For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

MICHAEL DAVIS, Appellant/Defendant, v. **PEOPLE OF THE VIRGIN ISLANDS,** Appellee/Plaintiff.	))))))))	**S. Ct. Crim. No. 2015-0121** Re: Super. Ct. Crim. No. 255/2014 (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.

Michael Davis ("Michael")[1] appeals his convictions for third-degree assault, unauthorized possession of a firearm during a crime of violence, and first-degree reckless endangerment. For the reasons that follow, we affirm his convictions for third-degree assault and unauthorized possession of a firearm during a crime of violence, but reverse his conviction for first-degree reckless endangerment.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 27, 2014, Khiry Crooke was sitting on a wall near his home when a green Suzuki SUV parked near him. Crooke recognized the vehicle, the driver, Akeam Davis ("Akeam"), and the passenger, Michael. Akeam remained near the parked vehicle with a firearm in his hand, whereas Michael, also with a firearm, first walked past, but eventually turned around and approached Crooke. As Michael approached Crooke, he asked him why he did not run. Crooke then walked to a nearby tree and collected rocks to defend himself. Michael, who had followed Crooke to the tree, shot him a single time in the chest as he began to turn around holding the rocks.

The People charged Michael with attempted first-degree murder, 14 V.I.C. §§ 295(1), 331(1), first-degree assault, 14 V.I.C. § 295(1), third-degree assault, 14 V.I.C. § 297(4), unauthorized possession of a firearm during a crime of violence, 14 V.I.C. § 2253(a), and first-degree reckless endangerment, 14 V.I.C. § 625(a), whereas it charged Akeam with aiding and abetting attempted first-degree murder, first-degree assault, third-degree assault, unauthorized possession of a firearm during a crime of violence, and first-degree reckless endangerment. A

[1] The People charged both Michael and his brother, Akeam Davis, 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. The People tried them together before a jury over three days in August of 2015, and they 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.

joint jury trial for both Michael and Akeam took place between August 10 and August 12, 2015. The Superior Court heard testimony from a number of witnesses on behalf of the People, including: Crooke, Lucia Henley, Officer Vernon Carr, Officer Miguel Perez, Officer Ecedro Linquist, Corporal Bernard Burke, Denise Berry, Detective Maha Hamdan, and Detective Ivan Christopher.

Crooke testified concerning the June 27, 2014 incident, confirming that Michael had shot him from close range under a tree near his home. Henley testified that she was in her business at the time of the shooting, explaining that she heard a single gunshot and observed two men walk toward a green vehicle and drive away from the scene. She also explained that, as a part of her business, she regularly sold her products under the tree, which Crooke had identified as the location where he was shot.

Officers Carr and Perez described their investigation of the crime scene, including their discovery of a single shell casing under the tree identified by Crooke and Henley. Both conceded that police did not recover a firearm at the scene. Officer Linquist described his investigation of the green Suzuki SUV, which he located in Estate Tutu.

Corporal Burke, a Firearms Supervisor for the Virgin Islands Police Department, testified that a search of the firearm registry revealed that Michael did not have a license to possess a firearm in the Virgin Islands, resulting in the creation of two absence-of-entry forms—one for the St. Thomas, St. John, and Water Island District, and the other for the St. Croix District.

Berry and Detective Hamdan both confirmed the nature of Crooke's injury, a gunshot wound to the chest. Detective Hamdan explained that she had been flagged down on the highway, and transported Crooke to the hospital. She also explained that Crooke gave a statement, identifying Michael as the shooter.

Detective Christopher interviewed Crooke at the hospital, and later located Michael. He took a written statement from Michael, in which Michael denied shooting Crooke, but confirmed that he had been in an altercation with him earlier that day involving Crooke arming himself with large rocks. Michael's written statement was admitted into evidence.

The People recalled Crooke to testify about an incident occurring on June 11, 2015. He explained that Michael had approached him while he was walking and asked to talk. After Crooke refused, Michael responded by stating "if [you] make it to court." Crooke notified his mother of the threat, remained indoors for a few days, reported the incident to the police, and then left the Island. When Michael's counsel inquired about Crooke's location, the People objected, arguing that the requested information was improper because "he left for safety reasons." Michael's counsel objected, and the Superior Court struck the People's statement.

After the People rested, Michael moved for judgment of acquittal, arguing generally that the evidence was insufficient to support a conviction for any of the charges in the information because Crooke's testimony was not credible. The Superior Court denied the motion, explaining that the testimony, including Crooke's, was sufficient to support the charges because credibility determinations were within the province of the jury.

During Michael's case-in-chief, the Superior Court heard testimony from Crooke, Clemile Gibbs, Makeda Simmonds, Marva Ramirez, and Jovan Henry.

Gibbs testified that he had worked with Michael at a chicken farm on June 27, 2014, from about 9:30 a.m. until 12:00 p.m., when he drove Michael from Smith Bay to Henry's car-audio business in Tutu. He also cursorily noted an earlier interaction in which Crooke and Michael discussed "a situation with [Michael] and [Michael's] mother."

Officer Simmonds, a crime scene technician, explained that she had performed an instant gunshot residue ("GSR") test on the afternoon of June 27, 2014 on Michael's hands and face, and on the driver's side door handle of the green Suzuki SUV parked in the roadway in Tutu, near Turnkey. She explained that although the GSR results from Michael's hands and face were negative for gunshot residue, the residue itself often dissipated between two and three hours after the discharge of a firearm. Michael's counsel moved to dismiss the case, alleging that the People had committed a *Brady*[2] violation by failing to disclose the exculpatory GSR results. However, after the court explained that the results appeared to be outside of the scope of *Brady*, Michael's counsel withdrew her objection.

Ramirez, Michael's mother, testified that Crooke regularly walked to her workplace, the Holy Family Church, and harassed her by calling her names and using profanity. She explained that Crooke's behavior had changed after she reported a physical altercation between herself and Crooke to the police.

Henry testified that he operated a car-audio business out of his home in Estate Tutu. He explained that on June 27, 2014, Michael came to his business at 7:30 a.m. to pick up his vehicle, a grey Toyota Corolla. Shortly thereafter, Crooke came to the business and began to threaten Michael, who left at around 8:00 a.m. in a third party's vehicle. At around 9:00 a.m., Akeam dropped off his green Suzuki SUV, which Henry moved from his driveway to the street at around 12:00 p.m. Michael later returned on foot and police arrested him.

During Akeam's case-in-chief, the Superior Court heard testimony from Shikeema Toussaint, Akeam's girlfriend. She testified that on June 27, 2014, she picked up Akeam in her Uncle's silver Suzuki SUV at Henry's car-audio business at around 9:00 a.m. and traveled to

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

Vessup Beach, near Red Hook. She testified that she and Akeam remained at Vessup Beach until about 1:00 p.m., when she drove him back to his apartment in Tutu, Turnkey.

After both defendants rested, Michael moved for a mistrial based on the People's elicitation of testimony from Crooke based on evidence—the June 11, 2015 police report—that was not previously disclosed. The court deferred ruling on the motion for mistrial, but struck the testimony in its final jury instruction as a sanction for discovery violation. The jury returned a verdict acquitting Michael of attempted first-degree murder and first-degree assault, but finding him guilty of third-degree assault, unauthorized possession of a firearm, and first-degree reckless endangerment. Following trial, Michael moved for judgment of acquittal and new trial, arguing that: the People's failure to disclose the June 12, 2015 Police Report constituted a *Brady* violation and a violation of Rule 16(d) of the Federal Rules of Criminal Procedure;[3] the People's comment on Crooke's testimony constituted prosecutorial misconduct warranting relief; and the People's failure to disclose exculpatory GSR results constituted *Brady* violation. In a December 8, 2015 judgment, the Superior Court sentenced Michael to five years' incarceration for third-degree assault and 15 years' incarceration for unauthorized possession of a firearm to be served concurrent to his sentence for third-degree assault. The Superior Court stayed Michael's first-degree reckless endangerment conviction pursuant to title 14, section 104. Also, in the December 8, 2015 judgment, the Superior Court denied Michael's motions for judgment of acquittal and new trial, relying on its earlier oral findings, in which it explained that the prejudice arising from Crooke's

[3] The proceedings in this case antedated the adoption of the Virgin Islands Rules of Criminal Procedure, and thus the relevant provisions of the Federal Rules of Criminal Procedure were applicable. Rule 16(d) provides: "Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows--or through due diligence could know--that the record exists."

testimony regarding the June 11, 2015 incident was insufficient to warrant mistrial because curative instructions were given. Michael filed a timely notice of appeal on December 2, 2015.[4]

II. JURISDICTION

"The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court." 4 V.I.C. § 32(a). "It is well established that 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 appeal." *Miller v. People*, 67 V.I. 827, 835 (V.I. 2017) (quoting *Fontaine v. People*, 62 V.I. 643, 647 (V.I. 2015)). Because the Superior Court's December 8, 2015 judgment is final, this Court possesses jurisdiction over this appeal. *Id.* (citing *Fahie v. People*, 62 V.I. 625, 629 (V.I. 2015)).

III. DISCUSSION

Michael makes a number of arguments on appeal. First, he argues that the People's comment on later stricken evidence prejudiced him, thus depriving him of a fair trial.[5] Second, he contends that the Superior Court erred in its instruction of third-degree assault and by failing to *sua sponte* instruct the jury on self-defense. Third, he argues that the evidence was insufficient to support his conviction for first-degree reckless endangerment. We address each argument in turn.

[4] The Superior Court judge sentenced Davis from the bench on November 18, 2015, and entered a written judgment on December 8, 2015. Although Davis prematurely filed his appeal on December 2, 2015, we nonetheless treat it as if it was filed "on the date of and after entry" and consider it timely filed. *Tyson v. People*, 59 V.I. 391, 399 n.5 (V.I. 2013) (citations omitted).

[5] Davis also generally alleges that the People committed prosecutorial misconduct by charging Davis with first-degree and third-degree assault. As we have previously explained, "[a] charging decision is not 'improper unless it results solely from the defendant's exercise of a protected legal right, rather than the prosecutor's normal assessment of the societal interest in the prosecution.'" *Castillo v. People*, 59 V.I. 240, 275–76 (V.I. 2013) (quoting *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982)). Davis has failed to demonstrate any vindictiveness, and therefore, the People did not commit error in charging Davis under both first-degree and third-degree assault.

A. Prosecutorial Misconduct

Michael argues that the Superior Court erred in denying his motions for judgment of acquittal and new trial. His argument is based on prosecutorial misconduct, alleging that the People's characterization of Crooke's testimony during an objection prejudiced Michael's right to a fair trial.[6] The Superior Court, in denying Michael's motions, held that the alleged misconduct was insufficiently prejudicial under Federal Rule of Criminal Procedure 26.3 to warrant mistrial.[7] We review the denial of a motion for mistrial for abuse of discretion. *John v. People*, 63 V.I. 629, 637 (V.I. 2015) (citing *Connor v. People*, 59 V.I. 286, 299 (V.I. 2013)). A claim of prosecutorial misconduct during trial requires a court to resolve two questions: whether the prosecutor's comments were in fact improper and, if so, whether the remarks prejudiced the defendant's right to a fair trial. *Monelle v. People*, 63 V.I. 757, 770 (V.I. 2015) (citations omitted). After considering the entire trial proceeding, reversal will result if the misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. *DeSilvia v. People*, 55 V.I. 859, 873 (V.I. 2011) (citing *United States v. Moreno*, 547 F.3d 191, 194 (3d Cir. 2008)); *see also Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citation omitted).

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[6] In his underlying motions for judgment of acquittal and new trial, Davis raised a challenge to undisclosed GSR results under *Brady*. Although he waived that argument on appeal by failing to brief it, V.I.S.CT.R. 22(m), we note that *Brady* is not implicated under these circumstances because the exculpatory GSR results were disclosed during trial. *See Williams v. People*, 59 V.I. 1024, 1040 (V.I. 2013) ("[A] *Brady* violation only occurs if exculpatory information is not disclosed until **after** trial." (emphasis added) (citing *George v. People*, 59 V.I. 368, 378 (V.I. 2013))).

[7] Davis does not challenge the Superior Court's evaluation of his motions for acquittal and new trial under Federal Rule 26.3, instead of Federal Rules 29 and 33(a). We note, however, that relief under Federal Rule 29 is only available for challenges to the sufficiency of the evidence; it is not available for discovery violations or allegations of prosecutorial misconduct. *See United States v. Urena*, 27 F.3d 1487, 1490 (10th Cir. 1994) (holding that an argument alleging testimony was improperly admitted is not a proper basis for a Rule 29 motion); *see generally United States v. Miranda*, 425 F.3d 953, 962 (11th Cir. 2005) ("The sole ground for a post-trial motion under Rule 29(c) is that the evidence was insufficient to sustain a conviction." (citations omitted)); *United States v. Fozo*, 904 F.2d 1166, 1171 (7th Cir. 1990) (same); *see also United States v. Urena*, 27 F.3d 1487, 1490 (10th Cir. 1994) (holding that an argument alleging testimony was improperly admitted is not a proper basis for a Rule 29 motion). We also note that, regardless of whether Davis's motion is evaluated under Federal Rule 26.3 or 29, we review the Superior Court's denial for an abuse of discretion. *United States v. Washington*, 462 F.3d 1124, 1135 (9th Cir. 2006).

In analyzing whether reversal is warranted, this Court considers the scope of the objectionable comments and their relationship to the entire proceeding, the ameliorative effect of any curative instructions given, and the strength of the evidence supporting the defendant's conviction. *Monelle*, 63 V.I. at 770 (citing *Mulley v. People*, 51 V.I. 404, 414 (V.I. 2009)); *see also Hein v. Sullivan*, 601 F.3d 897, 912–13 (9th Cir. 2010) (citing *Darden*, 477 U.S. at 182). When a jury is given an instruction, including a curative instruction, the presumption is that the jury will follow the instruction. *Monelle*, 63 V.I. at 770 (collecting cases). If we determine that the People did engage in misconduct, we will reverse unless the error is harmless. *Connor v. People*, 59 V.I. 286, 299 (V.I. 2013) (citations omitted); *Washington*, 462 F.3d at 1136. Under the harmless error analysis, if the error is constitutional, we will affirm only if we find that the error is harmless beyond a reasonable doubt, while if the error is non-constitutional, we will affirm when it is highly probable that the error did not contribute to the judgment. *Connor*, 59 V.I. at 299 (citing *United States v. Helbling*, 209 F.3d 226, 241 (3d Cir. 2000)).

In his testimony, Crooke described an interaction between himself and Michael occurring on June 11, 2015, nearly one year after the shooting, but two weeks prior to trial. He explained that Michael approached him while he was walking and asked to talk. After Crooke refused, Michael responded by stating "if [you] make it to court." Crooke notified his mother of the threat, remained indoors for a few days, reported the incident to the police, and then left the Island to stay with his father in Orlando, Florida. The People objected when Michael's counsel asked where Crooke had stayed, arguing: "Your Honor, he left for safety reasons and I don't think it's appropriate for him to tell in open court where he went during that time. I don't think it's relevant." Michael's counsel objected, and the Superior Court struck the People's statement. The Superior

Court later, in its final jury instructions, excluded all of the evidence concerning the June 11, 2015 incident:

> During this case, you heard evidence that Defendant Michael K. Davis threatened Khiry Crooke on June 11, 2015, and, in response to the alleged threat, Khiry Crooke left St. Thomas, U.S. Virgin Islands, and did not return until shortly before this trial.
>
> I have stricken that evidence from the record of this case in its entirety. This means that you may not use that testimony in any manner whatsoever against either defendant when you are deliberating about the charges and the Second Amended Information. That evidence is not before you, must not be discussed during the deliberative process, and must have no bearing on any decision you make in the course of your deliberations.

Michael asserts that the People's comment—"[Crooke] left for safety reasons"—represents reversible error because it so infected the trial with unfairness as to make the resulting conviction a denial of his due process rights. He does not, however, challenge the underlying stricken testimony.[8]

A mistrial is warranted only in rare circumstances implying extreme prejudice where a curative instruction is promptly given. *United States v. Reiner*, 500 F.3d 10, 16 (1st Cir. 2007) (citing *United States v. Torres*, 162 F.3d 6, 12 (1st Cir. 1998)); *United States v. Diaz*, 248 F.3d 1065, 1101 (11th Cir. 2001) ("If a [trial] court issues a curative instruction, we will reverse only if the evidence is 'so highly prejudicial as to be incurable by the trial court's admonition.'" (quoting *United States v. Trujillo*, 146 F.3d 838, 845 (11th Cir. 1998))). Generally, a prosecutor may argue

[8] We note that although Crooke's testimony relating to June 11, 2015 was stricken, it was stricken as a discovery violation sanction, not because of unfair prejudice. Had the People properly disclosed the Police Report, Crooke's testimony may very well have been admissible to show consciousness of guilt, particularly where threats are intertwined with the evidence regarding the charged crime. *United States v. Morgan*, 786 F.3d 227, 232 (2d Cir. 2015). For example, in *United States v. Miller*, 276 F.3d 370, 373–74 (7th Cir. 2002), the Seventh Circuit concluded that threat evidence was admissible to show the defendant's guilt where a defendant's ex-husband threatened to harm a cooperating government witness. *See also United States v. Guerrero*, 803 F.2d 783, 787 (3d Cir. 1986) (concluding that an alleged threat by the defendant to deter a co-defendant from testifying "if credited, would be highly probative of consciousness of guilty.").

any reasonable inference drawn from the evidence presented at trial, but may neither make arguments based on evidence not presented nor misstate the evidence. *Castor v. People*, 57 V.I. 482, 495 (V.I. 2012) (citations omitted). Although we believe that the People's objection, including its comment, would have been better made during a sidebar conference, the People's comment cannot be said to have been an improper characterization of Crooke's testimony relating to June 11, 2015, which itself had then been admitted without objection. *Cf. Brummett v. State*, 10 N.E.3d 78, 88 (Ind. Ct. App. 2014) (holding that an objection that revealed uncharged acts to the jury did not constitute prosecutorial misconduct where the objection was prompted by the defense's reference to the uncharged act). Moreover, even had the comment been improper, we presume that the jury followed the curative instruction given immediately to them. *Monelle*, 63 V.I. at 770; *see United States v. Vaulin*, 132 F.3d 898, 901 (3d Cir. 1997) (concluding that an "immediate, direct, and insightful" curative instruction was sufficient to eliminate any prejudice arising from inadmissible threat evidence). Therefore, we conclude that the Superior Court did not err in denying Michael's motion for mistrial based on prosecutorial misconduct.

