For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

EUGENE ROBERTS, Appellant/Defendant, v. **PEOPLE OF THE VIRGIN ISLANDS,** Appellee/Plaintiff.	)	**S. Ct. Crim. No. 2019-0051** Re: Super. Ct. Crim. No. 136/2014 (STX)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Darryl Dean Donohue, Sr.

Argued: April 13, 2021
Filed: April 19, 2022

Cite as: 2022 V.I. 10

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

APPEARANCES:

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OPINION OF THE COURT

SWAN, Associate Justice.

¶1 Eugene Roberts appeals the Superior Court's denial of his FED. R. CRIM. P. 29 post trial motion for a judgment of acquittal or, alternatively, a new trial. For the reasons elucidated below, we affirm the Superior Court's decision, but remand to enable the Superior Court to vacate Roberts' first degree assault conviction to comport with our decision in *Titre v. People*, 70 V.I. 797 (V.I. 2019).

I. FACTS AND PROCEDURAL HISTORY

¶2 On April 19, 2014, Kenya Stanley ("Stanley") and Matthew Vernege ("Vernege"), her fiancée, patronized Frontline Nightclub in St. Croix, U.S. Virgin Islands. As they exited the establishment at approximately 2 a.m., a man, who was entering the club with acquaintances, attempted to whisper in Stanley's ear. Stunned, Stanley stepped backwards into a wall. Angered by the man's attempt, Vernege and the man began to argue. Vernege claimed the man's actions were disrespectful. Subsequently, Stanley grabbed Vernege's hand, and they proceeded to Vernege's truck which was parked outside on the side of the club. As Stanley sat in the vehicle's passenger seat waiting for Vernege to enter the driver's side, the man who attempted to whisper in Stanley's ear exited the establishment holding a silver pistol and began to shoot at Vernege's truck. Stanley alerted Vernege to the threat, and he returned fire with his firearm while commanding Stanley to crouch down.

¶3 After the shooting commenced, bedlam and pandemonium punctuated the scene. Concerned patrons entered the club to alert Anthony Hector ("Hector") of the situation. Hector

worked at the club and was an off-duty police officer at the time of the incident. Retrieving his police-issued weapon, Hector exited the club and thereupon saw two men shooting into Vernege's truck. Hector identified himself as a police officer, commanded the men to drop their weapons, and proceeded to fire at the men when they failed to comply with his commands. Hector shot the first man, whom he later identified as Larry Williams, Jr., ("Williams") and saw him stagger. Similarly, Hector shot the second man, whom he later identified as Eugene Roberts ("E. Roberts"), and saw him stagger.

¶4 Immediately after shooting E. Roberts, Hector was tackled from behind by a man he later identified as Lester Roberts ("L. Roberts"). Upon falling to the ground, Hector's weapon was dislodged from his grip. L. Roberts and Hector then began to struggle for control of Hector's weapon. Realizing that he would not regain control of the pistol before L. Roberts acquired it, Hector rose from the pavement and ran towards the property across the street from the club. As he fled, L. Roberts shot Hector with Hector's pistol.

¶5 Before the shooting erupted, Roscar Hurtault ("Hurtault") arrived at the club to purchase refreshments. Hurtault parked his vehicle and proceeded to the establishment's exterior bar. Before he reached the bar, a female stopped Hurtault to ask him for a lighter to ignite her cigarette. As Hurtault lit the cigarette, the shooting commenced. To avoid being killed or injured, Hurtault and the woman huddled by the woman's car. When the shooting ceased temporarily, the woman and her companions hurriedly fled the scene in the woman's car. However, Hurtault continued towards the bar because he could not safely get to his vehicle without crossing the open parking lot and risk being shot. As he approached the bar, Hurtault crouched behind a parked, white Toyota truck. As he peered through the truck's window, Hurtault saw Hector exit the club and the shooting

recommenced. As he continued to huddle behind the truck, Hurtault saw an individual approaching the vehicle. Hurtault hurriedly maneuvered to the front of the truck so the approaching individual could hide in the rear of the vehicle. However, as he hid by the truck's front end, Hurtault turned and saw a man, whom he later identified as E. Roberts, pointing a gun at him. Allegedly, E. Roberts said something to Hurtault and then shot at Hurtault five times. Hurtault was struck twice with gun shots and immediately scrambled under the truck to prevent further injury to himself. While under the truck, Hurtault saw a man fall to the ground after being shot. Hurtault later identified that man as Williams. Continuing his refuge under the truck, Hurtault saw Williams and other individuals leave the scene in a small, four door black SUV vehicle. After the men departed the scene, Hurtault emerged from beneath the truck and was taken to the hospital by spectators for medical treatment.

¶6 During the chaos, Hector called 911 while he hid on the property across the street from the club. Before he made the 911 telephone call, Hector heard a man say that Hector shot him. Subsequently, Hector saw a man assist one of the two men he shot to get into a vehicle and heard the vehicle depart the scene. However, Hector failed to recognize the model of vehicle in which the men departed.

¶7 At approximately 3:15 a.m. on April 19, 2014, officers were dispatched to an automobile accident at Morning Star Hill ("Morning Star") on Northside Road in St. Croix, U.S. Virgin Islands. Upon arrival, officers encountered a black Dodge Caliber vehicle that had crashed into a tree and learned the vehicle was driven by Derick Liburd ("Liburd"). Although Liburd was uninjured, his three companions were injured because they had been shot. Liburd told officers that he and his friends were at Frontline Nightclub when shooting started. Liburd then told officers the group left the club in his Dodge Caliber and were shot at by individuals in a black car as they

passed the entrance to Salt River. After an occupant of the black vehicle allegedly shot at them, Liburd said he lost control of his automobile and crashed into the tree.

¶8 Following his recitation, officers secured Liburd in a police cruiser and traveled to the Salt River entrance to investigate Liburd's allegations. Officers found no evidence of a shooting at the Salt River entrance and observed no bullet holes in Liburd's crashed vehicle. Moreover, 911 personnel informed officers that the Frontline shooting suspects had left the scene in a vehicle that resembled Liburd's vehicle. Finally, officers recovered several firearms from the foliage in the vicinity of Liburd's crashed vehicle and one from the interior of Liburd's disabled vehicle. Ultimately, police forensic personnel would confirm that expended bullet casings from the Frontline shooting matched one of the weapons recovered from the foliage near the Morning Star accident as well as the firearm found inside Liburd's crashed vehicle which was later identified as Hector's police issued weapon.

