IN THE SUPREME COURT
OF THE VIRGIN ISLANDS
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IN THE SUPREME COURT OF THE VIRGIN ISLANDS

RODNEY E. MILLER, SR., Appellant/Defendant,	**S. Ct. Crim. No. 2020-0010** Re: Super. Ct. Crim. No. 425/2008 (STT)
v.	
PEOPLE OF THE VIRGIN ISLANDS, Appellee/Plaintiff.	

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas-St. John
Superior Court Judge: Hon. Michael C. Dunston

Argued: October 12, 2021
Filed: February 24, 2022

Cite as: 2022 VI 3

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **CURTIS V. GOMEZ**, Designated Justice.[1]

APPEARANCES:

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Appellate Public Defender
St. Thomas, U.S.V.I.
Attorney for Appellant,

Ian S.A. Clement, Esq.
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OPINION OF THE COURT

HODGE, Chief Justice.

[1] The Honorable Ive Arlington Swan is recused from this matter. The Honorable Curtis V. Gomez, a former judge of the United States District Court of the Virgin Islands, sits by designation pursuant to title 4, section 24 of the Virgin Islands Code.

¶ 1 Appellant Rodney E. Miller, Sr. appeals from the Superior Court's January 9, 2020 judgment and commitment, which adjudicated him guilty of numerous offenses stemming from his employment as Chief Executive Officer of the Roy L. Schneider Hospital ("RLSH"). For the reasons that follow, we reverse most of Miller's convictions due to the People's failure to support them with sufficient evidence, and order a new trial on all surviving convictions.

I. BACKGROUND

¶ 2 In 2002, the St. Thomas-St. John District Governing Board of the Virgin Islands Government Hospitals and Health Facilities Corporation hired Rodney E. Miller, Sr. as the Chief Executive Officer of RLSH. Miller began his employment on May 13, 2002, pursuant to a three-year contract set to expire on May 13, 2005. Pursuant to the 2002 agreement, Miller was to receive a $135,000 annual salary, as well as numerous benefits, including a housing allowance. However, on September 4, 2002, and June 12, 2003, respectively, the District Governing Board approved amendments to Miller's contract which, among other things, increased his salary to $150,000 and authorized payment of a $15,000 bonus subject to an annual review of his performance.

¶ 3 In 2004, the District Governing Board appointed Peter Najawicz as the RLSH's Chief Financial Officer, who commenced his employment on April 19, 2004. Miller executed an agreement with Najawicz providing him with an annual stipend that exceeded his salary, as well as various other incentives and perquisites, as Miller had done previously with Amos W. Carty, Jr., who served as the RLSH's General Counsel and Chief Operating Officer. Although Miller, Carty, and Najawicz had their salaries processed by the Executive Branch through its Department of Finance, their stipends and bonuses were paid from a separate RLSH account and were not reflected on the Notice of Personnel Action ("NOPA") form maintained by the Executive Branch.

¶ 4 In advance of Miller's employment contract expiring, the District Governing Board—now led by June A. Adams, who succeeded Beverly Chongasing as Chair—established a Compensation Committee and retained a consulting firm to recommend a salary and benefits package for Miller. On May 14, 2005, Miller and Adams signed a new two-year contract. However, in a letter dated June 21, 2005, Adams proposed new terms, apparently in response to ongoing negotiations between the RLSH and Miller, which Miller accepted. In September 2005, Miller and Adams signed another contract, backdated to May 14, 2005, which incorporated the terms of the June 21, 2005 agreement, as well as various other terms. While all three documents were signed by Adams in her capacity as Chair of the Board, the record contains no evidence that the District Governing Board held a formal vote to ratify any of these agreements.

¶ 5 Over the next two years, Miller received various payments pursuant to these agreements, which were distributed directly to him from RLSH accounts rather than through payroll processed by the Department of Finance. Moreover, in February 2006, Najawicz received permission from Miller to "write-off" a $10,768 debt Carty owed to RLSH, in the form of an unpaid salary advance.

¶ 6 At an unspecified point between May 17, 2007, and August 13, 2007, Miller and Adams executed another new contract for Miller to remain as Chief Executive Officer. Again, the compensation provided to Miller under this agreement exceeded the salary on his NOPA form, and such excess compensation was paid from RLSH accounts rather than through the payroll process conducted by the Department of Finance. As with the 2005 agreement, the District Governing Board never held a vote to approve the 2007 agreement.

¶ 7 Despite signing the 2007 agreement, on September 19, 2007, Miller announced that he would resign as Chief Executive Officer effective November 3, 2007, to take a position at another hospital. The District Governing Board appointed Carty to succeed him effective November 5, 2007. During this period, Miller received multiple payments to his personal account from RLSH accounts, totaling nearly $1.8 million, purportedly pursuant to his 2005 and 2007 agreements.

¶ 8 During Carty's tenure as Chief Executive Officer, the Virgin Islands Office of Inspector General conducted an audit of the RLSH's finances. The Inspector General issued its final report on July 28, 2008, identifying numerous instances where it concluded that payments to Miller, Carty, and Najawicz were made without authorization or were excessive. The District Governing Board terminated Carty as Chief Executive Officer on August 5, 2008, and terminated Najawicz's employment in September 2008.

¶ 9 On October 6, 2008, the People charged Miller, Carty and Najawicz with numerous offenses stemming from their tenure with the RLSH. After more than a decade of proceedings, including a trial that resulted in a mistrial, a six-week jury trial commenced on October 9, 2019, and concluded on November 14, 2019. Ultimately, the jury found all the defendants guilty of all charges, totaling 44 counts between them.

¶ 10 The Superior Court held a forfeiture and sentencing hearing on December 13, 2019. At the conclusion of the hearing, the Superior Court orally sentenced all the defendants. The Superior Court dismissed several convictions pursuant to title 14, section 104 of the Virgin Islands Code, and with respect to the remaining convictions sentenced Miller to a combined period of 10 years of incarceration and ordered certain collateral consequences, such as forfeiture of certain funds and disqualification from public office. The Superior Court memorialized its oral decision in a January 2, 2020 special verdict and order of forfeiture and a January 9, 2020 judgment and commitment. Miller timely filed a notice of appeal with this Court on February 1, 2020. *See* V.I. R. APP. P. 5(a)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 11 Pursuant to the Revised Organic Act of 1954, this Court has appellate jurisdiction over "all appeals from the decisions of the courts of the Virgin Islands established by local law[.]" 48 U.S.C. § 1613a(d). Title 4, section 32(a) of the Virgin Islands Code vests this Court with jurisdiction over "all appeals arising from final judgments, final decrees, [and] final orders of the Superior Court." Because the Superior Court's January 9, 2020 judgment and commitment resolved all of the charges presented in the People's seventh amended information, it is a final judgment under section 32(a). *Joseph v. Daily News Publishing Co., Inc.*, 57 V.I. 566, 578 (V.I. 2012); *see also* 48 U.S.C. § 1613a(d).

¶ 12 This Court exercises plenary review over all questions of law, including the sufficiency of the evidence. *Brathwaite v. People*, 60 V.I. 419, 426 (V.I 2014).

B. Sufficiency of the Evidence

¶ 13 Miller challenges the sufficiency of the evidence for all his remaining convictions. Each conviction is addressed in turn. However, given the nature of the charged conduct, we first consider the legal framework that governed the operations of public hospitals during the pertinent period.

1. The Virgin Islands Government Hospitals and Health Facilities Corporation

¶ 14 Between 1986 and 1994, the RLSH, along with other medical facilities, was owned and operated by the Government of the Virgin Islands, through two Government Hospital Facilities Boards, one on St. Croix and one on St. Thomas and St. John, which were established within the Department of Health. *See Governor Juan F. Luis Hosp. & Medical Ctr. v. Titan Medical Group, LLC*, 69 V.I. 873, 880 (V.I. 2018). In 1994, the Legislature, dissatisfied with the separate facilities boards within the Department of Health, *see* 19 V.I.C. § 240(d), enacted Act No. 6012 to dissolve those boards and replace them with the Virgin Islands Government Hospitals and Health Facilities Corporation (hereafter the "Corporation"). Act No. 6012 identified the Corporation as "a body corporate and politic constituting a public health corporation of the Government of the Virgin Islands," and vested it with "those powers and duties expressly provided by law and no others." 19 V.I.C. § 243(a).

¶ 15 Act No. 6012 also set forth the purposes of the Corporation. In addition to providing quality and comprehensive health care, "attain[ing] grater self-sufficiency in health care delivery through enhanced collection of health care costs," "demonstrat[ing] through fiscal responsibility and efficient management its ability to effectively operate the territorial health care delivery system," and "maintain[ing] a partnership with the V.I. government for as long as a significant portion of the cost of health care delivery constitutes uncompensated care" were all identified as express purposes of the Corporation. 19 V.I.C. § 242.

¶ 16 Consistent with the description of its relationship with the Government as a "partnership," Act No. 6012 granted the Corporation significant independence from the Executive Branch. The Corporation was authorized to employ its own legal counsel, *see* 19 V.I.C. § 245(d), and to establish and maintain its own personnel administration system based on merit principles separate from that utilized for the Executive Branch, *see* 19 V.I.C. § 245(e)(1). The Government was directed to "continue to include in its Executive Budget Acts an appropriation for the operation of the hospitals and health facilities under the jurisdiction of the corporation," 19 V.I.C. § 245(b), and the Corporation was prohibited from "commit[ting] unappropriated Government funds," *see* 19 V.I.C. § 247(c). However, the Corporation was expressly authorized to "establish and maintain separate bank accounts and [to] make direct fiscal disbursement from such accounts to pay all necessary costs and obligations of the health care facilities under its jurisdictions," and the Legislature directed that "[r]evenues generated by each hospital and health facility under its jurisdiction shall be deposited in its account(s)." 19 V.I.C. § 261(a). Nevertheless, Act No. 6012 provided that "the Department of Finance shall continue to be responsible for the payrolls of [the hospitals] subject to the appropriation and allotment process," 19 V.I.C. § 261(b), and that "[a]ll deposits and disbursements from the accounts created herein shall comply with the appliable provisions of the Virgin Islands Code regarding the deposit and disbursements of funds from government bank accounts." 19 V.I.C. § 261(c).

¶ 17 At all times pertinent to this appeal,[2] the Corporation was administered by a 15-member Board of Directors, who were empowered to elect a chairman and other officers as it may deem appropriate, and which was required to meet not less than once a quarter. *See* 19 V.I.C. § 242(b), (e)-(f). However, the Corporation also "ha[d] two district governing boards, one for the District of St. Croix and one for the District of St. Thomas-St. John," consisting of nine members representing their respective district. 19 V.I.C. § 243(g).

¶ 18 Under this bifurcated governance system, the Board of Directors had the authority to "formulate and determine hospital policy and planning for health care delivery at the territorial level," including "coordinat[ing] hospital policy, planning and decisions between the two districts to ensure efficient and coordinated hospital policy direction between the districts." 19 V.I.C. § 243(j). The District Governing Boards, however, were given the authority to "formulate and

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[2] Effective December 30, 2020, the Legislature enacted Act No. 8438, which made several structural changes to the operation of the Corporation, including changing the composition of the Board of Directors and eliminating the district governing boards. Because the conduct at issue in this case all occurred between 2002 and 2008, all quotations and citations are to the version of the statute that was in effect prior to the amendments made by Act No. 8438.

determine hospital policy and planning for health care delivery for their respective districts consistent with the hospital policy and planning established by the Board of Directors for the Territory." *Id.* "In the event of a dispute between the District Boards, or between a District Board and the Board of Directors, the Board of Directors [would] resolve the dispute by majority vote." *Id.*

¶ 19 Among the enumerated duties of the Corporation is the power to "manage, operate, superintend, control, and maintain the hospitals and health facilities of the Government of the Virgin Islands in partnership with the Government," 19 V.I.C. § 244(e), and to "make and execute contracts and leases and all other agreements or instruments necessary or convenient for the exercise of its powers and the fulfillment of its corporate purposes." 19 V.I.C. § 244(d). However, Act No. 6012 did not contemplate that the Board of Directors or the District Boards would directly manage the Territory's public hospitals. In fact, the Legislature expressly provided that "[n]o Board member or District Board member shall become involved in the day-to-day management operations of the hospitals or health care facilities." 19 V.I.C. § 243(j). Rather, the Legislature directed the "[t]he Board of Directors and the District Governing Boards [to] delegate management operations to the appropriate staff and hold the staff accountable for the execution of hospital policy decisions." *Id.*

¶ 20 To that end, the Corporation possessed the power to "employ and remove through the District Governing Boards the Chief Executive Officers." 19 V.I.C. § 244(h). Similarly, the Chief Executive Officer serving "as the head of the hospital to which he is appointed," and possessed the statutory duty to "appoint and remove the Medical Director, and the Chief Financial Officer with the advice and consent of the respective District Board," and to "appoint and remove all managerial personnel, health care providers and all other professional and nonprofessional personnel" subject to various provisions of Virgin Islands law. 19 V.I.C. § 244a(a)-(b).

¶ 21 The Corporation was also given the express power to "adopt, alter, amend or repeal bylaws or rules or regulations for the organization, management, and regulation of its affairs consistent with [its enabling statute] and all other applicable law." 19 V.I.C. § 244(c). The St. Thomas-St. John District Governing Board adopted such bylaws pursuant to this statutory grant of authority. Pursuant to Article VI, section 8(a) of those bylaws,

> The Chairperson [of the District Governing Board] shall be the official head of the Board and shall have general care, supervision, and direction of its affairs, subject to the authority of the Board. He/she shall be responsible for carrying into effect the policies, programs, and resolutions approved or adopted by the Board, for the conduct and management of the affairs of the Board, for coordinating all phases of its professional and business activities, and for directing the preparation of the annual operating plans and longer term objectives of the Board. Subject to his/her overall executive control, he/she shall delegate operating management functions and medical functions to appropriate officers, appointees, agents and employees of the Hospital.

(J.A. 3267.) In addition, section 8(c) of Article VI authorized the Chairperson to appoint all Standing and Special Committees subject to the approval of the Board, while section 8(d) provided that

> Whenever the execution of deeds or other legal instruments is directed by the Board, or becomes necessary and proper in carrying out the business of the Board, the Chairperson is authorized and empowered, in the name of the Board, to execute the same and to have the Board's seal affixed thereto.