B. Jury Instructions

Michael argues that the Superior Court erred by failing to instruct the jury on an essential element of third-degree assault and by failing to *sua sponte* instruct the jury on self-defense. Because Michael did not object to the jury instructions at trial, we review his arguments for plain error only. *Monelle*, 63 V.I. at 763 (citations omitted). To establish plain error, Michael must show an error, which was plain, that affected his substantial rights, i.e. the error must have been prejudicial. *Estick v. People*, 62 V.I. 604, 616 (V.I. 2015). If we determine that the error meets these requirements, we may grant relief in our discretion if we feel the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*; *Fahie*, 59 V.I. at 511.

1. Third-Degree Assault, 14 V.I.C. § 297(4)

Michael argues that the Superior Court erred by failing to instruct the jury that third-degree assault can occur "under circumstances not amounting to first-degree assault," which he characterizes as an essential element. "A 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 (citations omitted). And although a challenge to an instruction will rarely justify reversal where no objection has been made at trial, reversal may nonetheless be required if an instruction omits a required element of the offense and the omission is not proven to be harmless beyond a reasonable doubt. *Freeman v. People*, 61 V.I. 537, 544 (V.I. 2014) (citations omitted).

In this case, the Superior Court instructed the jury as follows:

> In order to sustain its burden of proof for the crime of first-degree assault as set forth in . . . the Information, the People must prove beyond a reasonable doubt, that: (1), on or about June 27, 2014; (2), in St. Thomas, U.S. Virgin Islands; (3), Michael K. Davis; (4), assaulted Khiry Crooke; (5) with intent to murder him; (6), by shooting him in the chest with a gun.
>
> . . . .
>
> In order to sustain its burden of proof for the crime of third-degree assault as set forth in the . . . Information, the People must prove beyond a reasonable doubt that: (1), on or about June 27, 2014; (2), in St. Thomas, Virgin Islands; (3), Michael K. Davis; **(4) assaulted[9] Khiry Crooke; (5) infl[i]cted serious bodily injury on him; (6) by shooting him with a gun.**

(emphasis added). Michael argues that the trial court's latter instruction is plainly erroneous because it failed to specify that third-degree assault cannot arise except under circumstances not amounting to an assault in the first degree. We disagree.

[9] The Superior Court instructed the jury on the definition of "assault," paraphrasing 14 V.I.C. § 291, as follows: "when one attempt[s] to commit battery or makes a threatening gesture showing in itself an immediate intention coupled with an ability to commit a battery[,] commits an assault." It defined "attempt" as where one "demonstrates an intention to do an act or bring about certain consequences which would amount to a crime, and an act in furtherance thereof which makes it – which is more than mere preparation," whereas it defined "battery" as "the use of force against another resulting in harmful or offensive contact."

Michael's argument is based upon a fundamental misunderstanding of the effect of the statutory language, "under circumstances not amounting to an assault in the first or second degree." Title 14, section 297(a)(4) provides: "Whoever, under circumstances not amounting to an assault in the first or second degree … assaults another and inflicts serious bodily injury upon the person assaulted … shall be fined not less than $500 and not more than $3,000 or imprisoned not more than 5 years or both." Viewed in its entirety, § 297 constitutes not merely a recitation of the substantive elements of third degree assault, but a directive that the Superior Court sentence a defendant within a particular range if, and only if, two conditions are met: first, that the defendant has committed an assault of the type specified in subsections (1)-(4);[10] and second, that the assault in question does not rise to the level of first or second degree assault, which would instead require that the defendant be sentenced under § 295 or § 296, respectively. Thus, read in the full context of the statute, the language "under circumstance not amounting to an assault in the first or second degree" does not establish an additional, substantive element of the offense, but rather constitutes a condition precedent to the Superior Court's application of the sentencing range prescribed in § 297. In other words, the sole effect of the quoted language is to clarify that a defendant found guilty of both third degree assault and first (or second) degree assault, for the same act,[11] is subject to sentencing under § 295 (or § 296) and not § 297. Indeed, the statutory revision notes accompanying § 297—cited in the Appellee's Brief—confirm that, in 1957, the language quoted above was substituted for other pre-existing language "to make it clear that the punishment

[10] In this case that the defendant committed an "assault" and "inflict[ed] serious bodily injury upon the person assaulted." 14 V.I.C. § 297(a)(4); *Nanton v. People*, 52 V.I. 466, 499 (V.I. 2009) (Hodge, C.J.., concurring in part and dissenting in part) ("[A]ssault in the third degree under title 14, section 297(4) . . . requires only that the People prove that the defendant 'inflict[ed] serious bodily injury upon the person assaulted.'").

[11] For example, an assault that inflicts serious bodily injury—satisfying the elements of § 297(4)—and was committed with intent to murder—also satisfying the elements of § 295(1).

prescribed by this section did not apply to any assault with intent to commit any of the felonies dealt with in section 295 and 296 of this title."[12] Therefore, we conclude that the Superior Court did not err—let alone plainly err—in its instruction on third-degree assault to the jury.

2. Self-Defense, 14 V.I.C. §§ 41, 43, and 293(a)(6)

Michael argues that the Superior Court erred by failing to *sua sponte* instruct the jury on self-defense. The trial court is required to instruct the jury regarding self-defense if the defendant places self-defense in issue. *Fahie*, 59 V.I. at 512 (citing *Phipps v. People*, 54 V.I. 543, 549 (V.I. 2011)). Although Michael's attorney did not raise self-defense at trial—within his opening statement, closing argument, or elsewhere—Michael nevertheless argues that Crooke's testimony entitled him to instructions under title 14, sections 41, 43, and 293(a)(6). We disagree.

Michael was entitled to an instruction under title 14, sections 41, 43, and 293(a)(6), "only if the trial record contained evidence sufficient for a reasonable jury to find these defenses." *Prince v. People*, 57 V.I. 399, 412 (V.I. 2012) (citing *Gov't of the V.I. v. Fonseca*, 274 F.3d 760, 766 (3d Cir. 2001)). All three sections authorize the use of force to resist attempted harm against one's person, whereas sections 41 and 293(a)(6) also authorize the use of force to resist attempted harm against another. *See Joseph v. People*, 60 V.I. 338, 349 (V.I. 2013) (discussing sections 43 and 293); *Prince*, 57 V.I. at 413 (discussing sections 41 and 293).

The evidence failed to confirm that the instructions on any of these defenses were warranted. Crooke testified that Michael approached him with a firearm while he sat on a wall

[12] Additionally, one cannot reasonably interpret the language "under circumstances not amounting to an assault in the first or second degree" to establish an additional substantive element of the offense, because such an interpretation would lead to the absurd result that, in order to obtain a conviction for third degree assault, the People would be required to prove a negative: that the defendant's actions did not constitute either first or second degree assault. *See One St. Peter, LLC v. Bd. of Land Use Appeals*, 67 V.I. 920, 926-27 (V.I. 2017) ("A statute should not be construed and applied in such a way that would result in injustice or absurd consequences.") (quoting *Gilbert v. People*, 52 V.I. 350, 356 (V.I. 2009)).

located on his property. As Michael got closer, he asked Crooke why he did not run away from him. Crooke then got up and walked away toward a nearby tree. Michael followed Crooke and shot him from close range in the chest as Crooke attempted to throw a rock he had collected at Michael. While Michael disputes Crooke's credibility, he relied on an alibi theory and did not present any evidence that he was not the aggressor or that he attempted in good faith to withdraw from the confrontation.[13] As a first aggressor who did not attempt to withdraw from the confrontation, he simply was not entitled to an instruction for self-defense. *See Prince*, 57 V.I. at 413 (noting that the evidence was insufficient to warrant a self-defense instruction where defendant "[w]as the initial instigator and aggressor").[14]

Therefore, viewing all of the evidence, we cannot say that Michael met his burden of showing that the Superior Court erred by failing to instruct the jury *sua sponte* on self-defense.[15] *Fahie*, 59 V.I. at 514 (citing *Fonseca*, 274 F.3d at 766–67).

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[13] Davis also relies on his own statement in which he admitted to seeing Crooke earlier the morning of June 27, 2014, behind Tutu, Turnkey. However, according to that statement, he did not shoot Crooke, but simply left the scene once Crooke picked up the rocks and went to his chicken farm. This incident, although seemingly similar to the incident described by Crooke, occurred at a different location and time than that described by Crooke, and did not involve a firearm.

[14] *Accord State v. Rutter*, 850 P.2d 899, 905 (Kan. 1993) ("[T]he evidence demonstrates that he was the aggressor and therefore not entitled to a[] [self-defense] instruction."); *Commonwealth v. Evans*, 454 N.E.2d 458, 463 (Mass. 1983) ("[T]he right of self-defense ordinarily cannot be claimed by a person who provokes or initiates an assault unless that person withdraws in good faith from the conflict and announced his intention to retire." (citation and internal quotation marks omitted))); *Bellcourt v. State*, 390 N.W.2d 269, 272 (Minn. 1986) ("An aggressor in an incident has no right to a claim of self-defense. However, where the defendant is the original aggressor in an incident giving rise to his self-defense claim, an instruction on self-defense will be available to him only if he actually and in good faith withdraws from the conflict and communicates that withdrawal." (citing *State v. Graham*, 195 N.W.2d 442, 444 (Minn. 1972))); *State v. Brown*, 694 P.2d 587, 589 (Utah 1984) ("The defendant's claim that the victim was the aggressor is without sufficient support in the evidence to give rise to a reasonable doubt as to whether he acted in self-defense." (footnote omitted)); *State v. Riley*, 976 P.2d 624, 628 (Wash. 1999) ("[I]n general, the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation." (citing *State v. Craig*, 514 P.2d 151, 156 (Wash. 1973))).

[15] Davis also relies on the Superior Court's failure to instruct the jury on self-defense to challenge his conviction for unauthorized possession of a firearm during a crime of violence. Because he was not entitled to a self-defense instruction, we also affirm his conviction for unauthorized possession of a firearm during a crime of violence.

C. Sufficiency of the Evidence

Michael challenges the sufficiency of the evidence supporting his conviction for first-degree reckless endangerment, claiming that there was no evidence the shooting occurred in a public place or that the circumstances evidenced a depraved indifference to human life. When reviewing the sufficiency of the evidence, this Court reviews the Superior Court's determination *de novo*, applying the same standard the Superior Court should have applied—viewing the evidence in the light most favorable to the People and affirming the conviction if any rational finder of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Woodrup v. People*, 63 V.I. 696, 707 (V.I. 2016) (citing *Percival v. People*, 62 V.I. 477, 484 (V.I. 2015)).

In order to obtain a conviction for first-degree reckless endangerment, the People must prove that the defendant (1) recklessly engaged in conduct (2) in a public place that (3) created a grave risk of death to another person (4) under circumstances evidencing a depraved indifference to human life. 14 V.I.C. § 625; *Woodrup*, 63 V.I. at 711 ("'By its plain terms, section 625(a) requires only a showing that the conduct was done in a place that is open to the public or where the public has a right to be, thereby posing a risk of death to members of the public who may be in the area.'" (quoting *Cascen v. People*, 60 V.I. 392, 408 (V.I. 2014))). A "public place" is defined as "a place to which the general public has a right to resort; but a place which is in point of fact public rather than private, and visited by many persons and usually accessible to the public." 14 V.I.C. § 625(c)(2); *Estick*, 62 V.I. at 615 (citing *Augustine v. People*, 55 V.I. 678, 689 (V.I. 2011)).

Michael's reckless endangerment count charged him with recklessly firing a single shot near Frydenhoj Ball Park, creating a grave risk of death to other persons who were present. (J.A. 10). Crooke testified that as he was sitting alone at "home," on "[his] wall," Michael and Akeam

drove on "[his] dirt road," leading to his home, eventually parking near where he sat on the wall. After a verbal exchange, Michael followed a fleeing Crooke to a nearby tree and shot him a single time from close range. Although the People adduced additional testimony explaining that Frydenhoj Ball Park was nearby—for example, Crooke explained that his home was "in the area of Ezra Fredericks Ballpark in Frydenhoj" and Henley explained that her business, which was located near the shooting location, was "close to the ballpark. . . . [i]t's the gut then my street and my shop"—that alone is insufficient to sustain a reckless endangerment conviction. *See* 14 V.I.C. § 625(c)(2); *Estick*, 62 V.I. at 616 (noting that "the crime of reckless endangerment must occur **in a public place**" (emphasis added) (citing 14 V.I.C. § 625(a)). In the vast majority of our precedent, for example, the conduct at issue occurred on a public road, which "is in point of fact public." *See Woodrup*, 63 V.I. at 711; *Estick*, 61 V.I. at 615; *Freeman*, 61 V.I. at 539; *Henley v. People*, 61 V.I. 240, 241 (V.I. 2014); *Tyson v. People*, 59 V.I. 391, 417 (V.I. 2013); *Phillip v. People*, 58 V.I. 569, 591 (V.I. 2013); *Augustine*, 55 V.I. at 689–90). Our concern with the evidence in this case is that the shooting occurred near a tree, which appears to be located on privately owned property on or adjacent to a privately owned gut and/or a privately owned dirt road. Yet, the People also presented conclusory evidence that Henley operated a business near where the shooting took place and "usually s[old] [her] products under [the] tree" where Crooke was shot. Therefore, we must determine whether the People demonstrated that the privately owned property at issue was "in point of fact public" under title 14, section 625.

In 1994, the Virgin Islands Legislature passed the Reckless Endangerment Act, which criminalizes certain conduct in public places that creates a grave risk of death to members of the public. 1994 V.I. Sess. Laws 217 (Act. No. 6026). In that act, the Legislature adopted the current definition of "public place," which is taken in part from that formerly appearing in Black's Law

Dictionary. *Compare* 14 V.I.C. § 625(c)(2) (defining "public place" as "a place to which the general public has a right to resort; but a place which is in point of fact public rather than private, and visited by many persons and usually accessible to the public."), *with* BLACK'S LAW DICTIONARY 1230–31 (6th ed. 1990) (defining "public place" as "[a] place to which the general public has a right to resort, not necessarily a place devoted to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public (*e.g.* a park or public beach). Also, a place in which the public has an interest as affecting the safety, health, morals and welfare of the community. A place exposed to the public, and where the public gathers together or pass to and fro." (emphasis added)).

A number of courts have interpreted similar definitions as applying to private property under narrow circumstances. For example, a Louisiana appellate court applied a definition of "public place" nearly identical to section 625 and determined that the parking lot of a tavern, even after the tavern had closed, was a public place because it was usually accessible to the neighboring public. *State v. Hansbro*, 796 So. 2d 185, 195–96 (La. Ct. App. 2001); *see also People v. Faucher*, Case No. SX-10-CR-60, 2013 WL 3977777, at *6–7 (V.I. Super. Ct. July 31, 2013) (holding that the porch of a private bar was a "public place" under title 14, section 625). Likewise, a Minnesota appellate court also applied a similar definition and determined that a private road was a public place "where a discharged gun could easily result in injury to innocent people who regularly pass close by" and it was located "in an urban area only yards from the road and other houses, and was clearly close to areas where people regularly walk." *State v. DeLegge*, 390 N.W.2d 10, 12 (Minn. Ct. App. 1986), *abrogated by* MINN. STAT. § 624.7181 *as recognized in State v. Theng Yang*, 814 N.W.2d 716, 721 (Minn. Ct. App. 2012)).

Notwithstanding this case law, we are not persuaded that the People presented sufficient evidence that the shooting occurred in a "public place." In her testimony, Henry did not describe either the nature of her business or her customers. In fact, the only other members of the public identified by the People in the area at the time were Henry's son and grandchildren. Under these circumstances, the People failed to demonstrate that the area of the shooting "was used by the public in general rather than only the residences next to the area." *Christian v. State*, 897 N.E.2d 503, 505 (Ind. Ct. App. 2008) (applying a definition of "public place" similar to title 14, section 625). Therefore, after carefully reviewing the trial transcript and reviewing the evidence in the light most favorable to the People, we conclude that there was insufficient evidence to uphold Michael's conviction for reckless endangerment.

IV. CONCLUSION

After reviewing the record before us, we conclude that neither the People's comment on stricken evidence nor the Superior Court's jury instructions amount to reversible error, and we affirm Michael's convictions for third-degree assault and unauthorized possession of a firearm during a crime of violence. But, because the People failed to demonstrate that the shooting occurred at a location that was, in point of fact, public rather than private, we reverse Michael's reckless endangerment conviction for insufficient evidence. Therefore, we affirm in part, and reverse in part, the Superior Court's December 8, 2015 judgment.

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 for S. Ct. Crim. Nos. 2015-0121 and 2015-0124.

Appellants assert that the following errors support reversal of their convictions, namely, that there was insufficient evidence to support each of their convictions, that the court imparted erroneous instructions to the jury thereby assuring their convictions upon proof less than beyond a reasonable doubt, and that prosecutorial misconduct infected the trial so adversely as to render it lacking in due process of law. Because I would conclude that the evidence was sufficient to establish that the shooting occurred in a place to which the public generally has access, bringing the location within the statutory definition provided in section 625(c)(2) of title 14, and because I would reach my conclusions based on a different analysis, I respectfully dissent in the reversal of the convictions relating to reckless endangerment and would affirm all the convictions.

I. FACTS AND PROCEDURAL HISTORY

On August 19, 2014, the People filed an information in the Superior Court, charging the brothers, Michael and Akeam Davis, with multiple criminal acts that, if proved beyond a reasonable doubt, constituted violations of several Virgin Islands criminal statutes. The alleged criminal acts occurred on June 27, 2014. Ultimately, a second amended information was filed on August 11, 2015, which is the information upon which the Appellants were jointly tried. The trial commenced on August 10, 2015, and concluded on August 12, 2015.

As to Michael Davis, the jury returned guilty verdicts on Count Three- "Third Degree Assault" (14 V.I.C. § 297(4)); Count Four- "Possession of a Firearm During the Commission of a Crime of Violence" (14 V.I.C. § 2253(a)); and Count Five- "First Degree Reckless Endangerment"

(14 V.I.C. § 625(a)). Akeam Davis was found guilty of Count Eight- "Aiding and Abetting Third Degree Assault" (14 V.I.C. § 11(a); 14 V.I.C. § 297(4)); Count Nine- "Aiding and Abetting Unauthorized Possession of a Firearm During the Commission of a Crime of Violence" (14 V.I.C. § 11(a); 14 V.I.C. § 2253(a)); and Count Ten- "Aiding and Abetting First Degree Reckless Endangerment" (14 V.I.C. § 625(a)).[1] Both defendants filed motions for judgment of acquittal, for new trials, and for a mistrial, all of which were denied.

