For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

ALAN NIGEL ARCHIBALD, Appellant/Defendant, v. **THE PEOPLE OF THE VIRGIN ISLANDS,** Appellee/Plaintiff.	)	**S. Ct. Crim. No. 2016-0050** Re: Super. Ct. Crim. No. 373/2012 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. James S. Carroll, III

Argued: June 13, 2017
Filed: March 29, 2019

Cite as: 2019 VI 13

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

APPEARANCES:

Robert Leycock, Esq.
St. Thomas, U.S.V.I.
Attorney for Appellant,

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OPINION OF THE COURT

CABRET, Associate Justice.

¶1 Alan Archibald appeals from the Superior Court's judgment and commitment entered September 15, 2016, upon his conviction on charges of aggravated rape in the second degree as an

act of domestic violence in violation of 14 V.I.C. § 1700a(a) and 16 V.I.C. § 91(b)(6), and incest in violation of 14 V.I.C. § 961, arguing that the Superior Court erred when it granted the People's motion to amend the information in violation of his constitutional rights and denied in part his motion for judgment of acquittal. Because the amendment did not violate Archibald's constitutional rights and the motion for judgment of acquittal was properly denied, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶2 In 2010, Makimba Leonard took her daughters Q.A. and S.A. to a family planning center because she suspected that they were sexually active. Based on confidential statements that Q.A. and S.A. made to the family planning staff regarding their father, Archibald, the Department of Human Services launched an investigation. S.A. later gave birth to a child in October of the same year. On March 7, 2011, the prosecution charged Archibald with a seven-count information for crimes against his daughter Q.A.: count one, unlawful sexual contact in the first degree as an act of domestic violence in violation of 14 V.I.C. § 1708(a)(2) and 16 V.I.C. § 91(b)(5); count two, aggravated rape in the first degree as an act of domestic violence in violation of 14 V.I.C. § 1700(a)(1) and 16 V.I.C. § 91(b)(6); count three, child abuse in violation of 14 V.I.C. §505, incest in violation of 14 V.I.C. § 961; count four, incest in violation of 14 V.I.C. § 961; count five, aggravated rape in the second degree as an act of domestic violence in violation of 14 V.I.C. § 1700a(a) and 16 V.I.C. § 91(b)(6); count six, child abuse in violation of 14 V.I.C. § 505; and count seven, incest in violation of 14 V.I.C. § 961. Archibald pleaded not guilty to the charges in the information and requested a jury trial.

¶3 In light of the ongoing investigation for crimes that Archibald allegedly committed against Q.A., Sergeant Ana Jimenez requested a search warrant to obtain DNA from Archibald and conduct a paternity test on S.A.'s newborn son. The Superior Court issued the warrant and ordered

a paternity test to determine whether Archibald fathered S.A.'s son. On April 26, 2012, the results of the paternity test indicated that there was a 99.9999 percent likelihood that Archibald was the father of S.A.'s child. On July 25, 2012, the prosecution charged Archibald in a two-count information with crimes against S.A.: count one, aggravated rape in the first degree as an act of domestic violence in violation of 14 V.I.C. § 1700(a)(2) and 16 V.I.C. § 91(b)(6), and count two, incest in violation of 14 V.I.C. § 961. Archibald pleaded not guilty to the charges and requested a jury trial. The Superior Court consolidated the cases and the prosecution filed an amended nine-count information on November 13, 2012.

¶4 The three-day jury trial began on April 5, 2016. During the prosecution's case-in-chief, Leonard and Sergeant Jimenez testified that an investigation was launched against Archibald for crimes he allegedly committed against his daughters, and that the investigation revealed evidence that Archibald had engaged in sexual conduct with Q.A. and S.A. In addition, S.A. testified that Alan Archibald is her father and, when asked if there was a time when her father had sex with her, she responded "yes." Mary Baltos, a DNA analyst, certified by the Superior Court as an expert in the field of DNA analysis, testified that the results of DNA testing showed a 99.9999 percent likelihood that Archibald was the father of his daughter S.A.'s child.