¶9 Eventually, paramedics arrived at both the Frontline Nightclub and Morning Star Hill crime scenes. Upon arrival at Frontline, paramedics concluded Vernege was deceased. Paramedics at Morning Star identified Williams as the individual with the most severe injuries and transported all injured individuals to the Governor Juan Luis Hospital.

¶10 On May 20, 2014, the People charged five individuals, including Williams and E. Roberts, in a twenty-two count information with crimes associated with the Frontline shooting incident. Additionally, the charges included first degree murder, 14 V.I.C. § 922(a); attempted first degree

murder, 14 V.I.C. § 331; first degree assault, 14 V.I.C § 295, and unauthorized possession of firearm during the commission of a violent crime, 14 V.I.C. § 2253(a).[1]

¶11 On January 20, 2015, Williams filed a motion to compel discovery of outstanding documents namely Stanley's videotaped interview, Hector's personnel records, and all police department internal affairs files that referenced Hector.

¶12 On February 11, 2015, E. Roberts filed a notice to join in Williams' motion to compel.

¶13 On April 15, 2016, Williams filed a motion to specifically compel discovery of Hector's personnel records and his internal affairs file because of alleged prior complaints in which Hector purportedly used excessive force. Moreover, the motion cited an April 19, 2014 internal affairs investigation into Hector's use of force during the Frontline incident which the People failed to disclose.

¶14 On April 21, 2016, E. Roberts filed a notice to join in Williams' motion to compel discovery of Hector's personnel records and his internal affairs file.

¶15 Following an April 28, 2016 hearing on Williams' motion to specifically compel discovery of Hector's personnel records and his internal affairs file, the court issued an April 28, 2016 order that allowed the Virgin Islands Attorney General or his designee access to Hector's internal affairs file for the limited purpose of obtaining exculpatory and discoverable information as they related

[1] In addition to the charges already itemized, the People also charged E. Roberts with third degree assault, 14 V.I.C. § 297(2); possession of ammunition, 14 V.I.C. § 2256(a); first degree reckless endangerment, 14 V.I.C. § 625(a); unauthorized possession of a firearm, 14 V.I.C. § 2253(a); first degree robbery, 14 V.I.C. § 1862(2); grand larceny, 14 V.I.C. § 1083(1); possession of stolen property, 14 V.I.C. § 2101(a); and conversion of government property, 14 V.I.C. § 895(a)(b).

to the *People v. Felix et al.* case.[2] The order also declared that the court would review in camera the material obtained from Hector's internal affairs file.

¶16 On May 2, 2016, the People provided the court with a summary of the results from the review of Hector's internal affairs file. Specifically, the People acknowledged that the file contained a report of an April 23, 2014 alcohol test and a DVD with three videotaped statements. The DVD included Hector's October 27, 2014 statement, Hurtault's July 10, 2014 statement, and Scott Gilbert's May 30, 2014 telephone statement, all of which were connected to the case. The People's summary also stated that the People reviewed thirty-one internal affairs files regarding Hector spanning 1998 to 2003 and none contained relevant information.

¶17 On May 9, 2016, Williams filed a motion to show cause why the People should not be held in contempt for failing to distribute to defendants the documents obtained from the review of Hector's internal affairs file.

¶18 On June 22, 2016, E. Roberts filed a notice to join in Williams' motion to show cause.

¶19 On July 11, 2016, Williams filed a motion for a ruling on his show cause motion. In the motion, Williams informed that the court held a June 22, 2016 hearing on the show cause motion. During the June 22, 2016 hearing, the People produced an illegible copy of a laboratory report, three statements, and a summary of Hector's personnel file. Williams claimed the summary of Hector's personnel file did not comply with Federal Rule of Criminal Procedure 16.1, which stated a defendant must have a reasonable basis to believe a police officer's internal affairs file or

[2] The caption in this case changed after co-defendant Elijah Felix was sentenced to two years' incarceration after he pled guilty to unauthorized possession of a firearm, Lester Roberts agreed to a dismissal of all charges against him without prejudice, and Derick Liburd was acquitted at the close of the People's case in chief.

personnel records contain discoverable information.[3] Following the hearing, the court ordered the People to provide a legible copy of the laboratory report and a summary of Hector's personnel file that complied with Rule 16.1 by June 30, 2016, which the People failed to do. Although the court required the People to provide certain documents to the defendants at the conclusion of the June 22, 2016 hearing, it failed to rule on Williams' show cause motion. Therefore, Williams moved the court again to grant his show cause motion and to hold the People in contempt for failing to produce the mandatory documents.

¶20 On July 11, 2016, E. Roberts filed a notice to join in Williams' motion for a ruling on Williams' show cause motion.

¶21 On July 29, 2016, the People filed an informational motion with the court. In the motion, the People informed the court that a review of Hector's personnel records yielded no discoverable data that related to Hector's credibility or his character for truthfulness. Moreover, the motion explained that the People transmitted a legible copy of the laboratory report to defendants on July 27, 2016.

¶22 On October 20, 2016, the trial commenced. On November 4, 2016, at the close of the People's case in chief, the court granted E. Roberts' Rule 29 motion on several of the original 22 counts and left nine counts remaining.

¶23 On November 4, 2016, the People filed a second amended information that charged Williams and E. Roberts with ten counts, including first degree murder, attempted first degree

[3] Notably, Federal Rules of Criminal Procedure apply to this matter because the Virgin Islands Rules of Criminal Procedure were promulgated after trial in this case commenced. The Virgin Islands Rules of Criminal Procedure became effective on December 1, 2017.

murder, first degree assault, and unauthorized possession of a firearm during the commission of a violent crime.[4]

¶24 However, on November 9, 2016, the People filed a third amended information that charged Williams and E. Roberts with nine counts. The third amended information alleged Williams and E. Roberts committed first degree murder (Count 1), in violation of 14 V.I.C §§ 921, 922(a)(1); E. Roberts committed attempted first degree murder (Count 2) in violation of 14 V.I.C §§ 922(a)(1), 331(1); E. Roberts committed first degree assault (Count 3) in violation of 14 V.I.C. § 295(1); Williams and E. Roberts committed third degree assault (Count 4) in violation of 14 V.I.C. §§ 297(2), 11(a); Williams and E. Roberts committed unauthorized possession of a firearm during the commission of a violent crime (Count 5) in violation of 14 V.I.C. §§ 2253(a), 11(a); E. Roberts committed unauthorized possession of a firearm during the commission of a violent crime (Count 6) in violation of 14 V.I. C. § 2253(a); Williams and E. Roberts committed unauthorized possession of ammunition (Count 7) in violation of 14 V.I.C. §§ 2256(a), 11(a); Williams and E. Roberts committed first degree reckless endangerment (Count 8) in violation of 14 V.I.C. § 625(a); and Williams and E. Roberts committed unauthorized possession of a firearm (Count 9) in violation of 14 V.I.C. §§ 2253(a), 11(a).