(J.A. 3268.) With respect to such legal instruments, section 10(b) granted the Treasurer of the Board to sell securities and take certain other specified actions in the name of the Board. Article XVI provided further guidance on execution of such instruments, providing that

> In the absence of any action by the Board, or unless otherwise determined by the Board, the Chairperson and the Treasure[r] of the Board shall have the power, in the name and on behalf of the Board, to execute and deliver any and all instruments, except to the extent otherwise required by law in the case of the purchase, sale, mortgage, or lease of real property.

(J.A. 3294.)

¶ 22 Article V, section 5(j)-(l) of the bylaws also addressed the relationship between the Chief Executive Officer and the District Governing Board, including delegating several duties of the District Governing Board to the Chief Executive Office:

> (j) The Board shall appoint a full-time Chief Executive Officer, who shall be continuously responsible for the management of the Hospital, commensurate with the authority conferred upon him by the Board and consistent with its expressed aims and policies.
>
> (k) The Board shall, through the Chief Executive Officer, take all reasonable steps to conform to all applicable federal and local laws, ordinances, codes and regulations, including but not limited to licensure, fire inspection and other safety measures.
>
> (l) The Board shall, through the Chief Executive Officer, provide for control and use of the physical and financial resources of the Hospital.

(J.A. 3264-65.) And while Article VII, section 10 of the bylaws provides for the Executive Committee of the District Governing Board—whose members include the Chairperson—to "cooperate and consult" with the Chief Executive Officer with respect to matters such as appointments and salary levels, it expressly provides that "[n]o individual member of the Committee shall have any veto power over decisions of Chief Executive Officer." (J.A. 3274.)

¶ 23 Article VIII of the bylaws, titled "Chief Executive Officer," further delineates the duties of the Chief Executive Officer and that position's relationship with the District Governing Board. Section 1 of Article VIII reiterates that the Chief Executive Officer is selected and appointed by the Board, while section 2(a) provides that the Chief Executive Officer shall "receive such compensation, as the Board shall determine." (J.A. 3280.)

2. No Deference to the Jury on Pure Questions of Law

¶ 24 Ordinarily, when reviewing a challenge to the sufficiency of the evidence supporting a conviction, this Court views all issues of credibility in the light most favorable to the People. *Latalladi v. People*, 51 V.I. 137, 145 (V.I. 2009). If "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," this Court will affirm. *DeSilvia v. People*, 55 V.I. 859, 865 (V.I. 2011) (quoting *Mendoza v. People*, 55 V.I. 660, 667 (V.I. 2011)). The evidence offered in support of a conviction "need not be inconsistent with every conclusion save that of guilt, so long as it establishes a case from which a jury could find the defendant guilty beyond a reasonable doubt." *Mulley v. People*, 51 V.I. 404, 409 (V.I. 2009) (quoting *United States v. Carr*, 25 F.3d 1194, 1201 (3d Cir. 1996)). A defendant seeking to overturn his conviction on this basis thus bears "a very heavy burden." *Latalladi*, 51 V.I. at 145 (quoting *United States v. Losada*, 674 F.2d 167, 173 (2d Cir. 1982)).

¶ 25 This extraordinary deference to the jury when assessing the sufficiency of the evidence is due to the well-established principle in the American criminal justice system that juries decide questions of fact while judges resolve questions of law. *See Sparf v. United States*, 156 U.S. 51, 100-03 (1895); *see also People v. Bruner*, 175 N.E. 400, 403-04 (Ill. 1931) ("The great preponderance of authority in the courts of the several states likewise denies that by the common law jurors in criminal cases are the judgers of law.") (collecting cases). This division of responsibilities between jury and judge is necessary to ensure due process and equal protection, for if juries were permitted to conclusively decide both the law and the facts "the result would be that the enforcement of the law against criminals, and the protection of citizens against unjust and groundless prosecutions, would depend entirely upon juries uncontrolled by any settled, fixed, legal principles," which "would bring confusion and uncertainty in the administration of the criminal law." *Sparf*, 156 U.S. at 101-02.

¶ 26 This necessary separation, however, did not occur in this case. Throughout trial, the jury heard substantial testimony on disputed issues of law, almost exclusively elicited by the People and largely relating to the legal relationship between the Corporation and the Executive Branch and the legal authority of the Chief Executive Officer, the Chief Financial Officer, the District Governing Board, and the Board Chair. In fact, at one point the prosecution even read portions of the Virgin Islands Code to a lay witness—Kenneth Hermon—and asked him whether that language authorized the defendants to take the specific actions that formed the basis for the charged offenses. (Trial Tr. 10/10/19 at 101). Perhaps most significantly, the Superior Court seemingly believed these purely legal questions were properly before the jury, and during final jury instructions restated, sometimes verbatim, many of the pertinent provisions of Act No. 6012 without providing any instruction on what that language meant – in effect conveying to the jury that it was their responsibility to determine the law and decide for themselves how Act No. 6012 and other statutes and legal doctrines allocated the powers of the District Governing Board, the Board Chair, the Chief Executive Officer, and other employees vis-à-vis each other and the Executive Branch. But this contravenes the well-established principles that lay testimony offering a legal conclusion is generally not helpful to the jury and is thus usually inadmissible as evidence, *e.g., United States v. Noel*, 581 F.3d 490, 496 (7th Cir. 2009), and that it is exclusively the role of the judge to instruct the jury on the applicable principles of law in a case. *United States v. Tartaglione*, 815 Fed. Appx. 648, 650 (3d Cir. 2020) (observing that "the articulation of governing law is within the sole province of the judge"); *Commodores Entm't Corp. v. McClary*, 879 F.3d 1114, 1128 (11th Cir. 2018) (admonishing that "the court must be the jury's only source of law"); *United States v. Milton*, 555 F.2d 1198, 1203 (5th Cir. 1977) (a "witness may not substitute for the court in charging the jury regarding the applicable law"). Accordingly, when assessing the sufficiency of the evidence on appeal in this case, the Court will not exacerbate the Superior Court's error, but instead comports with the proper allocation of authority between judge and jury deciding all questions of law independently without deferring to how the jury may or may not have interpreted the law.

3. Embezzlement by Public and Private Officers

¶ 27 Counts 4, 5, 6, 7, and 19 of the seventh amended information charged Miller with embezzlement by public and private officers in violation of title 14, section 1089 of the Virgin Islands Code. That statute provides, in its entirety, that

> Whoever, being an officer of the Virgin Islands or a subdivision thereof, or a deputy, clerk, or servant of such officer, or an officer, director, trustee, clerk, servant, attorney, or agent of any association, society, or corporation (public or private), fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement.

In Counts 4 and 5, the People allege Miller, without authorization of law, authorized, respectively stipends and bonuses for Carty that were not reflected on his NOPA form. Similarly, Counts 6 and 7 allege that Miller authorized such stipends and bonuses for Najawicz, while Count 19 asserts that Miller entered into an agreement with Najawicz to authorize a severance payment in the event he was terminated from his employment with the RLSH.

¶ 28 The People maintain that none of these transactions were lawful for two reasons. First, the People contend that Miller, as Chief Executive Officer, lacked the authority to set the compensation of Carty, and Najawicz, and other subordinates. Furthermore, the People assert that even if Miller could set their compensation, it was illegal to make those payments directly from an RLSH account without having that compensation reflected on the employee's NOPA form and paid by the Executive Branch through its payroll process. To determine whether these disbursements were lawful, it is necessary to again examine the structure, powers, and duties of the Corporation, as well as its relationship with the Executive Branch.

i. Authority of the Chief Executive Officer to Set Salaries for Subordinates

¶ 29 Act No. 6012 established the Corporation as a public corporation that possesses a substantial degree of autonomy and independence from the Executive Branch. The Legislature did so intentionally to divest the Department of Health of its direct administration of the territory's public hospitals. 19 V.I.C. § 240(d). In addition to granting the Corporation significant autonomy from the Executive Branch, Act No. 6012 provides each hospital's Chief Executive Officer and staff with considerable independence from both the Corporation's Board of Directors as well as its District Governing Board. While each District Governing Board possesses the statutory authority to "employ and remove" a Chief Executive Officer, *see* 19 V.I.C. § 244(h), the Legislature expressly and unambiguously provided that "[n]o Board member or District Board member shall become involved in the day-to-day management operations of the hospitals or health care facilities" and instead directed the "[t]he Board of Directors and the District Governing Boards [to] delegate management operations to the appropriate staff and hold the staff accountable for the execution of hospital policy decisions." 19 V.I.C. § 243(j).

¶ 30 Title 19, section 244a of the Virgin Islands Code, at the time of all events pertinent to this appeal, read, in its entirety, as follows:

> The Chief Executive Officer shall serve as the head of the hospital to which he is appointed and shall:
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> (a) appoint and remove the Medical Director, and the Chief Financial Officer with the advice and consent of the respective District Board;
>
> (b) appoint and remove all managerial personnel, health care providers and all other professional and nonprofessional personnel, subject to the provisions of Title 3, chapter 25, section 530 relating to procedures for employee dismissals, demotions and suspensions and 531 relating to the prohibition against discrimination on account of non-merit factors, the rules and regulations of the Corporation promulgated pursuant to section 245(e)(2) of this chapter, any collective bargaining agreements and subject to the V.I. Government's budget constraints and allotment process; and
>
> (c) with the assistance of the Chief Negotiator, negotiate all non-economic

> provisions of collective bargaining agreements which affect the management and operation of the hospital. The Chief Negotiator, in consultation with the Chief Executive Officers, shall negotiate all economic provisions of collective bargaining agreements which obligate the General Fund. All collective bargaining agreements shall be subject to the approval of the Governor. The Chief Executive Officers and the Chief Negotiator shall develop administrative polices and procedures to implement the provisions of this subsection.

At trial and in their appellate brief, the People place extraordinary emphasis on the fact that section 244a does not expressly state that the Chief Executive Officer may set the salaries for hospital employees. According to the People, the failure of the Legislature to enact a statute specifically stating that the Chief Executive Officer may do so means that the Chief Executive Officer lacks that authority. The People base this highly restrictive interpretation on a single sentence in title 19, section 243 of the Virgin Islands Code stating that the Corporation "shall have those powers and duties expressly provided by law and no others." 19 V.I.C. § 243(a).

¶ 31 The People have grossly misinterpreted the pertinent statutory provisions. Section 243(a), by its own terms, limits the power of <u>the Corporation</u>. As explained earlier, the Corporation is a complex organization where various authority is allocated internally—both through statutes and bylaws—between a Board of Directors, two District Governing Boards, and Chief Executive Officers and other managerial staff for each public hospital and health facility. Title 19, section 244 of the Virgin Islands Code, which delineates the powers of the Corporation, expressly provides that

> The V.I. Government Hospitals and Health Facilities Corporation shall have the power to:
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> . . . .
>
> (d) make and execute contracts and leases and all other agreements or instruments necessary or convenient for the exercise of its powers and the fulfillment of its corporate purposes; [and]
>
> (e) manage, operate, superintend, control, and maintain the hospitals and health facilities of the Government of the Virgin Islands in partnership with the Government[.]

19 V.I.C. § 244(d)-(e). Unquestionably, these provisions vest the Corporation with the power to determine the compensation of the employees hired to manage a hospital under its jurisdiction.

¶ 32 The question, then, is *who within the Corporation* is authorized to exercise the Corporation's power to set the compensation for hospital employees. While the People place great emphasis on the omission of the power to set salaries from the powers of the Chief Executive Officer delineated in section 244a, there is nothing in section 244a that provides that the Chief Executive Officer may only exercise the powers enumerated in that statute.

¶ 33 On the contrary, section 244a does not even appear to enumerate powers at all. The first sentence of the statute identifies the Chief Executive Officer as "the head of the hospital to which he is appointed." 19 V.I.C. § 244a. However, the enumerated list that follows does not grant powers to the Chief Executive Officer. Subsection (a) provides that the Chief Executive Officer may appoint and remove the Medical Director and Chief Financial Officer only with the advice and consent of the District Governing Board. Subsection (b) provides that the Chief Executive Officer may appoint and remove personnel subject to complying with numerous specific limitations in the Virgin Islands Code, such as the prohibition against discrimination on account of non-merit factors. Subsection (c) permits the Chief Executive Officer to negotiate the non-economic provisions of collective bargaining agreements, but only with the assistance of the Chief Negotiator, and for the Chief Negotiator to negotiate the economic provisions of collective bargaining agreements which obligate the General Fund in consultation with the Chief Executive Officer.[3] In other words, these are all affirmative limitations on powers that would otherwise be

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[3] Notably, that the Chief Executive Officer lacks the power to unilaterally negotiate the economic provisions of collective bargaining agreements which obligate the General Fund would seem to

inherent to the position of Chief Executive Officer as "head of the hospital." 19 V.I.C. § 244a. As such, it appears that section 244a should be read in the complete opposite way than proposed by the People, in that the Chief Executive Officer may exercise the powers stemming from his or her position as head of the RLSH, except for the enumerated situations where that power is restricted in some manner.

¶ 34 This construction of section 244a is also consistent with the overall statutory framework established by Act No. 6012. Since it is a power of the Corporation to enter into contracts for managerial personnel, that power must necessarily be exercised by someone within the Corporation. But Act No. 6012 expressly and unambiguously precludes the Board of Directors, the District Governing Boards, and individual Board members from participating in the day-to-day management operations of the hospitals, and mandates that they delegate such duties to "appropriate staff." 19 V.I.C. § 243(j). Since the Chief Executive Officer serves as "the head of the hospital," 19 V.I.C. § 244a, it stands to reason that this and other managerial functions would be within the purview of the Chief Executive Officer or his or her authorized designee.

¶ 35 Yet to the extent any doubt remains as to the power of the Chief Executive Officer to set employee compensation, it is resolved by the bylaws of the St. Thomas-St. John District Governing Board. Article VII, Section 10 of the bylaws, titled "Personnel Practices and Compensation meetings of the Executive Committee," reads, in its entirety as follows:

> (a) The Personnel Practices and Compensation meetings of the Executive Committee shall cooperate and consult with the Chief Executive Officer/Administrator of the Hospital and other administrative officers in regard to appointments, welfare, and working conditions of employees, labor relations recommendations for establishment and revision from time to time of salary levels, and the maintenance of proper relations between employees and

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imply that the Chief Executive Officer would have the power to unilaterally negotiate economic provisions in all other instances.

the Board.