¶5 After the prosecution finished presenting its case-in-chief, Archibald moved for judgment of acquittal on all nine counts. Archibald argued that the prosecution presented no evidence to support the charges for crimes against Q.A., and that the prosecution presented insufficient evidence to prove that S.A. was not Archibald's spouse, as well as insufficient evidence to prove that Archibald had used force, intimidation, or abused a position of authority to accomplish the sexual act as required by former title 14, section 1700(a)(2). The prosecution conceded that it presented no evidence to support the charges for crimes against Q.A., and the Superior Court

granted the motion for judgment of acquittal for counts one through seven, but deferred its decision on counts eight and nine. Archibald then rested his case. Immediately after Archibald rested and awaiting whether the Superior Court would grant Archibald's motion for judgment of acquittal as to count eight, aggravated rape in the first degree as an act of domestic violence and count nine, incest, the prosecution moved to amend the information to add the "lesser-included" charge of aggravated rape in the second degree as an act of domestic violence in violation of 14 V.I.C. § 1700a(a) and 16 V.I.C. § 91(b)(6), and Archibald objected to the amendment.

¶6 On April 7, 2016, the Superior Court denied Archibald's motion for judgment of acquittal as to count nine, incest, but granted the motion as to count eight, aggravated rape in the first degree. In granting Archibald's motion as to count eight, the court reasoned that although the prosecution presented sufficient evidence to prove that S.A. was not Archibald's spouse since a daughter cannot be married to her father as a matter of law, the prosecution had presented "no testimony that . . . force, intimidation, or the perpetrator's position of authority over the victim was used to accomplish the sexual act." The Superior Court then granted the prosecution's motion to amend the information to include aggravated rape in the second degree, explaining that, even if aggravated rape in the second degree was not a lesser-included offense, the charge was not different from the original charge of aggravated rape in the first degree and would not prejudice Archibald. Examining both charges, the Superior Court reasoned that although the age requirements were slightly different, the aggravated rape second degree charge was not prejudicial because "the victim fits under both age definitions" required by aggravated rape in the first and second degree. The prosecution then filed a fifth amended information charging Archibald for crimes against S.A., including count one, aggravated rape in the second degree as an act of domestic violence in violation of 14 V.I.C. § 1700a(a) and 16 V.I.C. § 91(b)(6), and count two, incest in violation of 14

V.I.C. § 961. After counsel concluded closing arguments, the Superior Court delivered the final instructions and submitted the case to the jury. After deliberating, the jury returned a verdict of guilty on both counts on April 7, 2016.

¶7 The prosecution filed a habitual criminal information on April 20, 2016, which referenced Archibald's 2002 conviction for a sex crime. Archibald was deemed a habitual offender at his July 26, 2016 sentencing.[1] On September 8, 2016, the Superior Court entered its judgment and commitment, adjudicating Archibald guilty on both counts and imposing a minimum ten-year sentence and a maximum life sentence. Archibald filed a timely notice of appeal on September 17, 2016.

II. JURISDICTION AND STANDARD OF REVIEW

¶8 "The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law." V.I. CODE ANN. tit. 4, § 32(a). Because the Superior Court's judgment and commitment dated September 8, 2016, constituted a final judgment, this Court possesses jurisdiction over Archibald's appeal. *Francis v. People*, 63 V.I. 724, 732–33 (V.I. 2015).

[1] Title 14, section 61(b) of the Habitual Criminals Statute provides that:

> Whoever . . . has been convicted of an offense which would be a felony in the Virgin Islands and a crime of violence as defined in Title 23, section 451(e) of the Code shall upon a subsequent conviction of a felony in the Virgin Islands, which is also a crime of violence as defined in the aforementioned provision, be incarcerated for a term of imprisonment of not less than ten years as provided in subsection (a) of this section, or not less than one-half the maximum sentence provided by law, whichever is greater, and may be incarcerated for the remainder of his natural life if the subsequent felony for which the person is convicted in the Virgin Islands, which is also a crime of violence as defined in Title 23, section 451(e) of the Virgin Islands Code, was committed within ten (10) years after the date the person has completed serving his sentence on the conviction for the prior felony and crime of violence.