¶25 On November 14, 2016, the jury adjudged E. Roberts guilty of seven counts including attempted first degree murder (Count 2), first degree assault (Count 3), unauthorized possession of a firearm during the commission of a violent crime (Counts 5& 6), unauthorized possession of

[4] In addition to the charges already enumerated, the second information also charged E. Roberts with third degree assault, unauthorized possession of a firearm, possession of ammunition, and first degree reckless endangerment.

ammunition (Count 7), first degree reckless endangerment (Count 8), and unauthorized possession of a firearm (Count 9).

¶26 On November 29, 2016, E. Roberts filed a Rule 29 post-trial motion for a judgment of acquittal or, alternatively, a new trial. In the motion, E. Roberts enumerated several alleged errors made during the trial which purportedly justified his acquittal or a new trial. Additionally, E. Roberts asserted that the People committed prosecutorial misconduct during closing arguments when its counsel stated E. Roberts was shot in the leg. E. Roberts also contended that the People's failure to disclose Hector's entire internal affairs file as well as the People's failure to produce Officer Namoi Joseph's Use of Force Report,[5] which he claimed contained impeachment as well as exculpatory evidence and was only produced at the conclusion of the People's case in chief, constituted substantial prejudice that warranted vacatur of the jury verdict. Importantly, after the disclosure of the Use of Force Report, Roberts moved the court for a mistrial, which the court denied.

¶27 On January 9, 2017, the People filed its opposition to E. Roberts' Rule 29 post-trial motion for a judgment of acquittal or, alternatively, a new trial. In the opposition, the People posited E. Roberts sustained no prejudice because of its mischaracterization of his gunshot wound since he did suffer a gunshot wound to his body during the shooting at Frontline Night Club. Moreover, the People also alleged the Use of Force Report is devoid of any exculpatory or impeachment evidence and that E. Roberts was not entitled to discover Hector's entire internal affairs file.

[5] A Use of Force Report is an internal document generated by the Virgin Islands Police Department whenever there is an officer involved shooting.

¶28 On February 21, 2019, the court entered an order denying E. Roberts' Rule 29 post-trial motion. In the order, the court, among other things, opined that the People's mischaracterization of E. Roberts' gunshot wound was inconsequential because the court presumed the jury followed its curative instruction. Furthermore, the court iterated E. Roberts was not entitled to full disclosure of Hector's entire internal affairs file despite the delay he experienced in acquiring the results of the People's investigation of Hector's internal affairs file, as well as his personnel records. Lastly, the court rejected E. Roberts' contention that the People's failure to disclose the Use of Force Report was prejudicial because the information in the report was elicited by E. Roberts' attorney on cross examination and the statement was never adopted by Hector. Moreover, the court declared it had reviewed the Use of Force Report and was unable to identify any exculpatory or impeachment evidence in it.

¶29 On May 16, 2019, the court vacated E. Roberts' sentence for Counts 5, 8, and 9. On the remaining four counts, the court sentenced E. Roberts to thirty-five years' incarceration.

¶30 On June 11, 2019, E. Roberts perfected the instant appeal.

II. JURISDICTION

¶31 "The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees, and final orders of the Superior Court." 4 V.I.C. § 32(a). "An order that disposes of all claims submitted to the Superior Court is considered final for the purposes of appeal." *Jung v. Ruiz*, 59 V.I. 1050, 1057 (V.I. 2013) (citing *Matthew v. Herman*, 56 V.I. 674, 677 (V.I. 2012)). Because the Superior Court's May 16, 2019 judgment against E. Roberts disposed of all claims submitted for adjudication, the order is final and we exercise jurisdiction over E. Roberts' appeal.

III. STANDARD OF REVIEW

¶32 We review the trial court's factual findings for clear error and exercise plenary review over its legal determinations. *Thomas v. People*, 63 V.I. 595, 602-03 (V.I. 2015) (citing *Simmonds v. People*, 53 V.I. 549, 555 (V.I. 2010)). "However, in ruling on the correctness of discretionary rulings, such as those granting or denying motions to suppress evidence or for severance, we review only for abuse of discretion." *Ponce v. People*, 72 V.I. 828 (V.I. 2020) (citations omitted). Lastly, "[we] appl[y] a 'particularly deferential standard of review' to sufficiency [of the evidence] claims, and will affirm the verdict so long as the evidence, when viewed in a light most favorable to the People—including the benefit of all reasonable inferences—would allow a rational jury to find all elements of each offense proven beyond a reasonable doubt." *Id.* (citations omitted). *See Coleman v. Johnson*, 566 U.S. 650, 655-56 (2012) (explaining the test for reviewing sufficiency of the evidence is whether any rational trier of fact could fairly find the defendant guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the government); *Greer v. People*, 2021 V.I. 7, 9 n.15 (V.I. 2021) (same) (citing *United States v. Kelerchian*, 937 F.3d 895 (7th Cir. 2019); *United States v. Atkins*, 881 F.3d 621 (8th Cir. 2018); *Ambrose v. People*, 56 V.I. 99, 107 (V.I. 2012); and *United States v. McClain*, 377 F.3d 219, 222 (2d Cir. 2004)).

IV. DISCUSSION

A. Sufficiency of the Evidence

¶33 On appeal, E. Roberts asserts there was insufficient evidence to sustain his convictions for attempted first degree murder (Count 2), first degree assault (Count 3), and unauthorized possession of ammunition (Count 7). We address each contention in turn.

¶34 The People charged E. Roberts with attempted first degree murder of Hurtault. To prove attempted first degree murder, the People had to prove that E. Roberts attempted to kill Hurtault with premeditation and malice.[6] E. Roberts argues the record is devoid of ample facts evidencing malice or premeditation (Appellant's Br. 14). We disagree.