Prior to trial, the Superior Court had imposed motions and discovery deadlines; however, the reasonableness of these deadlines is not challenged on this appeal. On April 20, 2015, Akeam Davis filed a motion to strike some of the People's planned witnesses and exhibits, which was granted in part and denied in part. The motion likewise sought sanctions against the People for discovery violations. Also, Akeam Davis sought to exclude the results of a gunshot residue test, to exclude some physical evidence (a shoe and bullet casing) recovered at the crime scene, and to exclude any testimony relating to these items of evidence. As to Akeam Davis, the trial court excluded the physical evidence as well as any testimony relating to the shoe and bullet casing. Michael Davis did make a discovery demand; however, he filed his motion for discovery sanctions months after the motions deadline. Therefore, the trial court denied his untimely motion to exclude certain evidence.

[1] Inexplicably, Count Ten of the second amended information did not charge Akeam Davis as an aider and abettor, as there is no reference to subsection 11(a) of title 14, *e.g.*, *Boston v. People*, 56 V.I. 634, 641 n.9 (V.I. 2012), which provides that any person who "commits a crime or offense or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 14 V.I.C. § 11(a). We have held that, because one who aids and abets a criminal act is liable as a principal under subsection 11(a) of title 14, so long as the government proves beyond a reasonable doubt the facts establishing aiding and abetting the crimes of the principal, a conviction will be affirmed. *Boston*, 56 V.I. at *3-4 nn.9-10; *Fontaine v. People*, 56 V.I. 571, 578 (V.I. 2012) ("[W]e note that it is highly unclear whether the People intended to charge [the defendant] as a principal who personally committed the murder and other crimes, as a principal by virtue of being an aider and abettor under section 11(a) of title 14 of the Virgin Islands Code, or both. This distinction is not academic, for the elements the People must prove to establish culpability as an aider and abettor differ from the elements necessary to establish liability as a principal actor.").

At a June 9, 2015 hearing, the trial judge announced that the cases would be tried jointly and that limiting instructions, when necessary, would be given to the jury to prevent any prejudice to Akeam Davis. Akeam Davis objected to this procedure. Additionally, at the July 27, 2015 jury selection, Akeam Davis informed the court that, as a sanction for discovery violations, he would seek the exclusion of photographs of the crime scene; the employment records of Akeam Davis; the medical records of the victim, Khiry Crooke; and the testimony of the medical records custodian who would authenticate those records. Most of the People's photographs were excluded as to Akeam Davis but were admitted in evidence as to Michael Davis.

In the preliminary instructions, the court informed the jurors that, if a particular item of evidence is stricken from the record or if they are instructed to disregard a specific piece of evidence, that evidence cannot be considered by them. The court also instructed that evidence of guilt was to be assessed as to each defendant, individually, even though they were being tried jointly. Moreover, the jurors were instructed that, when evidence is admitted as to only one defendant, it cannot be considered against the other defendant. The jurors were further informed that, if they are instructed to consider evidence for only a limited purpose, they must only consider the evidence for that specific purpose. Lastly, the jurors were instructed that the defendants were presumed innocent, that the burden of proof was on the prosecution, and that guilt must be proven beyond a reasonable doubt. At trial, People's exhibits 2, 3, 4, 6, 7, 8, 11, 14, 14a, 15, 15a, 16, and 18 were admitted into evidence. Michael Davis also successfully moved into evidence defense exhibits 1, 4, 5, 6, and 7.

Khiry Crooke, the victim, testified first for the People. Crooke stated that he had known Akeam and Michael Davis all his life and identified both of them in court. He confirmed that Michael Davis's sobriquet is "Ragga," and Akeam Davis's sobriquet is "Yag."[2]

Crooke testified that, in the early morning of June 27, 2014, prior to being shot, he had seen Akeam and Michael Davis near his home, after which he went home to bathe and to prepare for the day's activities. At approximately 11:30 a.m., Crooke[3] was sitting on a wall near "the dirt road to go to [his] home"[4] in proximity to the Ezra Fredricks Ballpark in Estate Frydenhoj, St. Thomas, U.S. Virgin Islands, when the Appellants arrived in a "green Suzuki jeep" with "8% Cut" written on the windshield. The green Suzuki parked in proximity to Crooke. [5] Crooke was able to observe the vehicle as it approached him,[6] and he was familiar with this vehicle stating, "I just

[2] Several witnesses confirmed these nicknames. Officer Lindquist, while inspecting the green Suzuki in Estate Tutu, was approached by a man by the sobriquet of "Ragga," who stated that he heard the police were looking for him. In his statement to the police, Michael Davis confirmed his nickname was "Ragga." On cross-examination, the People elicited testimony from Clemille Gibbs that Michael Davis's nickname is "Ragga." Marva Ramirez, the Appellants' mother, also testified that Michael Davis's nickname is "Ragga," and Akeam Davis's nickname is "Yag."

[3] He was wearing a pair of "Air Max" shoes that were colored with light gray, dark gray, and pink. As he was running, one of the shoes fell off.

[4] The wall is across from a marina and a bar. There is also an alternator repair shop near his aunt's shop/home. Lucia Henley referred to the road where the shooting took place as the "main road" and stated that she regularly sells her products under the tree where the shooting took place. Henley also testified that the green vehicle was parked under the tree and went "straight out" the road toward Redhook, that Lorn drove Crooke to the hospital using the same road, and that Lorn and his children were outside near the tree at the time of the shooting. Officer Carr explained that there was approximately ten feet of ground between the place of the shooting and the alternator shop, and directly behind the alternator shop is the fence to the ballpark. Officer M. Perez described the road where the shooting occurred as being busy with cars passing and stated that, around that time of day, it was to be expected that the road would be busy. Detective Hamdan also testified that the crime scene was adjacent to the Fydenhoj ballpark and authenticated People's exhibit 3, which was a picture of the crime scene as viewed form the "highway." Detective Christopher testified that he "traveled to the crime scene which was the Fydenhoj Ballpark [in proximity to] the big mahogany tree." Across from this is a boatyard and a restaurant.

[5] Exhibit 2, a photo of the "main" road leading to Crooke's home, was admitted into evidence without objection by either defendant.

[6] People's Exhibit 8, a photo of the green Suzuki vehicle was admitted into evidence without objection from either Defendant.

know it," because he had seen Akeam Davis driving this particular green Suzuki on innumerable occasions and knew the vehicle was owned by Akeam Davis.

When the Suzuki vehicle stopped near Crooke, as he sat on the wall in proximity to the main road in front of his home, Akeam Davis exited the driver's side of the vehicle with a "little black gun" in his hand.[7] Akeam kept the door to the vehicle open by placing his right hand on the vehicle's door while his left hand held the gun at his side, pointing it down toward the ground during the entire incident. During the ensuing shooting, Akeam never moved from his position by the driver's door of the green Suzuki.

When the Appellants arrived in the green Suzuki, Michael Davis was in the passenger seat of the vehicle facing the side road, forcing him to, as Crooke described, "come around" the vehicle in order to approach Crooke. Michael Davis, however, then walked past Crooke, at a distance of three to four feet, while carrying a "pistol" in his left hand. He did not look at or say anything to Crooke at this juncture. In this predicament, Crooke felt the need to "keep an eye on" both Michael and Akeam Davis, and he demonstrated for the jury the measures he took in an attempt to observe them. Michael Davis then reversed his course, walking past Crooke without saying anything. Eventually, Michael turned around and approached Crooke, who was still sitting on the same wall near the road. He asked Crooke why Crooke had not run away.

After Crooke responded, Michael Davis began to move closer to him. Crooke immediately attempted to walk away, and Michael Davis followed him at a distance of approximately three feet with the gun in his hand. Observing that Michael Davis was following him and closing the distance between them, Crooke bent down to retrieve some stones that were nearby. When Crooke looked

[7] He described the gun as a black pistol that required a magazine to hold the ammunition.

back, over his left shoulder, at Michael Davis, he was raising his gun. Crooke then heard a "BAM" and was instantaneously shot.[8] As Crooke was describing the incident, he was asked "is that when you got shot," to which he responded, "Yeah, that's when he shot me."[9] Crooke continued to run for a few feet to seek help from his Aunt Rita, who lived up some stairs next to the nearby delicacy shop owned by another of Crooke's aunts, Lucia Henley, where Crooke eventually fell. Michael Davis went in a different direction than Crooke. However, Crooke saw neither when the Appellants nor the green Suzuki departed the area.[10]

Crooke testified that, after being shot, he ran toward his aunt's shop because he intended to go to his Aunt Rita's home, next door, to seek help. When he was unable to wake his Aunt Rita, Crooke continued seeking help and immediately saw Lorn Henley, a family member, and his two children crossing the public street. Crooke explained that he did not call 911 because he had been shot and was running away from the Appellants for fear of being shot a second time. Therefore, he was unable to seek assistance from anyone who conceivably might be across the road because, if he did, he would be running towards Michael Davis, who had just shot him.

Lorn attempted to transport Crooke to the hospital, but the vehicle developed mechanical problems and became inoperable on the highway. The police and emergency services arrived at

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[8] People's exhibit 4 was then admitted into evidence; it was a photo of the tree, which was about six or seven feet from where Crooke was sitting near the main road, and the shell casing from the fired weapon. The court gave a cautionary instruction that the bullet casing and evidence marker were not evidence against Akeam Davis.

[9] Crooke then indicated where on his body the "bullet" entered and exited. People's exhibit 6, a picture of Crooke on the stretcher at the hospital, was admitted into evidence. Akeam Davis objected because he felt the picture was more prejudicial than probative, and this was overruled. Michael Davis did not object. The picture also showed the entrance and exit wounds from the gunshot.

[10] Counsel for Michael Davis cross-examined Crooke as to the location of the shell casing being inconsistent as to where everyone was standing. Additionally, through cross-examination, Michael Davis's counsel suggested that Crooke was shot as a result of being engaged in criminal activity unrelated to the defendants, which Crooke denied. During this portion of the cross-examination, Crooke testified that he did not know Officer Perez personally and explained the he knew the officer's first name, Freddy, simply because of seeing his interactions on social media.

Crooke's location after Lorn had called for assistance. At this time, Crooke informed the police of the identity of those who had shot him and provided a description of the vehicle they were driving.

On cross-examination, Crooke was exhaustively questioned in an effort to highlight what were, ostensibly, implausible aspects of his testimony. For example, he did not know if Akeam Davis is left-handed or right-handed. Crooke was questioned as to how he was shot in the front of his body if he was not facing Michael Davis at the time of the shooting. In response, he expounded that he was shot "sideways." He also admitted that he knew Akeam Davis's car sufficiently well that he did not need to see it on the day of the shooting in order to describe it. The general tenor of the cross-examination appeared to be calculated to establish that Crooke's version of the shooting was fabricated in order to get Michael Davis prosecuted for violating the law or to conceal Crooke's own criminal conduct. Crooke testified that he understood that the Appellants believed he had assaulted their mother; therefore, they were infuriated and incensed, prompting Michael Davis to shoot him.[11]

Lucia Henley was then called to testify. he testified that she was at her shop near the Frydenhoj ballpark on June 27, 2015. The shop is separated from the ballpark by a drainage gut and a public street. The shop is also directly adjacent to the tree where the shooting occurred.

On the day of the shooting, she was in her shop during daylight hours and heard a loud noise that sounded like a shot. She then proceeded to look outside, but her view was partially obstructed. However, she still saw two young black males walk down the road away from her

[11] The People recalled Crooke at the end of their case. He testified that he was convicted of attempted robbery in 2007. Testimony regarding a June 11, 2015 threat that Michael Davis had made to Crooke was elicited. This is discussed in more detail in the relevant portion of this opinion.

shop and enter a green vehicle, with ostentatious tire rims, that was parked in proximity to the tree near the wall and drive eastward. She testified that she may have been mistaken as to the color of the vehicle because the incident transpired so quickly.[12]

Henley further testified that while standing on her porch, she directly saw Crooke entering the road and heard him tell Lorn he had been shot. In response, Lorn drove Crooke from the area to get medical assistance. She explained that she could not easily exit her shop to assist Crooke because her plants had been knocked over and were blocking the stairway. Henley also testified that Lorn and his children were in the road at the time of the shooting.[13]

Officer Vernon Carr was called as the next witness. At the time of trial, Officer Carr had been employed, as a police officer, for two years with the Virgin Islands Police Department ("VIPD") on June 27, 2014. On that day, during daylight hours, he and his partner were dispatched to the area of the Frydenhoj ballpark. They had been informed that a shooting had occurred, and they were to search the area for evidence. During the search, they retrieved a spent shell casing.[14] No firearm was recovered.

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[12] On cross-examination, Henley admitted she needed to wear glasses to see anything far away and that she probably was not wearing her glasses that day. She did not see the faces of the two men, and did not know them.

[13] The questioning was as follows:

> Q: Okay. And you referred to your son; who was your son?
> A: Lorn Henley.
> Q: Do you know if he was outside at the time you heard that noise [referring to the shot]?
> A: Yes, he was outside.
> Q: Do you know where he was?
> A: He had his two children out there in the street.

She explained that he was outside near a business called V.I. Pleasure Boat.

[14] In response to this testimony, Akeam Davis's counsel requested that the court remind the jury to not consider the testimony regarding the shell casing as to Akeam Davis because it had been excluded only as to him. The limiting instruction was given.

Officer Miguel Perez[15] testified next. He was on patrol on the day of the shooting, a Friday, and, at approximately 11:45 a.m. was called to search for a green Suzuki vehicle occupied by two males traveling between Red Hook and Estate Nadir; however, the vehicle was never located. He was then directed to go to Frydenhoj ballpark and interview Henley, which he did. In searching for evidence, a spent shell casing was found beneath the mahogany tree, and a gray and pink shoe was retrieved from the bottom of the steps near Henley's shop.

Officer Ecedro Lindquist was the next witness. On June 27, 2014, Officer Lindquist[16] was dispatched to the Frydenhoj ballpark to investigate a reported shooting. While proceeding to Frydenhoj, he was instructed to proceed to Estate Tutu because the suspected vehicle had been located there. As Officer Lindquist approached the suspect vehicle,[17] he saw a person wearing a cream-colored shirt walking towards the vehicle, but that person entered a nearby residence. Upon reaching the vehicle, he observed that the green Suzuki's engine was running with the key in the ignition. In proximity to the vehicle, there was a man who installs and repairs vehicle electronics such as speakers, radios, and alarms. Officer Lindquist spoke to that man in the area, but the man had not seen anyone exit the vehicle.

The officer confirmed that there was some writing on the green Suzuki's windshield that was unique but could not remember what it stated, and the prosecutor drew the officer's attention to the rims, with the officer indicating, in response, that all the rims "ha[d] spokes like that." No canine inspection was conducted; no fingerprints were lifted from any item of evidence; no search

[15] At the time of trial, Officer Perez had been employed by the VIPD for 19 years.

[16] At the time of trial, he had been a police officer for 19 years.

[17] Without objection, a photo of the vehicle where it was located was introduced into evidence as People's exhibit 7. Also, a photo of the vehicle, as found, was introduced as Defendant's exhibit 1.

for a firearm was conducted, and no tests for the presence of gunshot residue were conducted. He also did not interview any witnesses who may have been in proximity to the crime scene. However, while inspecting the vehicle, Officer Lindquist was approached by Michael Davis, who stated that he heard the police were searching for him. Michael Davis informed the officer that he had been occupied that day with caring for his fighting chickens.

Corporal Bernard Burke, the firearms supervisor for the VIPD, testified. At the time of trial, he had been the firearms supervisor for five years and employed with the VIPD for twenty-four years. As supervisor of firearms, he maintains the firearms licensing records for both the St. Thomas/St. John/Water Island district and the St. Croix district. The firearms division regulates who receives a firearms license in the Virgin Islands. In the Virgin Islands, only law enforcement officers who have been issued a Government-owned firearm may possess a firearm without a license. Officer Burke conducted an examination of the police records for firearms licenses for both Michael Davis and Akeam Davis as of the date of the shooting, and neither brother had a license to possess a firearm on the day of the shooting.[18]

Detective Maha Hamdan also testified. On June 27, 2014, Detective Hamdan[19] was on duty and traveling in her police vehicle when she was flagged down by a citizen on the Weymouth Rhymer Highway. She saw a man exit the driver side of a truck, and another person had opened the passenger door and "rolled" onto the ground. The passenger, while clutching his chest, then exclaimed "I got shot. I got shot." After Detective Hamdan radioed for emergency assistance, she

[18] The certificates-of-no-entry were admitted into evidence as exhibits 14, 14A, 15, and 15A.

[19] At the time of trial, Detective Hamdan had worked for the VIPD for seventeen years and had been assigned to the forensic division for more than eight years. The forensic division is responsible for photographing, collecting, and preserving evidence of a crime.

assisted with the injured passenger. While awaiting the arrival of the ambulance, the passenger divulged the name "Ragga" or "Rag." After emergency services arrived at the scene on Weymouth Rhymer Highway, Detective Hamdan was dispatched to the crime scene in Frydenhoj. While searching the crime scene, she recovered a .45 caliber bullet casing.[20] She also testified as to the location of a sneaker that was recovered, describing it as purple and pink.

Detective Ivan Christopher then testified. On June 27, 2014, at approximately noon, Detective Christopher[21] was dispatched to the hospital, where the victim had been taken, in order to investigate the shooting at the Frydenhoj ballpark. Detective Christopher first saw Crooke at the hospital while Crooke was on a stretcher being attended by the medical staff. Crooke appeared to be in excruciating pain and afraid. Detective Christopher saw Crooke's open bullet wounds multiple times when the medical staff changed the bandage, and he described these injuries in his testimony.

In a statement, admitted in evidence, given at 2:21 p.m. on the day of the shooting Michael Davis stated that he was at his farm in Smith Bay, St. Thomas, and was not at the Frydenhoj Ballpark. Michael Davis said that he had seen Crooke that morning near the Tutu Turnkey Housing Project where they had a verbal altercation. Additionally, a day prior, Crooke had threatened Michael Davis's mother. On the morning of the shooting, Crooke had arrived in the area of Estate Tutu where Michael Davis was having a car alarm installed in his vehicle with the assistance of "Jean, Mikey[,] who was installing the alarm, and Cruso–Crucial"; and because Michael Davis felt threatened by Crooke's conduct, he went to his farm in Smith Bay. In his

[20] A photograph of the casing as found at the scene was admitted without objection as People's exhibit 11.

[21] At the time of trial, he had twenty years of experience with the VIPD and was assigned to the Investigation Bureau, which is responsible for the investigation of all felonies.

statement admitted into evidence, Michael Davis stated that he was at that farm when he was told by several people that his name had been mentioned on the police radio; therefore, Davis endeavored to contact the police.