(b) No individual member of the Committee shall have any veto power over decisions of Chief Executive Officer/Medical Director of the Hospital or the Administrative Staff of the Hospital (nor shall any Director make or maintain contact with employees except through the Chief Executive Officer/Medical Director or the Administrative Staff).

(J.A. 3274-75.) The plain language of this bylaws provision clearly contemplates that the District Governing Board, acting through its Executive Committee, would only "consult" and "make recommendations" to the Chief Executive Officer with respect to "salary levels" and other conditions of employment, subject to the District Governing Board's statutory authority to "hold the staff accountable for the execution of hospital policy decisions." 19 V.I.C. § 243(j).

¶ 36 Consequently, as a matter of law, Miller, as Chief Executive Officer of the Schneider Hospital, possessed the legal authority to set compensation for subordinate hospital employees, subject only to the retained authority of the District Governing Board as the policy-making body for the RLSH. To hold otherwise would not only be inconsistent with the plain language of Act No. 6012 and the St. Thomas-St. John District Governing Board bylaws, but effectively render the territory's hospitals unmanageable.[4]

ii. <u>Authority of the Executive Branch With Respect to Hospital Salaries</u>

¶ 37 The People further argue that even if Miller as Chief Executive Officer had the requisite legal authority to determine the compensation of subordinate employees that he nevertheless engaged in embezzlement by authorizing those payments from a hospital account without having the additional compensation reflected on the NOPA form maintained by the Executive Branch.

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[4] It is important to emphasize that the People's interpretation of Act No. 6012 with respect to salaries—that any action taken by the Chief Executive Officer that is not affirmatively vested in that position by statute is illegal and unauthorized until and unless it is approved by a formal vote of the District Governing Board—would appear to apply to *any* situation where Act No. 6012 does not affirmatively delineate authority.

¶ 38 As a threshold matter, the People are correct that Virgin Islands law required all of Carty and Najawicz's compensation to be included on their NOPA forms, and not just their salaries. Title 3, section 452 of the Virgin Islands Code provides that "[t]he Director of Personnel under the general supervision of the Governor . . . shall . . . establish and maintain a roster of all employees in the Government Service, in which there shall be set forth, as to each employee, the class title of the position held; the compensation; any change in pay or status; and any other necessary data, including the enrollment of the employees in the Group Health Insurance Program." 3 V.I.C. § 452(b)(4). As used in section 452, "'Government Service' means the Government of the United States Virgin Islands, <u>including governmental activities administered by boards, commissions, and authorities</u>." 3 V.I.C. § 451 (emphasis added). Therefore, Miller was unquestionably required to inform the Director of Personnel of the total amount of compensation given to Carty and Najawicz, including the value of any bonuses or stipends in addition to their salaries.

¶ 39 The People, however, did not charge Miller with failing to report Carty and Najawicz's compensation to the Director of Personnel. Rather, the gravamen of these charges is that Miller lacked the legal authority to pay any compensation to Carty and Najawicz from RLSH accounts separate and apart from the payroll processed by the Department of Finance.

¶ 40 The People failed to introduce sufficient evidence to prove that Miller engaged in embezzlement. Act No. 6012 mandated the Corporation to "establish and maintain separate bank accounts and [to] make direct fiscal disbursement from such accounts to pay all necessary costs and obligations of the health care facilities under its jurisdictions." 19 V.I.C. § 261(a). Moreover, Act No. 6012 provided for "[r]evenues generated by each hospital and health facility under its jurisdiction [to] be deposited in its account(s)." *Id.*

¶ 41 The establishment of separate bank accounts, and for disbursements to be made from such accounts to pay necessary costs and obligations, is consistent with the overall purpose of Act No. 6012, which was to make the public hospital system achieve "financial self-sufficiency" with the goal of having the hospitals funded to the greatest extent possible through patient care revenue rather than the General Fund or other accounts maintained by the Executive Branch. 19 V.I.C. §§ 240, 242. However, because financial self-sufficiency was the ultimate goal rather than the existing reality, Act No. 6012 directed the Executive Branch to "continue to include in its Executive Budget an appropriation for the operation of the hospitals and health facilities under the jurisdiction of the corporation." 19 V.I.C. § 245(b). Consequently, the clear intent of this statutory scheme is for the Executive Branch, through the appropriation it receives for the Executive Budget from the General Fund and other funding sources, to fund the costs that the Corporation is unable to pay from its own accounts.

¶ 42 In addition to requiring the Executive Branch to continue to fund the hospitals, Act No. 6012 provides that

> [n]otwithstanding the establishment of separate bank accounts under this section, the Department of Finance shall continue to be responsible for the payrolls of the Governor Juan F. Luis and Roy L. Schneider Hospitals subject to the appropriation and allotment process[,]

19 V.I.C. § 261(b). The People maintain that this provision requires the Department of Finance to process all payrolls of the hospitals, and that Miller was therefore not authorized by law to pay such compensation through a means other than the payroll process employed by the Department of Finance.

¶ 43 Again, the People have misinterpreted these statutory provisions. If section 261(b) simply stated that "the Department of Finance shall continue to be responsible for the payrolls of the Governor Juan F. Luis and Roy L. Schneider Hospitals," the People would likely be correct that all payrolls for both hospitals must be processed by the Department of Finance. But that is not what section 261(b) says – after that language, it contains the additional phrase "subject to the appropriation and allotment process."

¶ 44 Under traditional rules of English grammar, the phrase "subject to" modifies only the noun it immediately follows, and not the entire sentence. In legal parlance, this principle, as it applies in the context of statutory construction, is known as "the rule of the last antecedent." Under this rule, "a limiting clause or phrase [in a sentence within a statute] … should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Fontaine v. People*, 59 V.I. 1004, 1009 (V.I. 2013) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). And while this rule "is not an absolute and can assuredly be overcome by other indicia of meaning," *id.* at 1010 (quoting *United States v. Hayes*, 555 U.S. 415, 425 (2009)), the People have neither argued, nor established, that the phrase "subject to the appropriation and allotment process" in section 261(b) "is applicable as much to the first and other words [in that section] as to the last," *id.* (quoting *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920) and citing *Gov't of the V.I. v. Thomas*, 9 V.I. 17, 24 (V.I. Super. Ct. 1971) (same)), such that the interpretive presumption embodied in the rule does not limit the applicability of the phrase to just the last antecedent. *See, e.g., Payless Shoesource, Inc. v. Travelers Cos., Inc.*, 585 F.3d 1366, 1371 (10th Cir. 2009) (observing that "th[e] last antecedent principle is . . . an interpretive presumption based on the grammatical rule against misplaced modifiers"). Nor have the People contended that a related rule, the "series-qualifier canon," which applies to a statutory term or phrase at the end of a series "when there is a straightforward, parallel construction that involves all nouns or verbs in a series," should apply to permit the phrase "subject to the appropriation and allotment process" in section 261(b) to act as a modifier that would apply to the entirety of the language in section 261(b), rather than to solely the last antecedent. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1169 (2021) (acknowledging this canon) (citing *Paroline v. United States*, 572 U. S. 434, 447 (2014); *Porto Rico Railway, Light & Power Co.*, 253 U. S. at 348; and *United States v. Bass*, 404 U. S. 336, 339-40 (1971)). Thus, section 261(b) does not make the Department of Finance responsible for all payrolls – rather, it only makes it "responsible for the payrolls . . . subject to the appropriation and allotment process." In other words, section 261(b) mandates that the Department of Finance process the payrolls that are to be paid from the appropriation the Executive Branch receives from the General Fund or other funding sources for the purpose of hospital operations pursuant to section 245(b) but does not mandate that the Department of Finance process any payrolls that are funded from sources other than the General Fund, such as the separate hospital accounts in which patient care revenue is deposited. This construction of section 261(b) is consistent with how this Court and other courts have applied the last antecedent rule. *See, e.g., Fontaine*, 59 V.I. at 1010 (holding that by operation of the rule, "the language in [5 V.I.C. §] 3524 [that the territorial Public Defender] relies on — 'that he considers to be in the interest of justice' — would only modify 'other remedies before or after conviction,' and not 'appeals' or 'every stage of the proceedings against him'"); *Dennis v. Watco Companies, Inc.*, 631 F.3d 1303, 1305-06 (10th Cir. 2011) (holding that in the statutory phrase "any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of Title 49," the phrase "subject to part A" modifies "rail carrier" and not "employer"); *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 831-32 (9th Cir. 1996) (holding that in a statute stating that "all timber sale contracts offered or awarded before that date in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318" the phrase "subject to section 318" modifies "any unit . . . or district," and not "all timber sales contracts").

¶ 45 In this case, the undisputed evidence in the record established that the stipend and bonus payments received by Carty and Najawicz which exceeded the salary indicated on their NOPA forms did not come from the General Fund or any other account maintained by the Department of Finance or the Executive Branch, but from the separate hospital accounts the Corporation is authorized to maintain and make disbursements from pursuant to section 261(a). Because Miller was authorized by law to set Carty and Najawicz's compensation, and the Department of Finance is not responsible for payrolls which are not subject to the appropriation and allotment process, the People failed to introduce sufficient evidence that Miller engaged in embezzlement with respect to these acts. Consequently, we reverse Miller's convictions under Counts 4, 5, 6, 7, and 19.

4. Embezzlement or Falsification of Public Accounts

¶ 46 Counts 14 and 17 of the seventh amended information charged Miller with embezzlement or falsification of public accounts in violation of title 14, section 1662(1) of the Virgin Islands Code. That statute, provides, in its entirety, that

> Whoever, being a public officer or person charged with the receipts, safekeeping, transfer or disbursement of public monies—
> (1) appropriates the same, or any portion thereof to his own use or the use of another without authority of law;
>
> . . . .
>
> shall be fined not more than ten thousand ($10,000) dollars or imprisoned not more than ten (10) years, or both, and shall be disqualified from holding any public office.

In Count 14, the People charged Miller with receiving compensation from RLSH accounts pursuant to a June 21, 2005 employment agreement. In Count 17, the People charged Miller with receiving more than $1.5 million in unauthorized disbursements of funds from RLSH accounts to his personal accounts between May 17, 2007, and November 30, 2007. Each charge is addressed in turn.

a. Count 14: June 21, 2005 Employment Agreement

¶ 47 In both their trial presentation and their appellate brief, the People alternate between two different theories of guilt: (1) that the June 21, 2005 agreement was a complete fabrication; and (2) that the June 21, 2005 agreement, even if it existed, was not authorized by law. Regardless of which legal theory the jury relied upon in convicting Miller on this charge, the People failed to introduce sufficient evidence to sustain the conviction.

i. <u>Existence of June 21, 2005 Agreement</u>

¶ 48 Like at trial, in their appellate brief the People imply that the June 21, 2005 agreement did not exist because Carty, in response to a June 13, 2008 subpoena, stated that he "found no June 21, 2005 agreement between [RLSH] and Rodney Miller Sr." and that "[i]t is [his] belief that the reference to a June 21, 2005, agreement [in other documents] is erroneous," J.A. 3247-50, with Najawicz similarly responding that he "found no June 21, 2005, employment agreement between Schneider Regional Medical Center and Rodney E. Miller, Sr." (J.A. 3251-57.) But the fact that Carty and Najawicz said in a pretrial subpoena response that the agreement could not be "found" and that Carty had a "belief" that references to that agreement in other documents may be erroneous is not evidence that the agreement never existed. *Accord, State v. McFall*, 439 P.2d 805, 807 (Ariz. 1968).

¶ 49 Of course, if a June 21, 2005 agreement had never been produced, a jury certainly could reasonably infer that Carty and Najawicz's responses to the June 13, 2008 subpoena were not truthful and were instead calculated to cover up that they knew such a document never existed in the first place. After all, a jury possesses the right to disbelieve a witness's statement in whole or in part. *See Ostalaza v. People*, 58 V.I. 531, 556 (V.I. 2013). However, "neither the court nor the jury should be permitted to stubbornly ignore and refuse to be guided by competent, credible and uncontradicted evidence." *Arnold Machinery Co. v. Intrusion Prepakt, Inc.*, 357 P.2d 496, 497

(Utah 1960). Indeed, "although a trier of fact must determine the weight of the testimony and the credibility of witnesses, it may not arbitrarily disregard uncontradicted evidence of unimpeached witnesses which is not inherently incredible and not inconsistent with facts in the record, *even though such witnesses are interested in the outcome of the case.*" *Bradner v. Mitchell*, 362 S.E.2d 718, 723 (Va. 1987) (emphasis added); *Cheatham v. Gregory*, 313 S.E.2d 368, 370 (Va. 1984) (same) (citing cases). As the Supreme Court of the United States has explained,

> A jury cannot arbitrarily discredit a witness and disregard his testimony in the absence of any equivocation, confusion, or aberration in it. It is not proper to submit uncontradicted testimony to a jury for the sole purpose of giving the jury an opportunity to nullify it by discrediting the witness, when nothing more than mere interest in the case exists upon which to discredit such witness. [Rather, t]he testimony must inherently contain some element of confusion or contrariety, or must be attended by some circumstance which would render a total disregard of it by a jury reasonable rather than capricious.

Chesapeake & Ohio Ry. Co. v. Martin, 283 U.S. 209, 219-20 (1931). In other words, a jury is not permitted "to reach [a] conclusion [that] is entirely too tenuous" given the evidence actually presented "and goes beyond reasonable inferences to mere speculation." *People v. Clarke*, 55 V.I. 473, 478 (V.I. 2011).

¶ 50 Here, the June 21, 2005 agreement was actually introduced into evidence by the People at trial. Although taking the form of an offer letter from Adams to Miller, the document is dated June 21, 2005, sets forth numerous terms and conditions of employment, including bonuses, incentive payments, and cost of living increases on top of base salary. The letter states that the offer is being made by the Board, is signed by Adams in her capacity as Chair of the District Governing Board and contains a signature by Miller under the text "Please signify your acceptance of the terms outlined herein by signing below." (J.A. 1740.) It is clear, therefore, that a June 21, 2005 agreement did in fact exist. As such, a rational jury could not convict Miller of embezzlement on a theory that this agreement never existed.

ii. Legality of June 21, 2005 Agreement

¶ 51 The People also failed to introduce sufficient evidence to prove that the June 21, 2005 agreement was invalid as a matter of law. The June 21, 2005 agreement was signed by Adams in her capacity as Chair, issued on hospital letterhead, expressly states that it is an official offer from the Board, repeatedly uses the pronoun "we" when explaining its terms, and is signed by Miller under a sentence stating that his signature signifies his acceptance. Nevertheless, the People maintain that the June 21, 2005 agreement was not legally valid because it had never been approved by the St. Thomas-St. John District Governing Board.