¶9 Generally, we review the Superior Court's decision to grant the prosecution's motion to amend an information for abuse of discretion. *See Phillip v. People*, 58 V.I. 569, 598 (V.I. 2013); *Gov't of the V.I. v. Torres*, 476 F.2d 486, 491 (3d Cir. 1973); *accord Plaskett v. Gov't of the V.I.*, 147 F. Supp. 2d 367, 371 (D.V.I. App. Div. 2001); *City of Red Lodge v. Kennedy*, 46 P.3d 602, 604 (Mont. 2002). However, when addressing constitutional issues, as we do here, we engage in plenary review. *Francis*, 63 V.I. at 733 (citing *Carty v. People*, 56 V.I. 345, 354 (V.I. 2012)). We also exercise plenary review over a trial court's denial of a motion for judgment of acquittal. *Frett v. People*, 66 V.I. 399, 408 (V.I. 2017).

III. DISCUSSION

A. Amendment to Information

¶10 Archibald argues that the Superior Court erred in granting the prosecution's motion to amend the information at the close of all evidence because aggravated rape in the second degree is a different offense from aggravated rape in the first degree, making the amendment prejudicial and thus a violation of the Sixth Amendment of the Constitution. Archibald bases his argument on his Sixth Amendment right to notice, alleging that the prosecution's amendment after his defense rested failed to provide him with an opportunity to prepare a defense against the new charge of aggravated rape in the second degree. The Superior Court, in granting the prosecution's motion, explained that even if aggravated rape in the second degree was not a lesser-included offense, the charge did not provide different elements from the original charge of aggravated rape in the first degree and would not prejudice Archibald. "The Court reviews the [grant of leave] to [amend] an information for abuse of discretion." *Phillip*, 58 V.I. at 598. But we engage in "plenary review of 'all constitutional questions of law.'" *Francis*, 63 V.I. at 733 (quoting *Carty*, 56 V.I. at 354).

¶11 The Sixth Amendment guarantees the accused the right "to be informed of the nature and cause of the accusation." U.S. CONST. amend. VI.[2] To satisfy the Sixth Amendment, "an information [must] state the elements of an offense charged with sufficient clarity to apprise a defendant of what he must be prepared to defend against." *Ambrose v. People*, 56 V.I. 99, 103 (V.I. 2012) (quoting *Givens v. Housewright*, 786 F.2d 1378, 1380 (9th Cir.1986)). Significantly, a defendant is not deprived of his right to notice when the prosecution amends an information to add a lesser-included offense since the elements of the lesser offense are necessarily contained in the greater. *See Ambrose*, 56 V.I. at 105 (explaining that a defendant would be entitled to an acquittal if an amendment to the information required the prosecution to prove "any new or different elements that [the defendant] was unable to defend against due to the timing of the amendment"); *Derrickson v. Meyers*, 177 Fed. Appx. 247, 250 (3d Cir. 2006) (unpublished) ("Thus, where the initial information charges an offense that involves the same basic elements and evolved out of the same factual situation as the crimes specified in the amended indictment or information, the defendant is deemed to have been placed on notice regarding his alleged criminal conduct." (internal quotation marks and ellipses omitted)); *State v. Johnston*, 996 P.2d 629, 634 (Wash. Ct. App. 2000) ("[T]here is no prejudice under . . . the Sixth Amendment when the amendment is to a lesser included offense or an inferior degree crime."); *cf. State v. Davis*, 385 So. 2d 193, 200 (La. 1980) (explaining that when an indictment is amended to charge a lesser-included offense "defendant can hardly assert lack of notice of the crime for which he is charged, since all the elements of the lesser offense are included within the greater"); *Commonwealth v. Olivier*, 57

[2] The Sixth Amendment is applicable to the Virgin Islands pursuant to section 3 of the Revised Organic Act. *Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 315 n.11 (V.I. 2014) (citing 48 U.S.C. § 1561).