Michael Davis's counsel exhaustively cross-examined Detective Christopher on the investigation, testing of evidence, and possible aspects of the investigation that were not conducted or pursued. Detective Christopher admitted that the totality of evidence identifying Akeam and Michael Davis consisted of the testimony of the two eye-witnesses, Crooke and Henley, making the test results of any gunpowder residue important to the People's case. Detective Christopher was also the officer who arrested Akeam Davis on July 27, 2014. In arresting Akeam Davis, he noted that Akeam was right-handed.

For his first witness, Michael Davis called Crooke. Defense counsel's examination focused on Crooke's version of events on the day of the shooting. This description of the shooting, while more detailed, did not contradict any significant fact that Crooke had already stated in his prior testimony. Crooke did contradict Michael Davis's statement to the police in that Crooke testified that the alleged encounter between him and Michael Davis in Estate Tutu on the morning of the shooting never occurred. However, Crooke conceded that he had gone to the Estate Tutu Mall to purchase some items at the Kids Foot Locker store, which he was wearing at the time of the shooting. He also denied making any threats at or toward the Davis's mother. When questioned about the alleged threat, Crooke explained that Michael Davis and Crooke's brother have ongoing acrimony toward each other, and Crooke had occasionally been present when threats were exchanged between the two. Crooke testified during this examination that he believed that, because, at the crime scene, Michael Davis had walked directly past him and to the stairs looking

around, that he was looking for his brother, which is the reason Crooke did not immediately depart from the area upon seeing Michael Davis approach with a gun.

Michael Davis then called Clemille Gibbs as a witness to testify. Gibbs has a farm where he raises fighting roosters in Estate Smith Bay on St. Thomas. He and Michael Davis have been long-time friends, and Michael Davis frequented Gibbs's chicken farm. On June 27, 2014, Gibbs had arrived at the farm around 9:00 a.m., and Michael Davis had arrived about ten to twenty minutes later. Gibbs testified that Michael Davis told him that he got a ride to the farm that morning. Gibbs testified that at approximately 11:00 or 12:00, he gave Michael Davis a ride to Michael's car at the mechanic's shop near the Tutu High Rise apartment complex. Gibbs knew Michael Davis's mechanic by the sobriquet of "Lead." When they arrived at Lead's home where he works, the police were nearby, and both Michael Davis's car, a gray Toyota, and Akeam Davis's car were parked near each other. Gibbs also testified that he had witnessed Crooke, on a prior occasion, in June of 2014, confront Michael Davis about a situation with Michael Davis's mother. When cross-examined by Akeam Davis's counsel, Gibbs stated he had not seen or spoken to Akeam Davis on the day of the shooting.

Makeda Simmonds, a crime scene technician with the VIPD, testified. Simmonds was dispatched to the location where the green Suzuki was found and also dispatched to the hospital where Crooke was being treated.

An instant gunshot residue test was conducted on Michael Davis's left hand, right hand, and face at 2:16 p.m. that same day. The results confirmed that there was no gunshot residue present on Michael Davis. Simmonds had experience in conducting investigations where gunshot residue has not been detected on a suspect. Simmonds also testified that gunshot residue can dissipate within three to four hours of firing a gun.

Marva Ramirez, Appellants' mother, testified to an altercation during Easter of 2014 when Crooke assaulted her. However, she did not inform her sons of this incident.

Jovan Henry also testified. Henry testified that his sobriquet is "Lead" and that he is self-employed, working on car audio electronics and installing car alarms out of his residence. He lives in Estate Tutu across from the Holy Family Church by Foster Plaza, about a three-minute walk therefrom. On June 27, 2014, he was installing a car alarm in Michael Davis's silver Toyota Corolla. Michael Davis had brought his car to Henry the day before, but Henry was unable to complete the installation of the electronics and requested that the car be returned the next day.

Michael Davis's exhibit 7, a photo of where Henry lived, depicting Akeam Davis's vehicle parked outside his home, was then admitted into evidence. On the day of the shooting, Akeam Davis's vehicle was at Henry's place for either repairs or for installation of electronic equipment. Henry had moved the car from his driveway in order to make room for another vehicle, and it was while he was engaged in this process that the officers arrived and told him he could not move the vehicle. Henry testified that Akeam Davis had parked the vehicle at approximately 9:00 a.m. and that Michael Davis's car was also parked across the street under a tree, where he had parked at approximately 7:30 a.m.

Henry further testified that Michael Davis asserted that, on the morning of the shooting, when he had first brought his car to Henry, Crooke had come to Henry's workplace and threatened him (Michael Davis). At approximately 8:30 a.m., Michael Davis got a ride from another male, with the sobriquet "Crucial," who was also there. Henry was then shown People's exhibit 7, which purportedly showed Michael Davis's vehicle parked across from Henry's home on the morning of the shooting; and plainly visible on top of the car was a part for the alarm system that was being installed.

Akeam Davis then called Shikeema Toussaint to testify. Toussaint was then 22 years old and employed as a cashier at Home Depot. She and Akeam Davis had been dating for three years to the time of trial. On June 27, 2014, she had taken her children to school and thereafter picked Akeam Davis up from Henry's home in Estate Tutu at a little after 9:00 a.m.; they then spent the day together at Vessup Beach until approximately 1:00 p.m. They did not see any other person on the beach. After they departed the beach, she took Akeam Davis to his home in Tutu Turnkey housing community and then picked up her children. She testified that Akeam Davis "always" has his facial hair trimmed to a goatee.

On cross-examination, the People raised issues that focused on Toussaint's credibility. For example, she was questioned why, in the year after Akeem Davis was arrested, she had never contacted the police to inform them that he was in her company the day of the shooting. She also testified that they had discussed the case almost every day since Akeam Davis's arrest. She explained that she had picked Akeam Davis up near Henry's workplace, but she had not returned him there after leaving the beach because Henry had called and said the car was not ready.

II. JURISDICTION

This Court has jurisdiction over all appeals arising from a "Final Order" of the Superior Court. 48 U.S.C. § 1613a(d); V.I. CODE ANN. tit. 4, §§ 32(a), 33(a); *see also Toussaint v. Stewart* (*H. Toussaint*), 67 V.I. 931, 939-40 (V.I. 2017). "'A [Final Order] is a judgment from a court which ends the litigation on the merits, leaving nothing else for the court to do except execute the judgment.'" *H. Toussaint*, 67 V.I. at 939-40 (quoting *Ramirez v. People*, 56 V.I. 409, 416 (V.I. 2012) (citations omitted)). The entry of a Final Order implicitly denies all pending motions, and all prior interlocutory orders merge with the Final Order. *H. Toussaint*, 68 V.I. at 940-41, n.3

(citing *Simpson v. Bd. of Dirs. of Sapphire Bay Condo. W.*, 61 V.I. 728, 731 (V.I. 2015); *In re Estate of George*, 59 V.I. 913, 919 (V.I. 2013)).[22]

In a criminal case, the written judgment embodying the adjudication of guilt and sentence imposed based on that adjudication constitutes a Final Order for purposes of this statute. *Percival v. People*, 62 V.I. 477, 483 (V.I. 2015). Therefore, this Court obtained jurisdiction to hear these appeals, respectively, based on the filing of timely notices of appeal dated December 2, 2015, and December 22, 2015, following the entry of a judgment and commitment in the Superior Court on December 8, 2015 adjudicating the guilt of and imposing sentences for both Akeam and Michael. V.I. R. APP. P. 4(a), (5)(b)(1); *see also* V.I.S. CT. R. 4(a), 5(b)(1) (repealed); *Billu v. People*, 57 V.I. 455, 461 n.3 (V.I. 2012) (noting that, where an amended rule utilized the same language as the rule in effect at the time the notice of appeal was filed, the amended rule is applied); *cf. Webster v. FirstBank Puerto Rico*, 66 V.I. 514-519 n.3 (V.I. 2017) (applying former rules of the Superior Court in effect at the time the judgment was entered); *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 548 n.13 (V.I. 2015) (applying version of statute in effect at the time the action was commenced); V.I. R. APP. P. 5(a)(9), (b)(6) ("A judgment or order is entered within the meaning of this subdivision when it is entered on the criminal docket.").[23]

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[22] *See generally Penn v. Mosley*, 67 V.I. 879, 891 n.4 (V.I. 2017) (discussing the distinctions between a judgment, order, and decree); *Miller v. Sorenson*, 67 V.I. 861, 871-72 (V.I. 2017) (discussing the distinctions between a judgment and decree); *Cianci v. Chaput*, 68 V.I. 682, 688 (V.I. 2016) (quoting *In re George*, 59 V.I. at 919)); *J. Williams v. People*, 58 V.I. 341, 347-48 (V.I. 2013) (holding that a stay of execution of judgment does not render an order non-final); *Davis v. Allied Mortg. Capital Corp.*, 53 V.I. 490, 498-99 (V.I. 2010) (discussing circumstances under which a trial court's failure to address a counterclaim does not render a Final Order non-final).

[23] This Court also possesses an independent obligation to determine that the trial court properly exercised subject matter jurisdiction over the case. *Farrell v. People*, 54 V.I. 600, 607 (V.I. 2011) ("The agreement of the parties 'does not relieve the court of the need to conduct an independent analysis of the jurisdictional question." (quoting *H&H Avionics v. V.I. Port Auth.*, 2 V.I. 458, 460 (V.I. 2009)); *see Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 304 (V.I. 2014) (citing *In re Guardianship of Smith*, 54 V.I. 517, 525-26 (V.I. 2010)). In the Virgin Islands, a criminal information is defective for failing to allege subject matter jurisdiction if it fails to allege facts showing that the allegedly criminal conduct: (1) occurred in the Virgin Islands and (2) involved a violation of a criminal statute at the

III. STANDARD OF REVIEW

Appellants propound several issues for consideration on appeal. The Court addresses these issues in a different order than they are presented because a challenge to the sufficiency of the evidence provides greater relief, i.e., acquittal, than if an appellant is successful in having other rulings reversed, which would result in a remand for a new trial. *Elizee v. People*, 54 V.I. 466, 482 (V.I. 2010) ("'[A] reversal for evidentiary insufficiency is considered to be the equivalent of an acquittal.'" (quoting *McMullen v. Tennis*, 562 F.3d 231, 237 (3d Cir. 2009)); *see Galloway v. People*, 57 V.I. 693, 700 n.3 (V.I. 2012).

Appellants challenge the sufficiency of the evidence to sustain all of their convictions. The issue for consideration is whether there was sufficient evidence from which a reasonable jury could have concluded beyond a reasonable doubt that Michael Davis committed Third Degree Assault, Unauthorized Possession of a Firearm During the Commission of a Crime of Violence, and First Degree Reckless Endangerment, and that Akeam Davis aided and abetted Michael Davis in the commission of these crimes. Because Appellants challenged the sufficiency of the evidence on all their convictions by making motions for judgment of acquittal pursuant to Superior Court Rule 7 and Federal Rule of Criminal Procedure 29,[24] this Court exercises plenary review over the denial

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time of the conduct. *Tindell v. People*, 56 V.I. 138, 147-48 (V.I. 2012) ("Pursuant to Section 21(b) of the Revised Organic Act and title 4, section 76(b) of the Virgin Islands Code, the Superior Court has subject matter jurisdiction to hear criminal cases that (1) arise from the Virgin Islands and (2) involve violations of Virgin Islands criminal statutes."). The initiating information, filed August 19, 2014, alleged that Davis's criminal acts occurred June 27, 2015, on the Island of St. Thomas. These same facts were proved at trial, and the evidence established a violation of a Virgin Islands' criminal statute as to each count; therefore, the Superior Court properly exercised subject matter jurisdiction.

[24] Former Superior Court Rule 7 made the Federal Rules of Criminal Procedure applicable in the Superior Court. However, effective December 1, 2017, the Virgin Islands Rules of Criminal Procedure became operative and were subsequently amended on December 19, 2017. S. Ct. Prom. Orders 2017-010 (Dec. 1 & 19, 2017). Because we apply the rules in effect at the time the Superior Court decided the issue under consideration, we apply former Superior Court Rule 7 and Federal Rule of Criminal Procedure 29. *H. Toussaint*, 67 V.I. at 941 n.5 (explaining that the rule in effect at the time of entry of the order appealed from is the rule applied on appeal); *compare* FED. R. CRIM. P. 29(a)

of such motions and applies the same standard as the trial court. *Stanislas v. People*, 55 V.I. 485, 491 (V.I. 2011) (citing *Stevens v. People*, 52 V.I. 294, 304 (V.I. 2009)); *see also Prince v. People*, 57 V.I. 399, 405 (V.I. 2012) (stating that review of sufficiency of the evidence is plenary). "This standard of review is formidable and 'defendants challenging convictions for insufficiency of evidence face an uphill battle on appeal.'" *United States v. Santos-Rivera*, 726 F.3d 17, 23 (1st Cir. 2013) (citations omitted). When an appellant seeks to have his conviction overturned for lack of evidence, he bears a heavy burden. *Ritter v. People*, 51 V.I. 354, 359 (V.I. 2009).

There is no requirement that the evidence be consistent with only the conclusion of guilt, because a conviction must be affirmed if a rational trier of fact, taking the evidence in the light most favorable to the verdict, could have found the defendant guilty beyond a reasonable doubt, and the conviction is supported by substantial evidence. *See Coleman v. Johnson*, 566 U.S. 650, 654 (2013); *Ritter*, 51 V.I. at 359. A trier of fact acts rationally if, in light of reason and everyday experience, the evidence properly presented rationally and logically supports the existence of the facts establishing the elements of the crime. *Leary v. United States*, 395 U.S. 6, 33-35 (1969) (citing *Tot v. United States*, 319 U.S. 463, 466-67 (1943)); *United States v. Gainey*, 380 U.S. 63 (1965); *United States v. Romano*, 382 U.S. 136 (1965)); *Ventura v. People*, 64 V.I. 589, 601 (V.I. 2016) ("'A verdict may not rest merely upon suspicion, speculation, or conjecture or any overly attenuated piling of inference on inference." (quoting *Todman v. People*, 59 V.I. 675, 861 (V.I. 2013)).[25] The credibility of witnesses and the weighing of evidence is not for this Court to second

("[T]he court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.") *with* V.I. R. CRIM. P. 29(a) ("[T]he court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.").

[25] *See Penn*, 67 V.I. at 898; *Nicholas v. People*, 56 V.I. 718, 748-49(V.I. 2012) (finding lay testimony to have been improperly admitted because it was not based on "rational perceptions"); *e.g.*, *Mulley v. People*, 51 V.I. 404, 410 n.3 (V.I. 2009) (holding that proof of use of ammunition cannot satisfy the element requiring that possession of

guess, and we view the evidence in the light most favorable to the People. *Williams v. People* (*A. Williams*), 55 V.I. 721, 734 (V.I. 2011); *see also Ritter*, 51 V.I. at 359 ("[A]ll issues of credibility within the province of the jury must be viewed in the light most favorable to government." (citation and internal quotations omitted)); *Santos-Rivera*, 726 F.3d at 25 ("Credibility is a question for the jury, which on appeal must be resolved in favor of the government." (citation omitted)). Even where the court does not believe the prosecution's witness, a conviction must be affirmed where there was evidence sufficient to support a rational jury in finding each essential element of the crime beyond a reasonable doubt, and relief is better requested in a motion for a new trial. *United States v. Truman*, 688 F.3d 129 (2d Cir. 2012).

Appellants also challenge the correctness of the jury instructions. Michael Davis challenges the jury instructions for Third Degree Assault, arguing that the failure to instruct that the injury must occur "under circumstances not amounting to assault in the first or second degree" was an omission of an essential element of the crime and, thus, prejudicial. Michael Davis also challenges the failure of the trial court to give, *sua sponte*, a self-defense jury instruction. Akeam Davis argues that the court's refusal to adopt his suggested jury instruction on Aiding and Abetting the Unauthorized Possession of a Firearm During the Commission of a Crime of Violence was an abuse of discretion. Challenges to jury instructions are reviewed for abuse of discretion when properly objected to at trial. *Ostalaza v. People*, 58 V.I. 531, 556 (V.I. 2013); *Jackson-Flavius v. People*, 57 V.I. 716, 721 (V.I. 2012). Where no objection is made or an instruction is not requested, the claim of error is subject to Plain Error Review. *Elizee*, 54 V.I. at 475; *Cornelius v. Bank of Nova Scotia*, 67 V.I. 806, 816 n.2 (V.I. 2017).

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ammunition be unlawful); *Castor v. People*, 57 V.I. 482, 494 (V.I. 2012) ("The jury's inference that partial insertion occurred—especially in light of the fact that M.L. became pregnant by the contact—cannot be considered irrational.")

Lastly, appellants argue that the trial court abused its discretion when it refused to grant their motions for a mistrial. The denial of such a motion is reviewed for abuse of discretion. *John v. People*, 63 V.I. 629, 644-45 (V.I. 2015).

IV. DISCUSSION

A. Sufficiency of the Evidence

Importantly, "before discussing whether there was sufficient evidence supporting the challenged elements, the elements of each crime should be considered, as any evidentiary [or jury instruction] analysis is necessarily framed by the elements being challenged." *Ubiles v. People*, 66 V.I. 572, 590 (V.I. 2017); *see, e.g.*, *Duggins v. People*, 56 V.I. 295, 307 (V.I. 2012) (noting that, in determining the applicability of a statute of limitations, "we were required to determine the elements of a violation of" the crime charged (citing *Miller v. People*, 54 V.I. 398 (V.I. 2010))).

1. Third Degree Assault

Appellants invoke the language of the charging clause of section 297 of title 14 of the Virgin Islands Code, arguing that the language—"under circumstances not amounting to assault in the first or second degree"—is an essential element of the crime of Third Degree Assault while challenging the sufficiency of the evidence to support the convictions.[26] We must give effect to all the words and provisions of a statute by considering their plain language in light of any statutory

[26] We must also examine the elements of First Degree Assault and Second Degree Assault in order to give meaning to the phrase "under circumstances not amounting to assault in the first or second degree" and determine if that phrase would require proof of additional facts not covered by the subsections of section 297 and is, thus, an essential element of Third Degree Assault or if it is merely descriptive language providing context. *Haynes v. United States*, 390 U.S. 85, 90-91 (1968) ("The first issue is whether the elements of the offense under § 5851 of possession of a firearm 'which has not been registered as required by section 5481' **differ in any significant respect** from those of the offense under § 5841 for failure to register possession of a firearm." (emphasis added)); *see Phillip v. People*, 58 V.I. 569, 590 (V.I. 2013); *S.T. v. People*, 51 V.I. 420, 435 (V.I. 2009) (Swan, J. concurring) ("The plain meaning of statutory language is often illuminated by considering not only the particular statutory language, but also the structure of the section in which the key language is found, the design of the statute as a whole, and its object." (internal citations and quotations omitted)).

definitions, any words that have an accumulated legal meaning, and, absent such definitions, we apply the common, "dictionary" meaning. *Ubiles*, 66 V.I. at 590; 1 V.I.C. § 42; *see also* 1 V.I.C. § 41. Determining the exact meaning of a word requires consideration of the context, structure, placement, and other linguistic indicators in the statute. *Ubiles*, 66 V.I. at 590; *e.g.*, *Gilbert v. People*, 52 V.I. 350, 356 (2009) (discussing the legal effect of the grammatical meaning of an adjective).