¶35 To satisfy the premeditation element, the People are not required to demonstrate E. Roberts labored over the decision to kill Hurtault or that he had a long standing plan to do so. *James v. People*, 60 V.I. 311, 326 (V.I. 2013). Essentially, "[a]lthough the mental processes involved must [occur] prior to the killing, a brief moment of thought may be sufficient to form a fixed, deliberate design to kill. It is not the length of time or reflection that determines whether an act of murder was premeditated, but rather it is the act of deliberation before murder." *Id.* (citations omitted). *See United States v. Rogers*, 457 Fed. Appx. 268, 271 (4th Cir. 2011) ("'[N]o particular period of time for reflection is essential to a finding of premeditation and deliberation.' While the amount of time for reflection may vary, 'it is a fact of deliberation, of second thought that is important.'") (citations omitted); *Northern Mariana Islands v. Quitano*, No. 2011-SCC-0022-CRM, 2014 WL 1407211, at *6 (N. Mar. I. Apr. 4, 2014) (unpublished) ("[P]remeditation need not involve extensive planning and calculated deliberation . . . [and] can be formulated virtually instantaneously . . .") (citations omitted); *Goodwin v. Keller*, No. 1:10CV679, 2011 WL 1362110, at *11 (M.D. N.C. Apr. 11, 2011) (unpublished) ("'Premeditation' means that the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing. 'Deliberation' means an intent to kill executed by the defendant in a cool state of blood, in furtherance of a fixed

[6] "(a) All murder which (1) is perpetrated by means of poison, lying in wait, torture, detention of a bomb, or by any other kind of willful, deliberate, and premediated killing; (2) is committed in the perpetration or attempt to perpetrate arson, burglary, kidnapping, rape, robbery, or mayhem, assault in the first degree, assault in the second degree, assault in the third degree and larceny . . . is murder in the first degree." 14 V.I.C. § 922(a)(1)(2).

design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by a lawful or just cause or legal provocation."); *see also Nicholas v. People*, 56 V.I. 718, 731-32 (V.I. 2012) ("In the Virgin Islands, malice aforethought does not mean simply hatred or particular ill will, but extends to and embraces generally the state of mind with which one commits a wrongful act. It may be inferred from the circumstances which show a wanton and depraved spirit, a mind bent on evil mischief without regard to its consequences. And 'where the killing is proved to have been accomplished with a deadly weapon, malice can be inferred from that fact alone.'") (citations omitted).

¶36 Here, the facts undisputedly demonstrate legally sufficient deliberation, premeditation, and malice. E. Roberts approached Hurtault from the rear of the parked white Toyota truck. (J.A. 1298). Upon moving to the front of the truck where Hurtault had ventured in order to secure for himself protection provided by the vehicle's engine, E. Roberts had adequate time to contemplate his actions and form the necessary intent to kill Hurtault. Moreover, after encountering Hurtault at the vehicle's front end, E. Roberts said something to Hurtault as he pointed his gun towards Hurtault and shot at Hurtault five times. E. Roberts' utterance before firing five shots at Hurtault provided E. Roberts with even more time to contemplate his actions, concerning whether he wanted to kill Hurtault. Lastly, E. Roberts' use of a firearm to shoot at Hurtault five times established the prerequisite malice under Virgin Islands law. Under a totality of the circumstances, a reasonable jury certainly could have concluded beyond a reasonable doubt that E. Roberts possessed the necessary premeditation, deliberation, and malice to be guilty of attempted first degree murder of Hurtault. Therefore, E. Roberts' argument regarding the insufficiency of evidence to establish attempted first degree murder is shamefully specious and non-meritorious.

¶37 In the Virgin Islands, first degree assault occurs whenever a perpetrator assaults another with the intent to murder that person. 14 V.I.C § 295(1). Although the information cites first degree assault, which requires an intent to murder, as the basis of the offense for which E. Roberts was convicted, assault, under Virgin Islands law, requires an individual to attempt a battery or to make a threatening gesture demonstrating an immediate intent and ability to commit a battery. 14 V.I.C. § 291. Therefore, E. Roberts technically assaulted Hurtault by merely pointing the gun at him.

¶38 Regardless, E. Roberts' intent to kill as discussed relative to the charge of attempted first degree murder similarly applies to the analysis for first degree assault. Specifically, E. Roberts aimed a firearm at Hurtault and, without legal or just cause, fired five times at Hurtault, a defenseless victim. Importantly, the trial record is devoid of any modicum or scintilla of evidence that E. Roberts acted in self-defense or in defense of another person when he shot Hurtault. Therefore, E. Roberts' actions unequivocally demonstrate his murderous intent and offer sufficient evidence for a reasonable jury to convict him of first degree assault beyond a reasonable doubt. *See Simmonds v. People*, 59 V.I. 480, 488-89 (V.I. 2013) (finding sufficient evidence for first degree assault when the defendant fired shots at the victim); *Phillip v. People*, 58 V.I. 569, 592 (V.I. 2013) (explaining a jury could have convicted the defendant of first degree assault from evidence the defendant pointed a firearm in a threatening manner with the ability to injure and kill the victim.); *Joseph v. Racette*, No. 12-CV-1693 (NGG), 2014 WL 1426255, at *8 (E.D.N.Y. Apr. 14, 2014) (unpublished) ("It was the act of shooting Davis and causing serious physical injury that fulfilled the elements of assault in the first degree.") (citations omitted).

¶39 In the Virgin Islands, a person commits unauthorized possession of ammunition, in pertinent part, if he lacks a firearm license but possesses, sells, purchases, manufactures, advertises

for sale, or uses firearm ammunition. 14 V.I.C. § 2256(a). However, on appeal, E. Roberts alleges the People had to prove that he violated each statutory provision rather than just the one the People presumed relevant. Essentially, E. Roberts contends that, in addition to establishing that he was an unlicensed firearm owner under § 2256(a)(3), the People also had to confirm he was not a licensed firearms or ammunition dealer under § 2256(a)(1) and he was not an on duty law enforcement officer, agent, or employee of the Virgin Islands government or the United States government acting within the scope of his duties under § 2256(a)(2). We agree.

¶40 Undeniably, statutory interpretation commences with ascertaining whether the statutory language is ambiguous. *Wallace v. People*, 71 V.I. 703, 715 (V.I. 2019). If unambiguous, the inquiry ends. *Id.* As stated above, E. Roberts argues that, to be found guilty of unauthorized possession of ammunition, the People had to prove that he was not a territorial or federal law enforcement officer, a licensed firearms dealer, *nor* a locally licensed firearm owner.