N.E.3d 1, 4 (Mass. App. Ct. 2016) ("It is well established that an indictment for a greater offense puts a defendant on notice that he may be convicted of a lesser included offense that is not named in the indictment.").

¶12 But Archibald argues that rape in the second degree is not a lesser included offense of rape in the first degree. In deciding whether a charge is a lesser-included offense of another charge, we must ensure that, when the elements of both crimes are compared in the abstract without regard to the facts of the case, the lesser offense does not require an element beyond what the greater offense requires. *See Phipps v. People*, 54 V.I. 543, 573 (V.I. 2011); *Brown v. Ohio*, 432 U.S. 161, 168 (1977) ("As is invariably true of a greater and lesser included offense, the lesser offense joyriding requires no proof beyond that which is required for conviction of the greater auto theft."); *United States v. Lampley*, 573 F.2d 783, 789 (3d Cir. 1978) ("A lesser-included offense charge is inappropriate where, upon examination of the relevant statutes, it appears that the offense claimed to be lesser-included contains an additional element not part of the allegedly inclusive offense."); *Gov't of the V.I. v. Smith*, 558 F.2d 691, 696 (3d Cir. 1977) ("We are convinced, however, that the proper test focuses on the evidence necessary to prove the statutory elements."). Consequently, we must compare the elements of aggravated rape in the first and second degrees.

¶13 Aggravated rape in the first degree was previously codified under former section 1700 of title 14,[3] provided, in relevant part:

> (a) Whoever perpetrates an act of sexual intercourse or sodomy with a person not the perpetrator's spouse:
>
> (1) Who is under the age of thirteen, or

[3] On October 15, 2013, the Legislature amended title 14, section 1700 pursuant to Act No. 7517 §1 by removing "not the perpetrator's spouse" as an element of the substantive offense and adding spousal consent as an affirmative defense. Since the alleged incidents upon which the present prosecution proceeded occurred before the Legislature's revision of these sections, we address the elements of the crime in effect at the time of Archibald's conduct. *Francis*, 63 V.I. at 734 n.1.

> (2) who is under sixteen years of age residing in the same household as the perpetrator, and force, intimidation, or the perpetrator's position of authority over the victim is used to accomplish the sexual act . . . . is guilty of aggravated rape in the first degree and shall be imprisoned for life or for any term of years, but not less than 15 years.

¶14 In contrast, aggravated rape in the second degree, previously codified under former section 1700a of title 14,[4] provided, in relevant part:

> (a) Whoever perpetrates an act of sexual intercourse or sodomy with a person who is under eighteen years but thirteen years or older and not the perpetrator's spouse, or by force, intimidation, or the perpetrator's position of authority over the victim is used to accomplish the sexual act, is guilty of aggravated rape in the second degree and shall be imprisoned for life or for any term in years, but not less than 10 years. "Position of authority" shall include, but not be exclusive to the following: an employer, youth leader, scout leader, coach, teacher, counselor, school administrator, religious leader, doctor, nurse, psychologist, guardian ad litem, baby sitter, or substantially similar position, and a police officer or probation officer other than when the officer is exercising custodial control over a minor.