¶ 52 We disagree. It is well-established that "contract construction, that is, the legal operation of the contract, is a question of law" reserved for the court, and not the jury. *See Phillip v. Marsh-Monsanto*, 66 V.I. 612, 624 (V.I. 2017); *see also Gaede v. SK Invs., Inc.*, 38 S.W.3d 753, 757 (Tex. App. 2001). This principle, while typically arising in civil suits for breach of contract, remains applicable even in criminal cases. *See, e.g., Smith v. State*, 68 N.E.2d 549, 436-37 (Ind. 1946) (rejecting testimony that the defendant had "sold" a controlled substance since it "was a legal conclusion of no evidentiary value as to the nature of the transaction," and instead analyzing the sufficiency of the evidence by determining whether the facts, when viewed in the light most favorable to the prosecution, met the legal definition of a "sale"). Therefore, this Court is not required to give any credit or deference whatsoever to the legal interpretations and conclusions that various prosecution witnesses testified to at trial.

¶ 53 As outlined earlier, Act No. 6012 granted each District Governing Board the statutory authority to "employ and remove" the Chief Executive Officer. 19 V.I.C. § 244(h), and the bylaws of the St. Thomas-St. John District Governing Board gave it the power to set the Chief Executive

Officer's compensation. (J.A. 3280.) But while there is no direct evidence that the District Governing Board formally approved, by an official vote at a duly noticed meeting, the terms of the June 21, 2005 agreement, neither Act No. 6012 nor any other provision of Virgin Islands law required the District Governing Board to affirmatively approve, by formal vote, the salary or other conditions of employment of the Chief Executive Officer. However, the June 21, 2005 agreement is signed by Adams in her capacity as Board Chair, and says that "we are pleased to officially offer you the following terms." (J.A. 1739.) The question, then, is whether this was sufficient to constitute a legally binding contract between Miller and the District Governing Board.

¶ 54 In addition to granting the District Governing Board the authority to employ and remove the Chief Executive Officer, Act No. 6012 authorizes the Boards to "make and execute contracts and leases and all other agreements or instruments necessary or convenient for the exercise of its powers and the fulfillment of its corporate purposes." 19 V.I.C. § 244(d). But Act No. 6012 does not set forth a procedure for how the District Governing Boards may exercise this power to create contracts. Nevertheless, the bylaws of the St. Thomas-St. John District Governing Board expressly and unambiguously grant this authority to the Chairperson:

> Whenever the execution of deeds or other legal instruments is directed by the Board, or becomes necessary and proper in carrying out the business of the Board, the Chairperson is authorized and empowered, in the name of the Board, to execute the same and to have the Board's seal affixed thereto.

(J.A. 3268.) Certainly, entering into an employment agreement with the individual selected by the Board to serve as Chief Executive Officer is "necessary and proper in carrying out the business of the Board." But even if this were not the case, section 1 of Article XVI expressly provides that

> <u>In the absence of any action by the Board</u>, or unless otherwise determined by the Board, the Chairperson and the Treasure[r] of the Board shall have the power, in the name and on behalf of the Board, to <u>execute and deliver any and all instruments</u>, except to the extent otherwise required by law in the case of the purchase, sale,

mortgage, or lease of real property.

(J.A. 3294 (emphasis added).) In these provisions, the bylaws establish a default rule where the Chairperson (or the Treasurer, in the case of securities and other legal instruments which the bylaws permit the Treasurer to buy, sell, or otherwise dispose of) may exercise his or her authority to execute a contract in the name of the Board when the Board has not taken a contrary action.[5]

¶ 55 The uncontradicted evidence in the record established that the District Governing Board had established a Compensation Committee as a special committee pursuant to Article VII of the bylaws, and delegated to it various duties, including approval of executive compensation contracts, and that the Compensation Committee would routinely exercise this authority to approve contracts without presenting those contracts to the entire Board for approval. Importantly, Adams testified that the June 21, 2005 agreement "reflects what the Compensation Committee recommended."

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[5] None of the parties have challenged as part of this appeal the authority of the District Governing Board to enact bylaws which delegate these duties to individual members such as the Chair. However, it is well-established that "[w]hen a statute delegates authority to a [public] officer or agency, subdelegation to a subordinate [public] officer or agency is presumptively permissible absent affirmative evidence of a contrary [legislative] intent." *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (collecting cases). Such subdelegation is permissible "even in the absence of explicit statutory authorization permitting delegation of a particular function" due to "the impossibility of personal performance of every statutory duty." *People v. Murrell*, 56 V.I. 796, 803-04 (V.I. 2012) (collecting cases).

Certainly, the authority to delegate is not without limits; most significantly, a delegation cannot "constitute[] divesting or transferring a fundamental responsibility of the office." *Murrell*, 56 V.I. at 804. Here, no such divestment or transfer occurred since the District Governing Board delegated certain powers internally to individual board members and subcommittees, which is a practice consistent with well-established law in the Virgin Islands and elsewhere governing corporations and boards. *See* 13 V.I.C. § 32(5); *Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120, 127 (3d Cir. 1998); *San Antonio Joint Stock Land Bank v. Taylor*, 105 S.W.2d 650, 654 (Tex. 1937); *see also* 2 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 9:17 (3d ed. 2010). The Legislature was therefore certainly aware that in choosing such a governance structure, a District Governing Board would have the authority to enact bylaws that further delegate certain powers to one of its officers or committees.

Moreover, the bylaws do not require that the entire District Governing Board approve each contract or other legal instrument signed by the Chairperson or approved by the Compensation Committee or any other standing or special committee pursuant to this bylaws provision. Under these provisions, testimony by Chongasing and other Board members that they had not seen the June 21, 2005 agreement, even if credited by the jury, is not relevant to the question of whether that agreement was authorized by law.

¶ 56 The record further contains absolutely no indication that Adams or anyone else concealed the existence of the June 21, 2005 agreement from the District Governing Board so as to prevent it from disavowing the agreement. On the contrary, the uncontradicted evidence—elicited by the People during their direct examination of Chongasing—established the opposite. Chongasing testified that the Compensation Committee advised the full Board at its June 15, 2005 session that it was negotiating with Miller. She further testified that the District Governing Board had been informed of the agreement and had the opportunity to discuss it, testifying that at an executive session held on July 20, 2005, "we were given an update as to what it was," with her even stating, "I remember voicing my opinion that I thought it was wrong."

¶ 57 That the District Governing Board apparently took no formal vote on the June 21, 2005 agreement at the July 20, 2005 executive session is of no legal significance, since Article XVI, section 1 of the bylaws permits the Chairperson to execute a contract in the absence of any action by the Board. Moreover, it is well-established that "a formal resolution need not be passed nor a formal vote taken in order to validate acts done at the meeting, unless so required by statute, the articles of incorporation, or the bylaws," and "[t]he ratification or adoption of a contract by a corporation through its board of directors may be implied," including "by conversation, without formal votes." 2 WILLIAM MEADE FLETCHER, CYCLOPEDIA OF CORPORATIONS § 418 (Perm. Ed.

1990) (collecting cases); *see also CDB Software, Inc. v. Kroll*, 902 S.W.2d 31, 39 (Tex. App. 1998) ("The ratification or adoption of a contract by a corporation through its board of directors may be implied."). As such, the failure of the Board to formally vote on the June 21, 2005 agreement did not render the agreement invalid – on the contrary, the Board's failure to take action is precisely what authorized Adams to sign the contract pursuant to her powers under Article XVI of the bylaws. Therefore, we reverse Miller's conviction on Count 14.

b. Count 17: Disbursements from May 17, 2007, through November 30, 2007

¶ 58 In Count 17, the People charge Miller with unlawfully obtaining more than $1.5 million in funds from RLSH bank accounts that he was not authorized to receive. Although not specifically identified, it appears that the transfers referred to in the Seventh Amended Information are transfers to Miller of (1) $966,456.45 on May 17, 2007; (2) $111,759.62 on August 13, 2007, as well as bi-weekly payments of $6,153.84 effective the pay period ending August 18, 2007, and monthly payments of $3,333.33 beginning on September 1, 2007; and (3) $789,660 on October 24. 2007. Each transfer is addressed in turn.

i. <u>May 17, 2007 Transfer</u>

¶ 59 The record reflects that on May 16, 2007, Adams signed a letter directing Najawicz to pay all outstanding monies due to Miller pursuant to his 2005 contract. Although Adams did not specify a specific amount in her May 16, 2007 letter, Miller directed Najawicz in a May 17, 2007 letter to transfer $966,456.45 to him, which he represented as the outstanding amount owed. While the People maintain that the 2005 agreement was unauthorized by law, the contract was in fact authorized, for the reasons discussed earlier in this opinion. Therefore, to determine whether the People introduced sufficient evidence to prove embezzlement, we must first ascertain whether this $966,456.45 was in fact authorized by the 2005 agreement.

¶ 60 Miller's May 17, 2007 letter did not explain how he arrived at the $966,456.45 figure. However, the evidence introduced at trial established that it represented a $55,650 retention incentive, a $83,475 annual incentive, a $13,250 cost of living increase, a $41,660 one-time retirement plan contribution for December 2005; a $22,260 retirement plan contribution for 2005; a $23,373 retirement plan contribution for 2006; $20,384.61 representing the value of unused vacation in 2005; $21,403.07 representing the value of unused vacation in 2006; a $30,000 contribution to his 403(b) plan for 2005; a $30,000 contribution to his 403(b) plan for 2006; and $625,000 representing five years of annual $125,000 payments to a so-called Rabbi Trust.[6]

¶ 61 While it appears that many of these payments were in fact authorized by the 2005 contact, several were not. Although the 2005 agreement provided Miller with the opportunity to earn an annual incentive of up to 30% of annual base salary, the payment of the annual incentive was to be "determined by the Compensation Committee." (J.A. 1743.) The record contains no evidence that the Compensation Committee ever determined that Miller was entitled to receive any incentive, let alone the full 30% incentive provided for in the agreement. And while Adams, as Chair of the Board, possessed the authority to act on the Board's behalf, her May 16, 2007 letter to Najawicz did not state that the Compensation Committee approved an incentive or that Miller should receive the incentive provided for in the agreement, but only that Miller be paid "all outstanding amounts due." (J.A. 1784.) Consequently, Miller was not authorized to receive the $83,475 annual incentive.

¶ 62 Likewise, Miller was not entitled to receive $625,000 representing payments that

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[6] "A rabbi trust, so called because its tax treatment was first addressed in an IRS letter ruling on a trust for the benefit of a rabbi, is a trust created by a corporation or other institution for the benefit of one or more of its executives (the rabbi, in the IRS's original ruling)." *Bank of America, N.A., v. Moglia*, 330 F.3d 942, 944 (7th Cir. 2003) (internal citations omitted).

purportedly should have been made to the Rabbi Trust. The 2005 agreement provided for "[a]nnual contributions of $125,000.00 to an Irrevocable Rabbi Trust in the name of Mr. Miller (with Miller's named beneficiaries) for the next five years." (J.A. 1757.) However, at the time Najawicz made the May 17, 2007 transfer, Miller had only been employed under the 2005 contract for two years. Moreover, the agreement required that the contributions be made to the trust, rather than to Miller directly. For similar reasons, Miller was not entitled to have the $60,000 in 403(b) plan contributions deposited into his personal bank account, for the agreement expressly directed that the contributions be made "to a 403(b)(7) individual retirement account in the name of Mr. Miller." (J.A. 1757.)

ii. Transfers Based on August 13, 2007 Letter

¶ 63 The record reflects that on August 13, 2007, Miller submitted a letter to Najawicz directing him to transfer $111,759.62 to him from the appropriate RLSH bank account, to transfer $6,153.84 to him bi-weekly beginning with the conclusion of the August 18, 2007 pay period, and to transfer $3,333.33 to him on a monthly basis beginning on September 1, 2007. In that letter, Miller stated that these payments were "[i]n accordance with the May 14, 2007 employment agreement" between him and the RLSH. (J.A. 1786.) While the People maintain that the 2007 agreement was unauthorized by law, the contract was in fact authorized, for the reasons discussed earlier in this opinion. Therefore, to determine whether the People introduced sufficient evidence to prove embezzlement, this Court must first ascertain whether these transfers were authorized by the 2007 agreement.

¶ 64 Miller did not indicate in the letter what any of these payments represented. However, the uncontradicted evidence at trial established that monthly $3,333.33 payment represented a housing allowance of "$40,000 annually, payable in equal monthly installments," J.A. 1782, while the biweekly payments of $6,153.84 represented the portion of his $310,000 annual salary—$160,000—that was paid from RLSH accounts rather than processed through the Department of Finance. Because this compensation was expressly provided for in the 2007 agreement, Miller was authorized to receive these funds.

¶ 65 As with the earlier request for $966,456.45, Miller did not explain in his letter what the $111,759.62 payment represented. However, at trial, it was established that it represented a $77,500 signing bonus, a $10,000 education allowance, a $10,000 spousal travel allowance, a $3,875 cost of living adjustment, and $10,384.62 in retroactive pay. The signing bonus and cost of living adjustment were expressly provided for in the 2007 agreement, and $10,384.62 properly represents retroactive payment of his increased salary under the agreement retroactive to its May 14, 2007, effective date. Consequently, these payments were authorized by law.

¶ 66 The same cannot be said, however, for the $10,000 educational allowance and $10,000 spousal travel allowance. While the 2007 agreement provided for a $10,000 educational allowance, it also provided that the allowance was "[s]ubject to Compensation Committee approval." (J.A. 1770.) Moreover, the 2007 agreement did not provide Miller with a $10,000 spousal travel allowance, but instead stated that "Miller shall receive a spouse travel allowance of up to $10,000 annually." (J.A. 1782 (emphasis added).) Importantly, the 2007 agreement expressly mandated that "Miller shall submit to Schneider Regional such vouchers or expense statements that satisfactorily and reasonably evidence such expense in accordance with Schneider Regional's travel and expense reimbursement policy." (J.A. 1770.) Here, the record contains no evidence indicating that the Compensation Committee approved the $10,000 educational allowance, or that Miller submitted vouchers or expense statements to support that he had already incurred the maximum educational and spousal travel expenses by August 13, 2007.

