the criminal charges emanated, creating a significant overlap in the evidence in both matters, I have written a consolidated opinion and would reach the same conclusion for the reasons I stated in my opinion in Michael Davis v. People, S. Ct. Crim. Nos. 2015-0121.

Dated this 27th day of July 2018

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

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