¶15 Formerly, both offenses required the prosecution to prove that the accused "perpetrat[ed] an act of sexual intercourse or sodomy," and that the victim was "not the perpetrator's spouse." *Compare* former 14 V.I.C. § 1700(a)(2), *with* former 14 V.I.C. § 1700a(a). Furthermore, because Archibald had every opportunity to prepare a defense regarding whether he perpetrated an act of sexual intercourse or sodomy and whether S.A. was his spouse, he had sufficient notice to defend himself concerning both elements. In addition to these two elements, in order to prove aggravated rape in the second degree under former section 1700a(a), the prosecution was required to provide evidence of the age of the minor victim, *or* in the alternative, that the sexual act was accomplished with force, intimidation, or the abuse of the perpetrator's position of authority over the victim.[5]

[4] On October 15, 2013, the Legislature also amended title 14, section 1700a pursuant to Act No. 7517 §1 by removing "not the perpetrator's spouse" as an element of the substantive offense and adding spousal consent as an affirmative defense.

[5] However, in *Gilbert v. People*, 52 V.I. 350, 360–61 (V.I. 2009), we held that, with respect to 17-year-old victims, the Legislature intended to require the prosecution to prove both the age of the victim and some aggravating factor,

Francis, 63 V.I. at 735–36 ("[U]nder 14 V.I.C. § 1700a the age of the victim—when the victim is 13, 14, or 15 years old—constitutes an aggravating factor, and to establish guilt the People need not in addition prove force, intimidation, or use of position of authority to accomplish the sexual act."). But aggravated rape in the first degree differed under former section 1700(a)(2) in that it required proof of *both* the age of the minor victim[6] and that the sexual act was accomplished with force, intimidation, or abuse of the perpetrator's position of authority, along with proof that the victim resided in the same household as the perpetrator.

¶16 Here, in proving the charged offense of aggravated rape in the first degree, the prosecution must prove every element of aggravated rape in the second degree. For that reason, aggravated rape in the second degree requires proof of less than all the facts necessary to prove the offense of aggravated rape in the first degree, and thus, is necessarily a lesser-included offense of the crime of aggravated rape in the first degree. Moreover, Archibald had abundant notice that the victim's age was an element of the charge he faced—and the prosecution's allegation that the victim was a minor—from the information that included the charge of aggravated rape in the first degree. *State v. Vance*, 537 N.W.2d 545, 548 (N.D. 1995) ("Quite simply, an offense charged in an Information inherently notifies the defendant that he or she may have to defend against lesser included offenses;

such as the use of force, intimidation, or abuse of a position of authority to sustain a conviction for aggravated rape in the second degree.

[6] Although Archibald did not raise the issue of age requirements in his brief, the Superior Court noted that the age requirements are slightly different. While we recognize that aggravated rape in the second degree criminalizes sexual acts with minor victims 16 and 17 years of age and thus encompasses a broader age range than aggravated rape in the first degree, this difference is not dispositive because, by proving that the victim is 13 or older but under 16 pursuant to section 1700(a)(2), aggravated rape in the first degree, the prosecution will have also proved that the child is 13 or older but under 18 pursuant to section 1700a(a), aggravated rape in the second degree. *See Com. v. Walker*, 687 N.E.2d 1246, 1249 (Mass. 1997) (holding that indecent assault and battery of a child is a lesser included offense of rape of a child, despite different age thresholds); *Rios v. State*, Crim. No. 08-06-00211, 2008 WL 4351133, at *5 (Tex. Ct. App. Sept. 24, 2008) (unpublished) ("By proving that a child is younger than six years of age [for capital murder charge], the State would also prove that the child is younger than fourteen years of age for [injury to a child charge].").

no additional or specific language as to the lesser included offense is necessary to put the defendant on notice."). Because Archibald had adequate opportunity to prepare a defense concerning S.A.'s age, he had sufficient notice to defend himself concerning the age of the alleged victim.