Section 291 of title 14 defines "Assault" as follows:

> Whoever
> (1) attempts to commit a battery; or
> (2) makes a threatening gesture showing in itself an immediate intention coupled with an ability to commit a battery commits an assault.

Section 292 of title 14, "Assault and Battery," provides as follows:

> Whoever uses any unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used, commits an assault and battery.

14 V.I.C. § 292. Subsection 291(1), therefore, prohibits **the use** of unlawful violence against another, 14 V.I.C. § 291(1) (emphasis added); *cf.* 14 V.I.C. § 292. Whereas, subsection 291(2) prohibits **threating the use** of unlawful violence, 14 V.I.C. § 291(2) (emphasis added).

A person commits an Assault when he attempts to commit a battery or, under circumstances wherein the gestures made could be immediately carried out, makes gestures that in themselves communicate an immediate intent to commit a battery. 14 V.I.C. § 291. Under subsection 291(1), the elements of an Assault are: (1) the defendant; (2) attempted to use unlawful violence against another person; and (3) he attempted to use that unlawful violence with the specific intent to injure that person. 14 V.I.C. § 291(1); 14 V.I.C. § 292. Under subsection 291(2), the elements of Assault are: (1) the defendant; (2) made gestures; (3) under circumstances wherein the gestures made could

be immediately carried out; and (4) those gestures communicated an immediate specific intent to use unlawful violence against another. 14 V.I.C. § 291(2). Despite the varying language, these are both statements of elements of Assault, as defined in section 291 of title 14.[27] A person commits an Assault and Battery if the following are proved beyond a reasonable doubt: (1) the defendant; (2) used unlawful violence against another person; and (3) the defendant used that unlawful violence with the specific intent to injure the intended victim. 14 V.I.C. § 292.

Unlawful violence is not defined explicitly, but it is defined by implication. *See* 14 V.I.C. § 293.[28] Subsection 293(a) of title 14 adumbrates the circumstances under which a person's

[27] Under subsection 291(1), a victim does not necessarily need to have observed the conduct that constituted the assault. An obvious example of this is a case in which a defendant discharges a firearm in the direction of the victim who has his/her back turned. Clearly, in such a hypothetical, the defendant intended to use unlawful violence against the victim, even if he did not actually make contact with the victim and the victim did not see the missed shot. In comparison, subsection 291(2) would be violated if a defendant, standing at a great distance while the victim was looking, pointed a loaded firearm at the victim after having communicated a desire to immediately injure the victim, even if the firearm was never discharged.

[28] The full text of section 293 of title 14, titled "Lawful violence, what constitutes," is as follows:

> (a) Violence used to the person does not amount to an assault or an assault and battery
> (1) in the exercise of the right of moderate restraint or correction given by the law to the parents over the child, the guardian over the ward, the master over his apprentice or minor servant, whenever the former be authorized by the parent or guardian of the latter so to do;
> (2) for the preservation of order in a meeting for religious or other lawful purposes, in case of obstinate resistance to the person charged with the preservation of order;
> (3) the preservation of peace, or to prevent the commission of offenses;
> (4) in preventing or interrupting an intrusion upon the lawful possession of property, against the will of the owner or person in charge thereof;
> (5) in making a lawful arrest and detaining the party arrested, in obedience to the lawful orders of a magistrate judge or court, and in overcoming resistance to such lawful order; or
> (6) in self defense or in defense of another against unlawful violence offered to his person or property.
> (b) In all cases mentioned in subsection (a) of this section, where violence is permitted to effect a lawful purpose, only that degree of force must be used which is necessary to effect such purpose.
>
> 14 V.I.C. § 293.

actions will not constitute an Assault or an Assault and Battery for the use of "violence." Violence is "[t]he use of physical force, usu[ally] accompanied by fury, vehemence, or outrage; esp[ecially], physical force unlawfully exercised with the intent to harm." BLACK'S LAW DICTIONARY 1705 (9th ed. 2009). For example, a parent exercising moderate force may restrain or "correct" a child. 14 V.I.C. § 293(a)(1). Similarly, preservation of the peace, in general, and preservation of the order of a lawful meeting, for religious or other reasons, "in the case of obstinate resistance to the person charged with the preservation of order" allow a person to use force against another. 14 V.I.C. § 293(a)(2)-(3). Further, preventing a crime, protection of property, defense of others, and self-defense all justify the use of force. 14 V.I.C. § 293(a)(3)-(4), (6). Finally, use of force in effecting a lawful arrest and overcoming resistance to that arrest is lawful. 14 V.I.C. § 293(a)(5). In all such cases, however, the force becomes unlawful violence if it is a degree of force in excess of that "necessary to effect such purpose." 14 V.I.C. § 293(b).

Section 297 of title 14, which defines the crime of Third Degree Assault, states as follows:

> (a) Whoever, under circumstances not amounting to an assault in the first or second degree
>
> (1) assaults another person with intent to commit a felony;
>
> (2) assaults another with a deadly weapon;
>
> (3) assaults another with premeditated design and by use of means calculated to inflict great bodily harm;
>
> (4) assaults another and inflicts serious bodily injury upon the person assaulted; or whoever under any circumstances;
>
> (5) [Deleted.]
>
> shall be fined not less than $500 and not more than $3,000 or imprisoned not more than 5 years or both.
>
> (b) Whoever, under circumstances not amounting to an assault in the first or second degree assaults a peace officer in the lawful discharge of the duties of his office with a weapon of any kind, if it was known or declared to the defendant that the person assaulted was a peace officer discharging an official duty, shall be fined not less than $2,000 and not more than $10,000, or imprisoned not more than 10 years, or both.

14 V.I.C. § 297. Both subsections 297(a) and 297(b) address assaults, and the elements of the crime of Third Degree Assault must be framed in terms of the definition provided in section 291 of title 14. Subsections (1)-(4) of section 297 provide for, in addition to the elements as defined in sections 291 and 292 of title 14, aggravating factors that make the conduct involved the crime of Third Degree Assault. *Cf.* 14 V.I.C. § 299.

Section 297(a)(1) makes it Third Degree Assault to use violence upon another with the intent to commit a felony. While this provision necessarily requires reference to section 291(2) to define Assault, nothing in section 297(a)(1) requires reference to either sections 295 or 296 to understand the conduct proscribed; and any person reading the statute would be informed that, if a person Assaults someone while attempting to commit any crime defined in the Virgin Islands as a felony, the person is guilty of Third Degree Assault. This contention is also true for subsections 297(a)(2-4). Subsection 297(a)(2) instructs that the use of a deadly weapon while committing an Assault is a crime. Subsection 297(a)(3) defines Third Degree Assault as any Assault whereby a person acts with premeditation and employs means calculated to cause great bodily injury. Finally, subsection 297(a)(4) informs that any person who Assaults another and causes that person serious bodily injury is guilty of Third Degree Assault.

Setting aside the language under consideration in this appeal—"under circumstances not amounting to assault in the first or second degree"—the elements of Third Degree Assault, subsections 297(a)(1)-(4), are: (1) the defendant; (2) under circumstances wherein the gestures made could be immediately performed; (3) made gestures; (4) those gestures communicated an immediate ability and specific intent to use unlawful violence against another; and (5) such actions (a) were taken with the specific intent to commit a felony, (b) were taken with the use of a deadly weapon, (c) were taken with a premeditated design and by use of means calculated to inflict great

bodily injury, or (d) inflicted great bodily injury upon the victim. 14 V.I.C. § 297(a)(1-4); 14 V.I.C. § 291(2).[29] It is incontrovertible that the phrase "under circumstances not amounting to an assault in the first or second degree" does not serve to define or add an essential fact to the elements of Third Degree Assault as defined in subsections 297(a)(1)-(4) and is, therefore, not an element of the crime of Third Degree Assault.

The substance of sections 295 and 296 provide further support for the conclusion that "under circumstances not amounting to an assault in the first or second degree" is not an essential element of Third Degree Assault. As consideration of the elements of First Degree Assault and Second Degree Assault fully and comprehensively illustrate, subsections 297(a)(1)-(4) involve conduct similar to, but distinct from, the conduct proscribed in sections 295[30] and 296.[31] For

[29] The elements of Third Degree Assault under subsection 297(b) are: (1) the defendant; (2) under circumstances wherein the gestures made could be immediately carried out; (3) made gestures, with the use of a weapon of any kind, that in themselves communicated an immediate specific intent to use unlawful violence against another; (4) the victim was a peace officer; (5) the peace officer was acting in the lawful discharge of his duties; and (6) it is known or declared to the defendant that the victim was a peace officer acting in his official capacity. 14 V.I.C. § 297(b); 14 V.I.C. § 291(2).

[30] All three subsections of section 295 are variations of section 291(1) that alter the intent requirement that is provided in section 292 from requiring the specific intent to cause injury to requiring the specific intent to commit certain enumerated crimes. Therefore, under subsections (1) and (3) of section 295, the elements of First Degree Assault are: (1) the defendant; (2) used unlawful violence against another person; and (3) he attempted to use that unlawful violence with the specific intent to commit murder, rape, sodomy, mayhem, robbery, or larceny against that person. 14 V.I.C. § 295(1) and (3); 14 V.I.C. § 291(1). By comparison, subsection (2) of section 295, while also varying the intent element, enumerates specific acts that constitute First Degree Assault; and the elements under subsection (2) are: (1) the defendant; (2) administered or caused to be administered to another person any poison or other noxious or destructive substance; and (3) such poison or other noxious or destructive substance was administered with the specific intent to kill that person. 14 V.I.C. § 295(2); 14 V.I.C. § 291(1).

[31] Section 296 of title 14 is similar to section 295(2) in that its provisions focus on acts of violence, as opposed to threats of violence, and alter both the act and intent elements from those provided in section 291(1). The plain text of section 296 makes clear that a mens rea of willful is applicable to each of the subsections. In contrast, sections 291 and 292 have a mens rea requirement of knowingly; and section 295 requires a mens rea of specific intent. 14 V.I.C. § 14(5); *Duggins*, 56 V.I. 295. However, subsections (1) and (4) of section 296 add certain additional specific intent elements. 14 V.I.C. § 296(1) ("with intent that the same shall be taken by any human being, to his injury"); 14 V.I.C. § 296(4) ("with intent to injure the flesh or disfigure the body or clothes of such person"). Because Second Degree Assault under subsections 296(1) and (4) has an additional specific intent element that is not present under 296(2, 3), the elements of Second Degree Assault under subsections 296(1) and (4) are: (1) the defendant; (2) either **willfully** added poison to food, drink, or medicine or **willfully** placed or threw or caused another to place or throw vitriol, corrosive acid, pepper, hot water, or a chemical of any nature upon another person; and (3) such actions were taken

example, subsections 295(1) and (3) are addressed to the specific crimes of murder, rape, sodomy, mayhem, robbery, and larceny. Whereas, subsection 297(a)(1) is addressed to any felony. Sections 295(2) and 296(1) and (4) relate to the use of a specific deadly weapon, i.e., poison, and section 297(a)(2) governs assaults where any deadly weapon is used. Likewise, subsections 296(1) and (4) both require the specific intent to cause injury and are concerned with the specific means by which this is attempted, i.e., use of poison or chemicals that physically burn and injure a person. Section 297(a)(3) has the same specific intent requirement that the person desired to injure the victim but is only concerned with assaults achieved through premeditated design in general and not the specific means employed, which is in contrast to subsections 296(1) and (4). Therefore, the language "under circumstances not amounting to assault in the first or second degree" is not an element of Third Degree Assault. Having identified the elements of the crime for which Michael Davis was convicted, I turn to the sufficiency of the evidence supporting that conviction and Akeam Davis's conviction for aiding and abetting that crime.

a. Principal

Michael Davis was charged with violating section 297(4) of title 14. This charge required proof beyond a reasonable doubt of each of the following elements: (1) the defendant; (2) under circumstances wherein the gestures made could be immediately performed; (3) made gestures; (4) those gestures communicated an immediate, specific intent to use unlawful violence against

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with the **specific intent** that such poisoned food, drink, or medicine injure another person or with the **specific intent** that the application of such vitriol, corrosive acid, pepper, hot water, or chemical injure or disfigure another person or the clothes that person is wearing. 14 V.I.C. § 296(1) and (4); 14 V.I.C. § 291(1). In contrast, the elements of Second Degree Assault under subsections 296(2) and (3) are: (1) the defendant; (2) willfully; (3) either strangled or attempted to strangle another person in an act of domestic violence or poisoned a spring, well, or reservoir of water. 14 V.I.C. § 296(2) and (3); 14 V.I.C. § 291(1).

another; and (5) such actions inflicted great bodily injury upon the person assaulted. 14 V.I.C. § 297(a)(4); 14 V.I.C. § 291(2).

Crooke testified that, at approximately 11:30 a.m. on June 27, 2014, in the area of the Frydenhoj ballfield, Michael Davis displayed a firearm in his hand as he walked closely past Crooke. Michael Davis then asked Crooke why he had not run away. As Crooke was retreating, Michael Davis pursued him and shot Crooke as he was attempting to retrieve rocks from the ground nearby to defend himself. The shooting was seen by Crooke, and the shot he received when Michael Davis discharged his firearm resulted in the collapse of one of Crooke's lungs requiring emergency medical attention at a medical facility. Crooke, under oath, identified Michael Davis (and Akeam Davis) both as one of the persons sitting at the defense counsel's table and the one of the two defendants who had shot him.

It is noteworthy that the shooting occurred during daylight hours, and no testimony revealed that Michael Davis wore a mask or made any other attempt to conceal his face. Moreover, Crooke had known Michael Davis for several years. Therefore, the possibility of mistaken identity is absolutely nil or non-existent, and the evidence supported a finding beyond a reasonable doubt that Michael Davis was the defendant (element 1). Michael Davis's act of walking past Crooke while in proximity to him and displaying a gun in conjunction with his inquiry as to why Crooke had not run is compelling circumstantial evidence of his specific intent to use unlawful violence against Crooke. Further, upon pointing a firearm at Crooke while within firing range and ultimately firing, Michael Davis confirmed this intention (elements 2, 3, and 4). Finally, Crooke showed that area of his body where he was shot and testified that he thought "that was it," indicating he feared he would die. Further, at least one police officer testified to seeing the chest

wound, thereby establishing grave and severe bodily injury to the victim (element 5).[32] Consequently, the testimonial evidence was sufficient for a reasonable jury to conclude beyond a reasonable doubt that Michael Davis committed Third Degree Assault.

b. Aider and Abettor

Akeam Davis was charged with aiding and abetting Michael Davis in committing Third Degree Assault in violation of 14 V.I.C. § 11(a) and 14 V.I.C. § 297(a)(4). There are four general elements of "Aiding and Abetting," to wit: (1) the defendant; (2) was associated with a criminal endeavor; (3) the association was made by the defendant with the specific intent to achieve the desired crime; and (4) the defendant encouraged the success of the criminal endeavor through his words or actions. *Brown v. People*, 54 V.I. 496, 509 (V.I. 2010); *see Tot*, 319 U.S at 467-68 (recognizing that an inference from circumstantial evidence is arbitrary if there is a lack of connection between the evidentiary facts presented and the inferential fact determined by the circumstantial evidence properly presented (citing *Mobile J. & K.C.R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910); *Bailey v. Alabama*, 219 U.S. 219, 239 (1911); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 81 (1911); *Luria v. United States*, 231 U.S. 9, 25 (1913); *McFarland v. Am. Sugar Ref'g Co.*, 241 U.S. 79, 86 (1916); *Manley v. Georgia*, 279 U.S. 1 (1929); *Western & A.R. Co. v. Henderson*, 279 U.S. 639, 642 (1929); and *Morrison v. California*, 291 U.S. 82, 90 (1934)). Therefore, the essential elements of the crime of Aiding and Abetting Third Degree Assault in violation of 14 V.I.C. §§11(a), 297(a)(4) required proof beyond a reasonable doubt that: (1) the defendant; (2) associated himself with Michael Davis under circumstances wherein Michael Davis

[32] Crooke's medical records further support this element. However, this evidence is not essential to the Court's ruling in sustaining Michael Davis's conviction and is not considered when discussing the sufficiency of the evidence for Akeam Davis's convictions.

made gestures that could be immediately carried out and the gestures in themselves communicated an immediate specific intent by Michael Davis to use unlawful violence against another and such actions inflicted great bodily injury upon the person assaulted ("Association with the Crime"); (3) the defendant specifically intended that the criminal endeavor succeed ("Specific Intent"); and (4) the defendant spoke words or took actions that encouraged or assisted in the success of the criminal endeavor ("Overt Act"). 14 V.I.C. § 297(a)(4); 14 V.I.C. § 291(2); 14 V.I.C. § 11(a).

The evidence was sufficient for a jury to conclude beyond a reasonable doubt that Akeam Davis was guilty of Aiding and Abetting Michael Davis in the commission of Third Degree Assault. Crooke identified Akeam Davis as the driver of the vehicle that transported Michael Davis to the crime scene. It was daylight when the same vehicle parked in proximity to Crooke. Further, there was no other person between Crooke and Akeam Davis, which eliminated any possibility of mis-identification. Therefore, once Crooke identified Akeam Davis as one of the men at the defense counsel's table who was involved in the assault and battery upon him, there was sufficient evidence proving element 1. Additionally, upon his arrival at the crime scene, Akeam Davis immediately, and without conversing with Michael Davis, exited the vehicle and displayed a firearm and then maintained this position as a guard and watchman while he watched Michael Davis display his own firearm and walk past Crooke and then ask Crooke why he did not run.[33] Akeam Davis was present as Michael Davis pointed his firearm at Crooke and shot him. Akeem Davis then assisted his brother in departing the crime scene when the Appellants fled in Akeem's vehicle.