¶41 In *Smith v. People*, 51 V.I. 396 (V.I. 2009), the Court agreed with the decision of the United States Court of Appeals for the Third Circuit in *United States v. Daniel*, 518 F.3d 205 (3d Cir. 2008), that "Virgin Islands law," as embodied in 14 V.I.C. § 2256 as worded at that time, "proscribe[d] possession of ammunition without authorization, but it d[id] not establish a mechanism for authorizing possession of ammunition." *Smith*, 51 V.I. at 402. As a result, the Court was "compelled" to "reverse Smith's conviction on" the charge of unlawful possession of ammunition, because "the People failed to prove a requisite element of the offense of unlawful possession of ammunition," namely, that the possession was unauthorized. *Smith*, 51 V.I. at 403 (citing *Daniel*, 518 F.3d at 209-10).

¶42 After the decisions in *Smith* and *Daniel* in 2010, the Virgin Islands Legislature re-wrote subsection (a) of the statute to establish a "mechanism for authorizing possession of ammunition" that those opinions had concluded was lacking. That mechanism was ultimately set forth in four new, enumerated paragraphs of rewritten subsection (a), which have not been amended since. *See* Act No. 7182, § 1 (V.I. Reg. Sess. 2010). The first three paragraphs of rewritten subsection (a) are indisputably worded in the negative regarding what the People must prove. The operative statutory language unambiguously requires that the People first establish that the defendant (a)(1) "is not . . . a licensed firearms or ammunition dealer; or" (a)(2) "is not . . . [an] officer, agent or employee of the Virgin Islands or the United States, on duty and acting within the scope of his duties; or" (a)(3) "is not . . . [a] holder of a valid firearms license for the same firearm gauge or caliber ammunition of the firearm indicated on such license[.]" Continuing, since the conjunctive word "and" appears immediately after these three paragraphs, the fourth element of the statute, set out in paragraph (a)(4), must also be shown, in order to establish that all of the elements of subsection (a) have been proven. However, the language of paragraph (a)(4), in contrast to paragraphs (a)(1) through (a)(3), is set up in the affirmative, requiring the People to prove that the suspect whose status is accurately described by paragraphs (a)(1) or (a)(2) or (a)(3) at the relevant time, simultaneously "possesses, sells, purchases, manufactures, advertises for sale, or uses any firearm ammunition."

¶43 The People argue that the negative status requirements of subsections (a)(1), (a)(2), and (a)(3) should be treated as separate "options" that the People may choose from in order to establish unauthorized possession. But if that construction were to be adopted, an individual who is indisputably "a licensed firearms or ammunition dealer" within the contemplation of 14 V.I.C. § 2256(a)(1) could, at first blush, nevertheless be successfully prosecuted under subparagraph (a)(2)

of the same statute for unauthorized possession of ammunition—based on nothing more than the People's election--premised on the fact that such individual is not an "officer, agent or employee of the Virgin Islands or the United States, on duty and acting within the scope of his duties" at the time such person possessed, sold, purchased, manufactured, advertised for sale, or used any firearm ammunition. Thankfully, it is beyond cavil that such an absurd and unjust result, which can reasonably be presumed to not have been the intent of the Virgin Islands Legislature in enacting and subsequently amending 14 V.I.C. § 2256 to address the holdings in *Daniel* and *Smith*, is foreclosed. *Gilbert v. People*, 52 V.I. 350, 356 (V.I. 2009) ("A statute should not be construed and applied in such a way that would result in injustice or absurd consequences."); *One St. Peter, LLC v. Bd. of Land Use Appeals*, 67 V.I. 920, 928 (V.I. 2017) ("[A]n 'absurd result,' in the statutory construction context, refers to an interpretation of a statute that would be 'clearly inconsistent with the Legislature's intent.'").

¶44 Here, it is obvious that the People established that E. Roberts was "not . . . [a] holder of a valid firearms license" within the scope of paragraph (a)(3) at the time he indisputably "possesse[d] . . . or use[d] . . . firearm ammunition" to shoot Hurtault. At trial, E. Roberts' only argument that the People failed to "prove an[] essential element of the crime" addressed paragraph (a)(2), pertaining to which he claimed that "the People failed to prove that . . . E. Roberts w[as] not employed by or [was] a federal agent at the time he was alleged to have been in possession of ammunition." (JA 229-230). He made no argument whatsoever regarding whether the People established that he was "not . . . a licensed firearms or ammunition dealer" as contemplated by paragraph (a)(1). Yet, in his appellate brief, he argues that the People's case is deficient because "it was incumbent upon the People to prove not only that E. Roberts was not licensed to carry or

possess a firearm and/or ammunition in the Territory, but also that E. Roberts was (1) not a licensed firearms or ammunition dealer or (2) not an officer, agent or employee of the Virgin Islands or the United States, on duty and acting within the scope of his duties" when he shot Hurtault. Thus, to the extent that E. Roberts argues on appeal that the People failed to present sufficient evidence regarding whether 14 V.I.C. § 2256(a)(1) was satisfied, that argument is being raised for the first time. As such, it is procedurally defaulted and will not be considered. *See, e.g., Fontaine v. People*, 62 V.I. 643, 649 (V.I. 2015) (defendant waived argument that attempted murder and first-degree assault with intent to commit murder were the same offense for Double Jeopardy purposes under Virgin Islands law because it was not raised before the Superior Court). Regarding the question of whether 14 V.I.C. § 2256(a)(2) was satisfied, after considering E. Roberts' argument, the trial court concluded that "the jury could reasonably infer that shooting someone who is unarmed and taking cover during an active shooter situation is not within the scope of the duties of an officer, employee, or agent of the United States Government or of the Government of the Virgin Islands." *People v. Roberts*, 70 V.I. 125, 166 (Super. Ct. 2019). E. Roberts does not challenge this ruling on appeal.

¶45 Finally, we observe that 14 V.I.C. § 2256(f) unambiguously provides that "[t]he defendant shall have the burden of proving . . . an exemption" provided by the statute, and that "[a]n information based upon a violation of this section need not negate any exemption . . . contained" in the statute. Accordingly, to the extent that 14 V.I.C. § 2256(a)(1), (a)(2), and (a)(3) provide exemptions from the punishments available under the statute, it is the defendant who must establish a prima facie case of entitlement to the exemptions thereto.