¶17 In short, although Archibald contends the amendment to the information was prejudicial "because it charged a different offense," he identifies no additional or different element outside of the required elements of aggravated rape in the first degree. Also, because aggravated rape in the second degree under former section 1700a(a) does not require the prosecution to prove any additional or different elements outside the required elements of aggravated rape in the first degree under former section 1700(a)(2), we conclude that aggravated rape in the second degree is a lesser-included offense of aggravated rape in the first degree. *See Gov't of the V.I. v. Aquino*, 378 F.2d 540, 554 (3d Cir. 1967) ("[L]esser offense must be such that it is impossible to commit the greater offense without having first committed [the lesser offense]."); *State v. Thornton*, 111 A.3d 31, 35 (Me. 2015) ("[A] lesser-included offense is one that has no elements different from or in addition to the elements of the charged offense, making it impossible to commit the greater offense without having committed the lesser."); *State v. Meine*, 469 S.W.3d 491, 495 (Mo. Ct. App. 2015) ("A 'nested' lesser-included offense consists of a subset of the elements of the greater offense, therefore rendering it impossible to commit the greater offense without necessarily committing the lesser."); *State v. Miller*, 337 N.W.2d 424, 425–26 (Neb. 1983)("A lesser included offense is one which is necessarily established by proof of the greater offense." (citation and internal quotation marks omitted)). Accordingly, the Superior Court did not err in granting the prosecution's motion to amend the information to include aggravated rape in the second degree as a lesser included offense because Archibald was not prejudiced by the amendment. *See Vance*, 537 N.W.2d at 548 ("[T]he trial court did not err in permitting the amendment because [the defendant] was 'informed

of the nature and cause of the accusation' against him as required by the Sixth Amendment to the United States Constitution." (brackets and internal quotation marks omitted)).

B. Motion for Judgment of Acquittal

¶18 Archibald also argues that the Superior Court erred in denying his motion for judgment of acquittal regarding the charges of aggravated rape in the second degree and incest. "[I]n reviewing the Superior Court's denial of [Archibald's] motion for judgment of acquittal based on the sufficiency of the evidence, we exercise plenary review and apply the same standard as the trial court." *Fontaine v. People*, 59 V.I. 640, 648 (V.I. 2013) (citing *Francis v. People*, 56 V.I. 370, 379 (V.I. 2012)).

¶19 With respect to the charge of aggravated rape in the second degree, Archibald argues that the Superior Court should have granted the motion for judgment of acquittal because the prosecution failed to prove that S.A. was not Archibald's spouse, an element of aggravated rape in the second degree at the time of Archibald's offense.[7] When Archibald raised this argument before the Superior Court, the court reasoned that, because the prosecution elicited testimony that S.A. was Archibald's daughter, S.A. could not possibly be Archibald's spouse as a matter of law. We agree.

¶20 Aggravated rape in the second degree requires sexual intercourse "with a person not the perpetrator's spouse." 14 V.I.C. § 1700(a)(a). Therefore, Archibald is correct that the People must prove that the defendant and the victim of the sex crime were not married at the time of the offense.

[7] Although the prosecution omitted an element from the charge of aggravated rape in the second degree—that the victim is not the perpetrator's spouse—the Superior Court granted Archibald's motion to require the prosecution to include this element in the fifth amended information after he argued that the retroactive application of the current version of section 1700a violated the Ex Post Facto Clause of the Constitution, applicable to the Virgin Islands pursuant to section 3 of the Revised Organic Act. *See Rivera v. Gov't of the V.I.*, 183 F. Supp. 2d 770, 772–73 & n.2 (D.V.I. App. Div. 2002).

Yet, "when determining the sufficiency of the evidence, we 'credit all reasonable inferences that support the verdict.'" *Francis*, 63 V.I. at 736 n. 3 (quoting *Castor v. People*, 57 V.I. 482, 489 (V.I. 2012)). Throughout the trial, Sergeant Jimenez, Leonard, and S.A. testified that Alan Archibald is S.A.'s father. Furthermore, we note that any marriage between a man and his daughter is an illegal marriage which would be void. *See* 16 V.I.C. § 1 (marriage of a man and his daughter is illegal and void). Accordingly, by presenting evidence that Archibald is S.A.'s father, the prosecution presented sufficient evidence for a jury to find that S.A. cannot be Archibald's spouse. *See also Francis*, 63 V.I. at 736 n. 3 (explaining that the prosecution presented sufficient evidence to show that minor was not married to the accused based on testimony that minor was the nephew of the accused).