[33] Given the testimony of Henley that, even standing on her porch, she could hear Crooke telling Lorn that he had been shot, the jury could have reasonably inferred that Akeam Davis heard Michael Davis when he said this. *See Tot*, 319 U.S. at 466-67.

By transporting his brother, Michael Davis, to the crime scene, standing guard at his vehicle while brandishing a firearm, which Crooke could plainly see, and then, immediately after commission of the crime, transporting his brother from the crime scene, thus facilitating the "get away," Akeem Davis was a consummate aider and abettor in the criminal venture. The foregoing is all evidence supporting a finding of elements 2, 3, and 4 beyond a reasonable doubt. *See Gov't of the V.I. v. Rodriguez*, 423 F.2d 9, 15 (3d Cir. 1970); *Cf. Phillip v. People*, 58 V.I. 569, 584-85 (2013) (discussing how competing inferences do not make the evidence insufficient). Because there was sufficient evidence from which a reasonable jury could have concluded beyond a reasonable doubt that Akeam Davis aided and abetted Michael Davis in the commission of Third Degree Assault, I would affirm the conviction.

2. Unauthorized Possession of a Firearm During the Commission of a Crime of Violence

The elements of the crime of Unauthorized Possession of a Firearm require proof that: (1) the defendant, (2) knowingly (3) possessed, (4) a firearm, (5) without lawful authorization.[34] 14 V.I.C. § 11(a); 14 V.I.C. § 2253(a); *see Woodrup v. People*, 63 V.I. 696, 710-11 (V.I. 2015); *Phillip*, 58 V.I. at 589 n.24 (stating that it is the person, rather than the firearm, who is subject to

[34] Under section 2253(a) of title 14, the phrase, "unless otherwise authorized by law," has been held to establish what makes the possession of a firearm a crime; such possession is a crime unless authorized by law. This interpretation is open to question. *See generally* 1 V.I.C. § 45(a)(2)-(3) (providing that "catchlines . . . immediately preceding the texts of the individual sections" and "any descriptive catchlines immediately preceding the texts of any subsections or paragraphs" do "not constitute part of the law"); *Gov't of the V.I. v. King*, 31 V.I. 78, 84 (V.I. Super. Ct. 1995); *cf. Toussaint v. Gov't of the V.I.* (*G. Toussaint*), 964 F. Supp. 193, 198 (D.V.I. App. Div. 1997), *overruled on other grounds*, 301 F. Supp. 2d 420, 460 (D.V.I. App. Div. 2004). For example, in *Ambrose v. People*, 56 V.I. 99, 107 n.6 (V.I. 2012) (citing *United States v. McKie*, 112 F.3d 626, 631 (3d Cir. 1997)), we expressly held the licensing exceptions in other sections to be affirmative defenses. Similarly, this Court noted in *Murrell*, 56 V.I. at 808-14, that section 488 of title 23 indicates a complete prohibition on the possession of firearms, which would indicate that the "unless otherwise authorized by law," language is an affirmative defense rather than an essential element. *Cf. United States v. Santiago*, Crim. No. 2016-17, 2017 WL 187152, at *6 (D.V.I. Jan. 16, 2017). For purposes of this opinion, we include in the statement of elements the language, "unless otherwise authorized by law," and reserve further consideration the question of whether the statutory language read *in pari materia* supports the conclusion that this language is an element of the crime rather than an affirmative defense.

licensing) (citing *United States v. McKie*, 112 F.3d 626 (3d Cir. 1997) (holding it was the People's burden to prove the defendant was not authorized to possess a firearm)); *see also Percival*, 62 V.I. at 488-89 ("[A]ll that is required for a conviction under section 2253(a) is evidence that the defendant had an unlicensed firearm in his possession . . . ." (citation omitted)).

Section 2253(a) of title 14 of the Virgin Islands Code further provides for circumstances under which the sentence for violating that section is enhanced.[35] While technically not a crime, the courts of the Virgin Islands refer to the application of the penalty enhancement in section 2253(a) as "Unauthorized Possession of a Firearm During a Crime of Violence." *E.g.*, *Woodrup*, 63 V.I. 696; *Percival*, 62 V.I. 477. Furthermore, any fact that increases the minimum or maximum of a sentence must be alleged in the information and proved to a jury beyond a reasonable doubt. *Almendarez-Torres v. United States*, 523 U.S. 224, 242-43 (1998) (applying *McMillan v. Pennsylvania*, 477 U.S. 79, 86-90 (1986)); *see also Jones v. United States*, 526 U.S. 227, 243 n.6 (1999); *Hurst v. Florida*, 136 S. Ct. 616, 621 (2016); *Alleyne v. United States*, 570 U.S. 99, 112-13 (2013) ("It is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed." (citations omitted)); *Ring v. Arizona*, 536 U.S. 584, 602 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000); *Almendarez-Torres*, 523 U.S. at 240.

The circumstances under which the sentence for Unauthorized Possession of a Firearm is increased are as follows: (1) a firearm is possessed during the commission of a crime of violence; (2) a firearm was possessed during the attempted commission of a crime of violence; (3) an

[35] This Court has never thoroughly examined the interplay between the penalty enhancement provision and the charging clause. *See, e.g.*, *Merrifield v. People*, 56 V.I. 769 (V.I. 2012) (summarily finding sufficient evidence to sustain conviction under section 2253(a)); *Augustine v. People*, 55 V.I. 678, 684 (V.I. 2011) (same).

imitation firearm was possessed during the commission of a crime of violence; (4) an imitation firearm was possessed during the attempted commission of a crime of violence; or (5) the defendant had, prior to the crime in question, been convicted of a felony in a state, territorial, or federal court of the United States. 14 V.I.C. § 2253(a). Stated generally, then, the "elements" of the "crime" of Unauthorized Possession of a Firearm During a Crime of Violence require proof beyond a reasonable doubt that: (1) the defendant; (2) knowingly possessed; (3) a firearm; (4) without lawful authorization; (5) under one of the five aggravating circumstances.

a. Principal

As charged in the information, Michael Davis's conviction required proof beyond a reasonable doubt of the first four elements and, as to the fifth element, proof beyond a reasonable doubt that the first four elements occurred while Michael Davis was committing Third Degree Assault. Crooke testified that he watched as Michael Davis—who was within the effective firing range of the firearm—pointed a firearm at Crooke immediately prior to Crooke being shot. This fact, coupled with evidence that there were no other people in the area, inferentially establishes that it was the defendant (element 1) that shot Crooke with a firearm (elements 2 and 3). Corporal Burke, the firearms supervisor for the V.I.P.D., testified that Michael Davis was not licensed to possess a firearm in the Territory as of the date of the shooting (element 4). Finally, as already discussed, there was sufficient evidence to establish beyond a reasonable doubt that Michael Davis committed the crime of Third Degree Assault (element 5). Therefore, there was sufficient evidence upon which a reasonable jury could have concluded beyond a reasonable doubt that Michael Davis had committed Unauthorized Possession of a Firearm During a Crime of Violence. Therefore, I would affirm the conviction.

b. Aider and Abettor

The essential elements of the crime of Aiding and Abetting Unauthorized Possession of a Firearm During a Crime of Violence required proof beyond a reasonable doubt that: (1) Akeam Davis (the defendant); (2) associated himself with Michael Davis in a criminal endeavor wherein Michael Davis knowingly possessed a firearm without lawful authorization during a crime of violence ("Association with the Crime"); (3) knew what the criminal endeavor involved ("Knowledge of the Crime"); 4) specifically intended that the criminal endeavor succeed ("Specific Intent"); and (5) spoke words or took actions that encouraged or assisted in the success of the criminal endeavor ("Overt Act"). 14 V.I.C. § 11(a); 14 V.I.C. § 2253(a); *cf. People v. Clarke*, 55 V.I. 473, 479-83 (V.I. 2011) ("In addition to requiring proof of knowledge or intent for a conviction of aiding and abetting [the underlying principal offense], there must also be proof that the defendant performed some affirmative act relating to the firearm. . . . 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. [B]ecause the People presented no evidence that [the defendant] knew or facilitated [the perpetrator's] possession of the firearm, the trial court correctly granted [the defendant's] motion for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29." (internal quotation marks and alterations omitted)).

The evidence in this case, which was different than the evidence presented in this Court's previous opinion in *People v. Clarke*, was incontestably sufficient to support this conviction. The testimony, taken in the light most favorable to the jury verdict, substantiated that Akeam Davis drove Michael Davis to the crime scene to confront Crooke. Then, while armed, Akeam Davis stood sentry blocking one potential pathway for Crooke's escape and, without taking any actions

or saying anything to discourage the shooting, watched as Michael Davis aimed his firearm at Crooke and discharged a shot into Crooke's body. Henley testified that she saw two black males enter a green-colored vehicle with ostentatious rims, corroborating the testimony of Crooke that Akeam Davis provided the transportation for this criminal endeavor, and he departed the crime scene with Michael Davis after watching his brother shoot Crooke.

While Akeam Davis argues that there is no evidence of his knowledge concerning the firearm, the testimony of Crooke contradicts this assertion. Akeam Davis observed Michael Davis walk past Crooke twice while displaying a firearm, and he continued to watch as Michael Davis aimed the firearm at Crooke and shot him. Unquestionably, Akeam Davis was identified by Crooke as the person who drove the vehicle to the scene with Michael Davis and stood armed next to his vehicle, thus impeding a means of Crooke's escape. On this evidence, a jury could reasonably have concluded beyond a reasonable doubt that Akeam Davis had full knowledge of the firearm Michael Davis possessed. *See Tot*, 319 U.S. at 466-67 (noting that evidentiary inferences must be logical and rational in light of everyday experience). Importantly, while the individual acts of Akeam Davis, considered in isolation, may not establish his guilt for Aiding and Abetting Unauthorized Possession of a Firearm During a Crime of Violence, his overall course of action (arriving armed at the scene, watching Michael Davis shoot Crooke, fleeing from the scene with Michael Davis while driving the get-away vehicle, etc.) irrefutably establishes beyond a reasonable doubt Akeam Davis's (element 1) "Association with the Crime" (element 2), "Knowledge of the Crime" (element 3),[36] "Specific Intent" to facilitate the crime (element 4), and

[36] In contract to *Clarke*, 55 V.I. at 479-83, where there was a complete absence of any evidence demonstrating the defendant's knowledge of the firearm prior to the underlying crime and the evidence demonstrated that the defendant had stayed inside the vehicle while the crime occurred, Akeam Davis plainly saw Michael Davis's firearm and actively stood armed cutting off one route of retreat available to Crooke. These facts distinguish the result in *Clarke* from the result here.

"Overt Act" furthering the crime (element 5). *E.g.*, *Fontaine v. People*, 56 V.I. 571, 578 (V.I. 2012). Therefore, I would affirm this conviction.

3. First Degree Reckless Endangerment

Reckless endangerment is defined in section 625 of title 14 of the Virgin Islands Code and provides as follows:

> (a) A person is guilty of reckless endangerment in the first degree when, under the circumstances evidencing a depraved indifference to human life, he recklessly engages in conduct in a public place which creates a grave risk of death to another person. Reckless endangerment in the first degree shall be considered as a felony.
> (b) A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct in a public place which creates a substantial risk of serious physical injury to another person. Reckless endangerment in the second degree shall be considered as a misdemeanor.
> (c) The terms as used in this section shall have the following meaning unless the context clearly indicates otherwise:
> (1) 'reckless endangerment' means when a person consciously and knowingly engages in conduct or behavior that may pose intentional harm or physical injuries to another human being or property.
> (2) 'public place' means a place to which the general public has a right to resort; but a place which is in point of fact public rather than private, and visited by many persons and usually accessible to the public.

14 V.I.C. § 625. The focus of this statute is to proscribe conduct that has potential to put unsuspecting people who may be in a "Public Place" at risk of injury, with the degree of potential injury serving as the factor that distinguishes the degree of the crime. The general definition of "Reckless Endangerment" requires a mens rea, mental intent, of "knowingly or consciously." 14 V.I.C. § 625(c)(1).[37] Under this definition, a person has engaged in "Reckless Endangerment" if

[37] To act "knowingly" does not require any knowledge that the act or omission are unlawful but simply requires personal knowledge of the act on the part of the defendant. 1 V.I.C. § 41 (defining knowingly). "Consciously" is an

he has engaged "in conduct or behavior that may pose intentional harm or physical injuries to another human being or property." *Id.* "May" is "[u]sed to indicate [the] possibility" of something coming to pass. COMPACT AM. DICTIONARY: A CONCISE DICTIONARY OF AM. ENGLISH 514 (1998). Therefore, the definitional elements of Reckless Endangerment are: (1) the defendant; (2) knowingly or consciously; (3) engaged in conduct; and (4) that conduct, under the circumstances, had the possibility of causing intentional harm or physical injury to another person or to property. 14 V.I.C. § 625(c)(1).

However, both First Degree Reckless Endangerment and Second Degree Reckless Endangerment alter the mens rea of Reckless Endangerment to that of acting "recklessly." *Compare* 14 V.I.C. § 625(a) & (b) *with* 14 V.I.C. § 625(c)(1). This altered mens rea demonstrates a conscious choice by the Legislature of the Virgin Islands to require proof of a heightened mental intent so as to avoid criminalizing conduct that only has the potential to cause minor injuries, as the definition in subsection 625(c)(1) by its terms encompasses any conduct resulting in any physical injury to a person or property. In contrast, a person acts recklessly with respect to a material element of an offense

> when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a **gross deviation** from the standard of conduct that a law-abiding person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2)(c) (emphasis added).

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adverb form of the adjective conscious. COMPACT AM. DICT.: A CONCISE DICT. OF AM. ENGLISH 186 (1998). To be "conscious" is to have an awareness of one's own environment and one's own existence, to be "not asleep; awake" and "capable of thought, will or perception." *Id.*

Importantly, First Degree Reckless Endangerment requires proof beyond a reasonable doubt of conduct that creates a grave risk of death of another person. 14 V.I.C. § 625(a). The noun "risk" is "[t]he possibility of suffering harm or loss; danger." COMPACT AM. DICTIONARY, at 710. "Grave," as used in the context of subsection 625(a), is an adjective describing a risk that is "fraught with danger or harm." *Id.* at 366. To be "fraught" is to be "filled with a specified element; charged; an assignment fraught with danger." *Id.* Therefore, proof beyond a reasonable doubt of First Degree Reckless Endangerment requires proof that the defendant's actions, under the circumstances, had the very real potential of causing the death of a bystander, either through injury to the person or through injury to property that could result in injury to a bystander. 14 V.I.C. § 625(a) ("creates a grave risk of death to another person"), (c)(1) ("may pose intentional harm or physical injuries to another human being or property").[38] Therefore, conduct creates a "grave risk of death" when that conduct creates such a substantial risk of death that, should any people be present, they would potentially be exposed to such a severe injury that they would likely die from such injury.

Finally, both First Degree Reckless Endangerment and Second Degree Reckless Endangerment add the additional element that the proscribed conduct, the actus reus, occur in a "Public Place." *Compare* 14 V.I.C. § 625(a) & (b) *with* 14 V.I.C. § 625(c)(1). The Legislature mandated a definition in section 625(c)(2) that makes a given location a Public Place if it is a place that is, in fact, intended to be used for public gatherings or it is a place that is open to the general

[38] A hypothetical example of injury to property with very real potential to create a grave risk of death would be a defendant knowingly shooting at a vehicle loaded with explosives in a place where the public has a right of access. The explosives are merely property, but the damage to them has the very real potential to kill innocent people within the blast radius of any explosion. In contrast, Second Degree Reckless Endangerment requires conduct that creates a substantial risk of serious physical injury to a person. 14 V.I.C. § 625(b) & (c)(1). Something is "substantial" if it is "[c]onsiderable; large." . Conduct creates "a substantial risk of serious physical injury" where a defendant's actions create a large risk of serious physical injury to a person but death is not likely.

public and visited by many people. It is noteworthy that nowhere in this definition does it require that members of the public be actually present at the time of the proscribed acts, and this Court has repeatedly emphasized that the focus of the statute is the potential risk to the public who may be present, not the actual risk to those actually present. *E.g.*, *Tyson v. People*, 59 V.I. 391, 397 (V.I. 2013); *Joseph v. People*, 60 V.I. 338, 350 (V.I. 2013).

According to the plain language of section 625 of title 14 of the Virgin Islands Code, First Degree Reckless Endangerment requires proof beyond a reasonable doubt of the following: (1) the defendant (identity of the perpetrator); (2) consciously and knowingly (mental intent/mens rea); (3) engaged in conduct or behavior (criminal act/actus reus); (4) that conduct, under the circumstances, created the possibility of intentional harm or physical injuries to another human being or property thereby creating a grave risk of death to another person (grave risk of death/attendant circumstance); and (5) the conduct occurred in a place that the public has a right to access or is usually accessible by the public (Public Place/attendant circumstance). 14 V.I.C. § 625(a), (c)(1)-(2).[39]

[39] We cannot ignore the unambiguous language of the public place being a place to which the public has access, irrespective of whether the public is present at any given time. However, contrary to the explicit language of the statute, the trial court instructed that the people bore the burden of proving beyond a reasonable doubt an additional element, namely that other people were present at the time of the shooting. This error was precipitated by the People charging this element in the information, and it was the People's obligation to prove beyond a reasonable doubt the facts proving this additional "element." *See Connor v. People*, 59 V.I. 286, 296 (V.I. 2013) ("Finally, any variance between the information's reference to a 'dangerous weapon' and the instruction's reference to a 'deadly' one is of no moment, because the change in terminology required the People to prove more than what was charged . . . ."). The prosecution, through the testimony of Henley, proved beyond a reasonable doubt that other members of the public, Lorn and his children, were present outside at the time of the shooting. Also, as discussed previously, the evidence was sufficient to establish that Michael Davis was the defendant and acted knowingly. As also discussed previously, the evidence was sufficient to prove beyond a reasonable doubt that it was Michael Davis who fired the shot. Therefore, elements 1, 2, and 3 are not in question.

a. Principal

With regard to the fourth element, "Grave Risk," Michael Davis challenges the sufficiency of the evidence to establish beyond a reasonable doubt that his actions created a grave risk of death to another person. The act of discharging a firearm in proximity to places where people are likely to be at the time when people are most likely to be there, such as people driving past the crime scene, *e.g.*, *Tyson*, 59 V.I. at 397, or enjoying some recreation at a ballpark, *e.g.*, *Joseph*, 60 V.I. at 350, is conduct that creates a grave risk of death, e.g., being shot by a stray bullet, to those who may have happenstancely been within firing distance.