¶46 Accordingly, E. Roberts has failed to preserve for appeal his argument concerning whether 14 V.I.C. § 2256(a)(1) was satisfied. He has not challenged the Superior Court's ruling that the jury could have reasonably inferred from the evidence that 14 V.I.C. § 2256(a)(2) was satisfied, and he does not dispute that the evidence established that 14 V.I.C. § 2256(a)(3) and (a)(4) were satisfied. In addition, he has not established a prima facie case of his entitlement to qualify for an exemption under the statute. As a result, his conviction and sentence for unauthorized possession of ammunition will be affirmed.

B. Denial of Rule 29 motion for Attempted First Degree Murder and First Degree Assault

¶47 On appeal, E. Roberts next argues the Superior Court erred when it denied his Rule 29 motion for attempted first degree murder (Count 2) and first degree assault (Count 3). E. Roberts first made the motion at the close of the People's case, renewed the motion during the conference on jury instructions, and renewed it again after the jury returned a guilty verdict.

¶48 FED. R. CRIM. P. 29[7] empowers the court, on a defendant's motion, to enter a judgment of acquittal at the close of the People's case in chief or at the end of the presentation of evidence by all parties for any offense which the court finds is unsupported by the evidence. Moreover, a defendant may make or renew a Rule 29 motion 14 days after the jury renders a guilty verdict or the court discharges the jury. FED. R. CRIM. P. 29(c)(1).

[7] We assess the argument under Rule 29 of the Federal Rules of Criminal Procedure rather than the analogous Virgin Islands Rule 29 because this case was decided prior to the December 31, 2017 promulgation of the Virgin Islands Rules of Criminal Procedure.

¶49 "Under a Rule 29 Motion for Judgment of Acquittal, we must first determine whether there is sufficient evidence to sustain a conviction. . . . Therefore, "[w]hen we review evidence for its sufficiency, we neither judge the credibility of a witness nor weigh the evidence." *Mercado v. People*, 60 V.I. 220, 224 (V.I. 2013). *See United States v. Martinez*, 921 F.3d 452, 466 (5th Cir. 2019) (explaining that the test for reviewing sufficiency of the evidence is not whether the jury verdict was correct, but whether the decision was rational); *United States v. Acevedo*, 882 F.3d 251, 259 (1st Cir. 2018) (noting that the government's evidence need not exclude every reasonable hypothesis of innocence and if the evidence rationally supports two conflicting hypotheses, the conviction will not be reversed on appeal).

¶50 In his brief, E. Roberts cites *Simmonds v. People*, 59 V.I. 480, 489 (V.I. 2013) for the proposition that, to be guilty of attempted first degree murder and first degree assault, a suspect must shoot at a victim, strike him, stop, and move closer to the same victim to fire additional shots. We find this argument unpersuasive, preposterous, and outlandish.

¶51 Notably, *Simmonds* involved a charge of first degree murder because the defendant actually killed the victim after first shooting at him. In this case, the defendant only attempted to kill the victim. Given the distinctions between actually killing the victim and merely attempting to kill him, we believe *Simmonds* is inapplicable to this case.

¶52 Nonetheless, the crime of attempt entails (1) an intent to do an act or bring about certain consequences which in law would amount to a crime; and (2) an act in furtherance of that attempt which goes beyond mere preparation. *Audain v. Gov't of the V.I.*, No. 2006-46, 2014 WL 69027, at *3 (D.V.I. Jan. 8, 2014) (unpublished).

¶53 Here, E. Roberts pointed a pistol at Hurtault with the unequivocal intent to kill him. Moreover, E. Roberts shot at Hurtault five times. Even if the act of aiming a firearm at Hurtault failed to demonstrate an act beyond mere preparation needed for commission of attempted first degree murder, the act of shooting at Hurtault five times definitely demonstrated the required actus reus. Similarly, the act of pointing the firearm at Hurtault with the intent to kill him satisfied the elements of first degree assault. Therefore, a reasonable jury definitely could have concluded beyond a reasonable doubt that E. Roberts was guilty of both first degree assault and attempted first degree murder. Accordingly, the Rule 29 motion was correctly denied. Although there was sufficient evidence to convict E. Roberts of both first degree assault and attempted first degree murder, Virgin Islands jurisprudence, announced in *Titre v. People*, 70 V.I. 797 (V.I. 2019),[8] requires vacatur of E. Roberts' sentence for first degree assault. We now address that contention.

C. Vacatur of First Degree Assault Conviction

¶54 The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution states no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." *Williams v. People*, 56 V.I. 821, 831 (V.I. 2012). Generally, when a defendant's actions violate two different criminal statutes, the Double Jeopardy Clause dictates that he cannot be sentenced for the same offense or for the lesser and greater included infractions of the same predicate offense. *Id.* In *Blockburger v. United States*, 284 U.S. 299, 304 (1932), the United States Supreme Court delineated a test to ascertain if two crimes were the same. "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine

[8] The standard announced in *Titre* applies to this case because *Titre* was decided in January 2019 before the trial court entered judgment on E. Roberts post trial Rule 29 motion in February 2019.

whether there are two offenses or only one, is whether each provision requires a proof of fact which the other does not." *Id.* However, the *Blockburger* test "is a rule of statutory construction, and because it serves as a means of discerning [legislative] purpose[,] the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Williams*, 56 V.I. at 831 (internal citations omitted).

¶55 Locally, the Virgin Islands double jeopardy statute is codified in 14 V.I.C. § 104. Section 104 proclaims "an act or omission which is made punishable in different ways by different provisions of this Code may be punished under any such provisions but, in no case, may it be punished under more than one. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." By its terms, section 104 proscribes multiple punishments when a defendant's actions within a single occurrence violate multiple local laws. However, the prohibition does not apply when the legislature intends to impose multiple punishments for certain infractions even when those infractions occurred in a single transaction. Essentially, where double jeopardy under the Fifth Amendment targets identical crimes, section 104 focuses on all crimes emanating from a single transaction. Thus, section 104 allows a defendant to be charged and convicted of multiple crimes arising from a single transaction, but declares that a defendant can only be sentenced for one offense unless the legislature intends otherwise. *Williams*, 56 V.I. at 832.