¶21 Archibald also argues that the prosecution "failed to put on any evidence regarding the second degree rape requirements of Archibald's position of authority, the use of force, or the use of intimidation to accomplish the alleged sexual acts." This argument is precluded by the plain language of section 1700a(a) and our prior decisions. Plainly read, section 1700a(a) "clearly criminalizes sexual intercourse when either: (1) the victim is between the ages of 13 and 18; or (2) the victim is any age if the sexual act is accomplished by: (a) force; (b) intimidation; or (c) the perpetrator's use of their position of authority." *Gov't of the V.I. v. Clarke*, 572 Fed. Appx. 138, 143 (3d Cir. July 10, 2014) (unpublished). And in *Francis v. People*, we held that, once the prosecution prove the victim is 13, 14, or 15 years of age, the prosecution need not prove force, intimidation, or abuse of a position of authority. 63 V.I. at 735–36. Because S.A. was 14 at the time of the incident, the prosecution was not required to prove that Archibald used force, intimidation, or his position of authority to accomplish the sexual act in order to establish guilt

under section 1700a(a). Therefore, the Superior Court did not err in denying Archibald's motion for judgment of acquittal as to the charge of aggravated rape in the second degree.

¶22 Finally, Archibald argues that the Superior Court erred in denying his motion for judgment of acquittal with respect to the charge of incest. Archibald was charged under title 14, section 961 of the Virgin Islands Code, which provides in relevant part that "[p]ersons being within the degrees of consanguinity within which marriages are declared by law to be void . . . who commit fornication or adultery with each other shall each be imprisoned for not more than 10 years." S.A. testified that Archibald was her father, and when asked if there was a time when her father had sex with her, she responded in the affirmative. Moreover, Baltos offered expert testimony that the results of DNA testing showed a 99.9999 percent likelihood that Archibald was the father of his daughter S.A.'s child. This testimony allowed the jury to conclude that Archibald is S.A.'s father and that he committed fornication with his daughter in violation of section 961. *See Francis v. People,* 57 V.I. 201, 224 (V.I. 2012) (explaining that the testimony of a single witness is enough to sustain a conviction). Because the prosecution proffered sufficient evidence to substantiate the charge of incest, the Superior Court did not err in denying Archibald's motion for judgment of acquittal as to that charge.

IV. CONCLUSION

¶23 The Superior Court did not err when it permitted the prosecution to amend the information to include aggravated rape in the second degree because aggravated rape in the second degree is a lesser-included offense of aggravated rape in the first degree, the crime for which Archibald was originally charged. Nor did the Superior Court err in denying in part Archibald's motion for judgment of acquittal because the prosecution introduced sufficient evidence from which a

reasonable jury could find Archibald guilty of aggravated rape in the second degree and incest. Accordingly, we affirm the Superior Court's September 15, 2016 judgment and commitment.

Dated this 29th day of March, 2019.

BY THE COURT:

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

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

Swan, J., Concurring

¶24 While I concur in the decision of the majority, I still maintain my position elucidated in my dissenting opinion in *Gilbert v. People*, 52 V.I. 350 (V.I. 2009), regarding the statutory analysis of "Second Degree Aggravated Rape" and "Second Degree Rape," as the two criminal statutes were the constituted in 2009.

¶25 Additionally, any opinion in which I may have joined the majority since 2009 should not be regarded as an abandonment of my position in *Gilbert*, 52 V.I. 350. *E.g.*, *Gonsavles v. People*, S. Ct. Crim. No. 2016-0058, 2019 WL 539852, at *11 n.11 (V.I. Feb. 7, 2019).

Dated this 29th day of March, 2019.

BY THE COURT:

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

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