The testimony, when taken in the light most favorable to the jury verdict, establishes beyond a reasonable doubt that Michael Davis discharged a firearm in proximity to several buildings where people could readily have been. Importantly, at least one person, Henley, was in a nearby building. That discharge of a firearm in this case also occurred at mid-day when people are awake and would traverse the area and in addition, it occurred adjacent to a public road and near a public ballpark, both of which are regularly accessed by the public. One officer testified that, considering the time of day and location, it was reasonable to expect the area to be busy with people. There were several vehicles parked nearby, and three people were also nearby when the shot was fired, namely Lorn and his two children. Considering the foregoing evidence, Michael Davis created a grave risk of death to any bystander who may have been present at the time of the shooting.

Michael Davis further argues that the evidence does not prove that the shooting occurred in a Public Place. This argument is spurious and meritless. While it is convenient shorthand to use "Public Place" to describe the element that defines where the conduct must occur in order for it to be a crime, this element is actually much more expansive. The Public Place element includes

what one would typically consider the obvious public places, those places that the public has a right to access such as parks, streets, etc. Additionally, the Public Place element includes places that are privately owned but still "usually accessible to the public" in the sense that the public is either explicitly invited or implicitly permitted to enter, such as shopping centers, stores, other businesses, etc. 14 V.I.C. § 625(c)(2).

Michael Davis discharged a firearm just feet from a public road, the "main road." Crooke testified that Lorn drove him to the hospital from this place. Additionally, there was testimony that the shooting occurred near a public ballpark and several businesses, at least one of which was occupied. Further, one officer testified that it is expected that the public would be making use of this busy road at the time of day when the shooting occurred. The totality of this evidence establishes that the shooting occurred in a place "visited by many persons and usually accessible to the public." 14 V.I.C. § 625(c)(2).

It is incontrovertible that the area where the shooting occurred is a place visited by many persons and usually accessible to the public, and these facts also confirm the likelihood that members of the public will be present, thus augmenting the likelihood of unsuspecting persons not only being present but also subjecting them to a grave risk of death. There was sufficient evidence upon which a reasonable jury could have concluded beyond a reasonable doubt that Michael Davis's actions of discharging a firearm at Crooke occurred in a public place and created a grave risk of death to innocent bystanders. Accordingly, I would affirm this conviction.

b. Aider and Abettor

Aiding and Abetting Reckless Endangerment in the First Degree requires proof that: (1) Akeam Davis (the defendant); (2) associated himself with Michael Davis when he, in a public place, consciously and knowingly engaged in conduct or behavior that posed intentional harm or

physical injuries to another human being or property thereby creating a grave risk of death to another person ("Association with the Crime"); (3) knew what the criminal endeavor involved ("Knowledge of the Crime"); 4) specifically intended that the criminal endeavor succeed ("Specific Intent"); and (5) spoke words or took actions that encouraged or assisted in the success of the criminal endeavor ("Overt Act"). 14 V.I.C. § 11(a); 14 V.I.C. § 625(a), (c)(1)-(2)

The testimony of Crooke established that Akeam Davis drove Michael Davis to a mahogany tree near the "main road" by the Frydenhoj ballpark on June 27, 2014. Akeam Davis immediately exited the vehicle, simultaneously displaying a gun in order to serve as a barrier to obstruct one of Crooke's means of escape. Almost simultaneously upon their arrival, Michael Davis also exited the vehicle while displaying a gun. Akeam Davis then watched as Michael Davis, with the gun in full view, walked past Crooke and then back-tracked to him to ask why he did not run. Akeam Davis then watched as Michael Davis aimed the firearm at Crooke and discharged a shot into his chest. The Appellants then went to Akeam Davis's green vehicle with fancy rims and hurriedly departed in the direction of the Redhook area.

There were several businesses nearby, including a delicacy shop that was occupied, and a boat marina. There was a public ballpark and a road within feet of the shooting and well within the shooting range of a firearm. Three people were outside at the time of the shooting. Based on the foregoing, there was sufficient evidence from which a reasonable jury could have found Akeam Davis guilty of Aiding and Abetting First Degree Reckless Endangerment; therefore, I would affirm these convictions.

B. Jury Instructions

Even though a defendant is entitled to an instruction where the factual record contains evidence that is sufficient for a reasonable jury to find in the defendant's favor on an issue, element

or defense, *Prince*, 57 V.I. at 412, and this Court typically reviews a decision to include or exclude a jury instruction for abuse of discretion, *A. Williams*, 55 V.I. at 727 (*citing Phillips v. People*, 51 V.I. 258, 269 (V.I. 2009)), when a defendant fails to object to or fails to request a jury instruction, the issue is subject to Plain Error Review. *Id.* (*citing Francis v. People* (*L. Francis*), 52 V.I. 381, 390 (V.I. 2009); *United States v. Petersen*, 622 F.3d 195, 202 (3d Cir. 2010)).

Jury instructions must fairly and adequately inform the jury of the legal standard by which guilt is to be determined and must contain accurate statements and explanations of any applicable legal principles. *Id.* at 729. Jury instructions must also conform to the charges in the information and be consistent with the evidence presented. *Id.* (citing *United States v. Martin*, 528 F.3d 746, 752 (10th Cir. 2008)). An asserted error in jury instructions is reviewed for abuse of discretion, if fairly presented at the trial level. *Ostalaza*, 58 V.I. at 556; *Jackson-Flavius*, 57 V.I. at 721. Importantly, even when a defendant requests specific language for a given jury instruction, the trial court still retains the discretion to determine the language to be used. The trial court's obligation is to correctly state the law so long as the instruction conveys the required meaning, not to use specific language requested by either side. *A. Williams*, 55 V.I. at 732. Jury instructions must be viewed in their entirety, and the inquiry is whether the instructions on the whole were misleading or inadequate to guide the jury. *Prince*, 57 V.I. at 409. This Court has explicated that jury instructions are not to be invalidated unless the instruction substantially and adversely impacted the constitutional rights of the defendant and affected the outcome of the trial. *Id.* at 405. Even when there is a contemporaneous objection to a jury instruction and even if it omits a required element of an offense or defense, it will not justify reversal where the error has not impacted the defendant's rights and is harmless beyond a reasonable doubt. *Prince,* 57 V.I. at 405. An error in jury instructions will only result in reversal of a conviction where the error: (1) was fundamental

and highly prejudicial due to its failure to provide the jury with adequate guidance, and (2) this Court's refusal to consider the error would result in a miscarriage of justice. *A. Williams*, 55 V.I. at 727 (citing *Farrell*, 54 V.I. at 618-19).

However, under Plain Error Review, a claim of improper jury instructions will rarely justify reversal. *Prince*, 57 V.I. at 409; *Henderson v. Kibbe*, 431 U.S. 145, 154 & n.12 (1977) (stating that it is the rare case that will be reversed due to an error in jury instruction where there is no objection in the trial court). "Plain Error"[40] requires a finding of three factors, (1) an error at the trial level; (2) that error is plain; and (3) that error affected substantial rights. *L. Francis*, 52 V.I. at 390-91 (quoting *Johnson v. United States*, 520 U.S. 461, 466-67 (1997)); *see also Duggins*, 56 V.I. at 300. An error is plain if the error is clear or, equivalently, obvious under current law. *Murrell v. People*, 54 V.I. 338, 366 (V.I. 2010) (quoting *United States v. Olano*, 507 U.S. 725, 734); *see Henderson v. United States*, 568 U.S. 266, 271-79 (2013). An error has affected substantial rights when it is prejudicial such that there is a reasonable probability that the error affected the outcome of the trial. *Elizee*, 54 V.I. at 475.

However, because Plain Error Review is discretionary, even if all three factors are present (thus showing Plain Error), the court must further determine if a fourth factor is present. The fourth factor requires a finding that the Plain Error seriously affected either the fairness, integrity, or public reputation of the judicial proceedings, and if such a finding is made, the Court may then exercise its discretion and notice the error. *Id.*; *see Johnson*, 520 U.S. at 467; *Olano*, 507 U.S. at 732; *United States v. Sarabia-Martinez*, 779 F.3d 274, 277 (5th Cir. 2015). Under Plain Error

[40] The Court notes that this terminology is often confusing given the multiple uses in multiple combinations of the words "plain" and "error." For clarity's sake, in the present opinion, I employ the term "Plain Error" to refer to the presence of the first three factors of this test and will employ the term "Plain Error Review" to refer to the analysis that is conducted when the Court determines to exercises its discretion because the Plain Error affects the fairness, integrity, or public reputation of the proceeding. *Cornelius*, 67 V.I. at 816 n.2.

Review, it is the appellant's obligation to demonstrate how the error prejudiced him and affected a substantial right; whereas when a claim of error is fairly presented to the trial court, it is the prosecutor's burden on appeal to substantiate that the error was harmless. *Elizee*, 54 V.I. at 474. If the question involves determining whether the proper legal standard was stated in the jury instruction, this Court's review is plenary. *Prince*, 57 V.I. at 404.

1. Michael Davis: Assault in the Third Degree- "under circumstances not amounting to an assault in the first or second degree"

As already discussed, the language "under circumstances not amounting to an assault in the first or second degree" provides no substance to the elements of the crime; all the elements of Third Degree Assault can be proved without resort to consideration of the elements of First or Second Degree Assault. Moreover, the structure of the statute—placing the relevant language as a descriptive phrase prior to enumerating the modes of committing Third Degree Assault—indicates that the phrase "under circumstances not amounting to an assault in the first or second degree" is not an essential element of Third Degree Assault. Therefore, there was no error, much less Plain Error. Accordingly, I would affirm this conviction.

2. Akeam Davis- Aiding and Abetting in the Unauthorized Possession of a Firearm

In Count Nine, Akeam Davis was charged as follows:

> 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 unleaded, during the commission or attempted commission of a crime of violence as defined in 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 ANN. Tit. 14 § 2253(a); V.I. CODE ANN. Tit. 14 § 11(a). **[UNAUTHORIZED USE OF A**

> **FIREARM DURING THE COMMISSION OF A CRIME OF VIOLENCE]**

(emphasis in original). The trial court then instructed the jury as follows:

> 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 Virgin Islands Code Section 451 subsection (d), or an imitation thereof, loaded or unloaded, during the commission or attempted commission of a crime of violence as defined by 23 VIC Section 451 subsection (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 VI Code Annotated Title 14 Section 2253(a); VI 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 Count 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 of first-degree assault on, or third-degree assault on Khiry Crooke, in fact occurred; (4), Defendant Akeam Davis knew that crime had been committed; (5), he took an act in furtherance of that crime; and, (6), he intended to facilitate that crime.
>
> If you find from the evidence that each of these elements have been proven beyond a reasonable doubt, then it is your duty to find Defendant Akeam K. Davis guilty of aiding and abetting unauthorized use of a firearm during the commission of a crime of violence. However, if you find that the People have failed to prove any one of these elements beyond a reasonable doubt, then you must find Defendant Akeam K. Davis not guilty of aiding and abetting unauthorized use of a firearm during the commission of a crime of violence. [41]

[41] This instruction was based on the charge for a violation of section 2253(a) of title 14, which is generally referred to as "Unauthorized Possession of a Firearm During the Commission of a Crime of Violence." However, the language

Akeam Davis asserts the jury instruction contained two errors. First he argues that the language of the instruction was confusing and invited the jury to convict him on proof less than beyond a reasonable doubt. This argument is fallacious. The instruction makes clear that, "In Count 9 of the Second Amended Information, the People of the Virgin Islands allege that . . . ." The express language of the instruction is unambiguous and makes explicit that it is only a recitation of the charge, not a statement of the law. The court then stated that, "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 . . . ." the jury had to find the stated elements. When a jury instruction accurately states the language of the charge and gives a correct explanation of the law, there is no error.

As to the second challenge, Akeam Davis argues that the use of the past perfect tense when stating element 4 in the jury instruction, "(4), Defendant Akeam Davis knew the crime had been committed," invited the jury to convict him as an accessory after the fact and not as an aider and abettor. Appellant correctly notes that any challenge to a jury instruction is considered in light of the complete jury instructions and the whole trial record, and any error in the instruction will be disregarded if it does not impact substantial rights and is harmless beyond a reasonable doubt. *Monelle v. People*, 63 V.I. 757, 763, 771 (V.I. 2015); *Freeman v. People*, 61 V.I. 537, 544 (V.I. 2014). Appellant is also correct that this element of Aiding and Abetting requires that the aider and abettor have contemporaneous knowledge of the crime as it is being committed and took

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of the instruction as given by the Superior Court is phrased according to the specific predicate crime of violence (Third Degree Assault), *e.g.*, 14 V.I.C. § 2253(d)(1), and the specific mode of committing the crime, "use" rather than "possession," *e.g.*, 14 V.I.C. § 2253(a) (whoever "has," "possesses," "bears," "transports," or "carries"); *see Heywood v. People*, 63 V.I. 846, 860 (V.I. 2015) ("[U]se of a firearm requires the utilization of the firearm in some activity or employing it to achieve or complete an objective." *Lopez v. People*, 60 V.I. 534, 538 (V.I. 2014)." (internal quotation marks omitted)); *Alfred v. People*, 56 V.I. 286, 292 (V.I. 2012) (discussing how use of a firearm requires knowledge of it)).

actions or spoke words with the intent to facilitate that crime. *Brown*, 54 V.I. at 506. However, such a minor variation in language in one element of a crime in a jury instruction is unlikely to have impacted the outcome of the trial, especially when no evidence was presented indicating that Akeam Davis was an accessory after the fact and specifically presented an alibi defense arguing that he was not involved with the shooting.

This instruction specifically, and the jury instructions as a whole, make explicit that Akeam Davis was being accused of Aiding and Abetting in the commission of a crime. Furthermore, except for the language presently under consideration, the instructions eliminated any possibility of interpreting this specific instruction as informing the jury that Akeam Davis could be convicted for offering assistance after the crime was committed. For example, immediately after the language of the jury instruction presently challenged, the court instructed that Akeam Davis must have taken actions "in furtherance of that crime" and that he must have "intended to facilitate the crime." One cannot act in furtherance of or to facilitate a crime that has already been completed. Consequently, there is no issue of an accessory "after the fact."

Additionally, nothing in the charge alleges actions by Akeam Davis that occurred after Michael Davis completed the crime. Considering the complete absence of evidence suggesting that Akeam Davis associated himself with Michael Davis only after Michael Davis had shot Khiry Crooke coupled with evidence showing that Akeam Davis acted in concert with Michael Davis from the inception of their effort to confront Crooke, this error in the jury instruction was harmless beyond a reasonable doubt, especially since Akeam Davis presented an alibi defense.

3. Michael Davis: Failure to Give "Self-Defense" Instructions

Importantly, at the time of trial, this Court had already issued opinions that held it to be error for a trial court to fail to *sua sponte* give a self-defense instruction when the evidence

supported it. *E.g.*, *Phipps v. People*, 54 V.I. 543, 548-49 (V.I. 2011). A self-defense jury instruction is necessary where there is a factual record to support an instruction on those portions of each defense. *Prince*, 57 V.I. at 412 (citing *Gov't of the V.I. v. Isaac*, 50 F.3d a1175, 1180 (3d Cir. 1995)) ("[A]lthough an instruction on one defense does not preclude the need for instruction on another, [the defendant] was entitled to instructions on these additional defenses only if the trial record contained evidence sufficient for a reasonable jury to find these defenses, and if the defenses were not substantially covered by other defense instructions.") (citing *Gov't of the V.I. v. Fonseca*, 274 F.3d 760, 766 (3d Cir. 2001)). However, there are two flaws with Michael Davis's reliance on these cases.

First, both Akeam and Michael Davis chose to assert alibi defenses, arguing that they were not at the crime scene and were not the people involved in the crimes. Critically, the defenses of alibi and self-defense are mutually exclusive. They cannot co-exist. One asserts that the defendant was not present at the crime scene when the crime took place, and the other is an admission by the defendant that he was present at the crime scene and took reasonable measures to protect himself from harm or injury when the crime took place. Under these facts, the Appellants failed to place self-defense in issue. Therefore, there was not a need for the trial court to consider giving a self-defense instruction. *See Phipps*, 54 V.I. at 568 ("The proper instruction on self-defense in the Virgin Islands necessarily encompasses both the defendant's theory of the case and the burden of disproving that theory." (citing *Gov't of the V.I. v. Smith*, 949 F.2d 677, 680 (3d Cir. 1991)); *cf. Gov't of the V.I. v. Salem*, 456 F.2d 674, 675-76 (3d Cir. 1972) ("It is not the province of the court to accept or reject testimony tending to establish self-defense." (internal citations and quotation marks omitted)).

Furthermore, even assuming our precedent stands for the proposition put forth by Michael Davis, it is unclear, under the present facts, that the omission of a self-defense jury instruction by the trial court was even an error. Crooke's uncontradicted testimony informs that it was Michael Davis who approached Crooke with the firearm. Then, as Crooke was retreating after Michael Davis asked him why he had not run, Michael Davis pursued him and shot him before Crooke had an opportunity to even retrieve a stone from the ground. Michael Davis was at all times, from the inception to consummation of the crimes, indisputably the aggressor. On these facts, it is ludicrous to assert that self-defense was an issue, and it is unlikely that the trial judge's failure to *sua sponte* include a self-defense jury instruction was even an error.

Finally, in order to establish Plain Error, an error must have affected Michael Davis's substantial rights; the error must be prejudicial such that there is a reasonable probability that the error affected the outcome of the trial. *Elizee*, 54 V.I. at 475. So, even assuming that the trial judge's failure to include a self-defense jury instruction was an error that was plain, it does not appear that the failure to include self-defense in the jury instruction affected the outcome of the trial. Michael Davis chose an all-or-nothing alibi defense. He presented witnesses to establish that he was in Smith Bay at a chicken farm at the time of the shooting. Gibbs testified that Michael Davis had been at the farm with him the entire morning of the shooting, and he gave Michael Davis a ride to his car at the mechanic's near Tutu High Rise between 11:00 a.m. and 12:00 p.m. after Michael Davis had been informed via his cell phone that the police were looking for him. Michael Davis then called the crime scene technician who had conducted the field test for gunshot residue on him. The technician testified that the results were negative. Ostensibly, Michael Davis elicited this testimony to indicate that he had not fired a gun on the day of the shooting and, inferentially, to indicate that Michael Davis was not the person who shot Crooke.