Consequently, these $20,000 payments were not authorized by law.

iii. <u>October 24, 2007 Transfer</u>

¶ 67 The record reflects that on October 24, 2007, Miller submitted a letter to Najawicz directing him to transfer $789,660 to him from the appropriate RLSH bank account "[i]n accordance with the May 14, 2007 employment agreement." (J.A. 1787.) As with the May 17, 2007 and August 13, 2007 letters, the October 24, 2007 letter did not explain what the $789,660 represented. However, at trial, it was established that it represented a $625,000 payment to the Rabbi Trust; a $30,000 contribution to his 403(b) plan; $93,000 in annual incentive pay; and a $41,660 retirement plan contribution.

¶ 68 The evidence, when viewed in the light most favorable to the People, established that none of these payments were authorized by the 2007 agreement. Like the 2005 agreement, the 2007 agreement provided for "[a]nnual contributions of $125,000.00 to an Irrevocable Rabbi Trust in the name of Mr. Miller (with Mr. Miller's named beneficiaries) for the next five years," and for "[a]nnual contributions of $30,000 to a 403(b)(7) individual retirement account in the name of Mr. Miller." (J.A. 1781.) In addition to these provisions requiring that payments be made, respectively, to the trust and to the retirement account rather than to Miller personally, at the time of the October 24, 2007 letter, Miller had only been employed under the terms of the 2007 agreement for approximately five months. Moreover, the 2007 agreement specified that Miller would receive "[c]ontributions equal to $41,660 <u>in December 2007</u>." (J.A. 1781 (emphasis added.). Not only had the obligation to pay the $41,660 not yet been triggered, but it would not trigger, since Miller had already announced on September 19, 2007, that he would resign as Chief Executive Officer effective November 3, 2007, to take a position at another hospital. And like the 2005 agreement, the 2007 agreement did not make payment of his 30% annual incentive award as of right, but only to be "determined by the Compensation Committee." (J.A. 1769.) Not only did the record lack any evidence that the Compensation Committee authorized an annual incentive award, but it is also not clear how it even could have, given that Miller had only been employed under the 2007 agreement for five months at the time of the October 24, 2007 letter. In fact, the 2007 agreement expressly provided that "[n]o Incentive Compensation will be paid to Miller following the date of a Voluntary Resignation other than Incentive Compensation earned but not paid." (J.A. 1774.)

iv. Appropriation

¶ 69 It was not enough, however, that the People prove that Miller received monies that he was not authorized to collect. Rather, section 1662(1) requires that the defendant "appropriates" the public monies without authorization of law for his or her own use or use of another. In ordinary English, the word "appropriate," when used as a verb, is largely synonymous with "take." *See, e.g., United States v. Schneider*, 14 F.3d 876, 879-80 (3d Cir. 1994).

¶ 70 Although Najawicz disbursed the unauthorized funds, the People nevertheless proved that they had been appropriated by Miller. The record reflects that each transfer was initiated only after Miller, in his capacity as Chief Executive Officer, sent a letter to Najawicz—a subordinate—directing that these monies be paid to him, without providing any substantiation or explanation for what those payments represented. Moreover, the jury could certainly conclude that Miller, as a signatory to each of his employment agreements, was aware of what compensation he was and was not entitled to receive. Accordingly, we conclude that the People introduced sufficient evidence to sustain Miller's conviction on Count 17.

5. Obtaining Money by False Pretenses

¶ 71 Counts 8, 9, 10, 12, 16, and 18 of the seventh amended information charged Miller with obtaining money by false pretenses in violation of title 14, section 834(2) of the Virgin Islands

Code. That statute provides, in pertinent part, that

> Whoever knowingly and designedly, by false or fraudulent representation or pretenses, defrauds any other person of money or property shall—
>
> . . . .
>
> (2) if such property or money was $100 or more in value, be imprisoned not more than 10 years.

The charges stem from various reimbursements, allowances, perquisites, and similar actions made during Miller's tenure as Chief Executive Officer. Each act is addressed in turn.

a. Count 8: Automobile Allowance to Najawicz

¶ 72 The record reflects that this automobile allowance for Najawicz had been authorized by Miller in an August 24, 2004 letter, retroactive to July 15, 2004. (J.A. 213.) As explained earlier in the context of the stipends and bonuses Miller awarded to Najawicz, and Carty, Miller, as Chief Executive Officer, possessed the authority to set the compensation for Najawciz and other subordinate employees. Because the entire premise of Count 8 is that Miller lacked the legal authority to determine Najawicz's compensation, we reverse Count 8 for the same reasons we reverse Miller's convictions under Counts 4, 5, 6, 7, and 19.

b. Counts 9 and 10: Housing Allowances to Miller

¶ 73 The People introduced sufficient evidence to sustain Miller's convictions on Counts 9 and 10. Section 3 of Miller's April 17, 2002 employment agreement provided, in addition to other compensation, that he would receive temporary housing upon arrival in St. Thomas for a period not to exceed three months, and thereafter would "receive an annual housing allowance of $20,000 which shall be payable in monthly installments to commence upon the termination of the temporary housing period." (J.A. 1709.) Prior to October 1, 2004, Miller had received $29,999.97 in housing allowance payments under that agreement.

¶ 74 On October 1, 2004, Adams authorized a payment to Miller in "the amount of $45,000 from his housing allowance," noting on the check request voucher that this was authorized pursuant to section 3 of Miller's April 17, 2002 employment agreement. (J.A. 1840-43.) Najawicz certified the voucher on October 13, 2004, and signed the check that would issue to Miller on October 14, 2004. Because Miller's contract was for a three-year term, he would have been entitled to collect a combined total of $60,000 in housing advance payments over the term of the contract. Yet this advance, when combined with the $29,999.97 in housing allowance payments already received, resulted in Miller receiving nearly $15,000 more in housing allowance payments than he was entitled to under that agreement.

¶ 75 Nevertheless, despite receiving this advance and already receiving more housing allowance compensation than he was entitled to, Miller continued to collect housing allowance payments between November 18, 2004, and July 21, 2005, for a combined amount of $37,500. As a result, Miller received a combined total of nearly $120,000 in housing allowance payments over the life of the 2002 employment agreement, more than double the $60,000 he had been entitled to receive.[7] Consequently, the People proved that Miller was not entitled to receive these excess housing allowance payments,[8] and the convictions under Counts 9 and 10 are affirmed.

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[7] It is worth noting that the 2002 employment agreement had given the District Governing Board the option to retain Miller for an additional two-years after the expiration of his three-year term. However, even if these optional two-years were included, Miller still received approximately $120,000 in housing allowances when he would only have been entitled to receive $100,000 over a five-year period.

[8] We recognize that Miller's 2005 agreement contained language stating that the RLSH "expressly agrees to waive the repayment of any amounts advanced to Miller prior to the execution of this agreement." (J.A. 1744.) But a mere waiver of repayment, standing alone without other relevant action such as retroactively ratifying Miller's acts, and does not absolve Miller of his criminal liability. *Compare Goodwyn v. State*, 64 S.W. 251, 253 (Tex. Crim. App. 1901) (holding that full repayment to the victim is not a defense to an embezzlement charge), *with State v. Engle*, 82 N.W. 763, 764 (Iowa 1900) (holding ratification of the embezzlement by the victim is a defense to an embezzlement charge).

c. Count 12: Educational Reimbursements to Miller

¶ 76 The People also introduced sufficient evidence to sustain Miller's conviction on Count 12. The record reflects that Miller received $78,772.00 in educational payments between August 9, 2004, and October 11, 2007. Miller's initial 2002 employment agreement, which governed his employment through May 13, 2005, provided that he "shall be entitled to administrative leave to attend two (2) professional conferences each year, for which the Hospital shall pay all expenses, not exceeding $2,500 per conference," but did not provide for educational reimbursements. (J.A. 1709.) The vouchers submitted by Miller, however, reflect that the pertinent reimbursements were not for professional conferences but tuition.

¶ 77 Unlike the 2002 employment agreement, Miller's 2005 and 2007 agreements provided for educational reimbursements. However, the 2005 and 2007 agreements only provided that "Miller shall be entitled to receive an educational allowance of $10,000 annually," and, even then, only "[s]ubject to Compensation Committee approval." (J.A. 1744; 1770.) Not only is there no indication that the Compensation Committee approved the educational allowance, but the amounts Miller received greatly exceeded the $10,000 annual maximum. And while some of the reimbursement vouchers had been certified by Najawicz, most of them were approved by Miller himself. Consequently, the People proved that Miller had received substantial educational reimbursement payments to which he was not entitled, and the conviction under Count 12 is affirmed.

d. Count 16: "Write-Off" of Carty's Debt

¶ 78 Count 16 of the Seventh Amended Information alleges that Miller violated section 834(2) by arranging a "write-off" of a $10,000 debt owed by Carty to the RLSH. The $10,000 debt referred to is a $10,768 salary advance payment that Carty received from the RLSH's operating account shortly after he first commenced his employment as General Counsel on October 25, 1999. At the time this salary advance payment had been made, a policy had been in place—since rescinded—that precluded government employees from being paid from the General Fund until their NOPA form had been fully processed. It is undisputed that the purpose of the $10,768 salary advance payment from the RLSH operating account was to allow Carty to get paid while the Executive Branch processed his NOPA form, and that Carty was to repay the $10,768 advance to the RLSH once he began to receive salary payments from the Executive Branch after his NOPA form had been processed.

¶ 79 The People failed to introduce sufficient evidence to sustain this conviction. As a threshold matter, the uncontradicted evidence at trial established that Carty's $10,768 debt had not been waived but only written-off. In emails Miller and Najawicz exchanged with each other on February 6, 2006, Najawicz had requested that the RLSH "write-off" ten employee receivables, including Carty's $10,768 debt, to which Miller replied, "You may proceed in writing off these accounts." (J.A. 2771.) At trial, every witness—including prosecution witnesses—asked about the effect of a "write-off" testified that it is a term of art in accounting which does not forgive, waive, or otherwise extinguish a debt, but only designates it as unlikely to be collected, so that it does not appear as an active account receivable. Moreover, Carty himself testified that the $10,768 debt had not been forgiven and was still owed by him to the RLSH, and that he had not repaid it because he believed the RLSH owed him a greater amount of money. This is supported by a May 24, 2001 resolution passed by the St. Thomas-St. John District Governing Board, which states that it is "customary to remove inactive and uncollected account balances periodically," that "on average, industry standards for active account receivables do not exceed two (2) years," that "old account receivables inflate the gross account balance of the Hospital's assets" which "result[s] in a distorted balance sheet," and therefore "authorize[d] the Hospital Administration to establish a write-off policy, for accounting purposes only, for all outstanding account receivables that exceed two (2) years in age." (J.A. 247-48.)

¶ 80 In fact, the only evidence—that term being used loosely—the People cite in their appellate brief to support the idea that the $10,768 debt had been forgiven is a February 23, 2006 email exchange between Carty and Najawicz in which Najawicz states that he wishes to "forgive" a $45,500 housing allowance to Miller to get it "off the books" and asks Carty for language to effectuate that intent, to which Carty suggested that the housing advance be "waived." (Appellee's Br. 26.) Not only is this not evidence that the $10,768 salary advance debt had been waived, but it actually supports the opposite proposition, in that Carty, when asked for language to provide language to "forgive" Miller's debt, chose the word "waived" rather than "written-off," further emphasizing that these are different concepts. Accordingly, we reverse Miller's conviction on Count 16.

e. Count 18: Schedule A Perquisites

¶ 81 In Count 18, the People charged Miller with fraudulently obtaining benefits pursuant to documents attached as "Schedule A" to his 2005 and 2007 employment agreements. Specifically, the People assert that Schedule A had been "fraudulently made a part of" those documents.[9]

¶ 82 While Carty and his assistant, Spencer, testified that Schedule A had been included with the agreement, the People maintain that Schedule A had never been presented to the District

[9] Count 18 also asserts that Miller fraudulently obtained benefits pursuant to Schedule B of those agreements. However, Schedule B does not set forth any independent or new benefits not found elsewhere in the agreements, but simply identifies benefits previously enumerated in the agreement that Miller would continue to receive in the event he was involuntarily terminated without cause, constructively discharged, or had his employment agreement not renewed.

Governing Board. The primary evidence the People rely on is the existence of two documents dated May 14, 2005 – one containing Schedules A (admitted as People's Exhibit 13, and the other not (admitted as People's Exhibit 13a) – as well as the testimony of several Board members that they had never seen Schedule A. Board member Doradean Williams testified that she had never seen Schedule A before. Chongasing testified that she saw Schedule A for the first time when it was attached to Carty's proposed employment agreement to succeed Miller as Chief Executive Officer, while Frank Jackson testified that he was not aware of it until after the RLSH had been audited. And while Adams did not deny the existence of Schedule A, she also did not testify to having seen it before, instead testifying that she did not remember.

¶ 83 Again, the People failed to introduce sufficient evidence—or any evidence, for that matter—that Schedule A was surreptitiously added it to the agreements after they had been approved. As explained earlier, neither of Miller's employment agreements was required to be formally approved by vote of the District Governing Board; it was sufficient under the bylaws for Adams, as Board Chair, to sign those agreements. Therefore, the fact that Chongasing, Williams, and Jackson had not seen Schedule A is not evidence that it did not exist, particularly when those same Board members had testified to not having seen the June 21, 2005 agreement, even though that document is known to exist.

¶ 84 Perhaps most significantly, the People grossly misrepresent the record when they state that Adams "testified that Carty never presented her with Schedule A" and "testified that she never saw Schedule A." (Appellee's Br. 39; 79.) Adams did not testify that she had not seen Schedule A, but only that she did not recall, which is not the equivalent of testifying that she had not seen it before. *McFall*, 439 P.2d at 807 ("An answer by a witness that he does not remember whether an event occurred is not a denial that the event did not occur."). Moreover, when asked who had presented her with the contract to sign, she testified that she "cannot remember" who did, but that it "had to be . . . Karen Rennie, Allison Spencer, or Attorney Carty." In other words, Adams never testified that Schedule A had never been presented to her, and in fact never even identified the individual who provided her with the contracts to sign.