¶56 In *Titre*, we abrogated the former merger-and-stay rule and decided that vacatur of ancillary convictions as well as their accompanying sentences, which emanate from crimes completed in a single transaction, was the best remedy for the Virgin Islands. Under the former merger-and-stay

procedure, local courts sentenced a defendant for one crime and stayed[9] convictions and/or sentences for secondary crimes that were completed in a single course of action or a single act. *Titre*, 70 V.I. at 806.

¶57 Before being overturned, the merger-and-stay procedure contrasted the vacatur remedy sanctioned by the United States Supreme Court for double jeopardy violations. See *Rutledge v. United States*, 517 U.S. 292, 301-02 (1996) (To avoid collateral consequences, the Supreme Court opined that the lower court should "exercise its discretion to vacate . . . the underlying convictions' as well as the concurrent [or stayed] sentences[s] based upon [them].") Essentially, under merger-and-stay, local courts merged convictions and stayed sentences for a suspect's secondary transgressions that arose in a single occurrence. Contrastingly, the federal judiciary vacated identical convictions and their requisite sentences for double jeopardy violations. However, given the confusion merger-and-stay created for territorial courts, we consequently adopted vacatur as the remedy for violations of section 104.

¶58 In this case, E. Roberts assaulted Hurtault in the same episode in which he attempted to kill him. Under section 104, the two crimes occurred in a single course of conduct. The Superior Court sentenced E. Roberts to 20 years for attempted first degree murder (Count 2) and 15 years for first degree assault (Count 3). (J.A. Vol. VI 3088-89). The sentences were to run concurrently. However, pursuant to our holding in *Titre*, the Superior Court should have vacated E. Roberts' conviction and sentence for first degree assault and imposed sentence on E. Roberts' attempted first degree murder conviction. Accordingly, the Superior Court erred when it failed to do so.

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[9] A stay of execution is 1. The postponement or halting of a proceeding, judgment, or the like. 2. An order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding. BLACKS LAW DICTIONARY 1201(10th ed. 2015).

Consequently, we reverse E. Roberts' conviction and sentence for first degree assault and remand to the Superior Court with instructions to vacate E. Roberts' conviction and sentence for first degree assault in order to comport with our ruling in *Titre*.

D. Denial of Motion for a Mistrial

¶59 On appeal, E. Roberts also challenges the trial court's denial of his motion for a mistrial. In his appellate brief, E. Roberts frames the argument as one that contests the People's continuous discovery violations. However, the main reason E. Roberts apparently disputes the court's denial of his mistrial motion is the emergence of the Use of Force Report despite defendants' numerous discovery motions which failed to result in the report's disclosure. Thus, E. Roberts contends the report should have been disclosed pursuant to FED. R. CRIM. P. 16[10] and that the People's failure to so disclose caused him substantial prejudice that warranted the court granting his mistrial motion.

¶60 Importantly, we review the denial of a motion for a mistrial for abuse of discretion. *Connor v. People*, 59 V.I. 286, 299 (V.I. 2013). "If the prosecutor did engage in misconduct, we will reverse unless the error is harmless. . . . Under harmless error analysis, '[i]f the error is constitutional, we will affirm [only] if we find the error is harmless beyond a reasonable doubt'

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[10] "Documents and Objects. Upon a defendant's request, the government must permit the defendant to inspect and copy or photocopy books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is in the government's possession custody, or control and: (i) the item is material to preparing the defense; (ii) The government intends to use the item in its case-in-chief at trial; or (iii) The item was obtained from or belongs to the defendant." FED. R. CRIM. P. 16(a)(1)(E).

"Reports of Examinations and Tests. Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if: (i) the item is within the government's possession, custody, or control; (ii) the attorney for the government knows-or through due diligence could know-that the item exists; and the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial." FED. R. CRIM. P. 16(a)(1)(F).

while 'if the error is non-constitutional, we will affirm when it is highly probable the error did not contribute to the judgment." *Id.* (citations omitted).

¶61 Here, it is undeniable that the People had the police's Use of Force Report in its possession when the defense initially sought discovery of all relevant documents under Rule 16(a)(1)(E) and Rule 16(a)(1)(F) in November 2014, December 2014, and January 2015. (J.A. Vol. I 54-81). This assertion is confirmed by the fact the report was authored by Officer Naomi Joseph ("Joseph") on April 19, 2014, which is the same day of the shooting at Frontline Nightclub. (J.A. Vol. V 2615-2620). Moreover, although the court said the document did not contain exculpatory or impeachment evidence, the proper inquiry under Rule 16(a)(1)(E) or Rule 16(a)(1)(F) is essentially whether the document was in the People's possession and whether the People intended to use it in its case in chief or the document is helpful to the defense in developing a defense strategy. *Id.* If those circumstances are met, the document must be transferred to the defense. *See United States v. Hinkson*, No. CR-04-127-C-RCT, 2004 WL 7333649, at *1-2 (D. Idaho Dec. 3, 2004) (unpublished) ("Fed. R. Crim. P. 16 permits a defendant to request and inspect certain types of evidence in conformance with due process considerations, such as exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). . . . [Additionally, the government also has an] obligation to disclose impeachment information discoverable under *Giglio v. United States*, 405 U.S. 150 (1972)."); *United States v. Wilson*, No. CR 04-00476 SJO, 2017 WL 11489965, at *2 (C.D. Cal. Dec. 4, 2017) (unpublished) ("To receive discovery under [Rule 16(a)(1)(E)(i)], the defendant must make a threshold showing of materiality, which requires a presentation of facts [that] tend to show . . . the Government is in possession of information helpful to the defense. [However,] '[n]either a general description of the information sought nor conclusory allegations of materiality

suffice; a defendant must present facts which would tend to show that the Government is in possession of information helpful to the defense. . . .' Under *Brady* and its progeny, 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. . . .' Evidence is material for *Brady* purposes if a reasonable probability exists that the result of a proceeding would have been different had the government disclosed the information to the defense. . . . Any evidence that would tend to call the government's case into doubt is favorable for *Brady* purposes.") (citations omitted); *United States v. Foskey*, 570 Fed.Appx. 878, 881 (11th Cir. 2014) ("A reviewing court considers materiality 'in terms of the cumulative effect of suppression.'") (citations omitted); *see also United States v. Clark*, No. 11-032 (JRT-LIB), 2011 WL 13382878, at *3 (D. Minn. Mar. 2, 2011) (unpublished) (explaining Federal Rule of Criminal Procedure 16(a)(1)(F) requires the transfer of the results of physical and mental examinations to defendant).