It takes a considerable leap of logic to believe that, had the trial court *sua sponte* given a self-defense jury instruction, the jury, acting on that instruction alone and without any argument at any time by Michael Davis's counsel advancing such a defense, would have disregarded the primary focus of the alibi defense and decided: (1) that Michael Davis did, in fact, shoot Crooke; (2) that, despite the evidence indicating that Michael Davis immediately brandished the firearm as he approached Crooke and followed Crooke as he retreated, Michael Davis was not the initial aggressor; (3) that Michael Davis then was objectively threatened with serious bodily injury when he shot Crooke because Crooke was retrieving a stone in order to defend himself; and (4) that such action was only that amount of force necessary to repel the attack. Moreover, the jury would have had to have reached this conclusion by also disregarding Michael Davis's flight from the scene, evidencing his consciousness of guilt.

Additionally, while the results of the gunshot residue field test certainly benefited Michael Davis, the technician also testified that gunshot residue dissipates within three to four hours of exposure, and the test was not conducted until approximately three hours after the shooting, during which time Michael Davis had ample opportunity to wash himself and, particularly, his hands. Michael Davis's substantial rights were never adversely affected by the failure of the trial court to *sua sponte* give a jury instruction on self-defense, and Plain Error has not been shown. For the foregoing reasons, I do not continue to the fourth step in the analysis, and would affirm the conviction.

C. Denial of Motion for Mistrial[42]

The prosecution in a criminal case may argue the facts in evidence and any reasonable, logical inferences that follow therefrom. *Castor v. People*, 57 V.I. 482, 494 (V.I. 2012); *James v. People*, 59 V.I. 866, 888 (V.I. 2013).[43] A prosecutor's remarks are improper if they appeal to a jury's emotions, passions, or prejudice(s), thus diverting the focus of the trial from the evidence presented and leading the jury to convict for reasons other than the properly presented evidence. *DeSilvia v. People*, 55 V.I. 859, 872 (V.I. 2011); *Castor*, 57 V.I. at 495; *Brathwaite v. People*, 60 V.I. 419, 426 (V.I. 2014). Determining whether a prosecutor's statements or actions warrant reversal because they made the trial so fundamentally unfair that the defendant was denied due process requires that we consider the statements or conduct within the context of the entire trial giving consideration to the severity of the conduct or statements, the likely effect of any curative instruction, other preliminary instructions and final charges to the jury, and the quantum of evidence properly presented against the defendant. *Monelle v. People*, 63 V.I. 757, 770 (V.I. 2015); *see S. Francis v. People*, 56 V.I. 370, 389 (V.I. 2012); *see also K. Francis v. People*, 59 V.I. 1075, 1080 (V.I. 2013); *James*, 59 V.I. at 883; *DeSilvia*, 55 V.I. at 873; *Castor*, 57 V.I. at 495.

On the second day of trial, while the prosecutor was engaging in re-direct examination of Detective Christopher, the following exchange occurred:

> Q: Did you ever have contact with Lorn Henley?

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[42] As an initial matter, it should be noted that this argument was fairly presented. As discussed in *Ubiles*, 66 V.I. at 582-85, a defendant fairly presents an issue when he raises the issue in enough time to allow the trial court to establish a record and take corrective action. While a contemporaneous objection is the usual means employed to do this, *People v. Armstrong*, 64 V.I. 528, 535 (V.I. 2016) makes clear that a trial judge can revisit any ruling when the interests of justice so require, as long as the trial court still has jurisdiction over the case at the time. Here, the trial court fully entertained the mistrial motions. As such, the issue was fairly presented and was not forfeited.

[43] Indeed, the purpose of closing summation and arguments is to allow the parties to mold the facts as brought out through the trial process in the light most favorable to their respective positions. *James*, 59 V.I. at 888.

> A: No, I did not. He spoke with the detective, and he was more upset than anything. Even in talking to the detectives, they had to coax him along and encourage him to give a statement.
> Q: Do you know where he is?
> A: No, I do not.

No objection was made by either counsel for Michael Davis or Akeam Davis at that time. Prior to this exchange, the prosecutor had not solicited testimony regarding Lorn's whereabouts at the time of trial. At the close of questioning of Detective Christopher, the trial recessed for lunch.

Upon return, the prosecutor recalled Crooke. Crooke testified that, on June 11, 2015, at around 5:30 p.m., Michael Davis drove up to him in the neighborhood of Hidden Valley in Estate Tutu on St. Thomas. According to Crooke, Michael Davis asked to talk; and Crooke responded that they would talk in court. Michael Davis then said "if [you] make it to court." Crooke then explained that he left the island immediately thereafter but returned shortly before trial.

While Michael Davis's counsel was cross-examining Crooke, defense counsel asked Crooke where he had gone. The prosecutor objected saying "Your Honor, he left for safety reasons and I don't think it's appropriate for him to tell in open court where he went during that time. I don't think it's relevant." The Court then struck the statement from the record. Neither Michael Davis nor Akeam Davis asked for a curative instruction at that time.

On redirect examination, the prosecutor then used the June 12, 2015 police report to refresh Crooke's memory as to the date that Michael Davis threatened him. When Michael Davis's counsel completed her re-cross examination, Akeam Davis requested a limiting instruction informing the jury that the statements made by Michael Davis were not to be considered in determining the guilt of Akeam Davis. The court gave this limiting instruction. On the last day of trial, both Appellants moved for a mistrial based on Crooke's testimony concerning Michael

Davis's alleged threat and its temporal proximity to the testimony of Detective Christopher that he was unaware of the location of Lorn. These motions were denied because the court concluded that the striking of the testimony and the curative instruction given were enough to cure any prejudice. .) The court reviewed its curative instruction striking all testimony relating to Michael Davis threatening Khiry Crooke, and both defendants' counsel stated that they had no objection.

The jury was instructed again after closing arguments. The court reiterated its limiting instructions, reminding the jury that it was not to consider the evidence that was admitted only against Michael Davis in the determination of Akeam Davis's guilt.[44] The Court also gave an instruction reminding that jury that the testimony of Khiry Crooke that Michael Davis had threatened him to intimidate him into not testifying had been stricken from the record. The court admonished that each defendant was entitled to have his guilt determined only on the law and evidence individually applicable to him and that it was the jury's duty to consider the evidence against each defendant separately. The court also gave specific instructions on the elements to be proven on each count of the second amended information. As to Akeam Davis, the court gave a general aiding and abetting instruction.[45]

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[44] The full text of the instruction was as follows:

> During the trial, certain evidence, both through testimony and exhibits, was admitted only for a particular purpose and not generally for all purposes. As the jury, it is for you to determine what weight, if any, you give to this evidence. However, should you choose to give that evidence any weight, you must consider it solely for the purposes for which I have instructed you. You may not use this evidence for any other purpose which I did not specifically mentioned.
> Specifically, you heard and saw evidence about gunshot residue, also called GSR, cartridge or bullet casings, a gray and pink sneaker, and prior statements of Defendant Michael K. Davis. This evidence was introduced only against Defendant Michael K. Davis, and you may not consider this evidence against Defendant Akeam K. Davis for any purpose. You may not use this evidence for any other purpose which I did not specifically mention.

[45] The full text of the instruction was as follows:

1. Michael Davis

It should be acknowledged that Crooke had more than sufficient time and opportunity to see who shot him; and that he was familiar with both of the Appellants. Simultaneously, it must also be recognized that Crooke was the only person who positively identified the perpetrators as Michael Davis and Akeam Davis. Therefore, while the identification of the appellants was overwhelming, the overall evidence hinged entirely on the credibility of Crooke. In this context, misconduct by the prosecutor is of particular concern because it could have dramatically altered the outcome of the trial. Of course, just because prosecutorial misconduct had that potential does not mean that this potential actually transpired. In considering whether prosecutorial misconduct amounted to reversible error, we consider whether the statement or conduct at issue was improper and whether the improper statement or conduct made the trial so unfair as to render the trial a conviction without due process of law. *Brathwaite v. People*, 60 V.I. 419, 426 (V.I. 2014). As we have explained, the defendant bears the burden to show that: "(1) the prosecutor's conduct or remarks were improper, and (2) the conduct or remarks affected the trial in a manner that made the trial unfair and affected the defendant's substantial rights." *James*, 59 V.I. at 883 ; *Farrington v. People*, 55 V.I. 644, 656 (V.I. 2011).

> Defendant Akeam K. Davis is charged with what is called aiding and abetting Michael K. Davis in committing certain criminal acts. Before a defendant may be held responsible for aiding and abetting others in the commission of a crime, it is necessary that the Government prove beyond a reasonable doubt that the defendant knowingly and deliberately associated himself or herself in some way with the crime charged and participated in it with the intent to commit the crime. Therefore, in order for a defendant to be found guilty of aiding and abetting the commission of a crime, the Government must prove beyond a reasonable doubt that the defendant knew that the crime charged was to be committed or was being committed; knowingly did some act for the purpose of aiding the commission of that crime, and acted with the intention of causing the crime charged to be committed.

Because a prosecutor may argue facts in evidence and logical and reasonable inferences that can be drawn therefrom, the prosecutor's inclusion in his objection the inference that Crooke left the island for his safety was not improper. Crooke had just testified that Michael Davis threatened that he (Crooke) might not make it to court to testify, and in response he left until just before trial. The glaringly obvious inference of this testimony is that Crooke feared for his safety and left the island. However, Crooke testified that his mother sent him to stay with his father in Florida because of Michael Davis's statement to Crooke, "if you make it to court." Thus the prosecutor's statement of this obvious inference in his objection was not improper.

Also, the testimony of Detective Christopher as to the whereabouts of Lorn was improperly solicited by the prosecutor. The witness had just testified that he had not spoken to Lorn. Then the prosecutor asked, "Do you know where he is?" No witness ever testified that Lorn was missing, and the prosecutor placed these facts in the record through his question. However, this improper statement could not have affected the trial outcome. While the question implied facts not in evidence, it was not an illogical follow-up to Detective Christopher's testimony that he had never spoken with Lorn. It is also difficult to conclude that this single statement would have even been in the minds of the jurors when Crooke testified hours later, after lunch, about being threatened by Michael Davis. In the context of the overall trial, this statement likely did not affect the outcome. Accordingly, the record does not indicate that the defendant has made the requisite showing to obtain relief. *See James*, 59 V.I. at 883 (V.I. 2013); *Farrington*, 55 V.I. at 656.

Michael Davis also claims it was error to even allow Crooke to testify about the threat Michael Davis made. However, this evidence was stricken from the record and a curative instruction issued. Moreover, Crooke's testimony, excluding the threat evidence, if credited as we must, clearly established Michael Davis's guilt, as discussed in the sufficiency of the evidence

analysis above. *Cf. Thomas v. People*, 60 V.I. 183, 193 (V.I. 2013) ("But as indicated above, it was for the jury to determine whether [the] testimony was 'dubious and unbelievable,' and the testimony of a single witness can be sufficient to prove" any element of a crime. (citing *Connor v. People*, 59 V.I. 286, 290 (V.I. 2013); *United States v. Levi*, 405 F.2d 380, 383 (4th Cir. 1968)). The threat evidence, while showing consciousness of guilt, was unlikely to have affected the outcome of the trial when there was already sufficient evidence presented to establish guilt beyond a reasonable doubt.[46]

2. Akeam Davis

Akeam Davis presents his argument that a mistrial was necessary in a slightly different light. He argues that the trial court abused its discretion in failing to declare a mistrial because of prosecutorial misconduct, which is essentially the same argument expounded by Michael Davis, and discovery violations under Federal Rule of Evidence 16 due to the late disclosure of the police report accusing Michael Davis of threatening a witness.[47] Specifically, he argues that the trial court made clearly erroneous findings of fact and failed to apply the three factors required under *People v. Rodriguez.* These are

[46] Finally, Michael Davis arguably attempts to raise as an issue a *Brady* violation or a discovery violation. This "argument" is one clause in the heading of that section of his brief addressing his claim of error in the failure of the trial court to declare a mistrial. He states, "The court erred in denying Michael's motion for a judgment of acquittal where **the prosecutor withheld a critical police report**, Crooke testified that Michael threatened to kill him, and the prosecutor testified that Crooke fled the jurisdiction because Michael may kill him." This is the sum total of any discussion of this issue, and this argument is waived. *See* V.I. R. App. P. 22(m); *Ward v. People*, 58 V.I. 277, 282 n.2 (V.I. 2013) (holding that perfunctory and unsupported arguments are deemed waived (citing former V.I. S. CT. R. 22(m)).

[47] On April, 2010, Act No. 7161 became law, and the Federal Rules of Evidence became applicable in the Superior Court. *Ramirez*, 56 V.I. at *2 n.4; *but see In re: Adoption of the V.I. Rules of Evidence*, S. Ct. Prom. No. 2017-0002 (Apr. 3, 2017); *Gerace v. Bentley*, 65 V.I. 289, 303 (V.I. 2016) ("[T]he overwhelming majority of other jurisdictions where the legislature and the judiciary have been vested with concurrent authority to promulgate procedural rules have held that conflicts between rules promulgated by the judiciary and rules promulgated by the legislature are resolved in favor of the judiciary.") (collecting cases).

> (1) The reasons the government delayed producing the requested materials, including whether or not the government acted in bad faith when it failed to comply with the discovery order; (2) the extent of prejudice to the defendant as a result of the government's delay; and (3) the feasibility of curing the prejudice with a continuance.

S. Ct. Crim. No. 2009-0028, 2010 WL 1576441, at *4 (V.I. April 14, 2010) (unpublished).

It is undisputed that Akeam Davis made the appropriate demand for discovery. Additionally, Rule 16(a)(1)(E) requires that the prosecution turn over evidence if it is material to preparing the defense of the case or it is intended to be used in the prosecution's case in chief. FED. R. CRIM. P. 16(a)(1)(E). Furthermore, in reading the whole trial transcript, it is obvious that there was a "remarkable lack of attention" to the case. *Rodriguez*, 2010 WL 1576441, at *4. This does not weigh strongly in favor of the extreme remedy of declaring a mistrial for the failure to disclose the police report, as there is no finding of bad faith or reckless conduct.

The asserted prejudice to Akeam Davis can be summarized as follows. The late disclosure hampered his efforts in preparing a defense, which involved many considerations including seeking severance or exclusion of evidence as well as determining whether to take the stand. The total failure to disclose the June 12, 2015 police report prevented Akeam Davis from including this highly inflammatory evidence in his calculus when determining his defense strategy, and the late disclosure made it likely that any change in defense strategy mid-trial would have been more problematic than helpful.

However, even with this evidence disclosed, severance was unlikely because severance is granted only when a joint trial would compromise a specific trial right of the defendant or when necessary to prevent the jury from making a reliable determination of guilt. *Zafiro v. United States*, 506 U.S. 534, 539 (1993). The trial court determined that exclusion of the evidence as to Akeam Davis with a limiting instruction would prevent any prejudice, and nothing in the record indicates

that this was not successful. *United States v. Thomas*, 627 F.2d 146, 157 (5th Cir. 2010) (upholding denial of severance due to failure to show a specific trial right was compromised or that the jury did not reach a reliable judgment, despite several witnesses referring to the defendant by the co-defendant's name); *United States v. De La Paz-Rentas*, 613 F.3d 18, 23-24 (1st Cir. 2010) (upholding a denial of severance because thorough and accurate limiting instructions were given and the defendant's minor role as an aider and abettor was sufficiently clear to prevent any "spillover" effect from the co-defendant's charges).

Furthermore, it is difficult to perceive what other defense Akeam Davis might have chosen in consideration of this report. Akeam Davis advanced an alibi defense arguing he was not present at the time of the shooting. Therefore, he could not have testified to any contradictory facts. Further, he was only charged as an aider and abettor, so he could not have put forth his own self-defense argument. No alternate defense strategy has been suggested. *E.g.*, *United States v. Reyeros*, 537 F.3d 270, 286 (3d Cir. 2008) (upholding the denial of a severance due to lack of showing of prejudice); *cf. United States v. Arcuri*, 405 F.2d 691, 695 (2d Cir. 1968).

Of course, testimony that a co-defendant made threats to a victim to prevent testimony has the very real risk of the jury convicting simply because Akeam Davis was associated with Michael Davis. *See generally Douglas v. Alabama*, 380 U.S. 415 (1965) (addressing the prejudicial effect of the admission into evidence a confession by a co-defendant who was not subject to confrontation). While this is true, nothing in the testimony even remotely suggested that Akeam Davis had any knowledge of Michael Davis's actions that occurred over a year after the shooting. Further, the trial court meticulously provided limiting instructions and immediately struck any improper evidence as to Akeam Davis. Again, considered in the overall context of the testimony adduced at trial, this factor does not weigh strongly in favor of declaring a mistrial, as the prejudice,

while present, was minimal in light of his aider and abettor status and a lack of any evidence connecting Akeam Davis to this conduct.

Finally, the trial court made specific findings of fact regarding the attentiveness of the jury during the entire trial and found that, given the level of attentiveness and other considerations, striking the testimony and providing a curative instruction were adequate to cure any prejudice. Akeam Davis did not challenge this finding of fact at the trial level, and there is nothing in the record to contradict this finding. Therefore, the Court cannot declare it to be clearly erroneous. The trial court's conclusion that these corrective actions were adequate was sound in light of the attentiveness of the jury and the weight of the evidence. *United States v. Rittweger*, 524 F.2d 171, 179 (2d Cir. 2008) (upholding denial of severance because the trial court gave limiting instructions throughout the trial and carefully charged the jury that the case against each defendant must be considered separately). Even without the threat evidence, there was sufficient evidence to convict Akeam Davis as an aider and abettor of Michael Davis; and Crooke's testimony was corroborated by Henley's testimony. As such, it was not an abuse of discretion for the trial court to employ the less drastic measures to cure any prejudice Akeam Davis suffered by the late disclosure.

V. CONCLUSION

Because there was sufficient evidence from which a reasonable jury could find the appellants guilty beyond a reasonable doubt, there is no basis for reversing their convictions on the grounds of insufficiency of the evidence. Further, because the trial court properly stated the elements of Third Degree Assault, there was no Plain Error. Continuing, there was no reversible error in the jury instructions. Also, since the evidence did not place self-defense in issue, there was no Plain Error and no basis for reversal on this issue. The trial court did not abuse its discretion in imparting to the jury the instruction it gave regarding Aiding and Abetting Possession of a

Firearm During a Crime of Violence because the instruction accurately stated the law. The trial court also did not abuse its discretion when it denied Michael Davis's motion for a mistrial because the conduct complained of did not affect the outcome of the trial. Finally, the trial court did not abuse its discretion when it denied Akeam Davis's motion for a mistrial because the challenged conduct did not affect the outcome of the trial. Therefore, I would affirm all of the convictions as to both appellants.

Dated this ____ day of July 2018

_____
IVE ARLINGTON SWAN
Associate Justice

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

By: _____
Deputy Clerk II

Dated: _____