¶ 85 On the contrary, the record contains evidence reflecting that Schedule A was part of the agreements. The May 14, 2005 agreement admitted as People's Exhibit 13 and the May 14, 2007 agreement, both executed by Adams in her capacity as Chair, expressly directs to the "list of Benefits which is incorporated by reference and attached hereto as Schedule A." (J.A. 1744; 1770.) And while the second May 14, 2005 agreement admitted as People's Exhibit 13a does not reference Schedule A, the uncontradicted testimony at trial established that this had been an interim agreement executed by the parties after Miller's 2002 agreement had expired, in order to allow Miller to continue to serve as Chief Executive Officer while they continued contract negotiations. This is bolstered by the fact that People's Exhibit 13, in addition to including Schedule A, contains all the terms that were set forth in the June 21, 2005 agreement that had been signed by Adams and Miller, corroborating the testimony that Exhibit 13 represented the final agreement between the parties. Therefore, we reverse Miller's conviction on Count 18.

6. Criminally Influenced and Corrupt Organizations Act

¶ 86 In Count 3, the People charged Miller with violating title 14, section 605(a) of the Virgin Islands Code, the Criminally Influenced and Corrupt Organizations Act ("CICO"). "Pursuant to CICO, '[i]t is unlawful for any person employed by, or associated with, any enterprise . . . to conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of criminal activity.'" *Gumbs v. People*, 59 V.I. 784, 788 (V.I. 2013) (quoting 14 V.I.C. § 605(a)). CICO defines "criminal activity" as

> engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in the crimes, offenses, violations or the prohibited conduct as variously described in the laws governing this jurisdiction including any Federal criminal law, the violation of which is a felony and, in addition, those crimes, offenses, violations or prohibited conduct as found in the Virgin Islands Code as follows:
>
> . . . .
>
> (16) Title 14, chapter 41, Virgin Islands Code, relating to fraud and false statements;
>
> . . . .
>
> (19) Title 14, chapter 55, Virgin Islands Code, relating to larceny and embezzlement;
>
> . . . .
>
> (38) Any conspiracy to commit any violation of the laws of this Territory relating to the crimes specifically enumerated above.

14 V.I.C. § 604(e). "And CICO further defines a 'pattern of criminal activity' as 'two or more occasions of conduct (1) that (A) constitute criminal activity; (B) are related to the affairs of the enterprise; and (C) are not isolated; and (2) where . . . at least one of the occasions of conduct constituted a felony under the Virgin Islands Code. . . .'" *Gumbs*, 59 V.I. at 788 (quoting14 V.I.C. § 604(j)).

¶ 87 In this case, the seventh amended information identified the RLSH as the enterprise, and Miller does not dispute that characterization. Rather, he maintains that the People failed to introduce sufficient evidence to prove that he engaged in a pattern of criminal activity. The seventh amended information alleged that the following acts constituted the pattern of criminal activity Miller engaged in:

> a. Defendant, with the assistance of others, fraudulently circumvented the government employee payroll (NOPA) process, approved and appropriated numerous money transfers of thousands of dollars in gross payments directly from RLSH Scotia Bank accounts to his own personal bank accounts and personal accounts of Amos Carty, Jr., and Peter Najawicz, Sr., over and apart from their authorized (NOPA) salaries, without authority of law, without the knowledge, consent or approval of the RLSH Board of Directors, and not in the due and lawful execution of his trust to RLSH; or

> b. Defendant, aided by another, fraudulently created and placed in documents purporting to be his 2005 and 2007 "Employment Agreements", schedules (A and B), terms, compensation and employment benefits for the payment to Defendant of substantial sums of money from RLSH, without the approval authority or consent of the RLSH Board of Directors, without authority of law, and contrary to the due and lawful execution of [h]is trust to RLSH; or
>
> c. During the period between April 22, 2004 through May 10, 2005, Defendant fraudulently ordered and obtained thousands of dollars in unauthorized housing allowance payments in six successive installments, each of which was at least $2000.00 in excess of what Defendant was entitled, along with a fraudulent lump sum payment of $45,500.00 received by Defendant on the false pretenses of a housing allowance "advance", for a total of $60,000.00 in unauthorized payments for "housing allowance", without authority of law, without the approval of the RLSH Board of Directors and not in the due and lawful execution of his trust to RLSH;
>
> d. August 9, 2004 through October 11, 2007, Defendant, aided by another, fraudulently obtained from RLSH funds, approximately ten unauthorized payments or over payments of so called "educational reimbursements" totaling over $50,000.00, without authorization of law and not in the due and lawful execution of his trust; or
>
> e. August 3, 2005 through May 24, 2006, in St. Thomas, Virgin Islands, Defendant as a public officer and person entrusted with or having in his control property for the use of RLSH, designedly with false or fraudulent representations obtained four lump sum wire transfers of money, each gross lump sum payments in excess of $100, from RLSH bank account to his personal account, totaling $409,788.46, under the false pretense of a "June 21, 2005 employment agreement" that does not exist, without authority of law and without the knowledge or consent of the RLSH Board of Directors; or
>
> f. April 2007 through November 2007, in St. Thomas, Virgin Islands, Defendant, and aided by others, fraudulently directed and appropriated to himself several lump sum payments, each over $100 and totaling over 1.5 million dollars, from RLSH Bank accounts, on the false pretext of moneys owed to him. Such payments were made without substantiation or regard to its legality or correctness, without approval of law, without the RLSH Board's knowledge and approval, and not in the due and lawful execution of his trust to RLSH.

(J.A. 1054-56.)

¶ 88 Before proceeding to the merits, we note that it is impossible to determine what acts the jury found constituted the pattern of criminal activity required under the CICO statute. During final jury instructions on the CICO charge, the Superior Court did not provide the jury with the elements of the predicate offenses. This, standing alone, is permissible, for "a trial court may 'charge a predicate [CICO] offense by a generic description rather than giving the jury the elements in full,' even though fully setting forth the elements 'is the best practice.'" *Gumbs*, 59 V.I. at 790 n.2 (quoting *United States v. Carrillo*, 229 F.3d 177 (2d Cir. 2000)). But in this case, the seventh amended information never expressly stated which provisions of federal or Virgin Islands law were violated, and the Superior Court did not even provide a generic description of the elements of the predicate offenses. Rather, the Superior Court simply read the language from the seventh amended information nearly verbatim. This is problematic since many of the acts identified could potentially violate more than one of the laws identified in the CICO statute.

¶ 89 More significant, however, is that we do not know which of the numerous acts set forth in Count 3 the jury determined constituted a pattern of criminal activity. Although the Superior Court stated in its preliminary jury instructions at the start of trial on October 9, 2019, that a pattern of criminal activity is two or more occasions of conduct that constitutes criminal activity under the CICO statute, it failed to include this instruction in its final instructions to the jury on November 13, 2019. But even if we were to make the highly unlikely assumption that the jury remembered the definition of pattern of criminal activity more than a month later and applied it despite its omission from the final jury instructions, the jury was not required to list in its verdict form which of the conduct charged in the seventh amended information constituted criminal activity and which—if any—did not. Because "the [information] was sufficiently broad and the evidence sufficiently complex as to create a risk that different jurors voted to convict on the basis of different facts establishing different offenses," the failure of the Superior Court to properly instruct the jury and direct them to identify the underlying acts that constituted the pattern of criminal activity " creates an extraordinarily high likelihood that the jury did not issue a unanimous verdict on this charge. *United States v. Lapier*, 796 F.3d 1090, 1097 (9th Cir. 2015).

¶ 90 Nevertheless, when reviewing the sufficiency of the evidence to sustain a criminal conviction, this Court must ignore other errors, even significant errors such as the wrongful admission of inadmissible evidence. *See Ambrose v. People*, 56 V.I. 99, 107 (V.I. 2012). We engage in such deferential review because when a conviction is set aside for insufficient evidence the remedy is a judgment of acquittal, whereas the remedy for virtually all other errors is merely a new trial. *Id.* Therefore, when a trial court "authorize[s] the jury to convict on alternate theories, the verdict of guilt will be upheld if the evidence was sufficient on any one of the theories," even if we were to ultimately hold that a new trial is warranted because the case should not have been submitted to the jury in such a manner. *See, e.g., Sorto v. State*, 173 S.W.3d 469, 472 (Tex. Crim. App. 2005).

¶ 91 Here, the jury was presented with sufficient evidence to permit it to convict Miller for violating the CICO statute. To establish a pattern of criminal activity, the People were not required to prove that Miller committed all the acts set forth in Count 3, but only two or more. Certainly, many of the acts identified in Count 3 were lawful. But as explained above, the People introduced sufficient evidence to prove that Miller committed the crimes of obtaining money by false pretenses and embezzlement or falsification of public accounts on multiple occasions. Embezzlement or falsification of public accounts is a crime codified in chapter 83 of title 14 of the Virgin Islands Code and is one of the predicate offenses enumerated in the CICO statute. *See* 14 V.I.C. § 604(e)(28). Likewise, obtaining money by false pretenses is codified in chapter 41 of title 14, and is also a predicate offense under CICO. *See* 14 V.I.C. § 604(e)(19). Moreover, each instance of embezzlement or obtaining money by false pretenses by Miller constituted a felony.

See 14 V.I.C. §§ 834(2), 1662. In addition, each felony was related to the affairs of the RLSH, in that Miller directed the transfer of unauthorized funds to himself while serving in his official capacity as Chief Executive Officer of the RLSH. Accordingly, the People introduced sufficient evidence from which a jury could properly convict Miller on Count 3.

7. Conspiracy

¶ 92 In Count 2, the People charged Miller with conspiracy in violation of title 14, section 551(1) of the Virgin Islands Code. Specifically, Count 2 alleged that Miller conspired with Najawicz and Carty

> to commit crimes of embezzlement by conspiring to appropriate thousands of dollars from RLSH bank accounts to their own use and benefit, without authority of law or not in the due and lawful execution of their trust. To wit: through agreements, arrangements and authorizations made with one another, without authority of law, Defendants circumvented the government employee payroll process and disbursed thousands of dollars of RLSH money in gross payments to themselves or to one another from RLSH bank accounts to their personal bank accounts, apart from their authorized (NOPA) compensation, without authority of law or without regard to their legality or correctness of payments, and contrary to the due and lawful execution of their trust to RLSH.

(J.A. 1053.)

¶ 93 "[T]he essential elements for a section 551 conspiracy are an agreement and an overt act done in furtherance of the conspiracy." *Francis v. People*, 52 V.I. 381, 389 (V.I. 2009). While the People may use circumstantial evidence to satisfy these elements, "[t]his circumstantial evidence must be sufficient to create a reasonable and logical inference that the activities of the participants could not have been carried on except as the result of a preconceived scheme or common understanding." *Id.* (internal citations and quotation marks omitted). And while not binding on this Court, the Supreme Court of the United States, in construing a federal conspiracy statute containing similar language, persuasively held that "[t]he overt act . . . may be that of only a single one of the conspirators and need not be itself a crime." *Braverman v. United States*, 317 U.S. 49, 52 (1942). Because the overt act is an element of the offense and need not be a criminal act, we agree that an information which charges a violation of section 551 must specify both the crime and the overt act, so as to meaningfully apprises the defendant of the factual predicate of the offense. *Bigby v. Gov't of the V.I.*, 125 F.Supp.2d 709, 712-13, 716-17 (D.V.I. App. Div. 2000). *See also* V.I. R. CRIM. P. 3(a)-(b).

¶ 94 As a threshold matter, we again note the extraordinarily high risk that the jury rendered a non-unanimous verdict on this charge. The crime that is the subject of the conspiracy is only referred to as "embezzlement" despite the three defendants having been charged with embezzlement under different statutes. And while Count 2 appears to identify "circumvent[ing] the government employee payroll process" as the overt act, J.A. 1053, the theory of the case presented by the People had been that this had occurred in different ways by the conduct of different defendants over the course of approximately six years. While it is certainly permissible for the People to charge the defendants in such a manner, the Superior Court only instructed the jury that "[y]our verdict must represent the collective judgment of the jury, and in order to return a verdict, each juror must agree," and that "your verdict must be unanimous." Such an instruction, however, is insufficient in a case where the People present multiple theories of liability to support the same charge, in that it gives no indication to the jury that they were required to unanimously agree on the facts that support its verdict, as opposed to only unanimously agreeing only on the verdict. *United States v. Holley*, 942 F.2d 916, 926 (5th Cir. 1991). And while the Superior Court did instruct the jury, in the context of the conspiracy charge, that "[y]ou must unanimously agree on the overt act that was committed," it failed to extend that instruction to cover all the elements of conspiracy and did not give such an instruction for any other charge. This makes it effectively impossible for this Court to review the sufficiency of the evidence with respect to those elements since there is no way to determine what the jury actually found. *See, e.g., United States v. Gaddy*, 174 Fed.Appx. 123, 125 (3d Cir. 2006); *United States v. Sayan*, 968 F.2d 55, 65 (D.C. Cir. 1992); *United States v. Sanderson*, 966 F.2d 184, 187 (6th Cir. 1992); *United States v. Gilley*, 836 F.2d 1206, 1211 (9th Cir. 1988).

¶ 95 Despite the inability of this Court to meaningfully review the sufficiency of the evidence on those elements, we nevertheless reverse the conspiracy conviction. As explained earlier, it is not illegal for a RLSH employee to receive compensation that exceeds that listed on the NOPA form maintained by the Executive Branch. Rather, Virgin Islands law permits employees of the RLSH and other hospitals under the control of the Corporation to receive compensation—including compensation in the form of stipends and bonuses—from accounts maintained by the Corporation, regardless of whether such compensation exceeds the salary listed on the NOPA form. Thus, virtually all of the conduct alleged in Count 2 does not constitute a crime at all, whether it was undertaken by Miller, Najawicz, or Carty.