¶62 Here, although the People did not utilize the Use of Force Report in its case in chief, the document certainly could have assisted the defense in its examination of Hector by compelling the defense to interview Joseph to ascertain which individuals she consulted before drafting the document. Apparently, the only valid application of the report would have been to impeach some of Hector's assertions including the statement that he encountered two males aiming firearms at Vernege's truck when he exited the club on the night of the incident. (J.A. Vol. V 2664-66).

¶63 In terms of the report's materiality under Rule 16(a)(1)(E)(i) or *Brady*, Williams, in his January 2015 motion to compel, stated that he was entitled to all impeachment and exculpatory

evidence in the people's possession.[11] Obviously, exculpatory evidence is material because it usually exonerates the accused while impeachment evidence raises doubts about the People's case and witnesses. Therefore, because the Use of Force Report was in the People's possession when the defense sought discovery of it and the report was material to the defense because it impeached Hector's credibility, the document should have been transmitted to the defense under either Rule 16(a)(1)(E)(i) or *Giglio*. Thus, the People's failure to do so was error.

¶64 However, in deciding E. Roberts' mistrial motion, the Superior Court acknowledged that the defense had access to multiple contradictory statements by Hector, which they used to impeach his credibility on cross examination. (J.A. Vol III 1161-1210; J.A. Vol. III 1262-85; J.A. Vol. V 2665-66). Thus, the court determined the exclusion of another inconsistent statement was harmless because the record already contained evidence of Hector's prior inconsistent statements. Moreover, the court also noted that Hector did not independently adopt the statement in Joseph's Use of Force Report. *See United States v. Valdez-Gutierrez*, 249 F.R.D. 368, 372 (D.N.M. 2007) ("The only situations in which circuit courts of appeal have held that a testifying witness adopted a statement or report prepared by someone else is where the testifying witness either had some part in making the statement or report or the testifying witness participated in conducting the underlying investigation and later approved the accuracy of the contents of statement or report of the investigation.") (citations omitted).

¶65 We agree with the Superior Court and iterate that the jury is in the best position to assess witness credibility. *See United States v. Radosh*, 490 F.3d 682, 686 (8th Cir. 2007) ("Prior inconsistent statements do not disqualify a witness . . . ") (citations omitted); *Ostalaza v. People*,

[11] E. Roberts filed a February 2015 notice to join in Williams' January 2015 motion to compel.

58 V.I. 531, 546 (V.I. 2013) ("Courts have long recognized that the simple failure to include every detail in a prior statement does not necessarily render it inconsistent with a more thorough testimony provided at a later time.") (citations omitted); *Nanton v. People*, 52 V.I. 466, 485-86 (V.I. 2009) ("It is inconsequential for the purposes of appellate review [] whether [the witness's] testimony reaffirming what he had told to the police conflicted with his testimony on cross-examination . . . '[W]e are not at liberty to substitute our own credibility determinations for those . . . of the jury.'") (citations omitted). Therefore, the Superior Court did not abuse its discretion when it denied E. Robert's motion for a mistrial.

¶66 Despite our holding that the court below did not err when it denied E. Roberts' mistrial motion, we note that, even if it did, the error was harmless beyond a reasonable doubt because, as already stated, the defense possessed several conflicting statements with which to impugn Hector's credibility. Despite the presentation of these contrary declarations, the jury still convicted L. Williams and E. Roberts. Therefore, the exclusion of Hector's contradictory statements in the Use of Force Report from the record did not affect the trial's outcome and was thus harmless because the jury heard other contradictory statements by Hector from which it could evaluate Hector's creditability. Consequently, E. Roberts was not prejudiced by the omission of the Use of Force Report.

E. Failure to Disclose the Entire Use of Force Report

¶67 On appeal, E. Roberts' also contends that the court's failure to disclose the entire Use of Force Report violated *Brady* and warrants a new trial because of the prejudice he incurred. Under *Brady*, a defendant must establish three elements to demonstrate a due process violation. *Benn v. Lambert*, 283 F.3d 1040, 1052-53 (9th Cir. 2002). "First, the evidence at issue must be favorable

to the accused, because it is either exculpatory or impeachment material. . . . Second, the evidence must have been suppressed by the State, either willfully or inadvertently. . . . Third, prejudice must result from the failure to disclose the evidence. . . . [However,] [e]vidence is deemed prejudicial, or material, only if it undermines the outcome of the trial." *Id.* (citations omitted). *See United States v. Bagley*, 473 U.S. 667, 676 (1985); *United States v. Agurs*, 427 U.S. 97, 110, 111-12 (1976).

¶68 In this case, E. Roberts prevails on the first two prongs of the *Brady* test because the Use of Force Report contained an impeachable statement by Hector and the People unintentionally failed to disclose it. However, E. Roberts' argument falters on the test's third element because the report was immaterial since its inclusion would not have changed the trial's outcome. Specifically, as iterated above, the defense possessed several contradictory statements by Hector and employed Hector's prior inconsistent statements to impeach him on cross-examination. Although E. Roberts' believes the report may have contained exculpatory evidence, the record does not support that allegation. Importantly, the trial court reviewed the Use of Force Report and informed the defense that it did not contain any exculpatory evidence. Therefore, E. Roberts incurred no prejudice resulting from the court's failure to disclose the entire Use of Force Report and its exclusion was essentially harmless.

F. Denial of Post-Trial Rule 29 Motion

¶69 Finally, E. Roberts argues the court erred when it denied his post-trial motion for a judgment of acquittal or, alternatively, a new trial because of the cumulative effect of the People's misconduct, namely the prosecution's mischaracterization of E. Roberts' being shot in the leg.

¶70 However, this Court has opined that Rule 29 is inapplicable to claims of prosecutorial misconduct. Therefore, because E. Roberts' challenge involves prosecutorial comments, we will not address it. *See Davis v. People*, 69 V.I. 619, 627 n.7 (V.I. 2018) ("[R]elief 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.").

V. CONCLUSION

¶71 For the above reasons, we affirm E. Roberts' convictions on all counts except his conviction for first degree assault. We remand the matter to the Superior Court with instructions to vacate the conviction for first degree assault in order to comport with our decision in *Titre v. People*.

Dated this 19th **day of** April **2022**

IVE ARLINGTON SWAN
Associate Justice

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

By: _____
Deputy Clerk II

Date: 4/19/2022