¶ 96 We recognize, however, there were at least a few transactions which did constitute a crime. For the reasons explained earlier in this opinion, Miller was not entitled to receive many of the payments that he received between May 17, 2007, and November 30, 2007. But as we explain in *Carty v. People*, 2022 VI 2, there is no evidence that Carty was a part of that conspiracy. This is significant because the seventh amended information charged an all-encompassing large conspiracy involving all three defendants. Both this Court and the federal courts have recognized that proof of smaller conspiracies involving some, but not all, of the same actors is not sufficient to establish a single, large conspiracy between all the actors when the defendants had been charged only with the latter and not the former. *See Duggins v. People*, 56 V.I. 295, 309-10 (V.I. 2012);

Kotteakos v. United States, 328 U.S. 750, 765 (1946); *United States v. Perez*, 28 F.3d 318, 345 (3d Cir. 2002). As the United States Supreme Court eloquently explained,

> Numbers are vitally important in trial, especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.
>
> Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth.

Kotteakos, 328 U.S. at 773.

¶ 97 But even if this Court were inclined to hold that evidence of a smaller conspiracy between Miller and Najawicz could sustain a conspiracy conviction for Miller, we hold that the People failed to meet their burden of proving such a conspiracy. The evidence the People rely on to support the existence of such a conspiracy is circumstantial, and largely identical to the circumstantial evidence it relied upon in its attempt to establish fraudulent intent: that Najawicz gave Adams the unsigned May 16, 2007 letter and asked her to sign it; that Miller drafted and signed letters to Najawicz requesting payments; that Najawicz disbursed the funds; and that Miller awarded Najawicz a bonus a month and a half before it was due. But while the People may use circumstantial evidence to satisfy the elements of a conspiracy, "[t]his circumstantial evidence must be sufficient to create a reasonable and logical inference that the activities of the participants could not have been carried on except as the result of a preconceived scheme or common understanding." *Francis*, 52 V.I. at 389. For the same reasons that the above evidence is not sufficient to establish fraudulent intent, it is not sufficient to prove the existence of a preconceived scheme or common understanding. Therefore, we reverse Miller's conviction on Count 2.

C. Juror Unanimity and Verdict Form

¶ 98 For the reasons given above, we conclude that the People introduced sufficient evidence to sustain Miller's convictions for Count 3 (CICO), Counts 9, 10, and 12 (obtaining money by false pretenses), and Count 17 (embezzlement of public accounts). However, as we noted throughout that discussion, the United States Constitution requires that a criminal jury issue a unanimous verdict -- not just on the ultimate question of whether the defendant is guilty or not guilty of a particular charge -- but it must also unanimously agree on the relevant facts that support the elements of the charged offense. *Lapier*, 796 F.3d at 1097. In a typical case, where the information charges only a single set of facts to support each count, a guilty verdict will necessarily indicate that the jurors unanimously agreed on the facts that satisfied each element of the charged offense. But when the prosecution elects to charge multiple or alternate sets of facts to support a single count, a trial court must take appropriate action to ensure that the jury issues a unanimous verdict, such as by issuing a unanimity instruction to the jury or requiring it to specify the factual predicates in its verdict form. *See, e.g.*, *Gaddy*, 174 Fed. Appx. at 125; *Sayan*, 968 F.2d at 65; *Sanderson*, 966 F.2d at 187; *Gilley*, 836 F.2d at 1211.

¶ 99 In this case, while the People introduced sufficient evidence from which the jury could convict Miller on Counts 3, 9, 10, 12, and 17, it is far from clear that the jury unanimously convicted Miller on the same factual basis on each of those charges. Count 3 charged Miller with violating the CICO statute based on numerous different incidents that occurred between December

1, 2002, and November 30, 2007. Count 9 charged Miller with obtaining money by false pretenses based on numerous acts that occurred between April 22, 2004, and May 10, 2005, and Count 12 charged him with that offense for acts ranging from August 9, 2004, to October 11, 2007. Similarly, Count 17 charged Miller with embezzlement based on multiple completely separate transactions that occurred between May 17, 2007, and November 30, 2007. It is only in Count 10, which charged Miller with falsely obtaining the lump-sum housing advance he requested on October 1, 2004, where there is any reasonable confidence that the jury unanimously agreed on a common set of facts to arrive at the conviction.

¶ 100 The issue of juror unanimity is very closely related to another error Miller asserts in his brief. Title 5, section 3636 of the Virgin Islands Code provides that "[w]hen an information charges an offense against property by larceny, embezzlement, or obtaining by false pretenses, the jury, on conviction, shall ascertain and declare in the verdict the value of the property stolen, embezzled, or falsely obtained." Miller argues that he is entitled to a new trial because the verdict form submitted to the jury did not require them to ascertain the specific value of the funds stolen. Although Miller, through his counsel, requested that the form contain a specific amount, the Superior Court denied the request, and instead directed only that the jury be required to find that the amounts exceeded the minimums provided for in the statutes codifying the substantive criminal offenses.

¶ 101 Unquestionably, the Superior Court committed error when it failed to comply with the plain terms of section 3636. In our prior decisions applying section 3636, we concluded that the error was harmless because the value of the property stolen was not in dispute and exceeded the statutory minimum needed to sustain a conviction. *See Joseph v. People*, 60 V.I. 285, 290 (V.I. 2013); *Gumbs v. People*, 59 V.I. 784, 791 (V.I. 2013); *Connor v. People*, 59 V.I. 286, 297 (V.I. 2013);

see also V.I. R. APP. P. 4(i) ("No error or defect in any ruling or order or in anything done or omitted by the Superior Court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.").

¶ 102 In the present case, however, the Superior Court committed error when it relied on these decisions finding harmless error as the reason for not complying with section 3636. As we have previously emphasized, "the harmless error standard is applicable for appellate courts, not trial courts" and "it is not only the right but the duty of the trial judge to refuse to intentionally commit error, even 'harmless' error." *Fontaine v. People*, 56 V.I. 571, 590 n.12 (V.I. 2012) (internal quotation marks and citations omitted). That this Court found, in other cases involving different criminal charges with different sets of facts, that the failure to comply with section 3636 was harmless does not mean that this Court would conclude that the error is always harmless. While it may be burdensome to require the jury to specify the value of the property stolen in a case like this involving dozens of charges against multiple defendants, "court[s] may not ignore basic tenets of [Virgin Islands] law . . . for the sake of administrative convenience." *Gordon v. Gordon*, 438 N.W.2d 762, 765 (Neb. 1989).

¶ 103 In fact, the Superior Court's failure to apply section 3636 is not harmless in this case. Certainly, there is no question that the values of the funds Miller allegedly obtained by false pretenses far exceeded the $100 statutory minimum. *See* 14 V.I.C. § 834(2). Moreover, the crime of embezzlement by public and private officers—the sole type of embezzlement conviction for which we conclude the evidence is sufficient—does not require that the People prove that the defendant embezzled a minimum amount of money to sustain a conviction or obtain a particular sentence. *See* 14 V.I.C. § 1662. Under ordinary circumstances, the failure to comply with section

3636 would not affect any of Miller's substantial rights and would not entitle him to a new trial on the substantive criminal offenses. *Connor*, 59 V.I. at 297-98.

¶ 104 But this case is not ordinary in one significant respect: our lack of confidence that the jury rendered a unanimous guilty verdict. As explained earlier, the People introduced sufficient evidence from which the jury, if it were to view all the evidence in the light most favorable to the People, could find Miller guilty of certain acts of embezzlement and obtaining money by false pretenses. This does not mean, however, that the jury did so. For example, with respect to Count 17, the jury, weighing the evidence, could have determined that Miller had been entitled to the Rabbi Trust payments, even though the People introduced sufficient evidence of embezzlement. Yet because the jury was not required to provide the specific amount of money that Miller embezzled, it is not possible to ascertain on what basis the jury convicted Miller of violating Count 17. For example, had the jury specified that Miller had only embezzled $55,650, then the jury had acquitted Miller of all transactions other than receipt of the $55,650 retention bonus under his 2005 agreement – a bonus that, as explained earlier, was unquestionably authorized. Had the section 3636 verdict revealed this, Miller may have been entitled to an acquittal on Count 17, based on the jury's specific findings, notwithstanding the fact that the evidence had been otherwise sufficient.

¶ 105 Moreover, the failure to direct the jury to issue a section 3636 verdict also impacted Miller's sentence. The CICO statute permits the Superior Court, in its discretion, to enter a judgment of criminal forfeiture as part of the sentence for a conviction for violating CICO. *See* 14 V.I.C. § 606. Specifically, the Superior Court was authorized to order Miller to criminally forfeit

> (1) any position, office, appointment, tenure, commission, or employment contract of any kind that he acquired or maintained in violation of section 605, or through which he conducted or participated in the conduct of the affairs of an enterprise in violation of section 605, or that afforded him a source of influence

or control over the affairs or enterprise that he exercised in violation of section 605;

(2) any compensation, right, or benefit derived from a position, office, appointment, tenure, commission, or employment contract described in this section that accrued to him during the period of conduct in violation of section 605;

(3) any interest in, security of, claim against, or property or contractual right affording him a source of influence or control over the affairs of an enterprise that he exercised in violation of section 605; or

(4) any amount payable or paid under any contract for goods or services that was awarded or performed in violation of section 605.

14 V.I.C. § 606(c). Consistent with this provision, the Superior Court ordered the criminal forfeiture of numerous bank accounts and other property controlled by or established for the benefit of Miller, apparently based on the assumption that the jury found that Miller unlawfully appropriated each dollar stemming from the transactions identified in the Seventh Amended Information. But as explained above, because the seventh amended information charged multiple transactions as part of the same count, the jury could have convicted Miller on all counts without finding that every transaction was unauthorized. Had the jury provided the specific amount of the property stolen, embezzled, or falsely obtained in accordance with section 3636, it would be relatively easy to determine what funds the jury believed were obtained without authorization, and which—if any—it nevertheless determined were authorized. As a result, it is possible that Miller received a higher sentence—in the form of a larger criminal forfeiture judgment—than he should have received.

¶ 106 This error likely affected even Count 10, in that while the information charged only a single factual predicate—Miller receiving a housing allowance advance without authorization—the jurors may not have necessarily unanimously agreed on the amount that Miller had not been entitled to receive. In addition to conflicting evidence as to whether Miller received an advance of $45,000 or $45,500, we note that Miller's 2002 employment agreement had given the District Governing Board the option to retain Miller for an additional two years after the expiration of his three-year term. If the jury concluded that these optional two years should have been included in determining the amount of housing allowances Miller was entitled to over the life of the contract, Miller would have been entitled to receive $100,000 over a five-year period rather than $60,000 over a three-year period. While whether Miller falsely obtained $20,000 or $60,000 may not necessarily affect whether Miller is guilty of Count 10, it is certainly relevant in calculating the forfeiture portion of Miller's sentence.

¶ 107 In this case, the Superior Court did not require the jury to identify the factual basis for its guilty verdicts for each charge in the verdict form, or comply with the statutory mandate set forth in section 3636 requiring the jury to specify the amount of money embezzled or fraudulently obtained in its verdict form. Rather, it only instructed the jury that "[y]our verdict must represent the collective judgment of the jury, and in order to return a verdict, each juror must agree," and that "your verdict must be unanimous." Such an instruction, however, is insufficient in a case where the People present multiple theories of liability to support the same charge, in that it gives no indication to the jury that they were required to unanimously agree on the facts that support its verdict, as opposed to only unanimously agreeing only on the verdict. *United States v. Holley*, 942 F.2d 916, 926 (5th Cir. 1991). And while the Superior Court did instruct the jury, in the context of the conspiracy charge, that "[y]ou must unanimously agree on the overt act that was committed," it failed to extend that instruction to cover all the elements of conspiracy and did not give such an instruction for any other charge. Because "the [information] was sufficiently broad and the evidence sufficiently complex," we conclude that this failure "create[d] a risk that different jurors voted to convict on the basis of different facts establishing different offenses." *Lapier*, 796 F.3d at 1097. Accordingly, we reverse Miller's convictions on Counts 3, 9, 10, 12, and 17, and order a new trial on those charges if the People elect to so proceed.[10]

D. Other Claims

¶ 108 Because we reverse Miller's convictions on Counts 2, 3, 5, 6, 7, 8, 14, 16, 18, and 19 due to the failure of the People to introduce sufficient evidence, and order a new trial on Counts 3, 9, 10, 12, and 17, most of the other issues Miller has raised in his appellate brief are moot.[11] Nevertheless, we exercise our discretion to address certain issues that would either provide Miller with greater relief than a new trial on Counts 3, 9, 10, 12, and 17, or which are likely to recur on remand as part of that new trial. *See, e.g.*, *Brathwaite v. Xavier*, 71 V.I. 1089, 1099 n.6 (V.I. 2019) (Supreme Court may exercise discretion to address issues that are likely to occur on remand, in the interests of judicial economy, to provide guidance to the Superior Court) (collecting cases).

1. Unconstitutionality of Statutes

[10] We emphasize, in the strongest terms possible, that while we earlier concluded that the People introduced sufficient evidence to sustain convictions on these counts, this is to have absolutely no bearing whatsoever in any new trial that occurs on remand. *See State v. Meyer*, 641 P.2d 594, 595 (Or. Ct. App. 1982). This is because "although we conclude that the evidence introduced at trial, when viewed in the light most favorable to the People, was sufficient to sustain [the] convictions, a jury does not apply such a deferential standard, but is expected to weigh the evidence, including judging the credibility of witnesses." *Francis v. People*, 57 V.I. 201, 223 (V.I. 2012). Any jury empaneled to hear these counts as part of a new trial is thus not just permitted, but required, to independently weigh the evidence and arrive at its own conclusions.

[11] For instance, we need not address Miller's claims that the Superior Court permitted the seating of an allegedly biased juror or coerced the jury by instructing that its deliberations would restart with an alternate juror seated if a verdict was not reached before the scheduled start date of a juror's cruise vacation, since those highly fact-specific issues are unlikely to recur on remand. Likewise, we decline to address Miller's challenge to his sentence because he may be acquitted at the new trial and, even if not, the Superior Court's sentencing decision may change due to our decision to direct entry of a judgment of acquittal on Counts 2, 3, 5, 6, 7, 8, 14, 16, 18, and 19.

¶ 109 Miller alleges that all the statutes under which he was charged and convicted are unconstitutional as applied to him because they purportedly criminalize innocent conduct. In making this argument, Miller relies on various decisions of the Supreme Court of the United States interpreting what he characterizes as comparable federal crimes. Although Miller does not identify with any particularity what precise provisions of the United States Constitution were purportedly violated by his prosecution, it appears that Miller is asserting that these statutes are unconstitutionally vague so as to violate his right to due process.

¶ 110 "To satisfy due process, a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 402-03 (2010). A statute is thus unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). However, since Miller asserts that these statutes are only unconstitutional as applied to him, this Court "must analyze the specific allegations against [Miller] and determine whether this statute is vague as applied to the facts of the particular charge against [him]." *LeBlanc v. People*, 56 V.I. 536, 541 (V.I. 2012). "If [Miller's] conduct fell within the bounds of what was clearly proscribed by the statute," then the statute is constitutional as applied to him, "whether or not it may turn out to be vague as applied in other situations." *Id.* (quoting *Gov't of the V.I. v. John*, 159 F.Supp.2d 201, 205 (D.V.I. App. Div. 1999)).

¶ 111 Miller has failed to meet his burden of demonstrating that any of the statutes under which he was convicted are unconstitutionally vague as applied to the charges against him. While Miller asserts that these statutes "criminaliz[e] virtually all certifications taken on behalf of clients, subjecting lawyers, especially general counsel, to prosecution without fair notice, and setting standards for the practice of law in contravention of the Virgin Islands Rules of Professional Conduct," Appellant's Br. 38, Miller is neither a lawyer nor criminally charged with providing advice to a client. And although Miller appears to claim that the embezzlement statutes purportedly criminalize conduct that does not confer a direct benefit on the defendant, the People expressly charged Miller with having literally millions of dollars transferred from RLSH accounts to his own personal accounts. Consequently, Miller has failed to prove that any of these statutes are unconstitutionally vague as applied to the conduct with which he was charged.

2. Advice of Counsel Defense

¶ 112 Miller appears to argue that the Superior Court relieved the People of their burden to prove the requisite criminal intent by failing to instruct the jury that reliance on the advice of counsel negates criminal intent.[12] Specifically, Miller maintains that he introduced "more than a scintilla of evidence" that he relied on the advice of Carty, which if believed would establish that he committed the charges offenses "under an ignorance or mistake of fact which disproves criminal intent." 14 V.I.C. § 14(4). Because Miller did not request such an instruction, this Court reviews this claim on appeal only for plain error. *See* V.I. R. App. P. 4(h); *Saldana v. People*, 73 V.I. 649, 663 (V.I. 2020) (where a jury instruction was not requested at the jury instruction conference or

[12] In the topic header of this section of his appellate brief, Miller asserts that the Superior Court "abused its discretion in failing to dismiss this action and in denying Miller's motions for a judgment of acquittal." (Appellant's Br. 45.) However, in the body of this section, Miller never mentions the Superior Court's failure to dismiss the action or enter a judgment of acquittal but asserts that the Superior Court "relieved the People of [their] burden of proof that Miller was not ignorant of the facts" and asserts that he "pleaded good faith with more than a scintilla of evidence." (Appellant's Br. 46.) As such, it appears that Miller is not challenging the sufficiency of the evidence as to criminal intent, but only arguing that he introduced the minimum amount of evidence necessary for an advice of counsel defense to be an issue in this case.

after the Superior Court instructed the jury, even after the judge inquired of the parties if the court needed to make modifications to the proposed jury instructions, defendant's claim that the Superior Court erred in failing to give such instruction is reviewed on appeal only for plain error).

¶ 113 While the People possessed the ultimate burden to prove beyond a reasonable doubt that Miller committed the charged offenses with the requisite intent, the advice of counsel defense remains an "affirmative" defense "only in the sense that a defendant is required to provide the People with notice of the defense" or otherwise assert the defense at trial, so that the People are aware of the need to negate the defense. *Cf. Farrell v. People*, 54 V.I. 600, 611 n.8 (V.I. 2011). To obtain a jury instruction on the advice of counsel defense, the defendant must introduce at least a modicum of evidence indicating that "(1) he made full disclosure of all material facts to his attorney before receiving the advice at issue; and (2) he relied in good faith on the counsel's advice that his course of conduct was legal." *United States v. DeFries*, 129 F.3d 1293, 1308 (D.C. Cir. 1997). This evidence need not be overwhelming, and a defendant should receive an instruction on the defense if there is "any foundation in the evidence sufficient to bring the issue into the case." *United States v. Duncan*, 850 F.2d 1104, 1117 (6th Cir. 1988).

¶ 114 Miller failed to meet even this modest burden. As a threshold matter, the evidence unquestionably established that Carty was not Miller's personal attorney, but the General Counsel of the RLSH. Thus, on the facts of this case an attorney-client relationship did not exist between Carty and Miller, even if Carty, as part of his duties as General Counsel to the RLSH, offered advice to Miller. *See Waggoner v. Snow, Becker, Kroll, Klaris & Krauss*, 991 F.2d 1501, 1504 (9th Cir. 1993). Miller cites to no cases—and there do not appear to be any—that stand for the proposition that the advice of counsel defense is available in the absence of an attorney-client relationship.[13] And even if such a relationship existed, Miller introduced absolutely no evidence to indicate that he even relied on Carty's advice, let alone that he fully disclosed all material facts when seeking that advice. Therefore, the Superior Court committed no error when it failed to *sua sponte* instruct the jury on a potential advice of counsel defense.

3. Ratification by the District Board

¶ 115 At a January 7, 2008 meeting, the District Board purportedly passed[14] a resolution that contained the following language:

> The Board hereby ratifies and approves all past actions of the Chief Executive Officer in executing all past minimum value contracts, medical equipment and supply contracts, and personal services contracts.

(J.A. 536.) Miller maintains that this resolution served to ratify all his actions as Chief Executive Officer. The People, however, allege in their appellate brief that this vote "was *void ab initio* because it is axiomatic that the Board could not ratify Appellants' illegal acts." (Appellee's Br. 78.)

¶ 116 We conclude that the District Board had the authority to retroactively ratify Miller's

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[13] In his appellate brief, Miller attempts to analogize Carty's role to that of the Attorney General and cites to a handful of law review articles that argue that federal Executive Branch officials who rely on an opinion of the Attorney General of the United States cannot be criminally prosecuted. However, there is no case law to support this broad proposition, and Carty was not the Attorney General of the Virgin Islands or even employed by the Department of Justice, but in-house counsel to the RLSH.

[14] Nevertheless, the evidence introduced at trial reflects that whether the District Board actually adopted the January 7, 2008 resolution remains in serious dispute. At trial, the parties elicited testimony that the resolution had not been attached to the minutes of the January 7, 2008 meeting—as was the practice of the District Board with respect to enacted resolutions—and the minutes themselves contain no mention that such a resolution had been introduced or discussed, let alone passed. Moreover, the document itself is signed only by Adams, and does not appear to bear the Seal of the Board, of which the Secretary is the custodian. (J.A. 1248.) We need not determine the validity of the resolution, however, for as we explain below, the resolution, even if properly enacted, did not ratify any of the actions that form the basis for Miller's surviving convictions.

actions. It is well-established that unauthorized acts by employees or agents of a corporation can be retroactively ratified by its board, and that such ratification has the same effect as if the act had been originally authorized. *See, e.g., Yaeger v. Giguerre*, 23 N.W.2d 22, 23 (Minn. 1946); *Appel v. State ex rel. Shutter-Cottrell*, 61 P. 1015, 1019 (Wyo. 1900); *see also* RESTATEMENT (THIRD) OF AGENCY § 4.01. Although the People are correct that illegal acts may not be ratified, the very authorities the People cite in support demonstrate that the illegal act must be something other than the act not being duly authorized. *See, e.g., McConnico v. Third Nat'l Bank in Nashville*, 499 S.W.2d 874, 886 (Tenn. 1973) ("A corporation may ratify only unauthorized acts of its officer which are within the scope of the corporate powers and which might have previously been authorized. However, it cannot ratify an act which it does not have the power to legally do. It is clear that it is not within the corporate power to forge an endorsement . . . ."). Because the District Board had the authority to order the Chief Executive Officer to "execut[e] all past minimum value contracts, medical equipment and supply contracts, and personal services contracts," it certainly possessed the authority to ratify them retroactively.

¶ 117 In its final instructions to the jury, the Superior Court instructed on the ratification defense as follows:

> Ratification means to give official sanction to some previous act or to confirm, approve, endorse, or validate a previous act by someone who has full knowledge of all material facts regarding that act.
>
> It is also the theory of all of the Defendants in this case that, even if in some instances they did something that was beyond the scope of their authority, the District Board knowingly and intentionally ratified their actions and validated those acts, such that the Defendants could not have defrauded the Board regarding those acts.
>
> If you find that the People failed to prove beyond a reasonable doubt that the Board did not knowingly and intentionally ratify acts of the Defendants that would otherwise have been fraudulent, you must find the Defendants not guilty of the crimes with which they are charged because of those allegedly fraudulent acts.

(Trial Tr. Nov. 13, 2019, at 316.) In other words, while the Superior Court agreed that ratification could serve as a defense, it instructed the jury that ratification could not occur unless the District Board acted "knowingly and intentionally."

¶ 118 We conclude that the Superior Court erred when it instructed the jury that it could look past a duly enacted resolution of the District Board in such a manner. We recognize that, in various civil cases, courts have stated the general proposition that "a ratification requires the principal to have knowledge of all material facts and an intent to ratify." *Bradshaw v. McBride*, 649 P.2d 74, 78 (Utah 1982); *see also* RESTATEMENT (THIRD) OF AGENCY § 4.06 ("A person is not bound by a ratification made without knowledge of material facts involved in the original act when the person was unaware of such lack of knowledge."). But this is a criminal case and not a civil case, and the District Board is not the board of a private corporation, but a government agency whose actions carry the force of law. That some or even all the members of the District Board may have voted for a resolution without sufficient knowledge of what they were voting on is not a valid reason for invalidating the resolution, just as an act passed by the legislature would not be declared void because several legislators failed to read the bill before voting for it. *Accord, Opinion of the Justices*, 319 So.2d 682, 692 (Ala. 1975) (acknowledging "the reality that legislators do not have time to read all bills in full").

¶ 119 This is not to say that an unscrupulous executive of a government hospital could engage in illegal acts, provide fraudulent information to the board to cover up those illegal acts, and then escape all criminal liability when the board passes a ratification resolution based on the fraudulent information. In fact, the Legislature has already codified the crime of fraudulent claims upon the government, which criminalizes precisely that sort of conduct. *See* 14 V.I.C. § 843. But the People did not charge Miller under that provision, and it is highly unlikely that they would have been able to, given that Miller had already resigned as Chief Executive Officer two months before the District Board passed its ratification resolution. Rather, the People elected to charge Miller with embezzlement and other offenses based on the underlying financial transactions. Because those offenses require that the transactions be unauthorized by law, the passage of a valid resolution of the District Board ratifying those transactions would necessarily render those transactions authorized and negate that element of the offenses.

¶ 120 But while the District Board possessed the authority to retroactively ratify Miller's actions, we conclude that it never actually did, at least with respect to his own compensation. The interpretation of a resolution passed by a government board, like the interpretation of a statute, is a question of law over which we exercise plenary review. *Bryan v. Fawkes*, 61 V.I. 201, 227-28 (V.I. 2014). The January 7, 2008 resolution approved and ratified "all past actions of the Chief Executive Officer in executing all past minimum value contracts, medical equipment and supply contracts, and personal services contracts." (J.A. 536 (emphasis added).) The phrase "in executing" may refer to either carrying out the terms of an already-valid contract, *i.e.* making payments as provided for in the contract, or transforming an unenforceable contract into an enforceable contract by signing it or taking some other action. *Compare Atkinson v. Estate of Hook*, 374 P.3d 215, 219 (Wash. Ct. App. 2016) (holding that to "execute" is "to make a document valid or legal") *with Cooper v. Edgewater Bank*, No. 296189, 2011 WL 2848782, at *2 (Mich. Ct. App. July 19, 2011) (unpublished) (holding that the "execution" of a contract means "[t]he act of carrying out or putting into effect"). But under either interpretation, the District Board's resolution in this case would not ratify the excess payments made to him under his employment agreements.

¶ 121 To the extent the resolution contemplated only the carrying out the terms of Miller's contracts and other personal services contracts, it could not ratify the payments made to Miller since those payments were not authorized by those contracts. But to the extent the resolution intended to ratify personal services contracts that had been entered into by the Chief Executive Officer without authority, it nevertheless would not retroactively authorize the excess payments to Miller. When Miller signed his employment agreements, he did so not in his capacity as Chief Executive Officer, but in his individual capacity as a prospective employee. As explained earlier, while Miller as Chief Executive Officer could enter into contracts setting the compensation of subordinate employees, he lacked the authority to set his own compensation, since doing so would be tantamount to him contracting with himself. For this reason, section 2(a) of Article VIII of the bylaws expressly vests the District Board with the authority to determine the Chief Executive Officer's compensation. (J.A. 3280.) Thus, the District Board, in enacting a resolution that "ratifies and approves all past actions of the Chief Executive Officer in executing all . . . personal service contracts," did not retroactively authorize any new payments or other changes to the contract that would otherwise require approval of the Board, the Chairperson, or any other person or entity other than the Chief Executive Officer. While the District Board certainly possessed the authority to retroactively ratify the unauthorized payments made to Miller, the language it utilized in the January 7, 2008 resolution was ineffective to do so.

III. CONCLUSION

¶ 122 The People failed to introduce sufficient evidence to sustain Miller's convictions for Counts 2, 3, 5, 6, 7, 8, 14, 16, 18, and 19, and we therefore reverse those convictions and direct the Superior Court to enter a judgment of acquittal on remand. Although the People introduced sufficient evidence from which a jury could properly render a conviction on Counts 3, 9, 10, 12, and 17, we order a new trial on those counts due to the failure of the Superior Court to take appropriate action to ensure that the jury rendered a unanimous verdict or to ascertain the value of the property stolen, embezzled, or falsely obtained as required by title 5, section 3636 of the Virgin Islands Code. Accordingly, we reverse the January 9, 2020 judgment and commitment, vacate the corresponding sentences and the January 9, 2020 special verdict and order of forfeiture, and remand the case for a new trial consistent with this opinion on the remaining counts if the People so elect.

Dated this 24th day of February, 2022.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: ______________________
Deputy Clerk

Dated: 2/24/2022